EMPLOYMENT TRIBUNALS

Claimant **Mr M Whitehouse**

Respondent **Ministry of Defence**

Heard at: Video hearing (CVP)
On: 29 May 2024, 13 June 2024 & 25 June 2024
Before: Employment Judge Hogarth

Appearances
For the claimant: Mr Richard Powell, counsel
Mr Keir Hirst, solicitor

For the respondent: Mr Tom Tabori, counsel
Ms Sarah Baines, solicitor

RESERVED JUDGMENT ON PRELIMINARY HEARING

1. Regulation 13(2) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 does not exclude the right of the claimant to bring claims under regulation 7(2) of those regulations (right not to be subjected to detriments) in relation to acts done by him that are alleged to be protected acts by virtue of regulation 7(3) of those regulations, in circumstances where--
    a. the protected acts in question relate to allegations that his employer has infringed the right conferred on him by regulation 5 of those regulations (right of part-time worker not to be treated less favourably than a comparable full-time worker); but
    b. the right under regulation 5 was excluded from applying to him (in relation to the subject matter of the alleged infringements) by regulation 13(2) of those regulations.
2. The acts of the claimant mentioned in paragraph 1 above are not prevented from being protected acts by virtue of the effects of regulation 7(3)(a)(iv), (v) or (vi) (or regulation 7(3)(b) so far as it relates to those provisions) in the circumstances described in paragraph 1.
3. Accordingly, it is not the case that the claimant's claims under regulation 7(2) have no reasonable prospect of success on the grounds put forward by the respondent.

4. The respondent's application for the claims to be struck out is refused.

REASONS

Introduction and background

Terminology

1. The above judgment and these Reasons are concerned with the correct interpretation of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551). References below to a numbered regulation are to the regulation of that number in those regulations.

2. I use the following abbreviations in these Reasons:
   "DTI" is the Department of Trade and Industry (the department of central government responsible for employment law matters when the PTWR were made);
   "ERA 1996" is the Employment Rights Act 1996;
   "ERA 1999" is the Employment Relations Act 1999;
   "HRA 1998" is the Human Rights Act 1998;
   "MOD" is the Ministry of Defence (the department of central government responsible for the armed forces);
   "PTW Directive" is the EU Part-time Workers Directive (i.e. Council Directive 97/81/EC. as applied to the UK by Council Directive 98/23/EC).
   "PTWR" is the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000;
   "RNR" is the Royal Naval Reserve;
   "RFA 1996" is the Reserve Forces Act 1996 and references to "section 22" or "section 27" are to that section of that Act.

The main legislative provisions in issue

3. The issues before me are concerned with resolving questions of interpretation of the PTWR. The main provisions in issue are (so far as material):

Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

"PART 2
RIGHTS AND REMEDIES
...

Less favourable treatment of part-time workers

5.--(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

... .

Unfair dismissal and the right not to be subjected to detriment

7--(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part X of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).

(2) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are—

(a) that the worker has—

(i) brought proceedings against the employer under these Regulations;

(ii) requested from his employer a written statement of reasons under regulation 6;

(iii) given evidence or information in connection with such proceedings brought by any worker;

(iv) otherwise done anything under these Regulations in relation to the employer or any other person;

(v) alleged that the employer had infringed these Regulations; or

(vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations, or

(b) that the employer believes or suspects that the worker has done or intends to do any of the things mentioned in sub-paragraph (a).

(4) Where the reason or principal reason for dismissal or, as the case may be, ground for subjection to any act or deliberate failure to act, is that mentioned in paragraph (3)(a)(v), or (b) so far as it relates thereto, neither paragraph (1) nor paragraph (2) applies if the allegation made by the worker is false and not made in good faith.

(5) ... .

...

Complaints to employment tribunals etc.

8--(1) Subject to regulation 7(5), a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 5 or 7(2).

... .

PART 4

SPECIAL CLASSES OF PERSON

Crown employment

12--(1) Subject to regulation 13, these Regulations have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees and workers.

