EMPLOYMENT TRIBUNALS

Claimant: **Mr. L.**

Respondent: **Ministry of Justice**

Heard at: **Newcastle Civil and Family Courts and Tribunal Centre, via CVP**

On **19 and 20 September 2024.**

Before: **Employment Judge T.R. Smith**

Representation

Claimant: **Ms. Nicola Braganza K.C.**

Respondent: **Mr. Naizi Fetto K.C.**

RESERVED JUDGMENT

The claimants claim under case reference 2500321/2023 is struck out pursuant to rule 37 (1) (a) of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 on the grounds that it has no reasonable prospects of success as the tribunal lacks jurisdiction pursuant to the provisions of paragraph 4 (3) of Schedule 9 of the Equality Act 2010.

Reasons

The agreed issues

1.Should the tribunal make an order under rule 50 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") anonymising the name of the claimant?

2.Should the claimant's claim be struck out under rule 37 (1) (a) of the Rules on the ground that it has no reasonable prospect of success because the tribunal lacked jurisdiction to consider all or any of the allegations of disability discrimination set out in the claimant's claim form presented on 17 February 2023 pursuant to paragraph 4 (3) of schedule 9 ("paragraph 4(3)") of the Equality Act 2010 ("EQA10"). The claimant relied upon the EQA 10 being read in a manner compatible with the Human Rights Act 1998 ("HRA 98") or in the alternative, if there was a blanket exception, that paragraph 4 (3) was not compatible with articles 6 and 8 read with article 14. It was common ground that this tribunal could not make a declaration under section 4 of the HRA 98.

3.Should the claimant be permitted to amend his claim form in accordance with the draft dated 23 February 2024?

Preliminary

4.The tribunal raised with the parties the wording of paragraph 4 (3) which reads: -

"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".

5.A possible difficulty arose with the commencement words to the paragraph "This Part" and the title to the schedule.

The parties had predicated their arguments that the reference to "This Part" was a reference to Part five "work" under the EQA 10.

6.It was agreed for the purpose of this hearing only that the tribunal would approach the matter on the basis that "This Part" was a reference to Part five "work" in the EQA 10.

7.It was further agreed that, absent the respondent's arguement on paragraph 4 (3), it was not argued that the respondent could show the claimant's claim had no reasonable prospects of success.

8.At the start of the hearing, after having heard submissions from both parties, the tribunal gave oral reasons why it made an order pursuant to rule 50 (1) and 50 (3)(b) of the Rules.

Documentation

9.The tribunal had before it the following: –

- A skeleton argument of Ms. Braganza K.C. dated 11 September 2024.
- A skeleton argument of Mr. Fetto K.C. dated 04 September 2024.
- The main bundle consisting of 948 pages.
- A supplemental bundle ("SB1") consisting of 71 pages.
- A further supplemental bundle ("SB2") consisting of 51 pages.
- An authorities bundle consisting of 2040 pages.

10.A reference to a document is a reference to a document in the main bundle, unless otherwise indicated.

Submissions

11.The tribunal should extend its grateful thanks to both advocates for the care, thoroughness and helpfulness they displayed to the tribunal in the course of both their oral and written submissions. The quality of the advocacy was of the highest order.

12.It would be a herculean task for the tribunal to succinctly summarise each and every argument made to it, both orally and in writing, and each authority it was taken to. It therefore does not propose to do so. The mere fact, however, that a specific argument or authority has not been recorded in this judgement should not be taken to mean the tribunal has not given careful consideration to that argument or authority.

Procedural history

13.By a claim form presented on 17 February 2022 the claimant brought complaints of: –

- direct disability discrimination.
- discrimination arising from disability.
- indirect disability discrimination.
- a failure to make reasonable adjustments.

14.The respondent made an application on 24 April 2023 to strike out the claimant's claim form in its entirety on two grounds, namely the tribunal was deprived of jurisdiction under paragraph 4 (3) and that the claimant had failed to comply with the provisions of section 120/121 EQA 10 (that is the service complaint procedure)

15.By email dated 23 February 2024 the claimant made an application to amend his claim form to add a complaint of direct race discrimination.

16.There have been proceedings in the Administrative Court in respect of the admissibility of claimant's service complaint which led to the tribunal proceedings being stayed. Ultimately Mr. James Strachan K.C., sitting as a Deputy High Court Judge of the Administrative Court, granted the claimant's application for judicial review.

17.His service complaint is now being pursued and the respondent no longer sought a strike out under sections 120/121 EQA 10, although it reserved its position to renew its application if the tribunal held it had jurisdiction, and in the event the claimant's service complaint was subsequently withdrawn or deemed withdrawn.

Background

19.The following were the agreed facts.

