EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Dunn

Respondent: Ministry of Defence

Heard at: Watford (in public, by CVP) **On:** 12 June 2024

Before: Employment Judge Poynton (sitting alone)

Representation

Claimant: Mr Keir Hirst (Solicitor)
Respondent: Mr Julian Allsop (Counsel)

RESERVED JUDGMENT ON A PRELIMINARY HEARING

The judgment of the Tribunal is that:

1) The claimant's complaint of discrimination on the grounds of disability is struck out. The Tribunal does not have jurisdiction to hear the claim because it is excluded by paragraph 4(3) of Schedule 9 to the Equality Act 2010.

REASONS

Introduction and procedure

1. This was a preliminary hearing held by video. There were no significant audio or connectivity issues.

2. The parties had produced an agreed bundle amounting to 134 pages with a separate index. The parties had also produced an agreed authorities bundle amounting to 278 pages with a separate index. The claimant and respondent had also produced skeleton arguments.

Background

3. The claimant was employed by the respondent as an Infantry Solider between 12 September 1988 and 15 February 2001. The claimant left under the Premature Voluntary Release Provisions (PVR).

4. In or around May 2023, the claimant requested that the respondent amend his mode of exit to medical discharge. The respondent's policy (AGAI 78.1213) provides for a time limit for all retrospective medical discharge and PIC Code appeals of 12 months from the discharge or retirement date.

5. The claimant's application was refused.

6. The claimant brings a claim of disability discrimination on the grounds that the respondent failed to make reasonable adjustments. The claimant's case is that the respondent should have (1) varied the 12 months' time limit or (2) amended his mode of exit to medical discharge.

7. A previous preliminary hearing took place on 14 March 2024 and Employment Judge Palmer made directions for the agenda for this hearing.

8. On 3 May 2024, the respondent made an application to vary the agenda for this hearing, indicating that it intended to take a neutral stance in relation to the jurisdictional point. The claimant objected to that application.

9. I indicated to the parties at the outset of the hearing, that notwithstanding the respondent's application and indication that it intended to take a neutral stance, it is necessary for me to consider whether the complaints presented by the claimant fall within the jurisdiction of the Employment Tribunal.

Issues to be determined

10. The issues to be determined today were:

    10.1. Whether the claimant's claim should be struck out on the grounds that the Tribunal has no jurisdiction to hear the claim pursuant to paragraph 4(3) of Schedule 9 to the Equality Act 2010 and section 108 of the Equality Act 2010;

    10.2. If, and insofar as the claim survives 10.1, whether the claimant's claim should be struck out under Rule 37 of the Employment Tribunal Rules of Procedure 2013 because there is no reasonable prospect of success;

    10.3. If, and insofar as the claim survives 10.1 and 10.2, whether the Tribunal should order a deposit to be paid by the claimant under Rule 39 of the Employment Tribunal Rules of Procedure 2013 on the basis that the claimant's claim has little reasonable prospect of success;

10.4. If, and insofar as the claim survives 10.1, 10.2 and 10.3, the Tribunal can then deal with such case management issues as are appropriate to further the claim, including consideration of whether the claimant is a disabled person under section 6 of the Equality Act 2010. The parties accept that there may need to be a further hearing to address this issue if the claim survives.

Facts

11. I have not heard any evidence and am not making any findings of fact. Very little of the factual background of the claim is relevant to the issues on which I have to decide. The following is a brief summary of the relevant factual background.

12. The claimant was employed by the respondent as an Infantry Solider between 12 September 1988 and 15 February 2001. The claimant left under the Premature Voluntary Release Provisions (PVR).

13. The claimant presented his claim to the Employment Tribunal on 31 July 2023. He indicated that he was pursuing a claim for disability discrimination. His claim relates to a request he made to the respondent in or around May 2023 to amend his mode of exit from the armed forces from PVR to medical discharge. The respondent refused the claimant's request. The claimant's case is that the respondent's failure to vary its policy of a 12 months' time limit in which applications to amend mode of exit would be considered and/or the failure to amend the mode of exit amount to a failure to make reasonable adjustments in relation to his disability. The claimant relies on the mental impairment of psychological issues and depression which he says led to him voluntarily discharging himself from service.

14. I will deal with the jurisdiction issue in 10.1 first, because, if I find in favour of the respondent, the claimant's claim will not be able to proceed and I will not be required to consider the application for a strike out or deposit order, nor give case management directions. If I find in favour of the claimant, I will then move on to consider the respondent's application for a strike out or deposit order in turn and make case management directions as appropriate.