(2) In paragraph (1) “Crown employment" means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

(3) For the purposes of the application of the provisions of these Regulations in relation to Crown employment in accordance with paragraph (1)—

(a) references to an employee and references to a worker shall be construed as references to a person in Crown employment to whom the definition of employee or, as the case may be, worker is appropriate; and

(b) references to a contract in relation to an employee and references to a contract in relation to a worker shall be construed as references to the terms of employment of a person in Crown employment to whom the definition of employee or, as the case may be, worker is appropriate.

Armed forces

13--(1) These Regulations shall have effect in relation—

(a) subject to paragraphs (2) and (3) and apart from regulation 7(1), to service as a member of the armed forces, and

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

(2) These Regulations shall not have effect in relation to service as a member of the reserve forces in so far as that service consists in undertaking training obligations—

(a) under section 38, 40 or 41 of the Reserve Forces Act 1980

(b) under section 22 of the Reserve Forces Act 1996,

(c) pursuant to regulations made under section 4 of the Reserve Forces Act 1996,

or consists in undertaking voluntary training or duties under section 27 of the Reserve Forces Act 1996.

.... ."

[Note: the Reserve Forces Act 1980 was repealed by RFA 1996, but the provisions referred to in regulation 13(2)(a) remained relevant for those who joined the reserve forces before the repeal took effect. The claimant joined after that time.]

Reserve Forces Act 1996

"Training obligations of members of the reserve forces.

22--(1) A member of a reserve force may, in accordance with orders or regulations under section 4, be required by virtue of this section, in any year, to train in the United Kingdom or elsewhere for—

(a) one or more periods not exceeding 16 days in aggregate; and

(b) such other periods as may be prescribed, none of which shall exceed 36 hours without the consent of the person concerned;

and such a person may, while undergoing a period of training under this section, be attached to and trained with any body of Her Majesty's forces.

.... ."

...

Voluntary training and other duties.

27--(1) Nothing in this Part prevents a member of a reserve force—

(a) undertaking any voluntary training in the United Kingdom or elsewhere that is made available to him as a member of that force;

(b) undertaking any voluntary training or performing other voluntary duties in the United Kingdom or elsewhere, being training or duties undertaken or performed at his own request or following a request made to him by or on behalf of his commanding officer.

(2) Orders or regulations under section 4 may make provision as to the provision and use of training facilities for members of reserve forces and otherwise in connection with the undertaking of training or other duties as mentioned in subsection (1) of this section."

Human Rights Act 1998

"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."

Employment status of members of the armed forces of the Crown

4. The armed forces of the Crown comprise regular forces (such as the Royal Navy) and reserve forces (such as the RNR).

5. Traditionally, the employment status of members of the armed forces has been seen as different to that of other kinds of employee or worker. That is partly because they are Crown servants, but also because their relationship with the Crown (including their terms of service) is largely regulated by legislation or instruments made under legislative or prerogative powers. Their terms of service have traditionally been seen as not based on a contract of employment or other similar kind of contract. So, for example, members of a regular force, or members of a reserve force in "permanent service" on call-out, are legally committed to complete their period of service and cannot simply resign. They are also subject to service law and discipline at all times, which includes liability to summary discipline or court-martial for "service offences" under the armed forces legislation (see section 367 Armed Forces Act 2006). Further, it is self-evident that the duties of a member of the armed forces may involve actions and risks that are inherently different from civilian employment.

6. Employment legislation usually makes special provision about its application to members of the armed forces. That may be designed to ensure that the legislation applies to them (despite the Crown's immunity from legislation and/or the lack of an employment contract) and/or that it applies to them appropriately, for example by treating service personnel as if they were employees with a contract of employment. Some employment legislation does not apply to them: for example, members of the armed forces cannot currently claim unfair dismissal. That is because Part 10 of ERA 1996 does not apply to them by virtue of the current text of section 192 of the Armed Forces Act 2006 (as it has effect by virtue of paragraph 16 of Schedule 2 to that Act).

Service of members of the armed forces

7. Members of the regular forces normally serve on a full-time basis, although I understand there may be a few exceptions to this. Members of the reserve forces are either volunteers who sign up as a member of a reserve force for a period or former members of the regular forces who spend a period in the reserves after leaving their regular force.

