



EMPLOYMENT TRIBUNALS

Claimant: Michael Greatorex

Respondent: Ministry of Defence

Heard at: East London Hearing Centre (by CVP)

On: 25 July 2023

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: John-Paul Waite, of Counsel

JUDGMENT

- 1. The Respondent's application under S121 of the Equality Act 2010 to strike out the claim is dismissed.**
- 2. It is just and equitable for the claim to proceed though it was filed out of time.**

REASONS

1. This judgment should be read with the earlier judgments striking out the claim and reconsidering that judgment.
2. The facts are fully set out in the judgment of 12 April 2022, and the law is set out in both those judgments.
3. I had before me today a 473 page bundle of documents, the witness statement of Trefor Martin (who gave evidence in April 2022), the application to reconsider the judgment dated 30 April 2022, the Claimant's 16 page submission, an email dated 05 October 2022 to the Claimant from Navy Service Complaints Secretary (accepting the findings of SCOAF and apologising for elements of maladministration found), and an email dated

04 May 2021 from Cdr Greg Young to Capt. Andrew Cowan RN. There was no further oral evidence.

4. In the reconsideration judgment I decided that whether Annex F amounted to a service complaint was perhaps better decided by the Service Complaints Ombudsman for the Armed Forces (SCOAF), which was dealing with the Claimant's referral to it.
5. That outcome was dated 29 September 2022. It is regrettable that the case has taken so long to return to a hearing. This is in part as I retired on 16 September 2022, but although there was an application well before that date for me to sit in retirement put forward by the Regional Employment Judge and the President to the Lord Chancellor (then Dominic Raab) it took many months after I retired for it to be signed off by him.
6. Unfortunately, the SCOAF report does not resolve the issue. It is a lengthy report (pages – 119 – 143 of the bundle of documents, and 139 paragraphs).
7. The background was set out in §92-95:

“92. In considering the above Regulation, I believe Mr Greatorex had the right to amend his complaint before the admissibility decision was made. While an “additional matter” is not defined in the Regulations, using its everyday meaning, it is clear that Mr Greatorex’s complaint of discrimination on the grounds of a protected characteristic had not been raised in the earlier Annex F and formed an “additional matter” for the purposes of Regulation 8. Although the ‘new’ complaint qualifies as an additional matter, the admissibility decision had not yet been made and therefore the provisions of the Regulation did not apply.

93. There was a delay on the handling of the 2019 Annex F and the admissibility decision was not considered until the SCOAF report of undue delay. By this time, the SO had changed from Cdr Hardinge to Cdr Young and Mr Greatorex had moved to another Unit.

94. Once the 2021 Annex F was received, it was open to the Service to reallocate the complaint to a new SO, being the Commanding Officer of Mr Greatorex’s Unit (HMS KING ALFRED). It may also be that these were matters which could have been discussed during an initial interview.

95. However, the Service were of the opinion the 2021 Annex F should be processed separately as a new complaint and be submitted to the Commanding Officer of HMS KING ALFRED.”

8. The SCOAF report concluded (§116):

“116. To clarify, SCOAF understands the issues which were raised in the 2021 Annex F have not been subject to a decision on admissibility and have not been investigated or finally determined. Therefore, this investigation has not considered the question of maladministration in respect of the 2021 Annex F. However, I have made a slight amendment to paragraph 96 above, to make clear that the finding of maladministration relates to the

handling of the 2019 Annex F which was determined to be an admissible Service Complaint on 26 April 2021.”

Paragraph 96 stated:

“96. Based on the available information, I find there was maladministration in that in determining the admissibility of the 2019 Annex F, the Service did not take the opportunity to also consider the additional matters raised in the 2021 Annex F, by allowing the current SO to consider its admissibility together with the earlier Annex F. Alternatively, it was open to the Service to nominate the Commanding Officer of HMS KING ALFRED as the Specified Officer to consider both Annex Fs together.”