Relevant law for issue 10.1

Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013

15. Rule 37 permits the Tribunal to strike out all or part of a claim or response at any stage of the proceedings, on its own initiative or on the application of a party.

37.— Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;
(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

The Equality Act 2010

16. The relevant provisions of the Equality Act 2010 are:

Section 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.

Section 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, [...]2

(aa) there are grounds (of which the complainant is aware) on which the complainant is entitled to bring such an appeal, and

(b) either—

(i) the complainant does not apply to the Service Complaints Ombudsman for a review by virtue of section 340D(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.

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 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.

Equality Act 2010: Explanatory notes

17. The relevant explanatory notes to the Equality Act are set out below:

Armed forces: paragraph 4

Effect
797. This paragraph allows women and transsexual people to be excluded from service in the armed forces if this is a proportionate way to ensure the combat effectiveness of the armed forces.

798. It also exempts the armed forces from the work provisions of the Act relating to disability and age.

Background
799. This paragraph replicates the effects of exemptions for the armed forces in previous legislation, but narrows the scope of the former combat effectiveness exception so that this applies only to direct discrimination in relation to recruitment and access to training, promotion and transfer opportunities.

Example
• Only ground close-combat roles requiring Service personnel to deliberately close with and kill the enemy face-to-face are confined to men. Women and transsexual people are, therefore, currently excluded from the Royal Marines General Service, the Household Cavalry and Royal Armoured Corps, the Infantry and the Royal Air Force Regiment only.

Council Directive 2000/78/EC: The Framework Directive

18. Council Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation ('the Framework Directive'). This provides that:

Recital 19
(19) Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.

Article 3(4)
Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

Human Rights Act 1998

19. The relevant provisions of the Human Rights Act 1998 are below:

Section 3.— Interpretation of legislation.

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

(2) This section—
(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

20. Schedule 1 to the Human Rights Act 1998 sets out the relevant Articles of the ECHR:

Right to respect for private and family life
Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Prohibition of discrimination
Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The parties' submissions on issue 10.1

21. I am grateful to both representatives for their very helpful submissions, both in writing and orally at the hearing.

The respondent's submissions

22. Mr Allsop relies on paragraph 4(3) of schedule 9 to the Equality Act 2010 which sets out a general exception in discrimination claims applied to service personnel so far as it relates to age or disability. He submits that the lawfulness of this general exception has been upheld by the High Court in **R (Child Soldiers International) v Secretary of State for Defence [2016] 1 WLR 1062** and that this should also apply in relation to disability discrimination.

23. He submits that there has been a clear choice by the legislature to derogate from the Framework Directive in relation to age and disability and that there is no basis to suggest that parliament intended to limit this derogation to the period of time that an individual is in active service. He says that it logically follows that former service members cannot acquire a better right than those rights conferred on existing members of armed services.

24. He submits that the case of **T v Ministry of Defence** (relied on by the claimant) does not apply, as in **T**, the very serious negative consequences that T had

experienced in her private life engaged Article 8 which then engaged the interpretative obligation in section 3 of the Human Rights Act 1998. Mr Allsop submits that Article 8 is not engaged and the interpretative obligation does not apply in the claimant's case. Mr Allsop also submits that the modification to the wording in **T**, which the claimant suggests should also be adopted in this case, goes against the grain of the existing legislation as it confers a greater right on former employee than those from which an existing employee benefits. He submits that the claimant has not demonstrated that Article 14 is engaged in any event.

The claimant's submissions

25. The claimant relies on the decision of EJ Stout in **T v Ministry of Defence (case number 2201755/2021**), specifically paragraphs 67 to 82. In summary, Mr Hirst submits that paragraph 4(3) of Schedule 9 to the Equality Act 2010 breaches the claimant's rights under the European Convention on Human Rights (ECHR), specifically Articles 8 and 14. Mr Hirst did raise in his skeleton argument that the claimant's rights under Article 6 of the ECHR were infringed although he did not pursue this further in oral submissions.