- On 17 July 2017 the claimant commenced service as a soldier in the British Army.
- In December 2019 he was diagnosed with HIV.
- The parties agreed this was a disability within the meaning of section 6 EQA 10.
- His service terminated on 03 October 2022 by way of medical discharge, as a direct result of his HIV.
- Absent his HIV he would not have been discharged.

Policies and statements

20.The tribunal considered it necessary, given the weight Ms. Braganza gave to an announcement made by the government on 01 December 2021 to explain the various policies and procedures utilised by the respondent in respect of potential and serving service personnel, who had contracted HIV.

21.The claimant relied upon a document issued on 01 December 2021 (376), World Aids Day. The document was entitled "*Armed Forces make major changes to end HIV being a barrier to service".*

22.The key passage relied upon stated: –

"The Ministry of Defence has today announced that the Armed Forces have committed to ensuring that people living with HIV will no longer be barred from serving. People taking the HIV preventative medication… can now join the Armed Forces with immediate effect, and serving personnel who are HIV-positive can also be recognised as fully fit, the changes planned to come into effect early New Year"

23.As it transpired the changes did not come into effect in the *"early New Year".*

24.On 21 June 2022 (389) there was a further press release in the following terms, which Ms. Braganza also relied upon.: –

"From today, serving personnel who are taking suppressant treatment for HIV and whose blood tests showed no detectable virus will now be recognised as fully fit for all service. The policy change also applies to anyone wishing to join the military, meaning living with HIV is no longer a barrier for those wishing to serve"

25.The above changes came into effect <u>after</u> the decision had been taken to discharge the claimant, although before his actual discharge date.

26.It was plain that the documents at 376 and 389 were press releases and not policy documents. The former was marked with the words *"news story"* and expressly embargoed (see 538 to 541).

27.The respondent had a policy entitled Joint Service Manual of Medical Fitness.

28.It was, as the title suggested, the policy the respondent utilised to determine medical fitness of service personnel.

29.This policy and its various iterations were abbreviated in the documentation as "JSP 950".

30.The first copy of JSP 950 that was placed before the tribunal was issued on 01 December 2021 (553), presumably to tie in with the World Aids Day announcement (376 above). HIV was dealt with at pages 587 to 588 of the policy. The policy should be read for its full terms and effects. What follows is an extremely simplistic statement of the principal matters, relevant to this judgement.

31.Under the policy, service personnel, even with HIV, could be retained, subject to certain conditions and limitations.

32.One such condition or limitation related to whether service personnel had a viral load, and if so, how much. The tribunal need say no more on this technical issue, given it was common ground that viral load had nothing to do with the claimant's subsequent discharge.

33.Another related to whether service personnel had a *"satisfactory"* or "*abnormal"* CD 4 count. CD 4 related (the advocates thought) to a level of immunity (the advocates were not sure) but even if that assumption was wrong nothing turns upon its exact medical meaning.

34.No specific CD 4 figure was quoted as to what was satisfactory or abnormal. The footnote in the policy implied this was being developed (as was subsequently evident).

35.JSP 950 was revisited in March 2022 and a draft was produced (647). The policy set out more specific criteria both in respect of service entry and remaining in service for those with HIV.

36.Before finalising the policy, the respondent involved the Medical Employment Standards Military Judgement Panel (595/ 602) in looking at the issues surrounding viral load and CD4

37.Under the draft policy, Inter alia, service personnel needed a CD4 count of over 200 cells mm3 for a period of at least six months to remain in service. Below 200, service personnel were regarded as non-deployable. In other words, their service would end.

38.It was common ground that, on the available medical evidence, at all times up to and including discharge, the claimant had a CD4 reading of under 200 cells mm3.

39.A finalised copy of JSP 950 (654) was adopted, dated 07 June 2022 and the wording of the March 2022 draft, in respect of HIV was adopted.

40.A further addition of JSP 950 was published on 03 August 2022 (701) but nothing appeared to this tribunal to turn on that. The CD4 threshold remained the same, as far as relevant to the claimant.

41.It was the claimant's failure to attain a CD4 count of 200 cells mm3 or above that the respondent relied upon to justify the discharge of the claimant. That was clearly the threshold applied by the respondent's medical board (292, see the section headed, *"summary of current situation").*

Strike out

The applicable legal framework.

42.Rule 37 (1) (a) permits a tribunal to strike out a claim or part of a claim if it has no reasonable prospect of success.

43.The burden is upon the respondent to establish the strike out ground.

44.A high threshold is required for strike out.

45.At a strike out the tribunal should look at the claimant's case at its highest, and assume the claimant will be able to establish what he asserts, unless there is very compelling evidence (e.g. an uncontested document) to the contrary.

46.It is not the role at strike out for the tribunal to determine disputed facts.

47.The numerous authorities cautioning a tribunal against strike out of a discrimination complaint have to be read in context. Most related to the merits, or the lack of them of a claim, not, as here, jurisdiction.