8. It is possible in certain circumstances for a reservist to serve for a period on a full-time basis. But most volunteer reservists are likely to be serving on a more casual and part-time basis. They will typically only be serving by--

   (a) undertaking training to meet their training obligation under section 22 RFA 1996; and

(b) if they wish to, undertaking voluntary training or additional duties under section 27 RFA 1996.

Sections 22 and 27 apply to all volunteer reservists unless engaged in a form of service under another section of RFA 1996 that is incompatible with service under them. In these Reasons I refer to the activities of a reservist undertaking training or additional duties under those sections as "ordinary activities". These are typically carried out in a reservist's own time or during time taken off from their civilian job, if they have one.

9. Ordinary activities under section 22 are (despite the words "obligations" and "required" in that section) voluntary in the sense that there is no specific legal obligation to do anything in particular at any particular time. Nor is there any direct disciplinary sanction for non-performance. But there is an expectation on both sides that the reservist will carry out duties regularly, for payment. Reservists carrying out training activities under section 22 are only subject to service law while carrying out those activities. They are not subject to service law at other times (see section 367(2)(d) Armed Forces Act 2006). The same applies to ordinary activities under section 27.

10. Ordinary activities under section 22 or 27 can be contrasted with other activities carried out by a reservist. Other sections of RFA 1996 provide for other specific kinds of service. A reservist may, by agreement, take on a more significant service commitment under the Act, such as an additional duties commitment under section 24 or 25 RFA 1996. I gather that such a commitment could be on a full-time or a part-time basis. So there could be situations where a reservist is carrying out, at different times, both ordinary activities and activities under such a commitment. A reservist may also be "called out" for a period of permanent service, for example under section 52 RFA 1996. My understanding is that "call-out" would be on a full-time basis.

11. Under their terms of service, reservists are paid for ordinary activities, but service under section 22 or 27 is not pensionable under the armed forces pension arrangements. However, they will receive a certificate of efficiency and a bounty payment for a year, if they meet their annual training obligation and perform satisfactorily over the year. As I understand it, the RNR has its own rules about such things as the activities carried out by their members that are paid or for which expenses will be re-imbursed. The rules applicable to members serving only under section 22, or under sections 22 and 27, appear to be quite complicated. In addition to payment for time spent on carrying out ordinary activities, there are other specified activities for which an individual may receive pay or expenses. However, there are also activities a reservist may carry out in connection with their role without any payment. It is the application of the PTWR to such unpaid activities that is the subject matter of the issues before me at the preliminary hearing.

Background to Mr Whitehouse's claims

12. The claimant is a volunteer member of RNR and thus a member of "the armed forces" and "the reserve forces". He was invested on 1 September 2010 and his

engagement was extended on 20 May 2015 to 31 August 2030. He is currently a Petty Officer, a non-commissioned officer rank.

13. As a volunteer member of RNR, the claimant is expected to carry out his training obligation by doing a minimum of 24 days training per year. He can also carry out further voluntary training or additional duties. It appears that at all material times the claimant was carrying out training activities as part of his training obligation under section 22. He does not appear to have been carrying out voluntary training or additional duties. It would make no difference to the issues before me if he had been doing that. The key point is that he was not undertaking any kind of service under a section other than section 22 or 27.

14. The matters in dispute relate back to the claimant forming the belief that he had been treated less favourably as a "part-time" member of RNR in relation to pay or expenses than his employer would treat a comparable full-time member of the armed forces. He thought he had undertaken unpaid work for which a full-time person would have received payment of some kind and that that infringed his right under regulation 5. In these Reasons "the unpaid activities" refers to the things the claimant asserts that he did a a member of RNR and for which he should have received payment of some kind.

15. The claimant raised concerns with senior officers of the RNR and then pursued service complaints about alleged infringements of his regulation 5 right in relation to the unpaid activities. His service complaints were all rejected. I will refer to these as his "original service complaints".

16. These proceedings relate to claims ("the regulation 7(2) claims") that the claimant's right under regulation 7(2) has been infringed. They are made on the basis that he was subjected by his employer to detriments resulting from acts by him that are protected acts (in relation to the assertion by him of his rights under regulation 5 in relation to the unpaid activities). The claimant says that the detriments were done on one or more of the grounds set out in regulation 7(3)(a)(iv), (v) or (vi) (or 7(3)(b) so far as relating to those provisions), and so his right not to be subjected to detriments on such grounds has been infringed by the respondent. Regulation 8(1) permits a complaint relating to infringements of the regulation 7(2) right to be presented to an employment tribunal.