26. Mr Hirst contends that the Equality Act 2010, as drafted, breaches the claimant's rights under Articles 8 and 14 of the ECHR because it prevents the claimant from bringing a claim of disability discrimination against the respondent in respect of matters that have occurred since discharge. He suggests that section 3 of the Human Rights Act 1998 requires the Equality Act 2010 to be interpreted to avoid that result. Mr Hirst submits that the wording of paragraph 4(3) of Schedule 9 *"…does not apply to service in the armed forces…"* is clearly constructed to relate to "active service" and that it does not relate to matters which post-date service. Mr Hirst argues that the claimant's case is very like **T v Ministry of Defence**, although he accepts that it is factually different. He submits that I can ignore the exclusions in the Equality Act 2010 for similar reasons as EJ Stout found in **T v Ministry of Defence**, that parallels can be drawn between **T** and the claimant's case, and that the same principles apply to the claimant.

27. Mr Hirst submits that the claimant's case falls within Article 8 and relies on the authorities of **Costello-Roberts v the United Kingdon (1993) 19 EHRR 112** and **Denisov v Ukraine (Application No. 76639/11)**.

Conclusions

28. The power provided for in Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is a power to be exercised judicially and in accordance with the overriding objective. A decision to strike out is a draconian measure as it deprives a party of the opportunity to have their claim or defence heard. It is therefore a high threshold.

29. Unless section 3 of the Human Rights Act 1998 requires the Equality Act 2010 to be interpreted differently, as is suggested by the claimant, the meaning and

effect of paragraph 4(3) of Schedule 9 to the Equality Act 2010 is as established by **Child Soldiers**.

30. In **Child Soldiers**, Kenneth Parker J decided that the meaning of Article 3(4) of the Framework Directive was plain in that it gave an unqualified and unrestricted power to Member States to derogate completely from the Framework Directive insofar as it concerns age and disability in the armed forces. He held that despite Recital 19 of the Framework Directive referring to the purpose of that derogation being to enable Member States to safeguard the combat effectiveness of their armed forces, the derogation itself is unqualified and paragraph 4(3) of Schedule 9 was, as regards age discrimination, lawful even though it included no requirement for proportionality or link to combat effectiveness.

31. Mr Hirst submits that the whole thrust of the exemption provided for in paragraph 4(3) as considered in **Child Soldiers** relates to combat effectiveness. Mr Hirst submits that the wording of paragraph 4(3) is clearly constructed as relating to "active service". He submits that the word "service" in paragraph 4(3) of Schedule 9 does not relate to facts or matters which occur post-exit.

32. I am mindful that **Child Soldiers** related to age discrimination, but I cannot see that this would not apply equally to disability discrimination as set out in the claimant's case. I am also mindful that there was no challenge to paragraph 4(3) of Schedule 9 on human rights grounds in **Child Soldiers**. However, it seems clear that the decision in **Child Soldiers** does not preclude me from deciding an interpretation under section 3 of the Human Rights Act which alters its meaning, if the claimant's Convention rights have been infringed.

33. On the face of it, the Tribunal's power to hear this claim is excluded by paragraph 4(3) of Schedule 9 to the Equality Act 2010. Paragraph 4(3) provides that Part V of the Equality Act 2010, *"…so far as relating to age or disability, does not apply to service in the armed forces…".* Paragraph 4(3) refers to "service in the armed forces".

34. Section 108(1)(b) extends the exemption to apply where the service relationship has come to an end if the discrimination arises out of and is closely connected to a relationship which used to exist between them, and conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene the Equality Act 2010. By virtue of his former employment status, the claimant must bring his claim under Part V, and is therefore precluded by the combination of paragraph 4(3) of Schedule 9 and section 108(1)(b) from bringing disability discrimination claims. Unless this infringes the claimant's rights under the ECHR, that is the position.

35. Whether or not the claimant's case can proceed hinges on me interpreting the Equality Act 2010 otherwise by reading words into section 108(1)(b) so that it reads (as suggested by Mr Hirst, adopting the wording that EJ Stout inserted in **T v Ministry of Defence**): *"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)****.".* The claimant says that I should read these words (in bold) into the Equality Act 2010 in order to ensure that it is compatible with the Human Rights Act 1998.

36. The decision of EJ Stout in **T v Ministry of Defence** decided in the London Central Employment Tribunal is not binding upon me, but if it relates to the same argument, it is appropriate that I consider it.

37. The claimant relies specifically on paragraphs 67 to 82 of **T v Ministry of Defence**. Paragraphs 67 and 68 relate to the parties' submissions in that case. EJ Stout sets out a clear and considered background to the interpretive obligation as established in **Ghaidan v Godin-Mendoza [2004] 2 AC 557** and I repeat paragraphs 73 and 74 of her decision here.