48.A tribunal is a creature of statute. If it does not have jurisdiction, it must strike out a claim however much sympathy it might have for a claimant.

Schedule 9 paragraph 4(3).

The applicable legal framework

49.Paragraph 4(3) of Schedule 9 EQA 10 provides as follows:-

"(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."

50.For the purpose of this hearing "work" as set out in part five is in scope.

51.Section 39 EQA10 provides: –

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

(c) by dismissing the

(*d) by subjecting B to any other detriment …"*

52.The EQA 10, must be interpreted consistently with Article 3 (4) of the Council Directive 2000/78/EEC on Equal Treatment in Employment ("the Framework Directive") which remains applicable, see section 5(2) European Union (Withdrawal) Act 2018.

53.Article 3(4) of the Framework Directive provides:

"*Member States may provide that the Directive, insofar as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.'*

54.The reasoning behind Article 3 (4) is set out in recital 19 of the Framework Directive in the following terms: –

"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."

55.Ms Braganza made brief reference to the EU Charter Rights. The tribunal determined those rights were not applicable. The Charter of Fundamental Rights ceased to be part of domestic law from 31 December 2020, see section 5 (4) of the European Union (Withdrawal) Act 2018 and also paragraph 3 of schedule 1 of the above act.

56.Similarly the recommendation of the UN Committee on the Rights of Persons with Disabilities, quoted by Mr Braganza, has no legal force. The tribunal discounted the recommendation.

57.Section 3 HRA 98 provides:

“”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;”

HRA 98 section 3, submissions and conclusions

The approach taken.

58.The tribunal should begin by explaining the approach it took.

59.The tribunal started its deliberations with the parties respective submissions on section 3 HRA 98 (“the section 3 question”) because, even if article 14, was within the ambit of articles 8 and/or 6 the answer to the above question would be determinative, as the tribunal had no jurisdiction to make a declaration of incompatibility, due to the operation of section 4 HRA 98.

60.Both counsel accepted the above statement of the law and to use the phraseology of Employment Judge Stout in **T -v- Ministry of Defence 201755/21** they agreed it was permissible for the tribunal to put the *“cart before the horse”.*

61.Thus in approaching the section 3 question the tribunal assumed that the claimant’s human rights had been engaged and the exclusion was inconsistent with those rights.

62.Both counsel urged the tribunal, that even if it found in favour of the respondent on the section 3 question, to set out its findings under articles 14 ,8 and/or 6 given the possibility that the issue might be ventilated elsewhere.

The section 3 question.

63.Mr Fetto relied heavily on the judgement in **R (Child Soldiers International) -v- Secretary of State for Defence [2016] 1 WLR1062** , particularly at paragraphs 9 to 12, 44 and 45 of the judgement.

64.The tribunal found **Child Soldiers** was authority for the proposition that Article 3 (4) gave Member States an unqualified and unrestricted power not to apply the Framework Directive to the armed forces. There was no power or indeed reason why

there should be implied into the Article any form of proportionality test. Thus Parliament was entitled under the EQA 10 to disapply protection of the characteristic of disability (and age) from those in the armed forces.

65.Mr Fetto submitted that paragraph 4 (3) could not be interpreted either in a manner that fundamentally changed its nature or gave rise to policy considerations that were properly a matter for Parliament.

66.He further explained why the decision in **T,** heavily relied upon by Ms Braganza was not relevant, specifically because **T** related to claimant bringing a disability discrimination claim in respect of matters that occurred after her discharge.

67.Ms. Braganza, in a carefully constructed and attractive argument, submitted that the tribunal should insert into paragraph 3(4) the words " other than HIV " so it read: –

*"This Part of this Act, so far as relating to age or disability, **other than HIV**, 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."*

68.She submitted that was appropriate and proportionate because the tribunal had to apply a purposive approach to section 3 HRA 98 and paragraph 4 (3) had to be read in a way that was compatible with the claimant's Convention Rights.

69.Whilst the tribunal was referred to a number of authorities it considered the most helpful guidance on its interpretive obligation was found in the judgement of the Supreme Court in **Ghaidan-v- Godin-Mendoza [2004] 2AC 557** particularly at paragraphs 30 to 33 and 50 which can be summarised as follows:-

- the interpretive obligations decreed by section 3 HRA 98 were of an unusual and far-reaching character.
- it allowed a tribunal to be depart from the unambiguous meaning the legislation would otherwise bear.
- it allowed departure from the intention reasonably to be attributed to Parliament in using the language in question.
- a tribunal could read in words which changed the meaning of the enacted legislation so far as to make it Convention compliant.
- a tribunal could modify the meaning and hence the effect of primary and secondary legislation, but could not adopt a meaning inconsistent with the

fundamental feature of legislation. What is a *"fundamental feature"* has been expressed in a variety of ways in case law but put succinctly any words implied must not go "*against the grain"* of the legislation.