Paragraph 97 is also relevant:

“97. SCOAF’s report of 25 March 2021 refers to another complaint (SC3) Mr Greatorex had submitted in April 2020 and which was amended in September 2020. I consider the Service failed to apply a consistent approach in the handling of these complaints where a complainant seeks to make amendments prior to a decision on admissibility in accordance with Regulation 8 of the 2015 Regulations.”

9. From this it can be seen that SCOAF made no decision as to whether the 2021 Annex F was an admissible complaint or not. It decided that no decision had been made as to whether it was admissible or not. It decided that it was not now possible to do so, and that there had been a “*window of opportunity*” when it could have been considered, but that window closed when the 2019 Annex F was considered to be an admissible complaint. It noted that the 2019 Annex F complaint was (subsequently) not upheld.
10. The Respondent says that this means that there is no service complaint about discrimination (which is what the 2021 Annex F was about), and so the Employment Tribunal has no jurisdiction to deal with the claim.
11. They say that it matters not that this was because there was maladministration of the 2019 Annex F in failing to consider whether or not to add the extra matters in the 2021 Annex F (or to remit it to the Claimant’s new CO), because of the simple fact that there is no admissible complaint of discrimination. They say that there has to be a positive acceptance of the complaint, and whether there was no decision or a refusal is not to the point. When I put it to Counsel for the Respondent the Claimant’s objection this was that this was to profit from their own maladministration, he responded that as this was a jurisdictional point that was not a reason the legislative provision could be ignored.
12. I asked what the position would be if the deciding officer wrongly refused to accept a service complaint with the sole aim of precluding an Employment Tribunal claim (I made it clear that was a hypothetical question). While Counsel understandably indicated that his response was not a considered one, he thought the point was the same, and remedy lay with a judicial review application.

13. I note that the SCOAF report does not say that the 2021 Annex F was a new complaint and says that it could be an amendment to the 2019 Annex F, and also says that if it was a new complaint the person receiving it could have forwarded it to the new CO at King Alfred.
14. At the time (as the email of 04 May 2021 makes clear) Navy Legal told the specified officer dealing with the 2019 Annex F that he “*was not empowered*” to deal with the discrimination claim because it was a new claim.
15. The Respondent says that the Claimant has refused to send in a new service complaint to the correct CO. The Claimant says he has no need to do so – he filed his complaint in the 2021 Annex F. SCOAF say that the MoD could themselves have forwarded it, and so he says there is no reason to ask him to do so.
16. Instead, he says, they decided a service complaint which he was now not making, redefining it themselves.
17. He accepts that once the 2019 service complaint had been accepted as admissible it could not be amended. He points out that he amended it in the 2021 Annex F before the 2019 Annex F was accepted as admissible.
18. He says he will not be submitting a new service complaint. This he regards as a trap (although he did not use that word). Surely the specified officer would say either that it was way out of time or was a duplication of the 2019 Annex F with a new label attached and so fall foul of Molaudi v. Ministry of Defence (Jurisdictional Points) [2011] UKEAT 0463_10_1504.
19. I see the force of the Claimant’s objection to submitting a new claim, particularly when SCOAF say that the way the 2019 Annex F was handled by not considering the 2021 Annex F was maladministration. I agree with the Claimant’s point that if the 2021 Annex F was to be treated as a new complaint it could have been forwarded by the Respondent to the correct specified officer. (I observe that the SCOAF report does not address the possibility that the maladministration could (belatedly) be corrected by it now being sent to the CO of King Alfred.)
20. Looking at Regulation 4 of Armed Forces (Service Complaint) Regulations 2015, it is clear that the 2021 Annex F was a service complaint as defined in that Regulation.
21. Regulation 5 then says the specified officer must (this is mandatory) decide whether the complaint is admissible. It cannot be admissible if it is substantially the same as a previous complaint. The Claimant’s 2021 Annex F is (in essence) to repeat the claims of detrimental treatment and to ascribe a discriminatory motivation to them. This has two consequences – it is possible for this to be an amendment to the 2019 Annex F, or a new complaint. SCOAF says so.