> 73. While it may appear to be putting cart before horse, I have considered next whether, if the legislation as currently drafted breaches the ECHR, it would be open to me to interpret the EA 2010 compatibly or whether, as Mr Chegwidden submits, to do so would impermissibly go against the grain of the legislation. I put the cart before the horse in this way because if the interpretative obligation in s 3 of the HRA 1998 cannot assist the Claimant, then neither can this Tribunal because, not being a court as defined in s 4 of the HRA 1998, I do not have jurisdiction to make a declaration of incompatibility.
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> 74. As to the extent of the interpretative obligation, I have been referred to the Supreme Court's decision in Ghaidan, from which I take the following:-
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> Per Lord Nicholls:-
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> 26. Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights "so far as it is possible to do so". This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention. …
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> 30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. …

> 31. … once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention compliance. If he chose a different form of words, section 3 would be impotent.
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> 32. …Section 3 … is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.
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> 33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

Per Lord Steyn:

> 50. Having had the opportunity to reconsider the matter in some depth, I am not disposed to try to formulate precise rules about where section 3 may not be used. Like the proverbial elephant such a case ought generally to be easily identifiable. What is necessary, however, is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights.

Per Lord Rodger:

> 123. Attaching decisive importance to the precise adjustments required to the language of any particular provision would

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

38. I agree with EJ Stout's analysis that the interpretative obligation in section 3 in principle permits a court or Tribunal to rewrite even a wholly unambiguous legislative provision if the Convention requires it and if doing so does not go against a fundamental feature of the legislation. I adopt the same approach to the issue before me today, in that I will firstly consider if the legislation as currently drafted breaches the ECHR as submitted by Mr Hirst, would it be open to me to interpret the Equality Act 2010 compatibly or whether, as Mr Allsop submits, to do so would impermissibly go against the grain of the legislation. I cannot make a declaration of incompatibility as this Tribunal is not a court as defined in section 4 of the Human Rights Act 1998.

39. The Tribunal's duty under section 3 goes beyond the normal principles of statutory construction. It may require me to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. However, the words added must *"go with the grain of the underlying legislation"* and cannot be *"inconsistent with a fundamental feature of the legislation".* In considering section 3 of the Human Rights Act 1998, I am mindful that the

Human Rights Act 1998 reserves the amendment of primary legislation to Parliament. I have considered whether the additional wording which the claimant submits is needed to read down the Equality Act so that it is compliant with the Article 8 Convention right to respect for private life would remain an exercise in legislative interpretation or would represent a legislative amendment. I reminded myself of Lord Steyn's comments in **Ghaidan**. He said *"there is a Rubicon which courts may not cross"* (paragraph 49). I also reminded myself of Lord Nicholls' comments at paragraph 33, in particular that I should not adopt a meaning that is inconsistent with a *"fundamental feature"* of legislation and that the choice of making a provision Convention-compliant may involve issues calling for legislative deliberation.

40. I have considered whether the derogation at Article 3(4) is a fundamental feature of the Framework Directive and the Equality Act 2010. Article 3(4) states: *"Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces."*. I agree with Kenneth Parker J in **Child Soldiers**. The meaning of this cannot be plainer. Member States are unambiguously given an unqualified and unrestricted power not to apply the Directive to the armed forces. The wording of the Directive does not require a Member State to consider whether the enactment of the exclusion is justified or proportionately justified by a clear and legitimate objective. Such wording could have been included but was not.

41. The rationale for conferring this unqualified and unrestricted derogating power is explained by Recital 19 which states that *"Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.".* I note that those words have not been imported into Article 3(4). Such wording could have been included but was not. If that wording had been included, then the power would be qualified and restricted. I note that the wording relating to "combat effectiveness" has been imported into paragraph 4(1) of Schedule 9 of the Equality Act 2010 but that it has not been imported into paragraph 4(3) of Schedule 9.