- There is a strong and rebuttable presumption in favour of an interpretation consistent with Convention rights.
- Whilst a respondent may frequently assert reading down will flout the will of Parliament the tribunal must balance the words of Parliament against its will as expressed in section 3 HRA 98.

70.The tribunal applied the above principles in reaching its judgement.

71.Ms. Braganza placed significant weight on the first instance decision of E.J. Stout in **T -v- Ministry of Defence** (a case of alleged disability discrimination whereby E.J. Stout found the EQA 10 could be read down in such a way as to be compatible with the HRA and allowed **T** to proceed with her claim).

72.The tribunal will analyse that judgement in due course.

73.Ms. Braganza submitted that her wording did not go against the grain of the legislation and placed weight on the press releases, referred to above. She said the respondent had already accepted that HIV did not impact upon combat effectiveness, hence its change in policy.

74.Ms Braganza referred to the recital to the EQA 10 which read:-

"An Act to …. require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities; to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics; …. to prohibit victimisation in certain circumstances; to require the exercise of certain functions to be with regard to the need to eliminate discrimination and other prohibited conduct;…. to increase equality of opportunity…"

75.Having regard to this wording, she submitted, her proposal did not go against a fundamental feature of the legislation and was in accordance with its objectives.

76.She further submitted that if the tribunal was to adopt her formulation it did not open the gates to all service personnel with a disability to bring a claim, but only to a cohort which lived with HIV.

77.Mr. Fetto argued that the interpretation submitted on behalf of the claimant did go against the grain. He relied upon ,inter alia, the judgement in **Steer -v- Stormsure Ltd [2021] ICR 807 at 147 to 150** (that was a case where Mr Steer argued that interim relief should be available for those bringing discrimination and victimisation claims arising out of dismissal and a failure to do so was a breach of Article 14 when read in conjunction with Article 6.)

78.Mr Justice Kavanagh K.C., sitting in the EAT in **Steer** held: –

"147……. *In the appeal tribunal judgment [2014] ICR 169, para 38 , Langstaff J said (quoting Lord Rodger of Earlsferry in* Ghaidan v Godin-Mendoza *[2004] 2 AC 557, para 121)*

"using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."

148. In my judgment, to add interim relief to the suite of remedies available for discrimination/victimisation cases would be inconsistent with the scheme of the 2010 Act, and would fall on the wrong side of the boundary referred to by Langstaff J.

149. Moreover, to use the words of the Court of Appeal at para 68 of Benkharbouche *(echoing Langstaff J at para 40 of the appeal tribunal judgment), there would be a "danger of its affecting the overall balance struck by the legislature whilst lacking Parliament's panoramic vision across the whole of the landscape".*

150. This is another way of saying that (to paraphrase Ghaidan v Godin-Mendoza *[2004] 2 AC 557) the extension of interim relief to discrimination/victimisation cases relating to discrimination would have major policy and practical consequences, the effects of which the Employment Appeal Tribunal is not equipped to evaluate. There are a large number of policy and practical considerations.'*

79.The tribunal read the judgement to mean that Mr Steer's claim failed for two reasons, firstly that the tribunal was being asked to interpret section 3 HRA 98 in a

fundamentally different manner and, secondly, that it was held that it was for the legislature to address, if appropriate, the lack of a right to which Mr Steer asserted he was entitled to.

80.The tribunal approached it determination on the assumed facts as at today.

81.The tribunal did not consider that the judgement in **Child Soldiers**, whilst correctly decided, prevented it interpreting section 3 in the manner submitted by Ms Braganza.

82.**Child Soldiers** was not a case where there was a challenge to paragraph 4(3) under HRA 98. Therefore the judgement did not inhibit the tribunal, if necessary, from interpreting paragraph 4 (3) under the HRA98 in a manner that altered its meaning.

83.If section 3 HRA 98 was not read, as submitted by Ms Braganza, the meaning and effect of paragraph 4 (3) was as established in **Child Soldiers.**

84.The tribunal found that the judgement in **T** was of little assistance to it on the section 3 question because.

- Firstly it was not binding upon this tribunal.
- Secondly it was distinguishable on its facts. **T** related to a service complaint raised after T had left the armed forces so the concept of combat effectiveness was not engaged. This claim differed. It was an in service complaint in respect of matters up to and including the claimant's discharge. E.J. Stout considered Article 3(4) of the Framework Directive when read with recital 19 that the derogation related to the concept of combat effectiveness. She inserted into the EQA10 the wording *"so as to provide that the exemption enjoyed by the Armed Forces in relation to disability discrimination does not apply to claims brought by ex-service men and women by virtue of section 108*"(section 108 permitted discrimination cases to be brought where it arose out of or was closely connected with a relationship that used to exist between parties). As combat effectiveness was not engaged it was open to EJ Stout to find as she did, and her judgement did not go against the grain or a fundamental feature of the legislation on the particular facts. However this was a case where the reason for dismissal was combat effectiveness, hence why it was distinguishable.