22. It must be one or the other. Accordingly, and as SCOAF pointed out, it was maladministration for it to be considered as neither: or more accurately not considered at all.
23. Regulation 7 gives the Ombudsman power to review (and overturn) a decision by a specified officer that a service complaint is not admissible. In the Claimant's case there was no such decision, and so SCOAF did not consider admissibility, but whether the handling of the 2019 service complaint was maladministration. SCOAF at paragraph 116 does not address maladministration of the 2021 Annex F other than in the context of the 2019 Annex F.
24. This leaves the Claimant in a void. His 2021 Annex F was ignored by the specified officer, who did not treat the 2021 Annex F as an amendment and refuse it (which SCOAF could have looked at and reversed) or send it to the Claimant's then CO, as SCOAF said he could have done.
25. His 2021 Annex F was then also not dealt with by SCOAF, on the basis that the specified officer had ignored it and made no decision that it was not admissible. It is scant consolation that SCOAF says this was maladministration and as a result the Claimant received an apology, because it does not address the issue (that his complaint of discrimination was sidelined).
26. Nowhere in the Regulations does it state that there can be no complaint to an Employment Tribunal unless there has been a service complaint that has been decided to be admissible. S121 requires only that "*the complainant has made a service complaint about the matter*" and that "*the complaint has not been withdrawn*". This is the case for the 2021 Annex F.
27. The requirement that the service complaint must be one that has been accepted by the Respondent comes from *Molaudi*. (§11 of the judgment of 12 April 2022 citing §26 of *Molaudi*.)
28. The headnote of that case states that "*service complaint*" means "*a complaint that could be considered substantively*" and that "*a complaint rejected by the military authorities brought out of time did not fall within that definition*". The 2021 Annex F could have been considered substantively. SCOAF says so, by necessary implication because the failure to make a decision was maladministration. This was not a complaint that was rejected.
29. The Respondent does not say that the substance of the 2021 Annex F is not worthy of acceptance. It says that it was not an amendment and was not sent to the right person. This is covered above: it is possible that the 2021 service complaint might have been considered inadmissible as being out of time but that is not what happened.
30. *Molaudi* was a case on very different facts. The issue with that complaint was that it was rejected as a duplication of a complaint already rejected as out of time. That second complaint was held not to be a service complaint. That was a common-sense decision – for otherwise any service person who

wanted to bring a claim in the Employment Tribunal could just file an identical second service complaint and meet the criterion in S121.

31. In this case the Claimant had not made a discrimination complaint before (that was why the Respondent would not regard it as an amendment).
32. In a claim to amend an Employment Tribunal claim, perhaps for unfair dismissal to add discrimination, based on the same facts but seeking to add the motivation of discrimination, the Judge deciding would want to assess the *Selkent*¹ principles and come to a decision on amendment, not just refuse the request out of hand, as was done in this case. The service complaint of the Claimant made in the 2021 Annex F could have been determined. The Respondent chose not to do so.
33. Accordingly, I find that the 2021 Annex F was a service complaint within the definition of the Regulations, and that the ratio of *Molaudi* does not apply to these circumstances. The Claimant has met the requirements of S121 of the Equality Act 2010.
34. The whole point of S121 of the Equality Act 2010 is that those in the Armed Forces must, before coming to an Employment Tribunal, give the Respondent an opportunity to address the subject matter of the service person's grievance. That is exactly what the Claimant did.
35. It is wholly the reverse of that rationale to deprive the Claimant of the opportunity to bring his case to an Employment Tribunal when he did what was required of him but the Respondent in effect ignored him, with no right of appeal (SCOAF did not resolve this by saying that the Respondent was guilty of maladministration).
36. I noted in my earlier judgment dismissing the claim that had I found the 2021 Annex F to be a service complaint I would have been minded to extend time for this claim to be continued though filed out of time, on the basis that it would be just and equitable to do so. The Respondent did not address me on that indication. In these circumstances of maladministration by the Respondent I see no reason to depart from that preliminary view, and I extend time.

Employment Judge Housego
Date: 25 July 2023

¹ *Selkent Bus Co. Limited v Moore* [1996] ICR 836