42. I have noted EJ Stout's finding that there can be no possible link between combat effectiveness and the way that the armed forces is permitted to treat disabled ex-servicemen and women. Mr Hirst's submissions effectively ask me to interpret combat effectiveness in a narrow sense and conclude that the exclusion provided for in paragraph 4(3) of Schedule 9 only applies in relation to time in active service. I consider that combat effectiveness describes the ability of a military force to accomplish its objective and will vary in different scenarios. The decision to derogate entirely from the Directive will have inevitably been based on a number of policy decisions taken during peace time and/or in preparation for war in relation to access to employment in and working conditions in the armed forces. It is right for decisions that relate to combat effectiveness to be taken by the legislature. It is not for this Tribunal to second guess the wording and the decision to disapply the Directive to all of the armed

forces. I find that the permitted derogation in the Framework Directive is unqualified and absolute.

43. Article 3(4) permits a Member State entirely to disapply the Directive, in so far as it concerns disability (and age) discrimination, in relation to the armed forces. In defining the scope of the derogation, the Member State could choose to limit the extent to which it should apply by for example, restricting it only to members of the armed forces in "active service". The United Kingdom chose not to restrict the derogation to members of the armed forces in "active service".

44. EJ Stout formed the view, in **T v Ministry of Defence,** that the overwhelming impression is that no consideration was given to the interaction between paragraph 4(3) of Schedule 9 and section 108(1)(b) when it was enacted. EJ Stout makes reference to the Explanatory Notes and these not explicitly referring to paragraph 4(3) although paragraphs 4(1) and 4(2) are mentioned. Mr Allsop directed me to the Explanatory Notes and submits that EJ Stout's statement is inaccurate. I have considered the Explanatory Notes and it is my view that the notes separately address the wording of paragraphs 4(1) and 4(2) in paragraph 797 of the Explanatory Notes which states *"This paragraph allows women and transsexual people to be excluded from service in the armed forces if this is a proportionate way to ensure the combat effectiveness of the armed forces.".* Paragraph 4(3) of Schedule 9 is addressed in paragraph 798 of the Explanatory Notes which states that *"It <u>also</u> exempts the armed forces from the work provisions of the Act relating to disability and age."* (my emphasis added). The use of the word *"also"* indicates in my view that this was considered separately to the provisions which were enacted in paragraphs 4(1) and 4(2).

45. Recital 19 provides that the Member State "…*may choose not to apply the provisions of this Directive concerning disability and age to* ***all or part of their armed forces****"* (my emphasis added). In enacting paragraph 4(3) of Schedule 9 and section 108(1)(b) with its current wording, my respectful opinion is that consideration was given by the legislature to whether to apply to *"all or part of their armed forces".* The omission of wording that would limit the exclusion to only those in "active service" demonstrates, in my judgement, that consideration was given to this and that a conclusion was reached that it should apply to all of their armed forces as the enactment of the Equality Act provides for an exclusion to all of their armed forces and not part of the armed forces. Article 3(4) of the Directive permits a member state to limit the scope of derogation to certain parts or functions of the armed forces, the United Kingdom has chosen not to limit the scope of the derogation in any way.

46. Mr Hirst submits that it is incomprehensible that it was the intention of the legislature to permit the respondent to discriminate against ex-service personnel. I do not agree with Mr Hirst that the effect of the wording is to actively permit discrimination against ex-service personnel. Article 3(4) permits a member state to disapply the Directive, in so far as it concerns disability discrimination, in relation to the armed forces. In defining the scope of the derogation, the Member State could choose to limit the extent to which it should apply, for example, by restricting the derogation to certain parts of the armed forces or to specified functions of the armed forces. In my respectful opinion,

the decision by the legislature not to limit the scope of the derogation will have been based on a number of policy decisions relating to the armed forces and it is not for this Tribunal to second guess that process. I consider the permitted derogation in the Framework Directive to be unqualified and absolute and that there has been no oversight in considering whether this should apply to members of the armed forces in "active service". It is my view that it would go against the grain of the wording of the legislation to introduce wording that would allow ex-service personnel the right to bring disability (and age) discrimination claims when the legislation specifically and explicitly excludes this.

47. The derogation at Article 3(4) is a fundamental feature of the Framework Directive and the Equality Act. The democratic process involved consideration of the extent to which armed forces in each Member State should be allowed to discriminate on the grounds of age and disability. The Member States did not require but have allowed a very wide derogation in that respect. Service in the armed forces is seen as different to other occupations. Recital 19 clearly allows Member States to decide to exclude age and disability discrimination claims in relation to their armed forces. It is my view that the scope of the derogation has been clearly and deliberately defined as applying to all of the armed forces in the enactment of the Equality Act 2010.