85.The tribunal did not accept that the press releases (see above) demonstrated HIV no longer impacted upon the respondent's assessment of service personnel as to combat effectiveness.

86.That was a too simplistic a formulation, having regard to the preceding analysis of the documentation.

87.By way of analogy a press release by the government that employees will receive "day one" employment rights would not take precedence from the actual legislation that flows from that aspiration.

88.The proper approach was to examine the respondent's policies that were actually applied to service personnel in respect of HIV Those set out a detailed medical criteria applied in each and every case and sought to achieve a balance between the concept of combat effectiveness and the continued retention or recruitment of those with HIV.

89.The claimant was not fit to serve despite Ms Braganza's submission to the contrary.

90.He was not fit because his CD4 count was below 200 cells mm3 and that was the criteria which he was judged against and which in turn led to his discharge.

91.Ms Braganza sought to argue was that service personnel with HIV should be permitted to bring claims of disability discrimination. The tribunal found that went against the grain of EQA10 because the legislation expressly prohibited such a claim.

92.If the wording suggested by Ms Braganza was adopted the tribunal would be adding a remedy which Parliament had expressly excluded and this would fall foul of the dicta in **Steer** that *….there would be a "danger of it affecting the overall balance struck by the legislature whilst lacking Parliament's panoramic vision across the whole of the landscape*"(paragraph 149).

93.Article 3(4) of The Framework Directive is clear and unambiguous as explained in recital 19 and **Child Soldiers** and allows member states a very wide derogation in respect of disability discrimination for those in the armed services.

94.Given paragraph 4 (3) is derives directly from the Framework Directive, what the tribunal was being asked to do and which it could not do, was to depart from a fundamental feature of it. That was not permissible on the case law.

95.Whilst the tribunal had regard to the preamble to the EQA10, including the desire to increase equality of opportunity, the tribunal's interpretation was not contrary to the will of Parliament. The reason is simple. The EQA10 sets out the will of Parliament.

96.Parliament has always limited equality of opportunity in the EQA10, by prescribing what is or is not a protected characteristic (weight is not included for example). It has limited rights in certain cases, by way of illustration a genuine occupational requirement for a post. Parliament must have been well aware of the Armed Forces exemption. Despite that, whilst it could have required the respondent to show that any exemption was a proportionate means of achieving a legitimate aim, it did not do so. The exemption does not go against the grain because it is derived directly from the Framework Directive. Parliament permitted the Armed Forces exemption in respect of age and disability discrimination and the rationale behind that derogation, being the combat effectiveness was relevant in terms of medical fitness. It followed that the presumption in favour of the interpretation consistent with Convention rights has been rebutted by the respondent.

97.Thus, the tribunal found it did not have jurisdiction and that the claim should be struck out.

98.What follows is not strictly necessary to address the agreed issues, but is included for completeness.

HRA 98 and the Articles

The law

99.The provisions of the European Convention on Human Rights (ECHR) are set out in Schedule 1 HRA 98

100.Relevant to these proceedings are the following: –

Article 6 - Right to a fair trial

"(1). In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Article 8 Right to respect for private and family life

"(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 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."

101.It is important to note that Article 8 is a qualified, not absolute right.

Article 14 Prohibition on discrimination

"*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."*

Submissions and conclusion

102.Ms Braganza in her oral submission made reference to article 13 but considered it did not add anything to her submissions on article 6. She did not invite the tribunal to do anything more. It is for this reason there is no discussion in the judgement in respect of article 13

103.The tribunal is concerned with articles 14, 8 and 6.

104.Does disability attract the protection of article 14 at all? It is not specifically named as a protected characteristic.

105.Mr. Fetto did not address the topic.

106.The tribunal resolved this question in favour of the claimant applying **Gor -v- Switzerland , application 13444/04** at paragraph 80 where disability was held to be caught by the words *"other status"* of article 14.

107.Article 14 is not a stand-alone right (see **Carson and others -v- the United Kingdom [GC] 2010**). It is an ancillary right. The claimant must show that the matter

complained of fell within the ambit of article 6 or 8 for article 14 to bite. That is a wider concept than that of an interference with a Convention right itself.

108.In **R (Stott) -v- Secretary of State for Justice [2020] AC 51** it was held four elements had to be establish to amount to a violation of Article 14 namely

- the circumstances had to fall within the ambit of a Convention right (question one)
- the difference in treatment had to have been on the ground of one of the characteristics listed in article 14, or other status (question two)
- the claimant and the person who had been treated differently must have been in analogous situations (question three)
- objective justification for the different treatment had to be lacking. (question four)

Did the circumstances fall within the ambit of article 6 or 8 (question one)?

