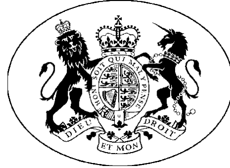

EMPLOYMENT TRIBUNALS

Claimant: Mr G Cue

Respondent: Ministry of Defence

Heard at: London South (by video) **On:** 22 June 2023

Before: Employment Judge G Cawthray

Representation
Claimant: In person – not legally qualified
Respondent: Mr J Allsop, Counsel

JUDGMENT

1. The complaints of age discrimination under the Equality Act 2010 in Claim 1, Claim 2 and Claim 3 are dismissed as they fall outside the jurisdiction of the Employment Tribunal by virtue of paragraph 4(3) of Schedule 9 of the Equality Act 2010.

2. The complaints of detriment (protected disclosure/whistleblowing) (section 47B Employment Rights Act 1998) and unlawful deduction from wages (section 13 Employment Rights Act 1996) in Claim 3 are dismissed as they fall outside the jurisdiction of the Employment Tribunal by virtue of section 192 Employment Rights Act 1996 as currently in force.

REASONS

Introduction and Procedure

1. The Claimant has, to date, lodged 5 separate claims as set out below.

   Claim 1 – 2304997/2021 – submitted 30 September 2021
   Claim 2 – 2301970/2022 – submitted 7 June 2022
   Claim 3 – 2302699/2022 – submitted 7 August 2022

Claim 4 – 2300308/2023 - submitted 19 January 2023
Claim 5 – 2301803/2023 - submitted 19 April 2023.

2. A public preliminary hearing was initially listed to consider the Respondent's applications in relation to Claim 1 and Claim 2, as made on 26 November 2021, 3 August 2022. Following receipt of Claim 3, the Tribunal confirmed in correspondence that the hearing today would also consider the Respondent's application in relation to Claim 3, as made on 15 September 2022.

3. The Respondent had produced a bundle amounting to 885 pages, it had also produced a skeleton argument. The Claimant had not accessed the bundle or the skeleton before the hearing and time was spent at the outset to ensure the Claimant had the documents.

4. At the outset of the hearing I asked the Claimant if there was anything else I should have and he said no. However, during the course of the hearing it became apparent that the Claimant had sent the Employment Tribunal a number of documents appended to several emails in the day or so before the hearing. The emails were forwarded to me and the Claimant asked me to read his skeleton argument, which I did.

5. The Respondent, within its skeleton argument, had set out a suggested approach for management of the issues for determination at the hearing. I discussed the proposed approach with the parties and explained that I was mindful that it was unlikely that we would have time to consider all of the matters in the Respondent's skeleton. It was agreed that a staged approach to each issue was required.

6. The focus of the hearing would be on excluded jurisdictional matters, namely those complaints that the Respondent says cannot be considered by the Employment Tribunal due to statutory exclusion.

7. I explained to the parties that the Claimant had only been provided with notice from the Tribunal that the applications in relation to Claim 1, Claim 2 and Claim 3 would be considered today, and that I would not be making any decision in relation to applications made under Claim 4 and 5.

8. The issues determined at the hearing are as set out below.

9. I heard oral submission from both parties. I also read the skeleton arguments provided by both parties and pages I was referred to in the Bundle, although I was only directed to a few documents. The Claimant directed me to two cases, as referenced below.

Issues

10. The issues determined today were:

    a) Whether the Employment Tribunal has jurisdiction to consider an age discrimination complaint brought under Claim 1, Claim 2 or Claim 3.

b) Whether the Employment Tribunal has jurisdiction to consider a protected disclosure/whistleblower detriment complaint (Claim 3) and arrears of pay/unlawful deduction from wages complaint (Claim 3).

Facts

11. In order to consider the issues, it was not necessary to make hear any evidence or make any findings of fact. Very little factual background was relevant to the issues for determination. The relevant fact was agreed by all parties, namely that the Claimant ceased to be an Army Reservist on 23 February 2023.

Law

12. The relevant provisions of the Equality Act 2010 are as follows:-

Schedule 9, paragraph 4 Armed forces

(1) A person does not contravene section 39(1)(a) or (c) or (2)(b) by applying in relation to service in the armed forces a relevant requirement if the person shows that the application is a proportionate means of ensuring the combat Case Number: 2201755/2021 - 8 - effectiveness of the armed forces.