17. On 16 June 2024 Mr Powell provided me with a helpful provisional draft list of issues relating to the regulation 7(2) claims, reproduced in Annex A to these Reasons. This gives a good flavour of the claimant's factual allegations.

18. The claims are resisted by the respondent on various grounds. Only one is directly relevant for present purposes, as it is the basis of the respondent's strike-out application. This is an assertion that in the circumstances of the claimant's case, any right under regulation 7(2) is excluded from applying to him by regulation 13(2). This is put forward by the respondent as a complete defence to all the regulation 7(2) claims. It says (a) that the right under

regulation 7(2) never applied to the claimant in relation to the unpaid activities , and (b) that that means the respondent cannot be liable for claims that the right has been infringed. So the claims will inevitably fail and should be struck out.

19. Mr Tabori relies on two main legal arguments to support this ground. Both rely on the regulation 5 right being excluded by regulation 13(2) in relation to all the unpaid activities. The respondent says the regulation 5 right is excluded and the claimant says it is not.

20. Mr Tabori's main argument (and the focus of most of the submissions made on the second hearing day) is that regulation 13(2) excludes the regulation 7(2) right because his right under regulation 5 is excluded (in relation to the unpaid activities) by regulation 13(2). He says the right is excluded because the claimant's service as a member of the RNR at the material time (i.e. when he carried out the unpaid activities) was service under section 22. That is service of a kind specified in regulation 13(2).

21. Mr Tabori also put this argument in a slightly different way, saying that because at the material times the claimant was only serving under section 22, regulation 13(2) means that the whole of the PTWR was excluded, including the regulation 7(2) right. Under this argument, both rights would be excluded together for the same reason, rather than one being excluded because of the other being excluded. However, I see this as so closely connected with the argument described in paragraph 20 that I will deal with it in my analysis of what I call below the main regulation 13(2) issue (see paragraph 53). It appeared to me that the main focus of both counsel's submissions was on the consequences for regulation 7(2) of the regulation 5 right being excluded in relation to the unpaid activities (if, as Mr Tabori submitted, it is so excluded).

22. Mr Tabori's second main argument is based on the words in regulation 7(3)(a)(iv), (v) and (vi) (and 7(3)(b) so far as relating to them), which the claimant relies on in his paragraph 7(2) claims. Mr Tabori says that the actions of the claimant in question were not protected acts under any of those provisions because their wording does not cover them. He says their words do not cover actions relating to alleged infringements of the regulation 5 right where that right is itself excluded by regulation 13(2) (in relation to the matters alleged to amount to infringements of that right). He says that is the case in relation to all the unpaid activities.

23. The claimant's position is that Mr Tabori's arguments are wrong, that he is therefore free to pursue his regulation 7(2) claims and that it not open to me to strike any of them out. He says that regulation 7(2) is not excluded in his case by regulation 13(2) and that it is irrelevant whether or not regulation 5 is excluded by regulation 13(2). He also denies that regulation 5 is excluded in relation to any of the unpaid activities.

24. Both counsel presented their cases as to the effect of regulation 13(2) on regulation 5 on an all or nothing basis i.e. asserting that regulation 5 is either

excluded by regulation 13(2) in relation to all the unpaid activities (Mr Tabori) or that it is not excluded in relation to any of them (Mr Powell). It appears to me that there is a third possibility, namely, that the position could be different for different unpaid activities.

Procedural history

The original claims

25. An Early Conciliation Certificate was issued on 15 March 2022 naming the Royal Navy as prospective respondent. The respondent's name was later amended to "Ministry of Defence".

26. By a claim form submitted on 12 April 2022 the claimant brought claims against the respondent for--
    (a) unlawful deductions from wages;
    (b) less favourable treatment as a part-time worker contrary to regulation 5 ("the regulation 5 claims");
    (c) victimisation by subjecting the claimant to detriments, contrary to regulation 7(2) (i.e. the "regulation 7(2) claims" described in paragraph 16 above).