Article 6

109.The tribunal began its deliberations with article 6. The case law established that the tribunal must draw a distinction between a procedural and a substantial bar.

110.As Lord Sumption said in **Benkharbouche v Embassy of the Republic of Sudan[2019] AC 777**, at [15-16]:

'… article 6 is concerned with the judicial processes of Convention states, and not with the content of their substantive law… The jurisprudence of the Strasbourg court establishes that, as a general rule, the question whether such cases amount to the creation of "immunities" engaging article 6 depends on whether the rule which prevents the litigant from succeeding is procedural or substantive… What the Strasbourg court means by a procedural rule is a rule which, whether technically procedural or substantive in character, has the effect of barring a claim for reasons which do not go to its legal merits; that is to say, rules which do not define the existence or extent of any legal obligation.'

111.Whilst a helpful statement of the law the tribunal considered that in practice it was not always easy to draw the line between procedural and substantive bars.

112.Unsurprisingly Mr. Fetto argued that there was a substantive bar and Ms. Braganza only a procedural bar. Ms. Braganza argued the claimant's claim came within the ambit of article 6 because it related to access to judicial remedies to enforce a civil right. Mr. Fetto on the other hand submitted no civil right existed.
113.On this point the tribunal favoured the submission of Mr. Fetto because the effect of paragraph 4 (3) was to prevent a cause of action even existing under the EQA10 in respect of a disability discrimination claim by a member of the Armed Forces. It fell squarely within the dicta of Lord Sumption as paragraph 4(3) was a rule which did define the existence or extent of any legal obligation.Ms. Braganza was seeking to use article 6 to generate a claim that did not exist as a result of the provisions of paragraph 4 (3).
114.Whilst the tribunal noted her submissions relying upon **Duncan v- MOD UKEAT/0191014/RN** and **Edwards -v- MOD [2024] EAT 18 5/3/24** both cases were looking at a different issue namely the service complaint procedure under section 121 EQA 10 and whether it was compatible with article 6. 115.Those cases were distinguishable and not relevant to the determination this tribunal had to undertake
116.Similarly, it did not find **Roche -v-the UK 2006 42 EHRR 30,** or **Airey -v- Ireland 2 EHRR 305** assisted her either.
117.Thus, the tribunal concluded that article 6 was not in ambit. It follows therefore the tribunal did not need to consider the other three questions set out in **Stott** in respect of article 6.

Article 8?

118.What of the position in respect of article 8?
119.Mr. Fetto contended article 8 was not engaged. The tribunal had to ask itself the correct question and he submitted the correct question was to look at the nature of the challenge. Here it was a challenge to the jurisdictional bar set out in paragraph 4 (3).
120.Mr. Fetto submitted paragraph 4(3) was simply a demarcation setting out the jurisdiction of a tribunal and the consequences were not of a serious negative effect on the claimant's individual private life because paragraph 4 (3) was not a measure which affected private life rights but jurisdiction.
121.Paragraph 4 (3) did not determine or affect private life.
122.On that analysis article 8 did not engage either the reason-based or consequence based approach set out in **Denisov -v- Ukraine 76639/11.**

123.Ms. Braganza emphasised the broad nature of article 8 and contended, applying the consequence based approach,
that the medical discharge of the claimant severely impacted on his life and dignity. Private life encapsulated a person's physical integrity and article 8 was engaged.
124.Despite the eloquence of Mr. Fetto's argument, and that the tribunal considered the matter was finely balanced it was persuaded that article 8 was in ambit for the reasons set out below.
125.The tribunal found article 8 was wide ranging and had the potential to permeate into work, although not every permutation brought it within ambit.
126.Discharge from the armed forces had the potential to be in ambit, see **Smith and Grady -v- the United Kingdom ECHR 1999-VI** (a case on sexual orientation and discharge).
Denisov made it clear that the underlying reasons for the actions of an employer that affect an employee's professional life may be linked to their individual private life (see paragraph 106) but they must be serious and severe.
127.Here it was the fact the claimant has HIV that has led to the termination of his engagement with the respondent. There was a clear link therefore between the claimant's private life and his professional life utilising the consequence based approach. The decision to terminate his engagement and the associated consequences were for the claimant serious and severe.
128.The tribunal was entitled to have regard to the statement the claimant had filed in the judicial review proceedings (SB 1 pages 8 to 15). In that statement he spoke cogently of how he felt on discharge, particularly with regard to shock, stress, and being stigmatised for his HIV. He explained the financial consequences including the risk to losing his own home flowing from the termination of his engagement. He stressed what he perceived to be the unfairness, in having lost a job he loved and which he intended to continue in until he retired. A comparison of the claimant's life before and after discharge fully illustrated the severity of the respondent's action on the claimant.
129.In addition, the tribunal was entitled to take judicial notice of the fact that service personnel work in teams. Whilst in the army this was the claimant's inner, and no doubt friendship circle which he lost, or was severely disrupted on discharge. Service personal's private and work life are frequently intertwined to a far greater degree

than for none service personal as they sleep, eat, train, fight, socialise and work together.