(2) A relevant requirement is— (a) a requirement to be a man; (b) a requirement not to be a transsexual person.

(3) This Part of this Act, so far as relating to age or disability, does not apply to service in the armed forces; and section 55, so far as relating to disability, does not apply to work experience in the armed forces.

108 Relationships that have ended

(1) A person (A) must not discriminate against another (B) if—

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

(2) A person (A) must not harass another (B) if—

(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.

(3) It does not matter whether the relationship ends before or after the commencement of this section.

(4) A duty to make reasonable adjustments applies to A if B is placed at a substantial disadvantage as mentioned in section 20.

(5) For the purposes of subsection (4), sections 20, 21 and 22 and the applicable Schedules are to be construed as if the relationship had not ended.

(6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.

(7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A.

121 Armed forces cases

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

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

(b) the complaint has not been withdrawn.

(2)Where the complaint is dealt with by a person or panel appointed by the Defence Council by virtue of section 340C(1)(a) of the 2006 Act, it is to be treated for the purposes of subsection (1)(b) as withdrawn if—

(a) the period allowed in accordance with service complaints regulations for bringing an appeal against the person's or panel's decision expires, and

(b)either—

(i) the complainant does not apply to the Service Complaints Ombudsman for a review by virtue of section 40D(6)(a) of the 2006 Act (review of decision that appeal brought out of time cannot proceed), or

(ii) the complainant does apply for such a review and the Ombudsman decides that an appeal against the person's or panel's decision cannot be proceeded with.

(5)The making of a complaint to an employment tribunal in reliance on subsection (1) does not affect the continuation of the procedures set out in service complaints regulations.

6)In this section—

- *“the 2006 Act” means the Armed Forces Act 2006;*
- *“service complaints regulations” means regulations made under section 340B(1) of the 2006 Act.*

The relevant provisions of the Employment Rights Act 1996 are as follows:-

191 Crown employment.

(1) Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers.

(2)This section applies to—

(a) Parts I to III,

(aa)Part IVA,

(b) Part V, apart from section 45,

[_(c)Parts 6 to 8A,_***]***

(d) in Part IX, sections 92 and 93,

(e) Part X, apart from section 101, and

(f) this Part and Parts XIV and XV.

(3) In this Act “Crown employment” means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

(4) For the purposes of the application of provisions of this Act in relation to Crown employment in accordance with subsection (1)—

(a) references to an employee or a worker shall be construed as references to a person in Crown employment,

(b) references to a contract of employment, or a worker's contract, shall be construed as references to the terms of employment of a person in Crown employment,

(c) references to dismissal, or to the termination of a worker's contract, shall be construed as references to the termination of Crown employment,

(d) references to redundancy shall be construed as references to the existence of such circumstances as are treated, in accordance with any arrangements falling within section 177(3) for the time being in force, as equivalent to redundancy in relation to Crown employment,

(da) the reference in section 98B(2)(a) to the employer's undertaking shall be construed as a reference to the national interest, and

(e) any other reference to an undertaking shall be construed—

(i) in relation to a Minister of the Crown, as references to his functions or (as the context may require) to the department of which he is in charge, and

(ii) in relation to a government department, officer or body, as references to the functions of the department, officer or body or (as the context may require) to the department, officer or body.

(5) Where the terms of employment of a person in Crown employment restrict his right to take part in—

(a) certain political activities, or

(b) activities which may conflict with his official functions,

nothing in section 50 requires him to be allowed time off work for public duties connected with any such activities.

(6)Sections 159 and 160 are without prejudice to any exemption or immunity of the Crown.

192 Armed forces [NOT YET IN FORCE]

(1) Section 191—

(a) applies to service as a member of the naval, military or air forces of the Crown but subject to the following provisions of this section, and

(b) applies to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996.

(2) The provisions of this Act which have effect by virtue of section 191 in relation to service as a member of the naval, military or air forces of the Crown are—

(a) Part I,

(aa) in Part V, sections 43M, 45A, 47C and 47D, and sections 48 and 49 so far as relating to those sections,

(ab) section 47C,

(b) in Part VI, sections 55 to 57B,

(c) Parts VII and VIII,

(d) in Part IX, sections 92 and 93,

(e) Part X, apart from sections 98B(2) and (3), 100 to 103, 104C, 108(5) and 134, and

(f) this Part and Parts XIV and XV.