48. In considering whether the additional wording sought by the claimant goes with or against the grain of the Equality Act, I have considered whether the inclusion of the additional wording would confer upon the claimant (and other ex-service personnel) a greater right than they would have enjoyed whilst they were in "active service".

49. The wording of section 108(1) of the Equality Act covers the reasonable adjustment duty where the matter arises out of and is closely connected to the employment. Section 108(4) of the Equality Act also states that post-employment obligations include a duty to make reasonable adjustments 'in so far as the employee continues to be placed at a substantial disadvantage as mentioned in section 20'. The Equality Act Explanatory Notes, at paragraph 354, give the example of reasonable adjustments to enable continued use of an in-house gym, where a disabled former employee's benefits include life-time use of the gym.

50. The claimant complains that the respondent has failed to make reasonable adjustments in not varying the 12 months' time limit on applications to amend mode of discharge or alternatively, in not amending his mode of discharge at all, although Mr Hirst did not pursue the latter in oral submissions. The scenario necessitating the reasonable adjustments proposed by the claimant only arises when the employment relationship has ended. The reasonable adjustments themselves cannot therefore be sought by current members of the armed forces. I have no difficulty in reaching a conclusion that the additional wording sought by the claimant would confer a broad and general right upon ex-service personnel to bring disability discrimination claims, including a claim that the respondent has failed to make reasonable adjustments which is not a right that they would have enjoyed had they been in service. I therefore conclude that

this goes against the grain of the legislative intent and the derogation provided for in paragraph 4(3) of Schedule 9. Whilst I accept that the overall thrust of the Equality Act 2010 is to make discrimination in the employment context unlawful, the very specific and particular exclusion that applies to armed forces is a fundamental feature of the legislation which derives directly from the Framework Directive.

51. I do not accept Mr Hirst's submissions that the changes sought are relatively modest. I find that the changes sought may be far-reaching and may involve issues calling for legislative deliberation, in particular, whether the derogation provided for by the Framework Directive should only apply to current members of the armed forces.

52. The claimant's claim therefore does not have any prospect of success because it is excluded by paragraph 4(3) of Schedule 9 to the Equality Act 2010. I therefore strike it out.

53. Whilst I do not therefore need to consider whether Articles 8 and 14 are engaged as I have decided that the amendments the claimant seeks go against the grain of the legislation and that the derogation is a fundamental feature of the legislation, I have considered this aspect in relation to the parallels that Mr Hirst submits should be drawn between the claimant and **T**. I consider it helpful to set out my observations in relation to this aspect. EJ Stout found in **T v Ministry of Defence** that Article 8 was engaged and this is set against the backdrop of the treatment to which the claimant said she was subjected during her time in service, the impact of these events and the manner in which her service complaint was dealt with by the respondent.

54. Mr Hirst submits that Article 8 is plainly engaged and relies on **Costello-Roberts** and **Denisov**. In **Costello-Roberts**, the court found that private life does cover a person's 'physical and moral integrity' although it unanimously found that the corporal punishment delivered in a school did not entail adverse effects for Costello-Roberts' physical or moral integrity sufficient to bring it within the scope of Article 8. In **Denisov**, the European Court of Human Rights (ECtHR) noted that a person's private life may include activities of a professional or business nature and Article 8 will be engaged where factors relating to private life have been brought into the work context or where the consequences of a decision in the work context (e.g. dismissal, demotion, non-admission to a profession or other similarly unfavourable measures) may have negative effects on an individual's private life, including their 'inner circle' of friends and family, their opportunities to establish and develop relationships with others in future and their social and professional reputation. Mr Allsop directed me to paragraphs 115 and 116 of **Denisov**. In paragraph 116, the ECtHR indicated that the court will only accept that Article 8 is applicable where the consequences of the impugned measure are very serious and affect the applicant's private life to a very significant degree. The respondent's position is as it was in **T**, the exclusion in paragraph 4(3) of Schedule 9 derives from the permitted derogation in the Framework Directive and is an unqualified blanket exception.

55. In **T v Ministry of Defence**, part of the claimant's claim was that the respondent had failed to make reasonable adjustments, specifically in that its practice of not progressing or resolving service complaints within the expected timescale substantially disadvantaged her because of her disability. The originating service complaints were made before **T** had left the armed forces, although they were resubmitted after she had exited the armed forces, following recommendations made by the Service Complaints Ombudsman. Mr Dunn's claim relates to the respondent's policy which provides a time limit for all retrospective medical discharge and PIC Code appeals of 12 months from the discharge or retirement date. This policy was implemented in 2017, approximately 16 years after the claimant's discharge from the Army. Prior to 2017, there was no time limit in place for retrospective medical discharge. Mr Hirst accepts that the claimant's case is factually different from **T** but submits that parallels can be drawn.