130.The tribunal, standing back and looking at matters holistically was therefore, just, satisfied that the claimant's psychological integrity and dignity, on the basis of what he had said was sufficient to be within the ambit of article 8, applying **Costello-Roberts -v- the United Kingdom (1993) 19 EHRR 112.**

The difference in treatment must have been on the ground of one of the characteristics listed in article 14 or other status (question two)

131.Given the tribunal's finding in respect of article 6, questions two, three and four are only potentially engaged in respect of article 8.

132.The tribunal can deal with the second question quite shortly. The tribunal has already found, for the reasons given, that disability falls within the ambit of "other status" under article 14 when looked at in the context of the claimant's protected characteristic, and status as a member of the armed services.

133.Mr. Fetto submitted there was no differential impact between disabled and non-disabled service personnel as neither could bring a discrimination claim.

134.With respect to Mr. Fetto the tribunal considered that was impinging on the third question and did not answer the second question.

135.It found the second question was answered in favour of the claimant.

The claimant and the person who had been treated differently must have been in analogous situations (question three)

136.Mr. Fetto submitted it was not appropriate to undertake a comparison between service personnel and civilian employees, because they were not in analogous situations. He relied upon the decision in **Engel -v- The Netherlands (a979-1980) 1 EHRR 647** particularly at paragraphs 54 and 73 which emphasised the characteristics of military life and that the conditions and demands were very different from those in civilian life.

137.The tribunal considered that the decision in **Engel** was not a case on article 8. It was a case that involved military discipline. The passage quoted by Mr. Fetto

therefore had to be looked at in that context. However, given that Ms. Braganza conceded that any comparison had to be with another member of service personnel it was not necessary for the tribunal to say anything further on the point.

138.The correct comparison Mr. Fetto submitted was to look at both a disabled and nondisabled member of the Armed Forces. Neither could bring a disability discrimination complaint.

139.The difficulty, in the tribunal's judgement, with that approach was that a none disabled member of the armed services would be unable to bring such a claim because they lacked the essential protected characteristic of disability and would have no reason to bring such a claim. It was the status, the protected characteristic of disability, that is the reason for the difference in treatment.

140.On Mr. Fetto's analysis it would be impossible for a member of the armed services to satisfy the third question in any circumstances.

141.In the tribunal's judgement the correct comparison had to be with another member of service personnel who sought to bring a discrimination complaint on grounds other than age or disability. What was meant by analogous was that the claimant had to be placed in an analogous situation to those who are not excluded under paragraph 4(3)

142.By way of illustration if the claimant had alleged that his discharge was tainted by race discrimination, he would have had a claim.

143.Applying that analysis the third question was answered in favour of the claimant.

Objective justification for the different treatment had to be lacking. (Question four).

144.On behalf of the claimant, Ms. Braganza accepted that operational effectiveness of the armed forces was a legitimate aim which justified some restriction on service personnel's Convention rights, including the right not to be subject to disability discrimination complaints. However, here, she argued it lacked proportionality because the respondent had a blanket and unqualified exemption in the case of those with HIV, even those who were fit to serve. The test the tribunal had to apply was the conventional proportionality test.

145.She supported her argument by a number of authorities, the most relevant in the tribunal's judgement being ***Markin -v- Russia (2013) 56 EHRR 8*** at paragraphs 136 and137: –

"136….the Convention does not stop at the gates of army barracks and … military personnel, like all other persons within the jurisdiction of the Contracting States, are entitled to Convention protection. It is therefore not open to the national authorities to rely on the special status of the armed forces for the purpose of frustrating the rights of military personnel. Any restrictions on their Convention rights, to be justified, must satisfy the test of necessity in a democratic society.

137.Further, in respect of restrictions on the family and private life of military personnel, especially when the relevant restriction concerns "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such interference can satisfy the requirements of article 8 (2) of the Convention. In particular, there must be a reasonable relationship of proportionality between the restriction imposed on the legitimate aim of protecting national security. Such restrictions are acceptable only where there is a real threat to the Armed Forces operational effectiveness. Assertions as to a risk to operational effectiveness must be substantiated by specific examples.

146.She submitted that the blanket nature of the restriction was a strong indication of disproportionality. The respondent had failed to consider more proportionate means of achieving its legitimate aim. She placed significant emphasis, indeed describing it as her "trump card" on what she said was the Respondent's change in policy in respect of HIV.