(3) Her Majesty may by Order in Council—

(a) amend subsection (2) by making additions to, or omissions from, the provisions for the time being specified in that subsection, and

(b) make any provision for the time being so specified apply to service as a member of the naval, military or air forces of the Crown subject to such exceptions and modifications as may be specified in the Order in Council,

but no provision contained in Part II may be added to the provisions for the time being specified in subsection (2).

(4) Modifications made by an Order in Council under subsection (3) may include provision precluding the making of a complaint or reference to any employment tribunal unless —

(a) the person aggrieved has made a service complaint; and

(b) the Defence Council have made a determination with respect to the service complaint.

(5) Where modifications made by an Order in Council under subsection (3) include provision such as is mentioned in subsection (4), the Order in Council shall also include provision—

(a) enabling a complaint or reference to be made to an employment tribunal in such circumstances as may be specified in the Order, notwithstanding that provision such as is mentioned in subsection (4) would otherwise preclude the making of the complaint or reference; and

(b)where a complaint or reference is made to an employment tribunal by virtue of provision such as is mentioned in paragraph (a), enabling the the service complaint procedures to continue after the complaint or reference is made.

(6A) In subsections (4) and (5)—

- *" service complaint " means a complaint under section 334 of the Armed Forces Act 2006;*
- *" the service complaint procedures " means the procedures prescribed by regulations under that section.*

(7) No provision shall be made by virtue of subsection (4) which has the effect of substituting a period longer than six months for any period specified as the normal period for a complaint or reference.

(8) In subsection (7) "the normal period for a complaint or reference", in relation to any matter within the jurisdiction of an employment tribunal, means the period specified in the relevant enactment as the period within which the complaint or reference must be made (disregarding any provision permitting an extension of that period at the discretion of the tribunal).

Schedule 2 – paragraph 16 - Armed forces ***[CURRENT VERSION IN FORCE]***

16(1) If section 31 of the Trade Union Reform and Employment Rights Act 1993 has not come into force before the commencement of this Act, this Act shall have effect until the relevant commencement date as if for section 192 there were substituted—

> ***"192 Armed forces.***
>
> *Section 191—*
>
> *(a) does not apply to service as a member of the naval, military or air forces of the Crown, but*
>
> *(b) does apply to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996."*

(2) The reference in sub-paragraph (1) to the relevant commencement date is a reference—

(a) if an order has been made before the commencement of this Act appointing a day after that commencement as the day on which section 31 of the Trade Union

Reform and Employment Rights Act 1993 is to come into force, to the day so appointed, and

(b) otherwise, to such day as the Secretary of State may by order appoint.

The provisions of the Human Rights Act 1998 – not copied here.

T v MOD 2201755/2021 8 December 2021

Debique v MOD UKEAT/0075/11/SM

Conclusions

Issue 1

13. Does the Employment Tribunal have jurisdiction to consider any form of an age discrimination complaint under the Equality Act 2010?

14. As currently in force, Schedule 9 paragraph 4(3) specifically "*This Part of this Act, so far as relating to age or disability, does not apply to service in the armed forces";* excludes members of the armed forces from bringing any complaint of age discrimination and disability discrimination under the Equality Act 2010.

15. I noted that other types of discrimination claims, such as race or sex for example, may be brought (subject to compliance with other legal provisions).

16. I considered case of *T v MOD 2201755/2021 8 December 2021,* which the Claimant relied upon to argue that he should be permitted to bring his age discrimination claim in the Employment Tribunal. I also noted the Respondent's submissions on the case, which was an Employment Tribunal decision.

17. In the claim of *T v MOD* the claimant had brought a claim of disability discrimination, and this was permitted to continue. The ley reasoning of the Employment Tribunal hearing that case us set out in paragraphs 70 and 82, which are copied below for reference. I have underlined the key text that I consider relevant in making my decision.