27. The respondent denied all the claims. The response to the regulation 5 claims was that the unpaid activities related to service by him as a member of RNR of a kind specified in regulation 13(2). This meant that he could not rely on the regulation 5 right. The response to the regulation 7(2) claims was that the regulation 7(2) right was also excluded by regulation 13(2).

28. On 17 October 2022, at a telephone case management preliminary hearing, the claims for unlawful deductions from wages were dismissed by Employment Judge Midgley upon withdrawal by the claimant.

29. On 24 January 2023, at a further telephone case management preliminary hearing, the regulation 5 claims were dismissed by Employment Judge Lambert upon withdrawal by the claimant. I note that withdrawal of the claims did not amount to a concession by the claimant that regulation 13(2) excludes the regulation 5 right in his case. Nor did Mr Powell make any concession of that kind at the preliminary hearing. He continued to maintain that the regulation 5 right is not excluded in relation to any of the unpaid activities. Paragraph 2.2 of EJ Lambert's CMO (see paragraph 40 below) also indicates that the effect of regulation 13(2) on regulation 5 is a potentially live issue.

30. The only surviving claims in these proceedings are the regulation 7(2) claims.

Preconditions for bringing the regulation 7(2) claims

31. Before presenting his claim form the claimant complied with--
    (a) regulation 13(3) (which requires a member of the armed forces to make a service complaint under section 340A of the Armed Forces Act 2006, before presenting a complaint under the PTWR); and

(b) the Early Conciliation requirements applicable to his claims (see paragraph 25 above).

This is not in dispute between the parties.

Provisional directions for a preliminary hearing (Employment Judge Midgley)

32. On 17 October 2022, EJ Midgley provisionally ordered a preliminary hearing to determine whether the remaining claims should be struck out or made the subject of a deposit order. He decided that the parties' cases needed to be clearer before a final decision could be made. He recorded that Mr Powell had both denied that regulation 13(2) excluded the claimant's claims (although the judge stated he was not persuaded by Mr Powell's construction) and objected to a preliminary hearing, mainly because of difficult factual issues involved.

Directions for a preliminary hearing (Employment Judge Lambert)

33. On 24 January 2023, EJ Lambert ordered a one-day preliminary hearing. I deal with the purposes of the hearing in paragraphs 37 to 69 below. There was a request to delay the hearing to enable the Claim and Response to be pleaded afresh, partly because the legal issues had wide implications for the armed forces but also because Mr Powell wished to introduce arguments based on section 3 HRA 1998. There were also live proceedings on a claim before the Scottish Employment Tribunal (the *Milroy* case referred to below) that the respondent asserted might involve similar issues. EJ Lambert agreed to postpone the hearing to 13 July 2023. He declined to delay it further to allow the Scottish proceedings to conclude first.

The preliminary hearing

34. The preliminary hearing was later relisted. In the end it took place over three days (29 May, 13 June and 25 June 2024). I reserved judgment owing to the complexity of the legal issues and the arguments deployed by the parties.

After the preliminary hearing: submissions on the Milroy case

35. Before judgment could be given, on 5 August 2024 the Scottish Employment Tribunal issued its decision in the case of *Milroy v. Advocate General for Scotland as representing the Ministry of Defence* (case 4103202/2020). In this case Major Milroy, a retired officer of the Army Reserve, brought a claim under regulation 5 in respect of the pension arrangements applicable to him as an officer of that Reserve. His claim succeeded, and (among other things) the respondent's argument that regulation 13(2) excluded the regulation 5 right in his case was rejected. I note that the factual and legal context in *Milroy* is not on all fours with these proceedings, not least because of the reliance placed on EU law by the parties and the Tribunal.

36. The parties applied for directions allowing them to make written submissions as to the impact of the decision in *Milroy* on the issues covered by the preliminary hearing. I agreed to this and issued directions on 30 September 2024 permitting each party to make such submissions and to comment on the other party's submissions. The parties each sent written submissions to the Tribunal on 23 October 2024 and further submissions commenting on the other's earlier

submissions on 30 October 2024. Each party suggested that the decision assists their case in various ways although it is common ground that it is not a binding precedent and that the facts and legal issues were somewhat different.