147.Mr. Fetto submitted that the differential treatment between service and civilian personnel had the legitimate aim of safeguarding the operational and combat effectiveness of the armed forces by means of determining who was or was not medically fit to serve, or to be retained within the armed services.

148.The appropriate standard to apply was the manifestly without reasonable foundation test as the characteristic, membership of the armed forces, was not one of the particular suspect grounds which required the conventional proportionality test to be applied.

149.The respondent had the legitimate aim of safeguarding operational and combat effectiveness of its personnel. Service personnel had to be deployed and fight

anywhere in the world at short notice. That aim was fulfilled by giving it full control over its medical employment and deployment standards. The armed forces without this freedom would be unable to meet their commitments and it was for the government, advised by competent military authorities, who were better placed to determine issues of combat effectiveness.

150.It was proportionate because the respondent was uniquely placed to make those critically important judgements whereas a tribunal was not.

151.He prayed in aid: -

- the government's response to the report of the joint committee on the draft Disability Discrimination Bill (419/420),
- annex A to the explanatory memorandum on the United Nations Convention on the Rights of Persons with Disabilities (401/403)
- the U.K.'s initial report of the United Nations Convention on the rights of persons with disabilities (506)
- the discussion recorded in Hansard entitled "Armed Forces: DDA exemption: questions" on the 12th of May 2009 (441)
- Commons Hansard, HC general committee 19 June 2009 (446/451)
- the respondents review in 2023 entitled "Review of the Armed Forces exemption for certain work and employment provisions of the Equality Act 2010 regarding disability (744)
- the judgement in **Child Soldiers** were Mr. Justice Kenneth Parker said *"judges of this generation do not typically have either experience of, or expertise in, military affairs and in my view, the community legislator has made a clear and unambiguous choice to leave these questions for the definitive appreciation of those who do have the relevant experience and expertise…"*

152.He submitted that paragraph 4 (3) was not about whether specific people would be treated as operationally or combat effective but whether the tribunal should be the arbiter of those questions.

153.The tribunal approach question four in the following manner.

154.It considered that wide margin of appreciation was afforded to respondents in cases concerning the armed forces see **Engel** at paragraph 54.

155.The extent of the margin of appreciation in determining justification depended upon the characteristic in question.
If the characteristic was physical or central to a person's identity then the concept of reasonable justification was interpreted strictly and very weighty reasons were required.
156.If it is not, then a lower standard was required, that is examining the public interest and the provision of a rational explanation, see the judgement of Baroness Hale in **A.L. (Serbia) -v- Secretary of State for the Home Office [2008] 1W LR 1434,**
157.Thus, there was a difference between what has been termed the *"manifestly without reasonable foundation"* test compared with the *"conventional proportionality test".*
158.If the characteristic, was one that had been described as by Baroness Hale as *"particularly suspect"* (and the tribunal found that if the characteristic was disability, it was particularly suspect) then the conventional proportionality test was applicable. If not, it was the manifestly without reasonable foundation test applied.
159.The key question the tribunal had to determine was what was the characteristic in play? If disability the tribunal considered the conventional proportionality test applied. If it was membership of the armed services then the manifestly without reasonable foundation test applied.
160.On this point the tribunal preferred the submission of Ms. Braganza. Defining the characteristic as membership of the armed forces was too wide. Members of the armed forces could, save in respect of age disability bring claims under the EQA 10. Here it was the characteristic that was preventing the claimant from so doing namely his disability.
161.The tribunal concluded that it was the conventional proportionality test that was in play.
162.The tribunal thus found article 8 was within the ambit of article 14.
163.For the avoidance of doubt the tribunal did not reach this conclusion on the submission that the change in policy by the respondent in respect of HIV fundamentally undermined any justification argument. With respect to Ms. Braganza, as already noted whilst adjustments have been made for those seeking to enter the armed services or continuing to remain the way HIV was treated by the respondent was carefully calibrated. There has been no total exemption for those with HIV.

164.It was not for the tribunal then to go on to see to make findings on the issues of proportionality for two reasons.

164.1.Firstly, the fact that article 8 was within the ambit of article 14 was irrelevant given the tribunal's primary finding of fact that he lacked jurisdiction

164.2.Secondly, it considered it would need to hear evidence on the issue.

Conclusion

165.The claim is struck out pursuant to rule 37 (1) (a) as the tribunal found it had no reasonable prospects of success.

166.Due to the shortness of time, the tribunal did not hear argument on amendment. Given the claim form has been struck out there can be nothing to amend. The tribunal will assume the amendment application is withdrawn unless the claimant sets out reasons in writing to the contrary to both it and the respondent within 14 days of service of this judgement on him.

Employment Judge **T.R.Smith**

Date 30 September 2024

Notes

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