    "70. I take as my starting point that, unless s 3 of the HRA 1998 requires the EA 2010 to be interpreted differently as the Claimant contends, the meaning and effect of paragraph 4(3) of Schedule 9 to the EA 2010 is established by the Child Soldiers case. In that case Kenneth Parker J held that article 4(3) of the Framework Directive had afforded Member States an unqualified right to

derogate completely from the Framework Directive so far as concerns age and disability in the armed forces. He held that even though Recital (19) of the Framework Directive refers to the purpose of that derogation being to enable Member States to safeguard the combat effectiveness of their armed forces, the derogation itself in article 4(3) of the Framework Directive is unqualified and accordingly paragraph 4(3) of the Schedule 9 was (as regards age discrimination) lawful even though it included no requirement for proportionality or link to combat effectiveness. In the light of s 6(3) of the European Union (Withdrawal) Act 2018, that position remains unchanged as a result of the United Kingdom's withdrawal as the Child Soldiers case is 'retained case law' as defined in that section. Although the Child Soldiers' case was concerned with age discrimination, I cannot see that there is any scope for argument that the exemption for disability discrimination could be approached any differently. "

"82. I therefore conclude that the EA 2010 as presently drafted breaches the Claimant's rights under Articles 8 and 14 of the ECHR because it prevents her bringing a disability discrimination claim against the Respondent in respect of matters that have occurred since her discharge and accordingly s 3 of the HRA 1998 requires it to be interpreted to avoid that result. For the reasons I have already set out, I consider that it can be so interpreted without offending any fundamental feature of the legislation. It is even possible readily to envisage the minor amendment to the drafting that would be required. In my judgment, s 108(1)(b) of the EA 2010 should be read as follows: "A person (A) must not discriminate against another (B) if- (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act (or would do were the Act not disapplied by paragraph 4(3) of Schedule 9)." With that minor amendment, the exemption from the prohibition on disability discrimination for those serving in the armed forces remains intact, but the armed forces are not permitted to discriminate against disabled ex-servicemen and women."

18. The reasoning in the case of *T v MOD* was in relation to a claim brought by an ex-servicewoman.

19. In considering the Claimant's situation, it is important to bear in mind that Claim1, Claim 2 and Claim 3 were brought between 30 September 2021 and 7 August 2022.

20. The Claimant did not cease to be an Army Reservist until 23 February 2023 (noting that this was after Claim 4 and before Claim 5 – although I am not making any determination in relation to Claim 4 or Claim 5 today.)

21. The Employment Tribunal only has power to adjudicate over matters that it is permitted to do so by Parliament.

22. Accordingly, the Employment Tribunal does not have jurisdiction to hear any complaint of age discrimination included within Claim 1, Claim 2 and Claim 3 as they relate to alleged matters that took place whilst the Claimant remained

in service as a Reservist. I consider this includes a victimisation complaint that flows from a protected act relating to age.

23. The complaints of age discrimination in Claim 1, Claim 2 and Claim 3 are dismissed as they fall outside the jurisdiction of the Employment Tribunal by virtue of paragraph 4(3) of Schedule 9 of the Equality Act 2010.

24. At present, any other complaints brought under Claim1, Claim 2 and Claim 3 will continue until it is clear on whether there any other complaints that may form part of the claims that fall within the jurisdiction of the employment tribunal. This will be considered at the next preliminary hearing.

Issue 2

25. Whether the Employment Tribunal has jurisdiction to consider a protected disclosure/whistleblower detriment complaint (Claim 3) and arrears of pay /unlawful deduction from wages complaint (Claim 3).

26. Although there was some reference to an unfair dismissal complaint within the response to Claim 2, it was accepted that the Claimant remained in active service until 23 February 2023 and that the Claimant had not attempted to bring an unfair dismissal claim within Claim 1 and/or Claim 2 and/or Claim 3.

27. The Claimant had sought to bring a whistle blowing detriment complaint (section 47B Employment Rights Act 1996) and an unlawful deduction from wages complaint (section 13 Employment Rights Act 1996) in Claim 3.

28. It was necessary to consider the Claimant's status as an Army Reservist in order to determine whether or not that the Employment Tribunal has jurisdiction to hear the complaints.

29. I have considered sections 191 and 192 ERA 1996 and the explanatory note in the Harvey text book as directed to me by Mr Allsop and cited below for ease of reference.

30. Part II of the Employment Rights Act 1996 contains sections 13 to 27 which deal with unlawful deductions from wages claims.

31. Part V of the Employment Rights Act 1996 contains section 47B, which makes it unlawful for a person to be discriminated against because they made a protected disclosure (blew the whistle).

32. Section 191 enables persons in Crown Employment to bring claims under the parts of the Employment Rights Act 1996 that are listed. However, section 191 is subject to section 192, which deals with Armed Forces.