Purpose of the preliminary hearing and the main legal issues

Employment Judge Lambert's Case Management Orders of 24 January 2024

37. Paragraphs 1 and 2 of EJ Lambert's CMO are based on EJ Midgley's CMO of 17 October 2022. It is EJ Midgley's CMO that explains the parties' respective positions and the background to the orders being made.

38. Paragraph 1 of EJ Lambert's CMO states that at the preliminary hearing:

> "the following issues/applications will be decided:--
>
> 1.1 Whether the claims should be struck out because the Tribunal lacks jurisdiction to hear them;
>
> 1.2 Whether a party should be required to pay a deposit as a condition of continuing with a claim or response or part of it.

39. Although I must end up making those two decisions, the cases presented to me by the parties were focused entirely on issue 1.1 (strike out). I will deal briefly with the issue in paragraph 1.2 (deposit order) at the end of these Reasons. Everything else I say below relates, one way or another, to "strike out".

40. Paragraph 2 of EJ Lambert's CMO then states that:

> "the issues for consideration at the preliminary hearing are limited to whether:
>
> 2.1 the claims under Regulation 7(2) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("PTW")(relating to detriment) are caught by the provisions of Regulation 13(2) of PTW, with the result that the Tribunal has no jurisdiction to hear the claims;
>
> 2.2 the expenses claims which are the subject of 7(2) of PTW are "*service which consists in undertaking training obligations*" under Section 22 of the Reserve Forces Act 1996."

41. My initial reading of the CMO was that I could only strike out all or any of the claims on the basis of the two matters referred to in paragraph 2. That suggested to me that under rule 37 of the (then) Tribunal Rules I should be considering the claimant's prospects of success on his claims and deciding if they have no reasonable prospect of success. This would not involve me in actually determining disputed issues of fact or law.

42. However, on a more detailed reading of the CMO on the morning of the first hearing day, I found both paragraphs increasingly difficult to understand in relation to the parties' written submissions. In particular, it was unclear to me exactly what paragraph 2.2 meant and why it was spelled out as a separate consideration. It appeared to me that it probably meant to refer to regulation 5 rather than 7(2), or perhaps both. I was also uncertain as to what decisions I would need to make.

Submissions

43. At the hearing I asked counsel for their views as to the specific purposes of the preliminary hearing. They both agreed that the starting point was paragraph 2 of the CMO and that in principle it delineates the scope of the hearing unless the Tribunal determines otherwise for some good reason. They also agreed that the only significant development since January 2023 was clarification of the parties' cases on interpreting the PTWR, including the possible application of section 3 HRA 1996 as put forward by Mr Powell.

44. Otherwise, counsel disagreed with each other on what were the issues I need to decide or consider before deciding whether to strike out the claims.

45. Mr Tabori said that even if, strictly, I should be assessing the claimant's prospects of success on his legal arguments, that might amount in practice to the same as determining, as a matter of law, whether the regulation 7(2) claims are, one way or another, excluded by regulation 13(2). He saw the matters in dispute at the preliminary hearing as essentially legal issues (rather than factual issues) and said that they could and should be determined by me. He did not consider there was any factual basis on which the "protected acts" relied on by the claimant did not relate to service of the kinds mentioned in regulation 13(2). He also said (in the alternative) that if there was any qualification to his assertion that there are no factual issues, it would only be in relation to the effect of section 3 HRA 1998 (if that matter requires to be decided).

46. Mr Powell told me that he resisted the listing of the preliminary hearing and continued to believe that there are factual issues involved as to whether the unpaid activities were covered by the reference in regulation 13(2) to specific kinds of service. He said those are genuine issues that are unsuitable for consideration or determination by me on a strike-out application, as all relevant written and oral evidence would need to be evaluated in detail. He said that the question of jurisdiction involved consideration both of a statutory matrix and a factual matrix: and even if I decided issues relating to the statutory matrix in favour of the respondent, there were factual questions raised by the interactions between regulations 13(2), 5 and 7 that should be left to the final hearing.

47. Mr Tabori responded by reasserting his position that nothing relied on by the claimant fell outside the scope of section 22 RFA 1996 and that there was no logic to the legislation excluding "more formal acts" but not "more informal acts". If there was any doubt as to relevant facts, there was no bar to my considering the evidence in deciding whether to strike out the claims.