56. I do not agree with Mr Hirst that there are parallels between **T** and the claimant beyond that their respective claims came before the Employment Tribunal at a time after they had each left service and that they both brought claims that the respondent had failed to make reasonable adjustments. **T** is distinguishable on the facts, **T** had made an originating service complaint before service ended. She complained of sexual harassment and bullying during her time in service and left the Navy with serious mental health conditions. In particular, she argued that the Navy was under a legal duty to make reasonable adjustments for her as a disabled person. In light of her mental health conditions, she argued that it was required to resolve her service complaint within a reasonable period of time and its failure to do so exposed her to further harm. Mr Dunn's request that his mode of discharge be amended post-dates him leaving service by some considerable number of years.

57. Mr Hirst submits that the claimant's mental health difficulties were the cause of him leaving the army and that the mode of his exit cannot be more personal. He submits that the claimant's mode of exit being amended would allow the claimant to perceive a proper ending to his military career, would potentially lead to a more generous pension, improve his personal circumstances and private life and his perception of himself. For those reasons, Mr Hirst submits that Article 8 is engaged.

58. The claimant refers in his witness statement to having suffered from depression and anxiety ever since leaving the army. The claimant's medical history on release dated January 2001 states that the claimant is not and has not suffered from *"nervous breakdown or mental disease".* The claimant's medical records on discharge refer to *"stress reaction requested to see by the family snco reported to be down and suicidal just found out that his wife had left him…".* The same entry in the claimant's medical records from December 2000 states *"…no psychotic features subjectively down no suicidal ideation imp upset no risk…".* Mr Hirst's submissions are to the effect that I should attach weight to the speed of the claimant's discharge. Mr Allsop's submissions are to the effect that I should attach weight to the fact that the claimant's application in September 2019 for Early Payment of Preserved Pension made no reference to mental health difficulties and referred to *"irreparable vagus nerve damage".* I

make no finding in relation to whether or not Mr Dunn was experiencing depression or mental health difficulties at the time of his release from service and I do not attach any greater or lesser weight to either party's submissions. I simply record my observation that there are some inconsistencies in the evidence. My decision does not turn on whether or not Mr Dunn is currently, or was at the time of his release, experiencing such difficulties. That would be relevant to the prospects of success of the claimant's claim. I must consider the issue at 10.1 on the basis of the law, not the prospects of success. However, I have these observations in mind on a contextual basis when considering whether or not the claimant's Convention rights have been infringed.

59. Whilst I agree with Mr Hirst that matters within the employment sphere can engage Article 8, I am mindful that not every case involving an employment relationship comes within the ambit of Article 8. I have doubts that the claimant's is a case where the consequences of the respondent's policy affect the claimant's private life to the very significant degree which would mean that Article 8 would be engaged. I accept that decisions taken by the respondent are, if discriminatory, capable of affecting the claimant's psychological integrity but the extent to which they affect the claimant appear to be connected in part to the financial benefit he is unable to access in respect of his pension on the basis of his current mode of discharge. Whilst I accept that amending the claimant's mode of exit may bring about an improvement in his personal circumstances, I am not satisfied that the claimant has shown convincingly that the threshold of severity with respect to his inner circle, his opportunity to establish and develop relationships with others and his social and professional reputation as referred to in **Denisov** has been attained. However, my decision does not turn on this as I have struck out the claimant's claim on the basis that it is excluded by paragraph 4(3) of Schedule 9 to the Equality Act 2010, I do not need to determine definitively whether Articles 8 and 14 are engaged.

60. As I have struck out the claimant's claim on the basis that it is excluded by paragraph 4(3) of Schedule 9 to the Equality Act 2010, I do not therefore need to decide on the strike out or deposit issues.

61. As I have struck out the claimant's claim on the basis that it is excluded by paragraph 4(3) of Schedule 9 to the Equality Act 2010, I do not therefore need to issue any case management orders.

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Employment Judge Poynton

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Date 10 July 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
16 July 2024
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FOR EMPLOYMENT TRIBUNALS

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