Extract from Harveys:

[1164] Those serving in the armed forces are covered separately by s 192 of the Act. However, this section has never been brought into effect, and under transitional provisions contained in ERA 1996 Sch 2 para 16, the position until it is brought into effect is that a substituted, briefer and simpler version of the section applies. This states that the Act does not apply at all to members of the armed forces, with the exception of employment by an association established for the purposes of Pt VI of the Reserve Forces Act 1980. The latter provisions were replaced with effect from 1 April 1997 by Pt XI of the Reserve Forces Act 1996, but because of a failure to make a consequential amendment to the transitional provisions in ERA 1996 Sch 2 para 17, it appears that technically it is still the RFA 1980 which determines the application of the vestigial ERA 1996 s 192 to reservists. No indication has been given by the government of any imminent intention to bring s 192 fully into effect, and the opportunity to do so provided by the passage through Parliament of a major Armed Forces Bill in 2005–6 (now the Armed Forces Act 2006) was not taken. An application for judicial review of the Secretary of State's failure to use the power to bring s 192 fully into effect to give members of the armed forces the right to claim unfair dismissal was, unsurprisingly, dismissed in McQuade v Secretary of State for Defence, 2004 SLT 182 (Ct of Sess (Lord Emslie)). [1164.01]

33. Section 192 as set out above is not yet in force (labelled as NOT YET IN FORCE for ease of reference).

34. The version of section 192 which is currently in force is set out in Schedule 2 paragraph 16 of the Employment 1996 Act, which is also set out above. The wording currently in force simply provides that section 191 does not apply to service as a member of the naval, military or air forces of the Crown. This means, at present, that members of the armed forces do not have the protections set out in the Employment Rights Act 1996.

35. The text set out in the version of section 192, if implemented, would enable members of the armed forces to bring claims in the Employment Tribunal for various causes of action under the Employment Rights Act 1996. However, it is not yet in force.

36. Accordingly, the current position is that although section 191 seeks to give those in Crown Employment most of the rights in the Employment Rights Act 1996, including a prohibition on unlawful deduction from wages, not to be subjected to detriment on the ground of having made a protected disclosure and indeed the prohibition on being unfairly dismissed, it is subject to section 192. The current version of section 192 does not give the protection to members of the armed forces, and this will not change unless and until amendment provisions are made.

37. The Claimant directed me to the case of <u>*Debique v MOD UKEAT/0075/11/SM*</u> as another example of a service person having been able to access the Employment Tribunal and pursue an appeal, which he says indicates he should be able to continue with his claims in the Employment Tribunal. This was an Employment Appeal Tribunal decision. I considered the pertinent part of the judgment relating to the present case was as set out in paragraph 2:

    *"2. On 30 April 2007 she commenced proceedings in the Employment Tribunal against the Ministry of Defence ("the MoD"), alleging indirect discrimination under the **Sex Discrimination Act 1975** and the **Race Relations Act 1976**. There was also a claim for unfair dismissal, but it was in due course appreciated that the Employment Tribunal had no jurisdiction to entertain such a claim in the case of a serving soldier, and the claim was dismissed."*

38. The Claimant also directed me to the MOD policy on whistleblowing, which states:

    "The position of HM Armed Forces is very different to civilians/civil servants working in public office who wish to expose matters of public concern. As they operate within a very different legal and constitutional construct, the legal obligations/duties which apply to civilians cannot simply be replicated and the Public Interest Disclosure Act specifically excludes them from the legislation. However, the Service authorities have agreed to honour the spirit of the Act in that they will recognise and adhere to the criteria for protected disclosures and follow the prescribed procedures whether dealing with or making a qualifying disclosure."

39. I have had regard to the MOD policy, and note that this seems this recognise the different protection afforded in law to members of the armed forces and sets out a commitment to honor the spirit of the law and follow internal procedures. However, the MOD policy cannot confer power on an Employment Tribunal. As set out above, the Employment Tribunal can only decide what parliament permits.

40. Accordingly, the Employment Tribunal does not have jurisdiction to hear any complaint of detriment (whistleblowing/protected disclosure) or a complaint of unlawful deduction from wages in Claim 3.

41. The complaints of detriment and unlawful deduction from wages in Claim 3 are dismissed as they fall outside the jurisdiction of the Employment Tribunal by virtue of section 192 Employment Rights Act 1996 as currently in force.

Employment Judge G Cawthray

Dated: 28 June 2023