Decisions on the purposes of the hearing: general

48. I agreed with Mr Tabori that was possible in all the circumstances of a legally complex case for me to decide that a purpose of the preliminary hearing should be the determination of one or more legal issues; and that it may be better to decide any such issues than risk legal arguments having to be re-run at the final hearing. The question for me was whether (despite the way the CMO is worded) any legal issues should be determined, rather than the claimant's

prospects of success on them being assessed. I also agreed with Mr Powell that I would need to consider whether there were disputed questions of fact relevant to the legal issues and, if so, how far (if at all) I should be going into them at a preliminary hearing dealing with a strike out application.

49. As a result of considering their detailed submissions I decided that the purposes set out in the CMO require some refinement.

50. I understood both counsel to agree that my main task is to interpret the PTWR in order to establish the effect of regulation 13(2) on regulation 7(2). Their written arguments focused on that question, although they appeared to see the issues for the hearing differently. There were also differences in the way they described the issues at different times during the hearing.

51. Counsel's submissions and written arguments suggested to me that there were potentially two main legal issues before me – whether Mr Tabori's two main arguments described in paragraphs 20 to 22 above are correct. The first is referenced in paragraph 2.1 of EJ Lambert's CMO. The second is not, although like the first it may depend on the respondent's position on the application of regulation 13(2) to regulation 5 being correct. That appears to involve considerations close to that mentioned in paragraph 2.2.

52. It appeared to me that it would cause complications if those two main issues depended on resolving or considering disputed facts. The solution to that problem that I considered would work best for the preliminary hearing is to formulate the issues on the assumption that the respondent's case on the interaction between regulation 13(2) and regulation 5 is correct: I should assume that the unpaid activities were covered by regulation 13(2) so that the regulation 5 right did not apply in relation to them. If I made that assumption, the two main issues would be questions of law that I could properly determine at the preliminary hearing by interpreting the PTWR. Whether that assumption is correct would be a separate, third, issue. The incidental question whether it would be appropriate for me to deal with the third issue (by determining it or by assessing the claimant's prospects of success) would not, in my view, prevent me from determining the two main issues.

First main issue: effect of regulation 13(2) on regulation 7(2)

53. The first main issue is whether regulation 13(2) operates to exclude the right of the claimant to bring claims under regulation 7(2) in relation to acts relied on by him as protected acts falling within regulation 7(3), in circumstances where-
    a. the protected acts in question relate to allegations that his employer has infringed the right conferred on him by regulation 5; but
    b. the right under regulation 5 was excluded from applying to him (in relation to the subject matter of the alleged infringements) by regulation 13(2).

    In these Reasons I call this issue "the main regulation 13(2) issue".

54. I decided that I should determine that issue in the interests of finality. The oral legal submissions on the interpretation of regulation 13(2) were going to take up at least one full hearing day and counsel had supplied lengthy and complex written arguments focused on that matter. It would have been unhelpful, and a waste of the time taken up by the preliminary hearing, not to resolve the legal question before the final hearing. It is a key legal question in the proceedings, and one that could be answered in advance of the final hearing without considering disputed questions of fact. Otherwise, the arguments might end up being repeated at the final hearing, if the claims proceed. Dealing with the issue at the preliminary hearing also gives the losing party a chance to appeal.

55. The main issue set out in paragraph 53 above supersedes, to some extent, paragraph 2.1 of EJ Lambert's CMO as set out in paragraph 40 above. Mr Powell did not dissent from the idea that I should determine a legal issue. His objection was to me dealing with disputed factual issues that require the evaluation of evidence. That is why the issue is formulated as it is. Determining the main regulation 13(2) issue would provide a clear basis for any further issues that arise in relation to the strike out application.

The steps required for determining the main regulation 13(2) issue

56. On the first hearing day Mr Tabori helpfully summarised four steps he considered the Tribunal would have to take to deal with what I have called the main regulation 13(2) issue. This was based on his understanding of the parties' respective cases. The first three steps are (in my words):

> Step (1): The Tribunal must decide whether as a matter of domestic law (i.e. disregarding the argument that section 3 HRA applies) regulation 13(2) excludes the claimant's regulation 7(2) claims.
>
> Step (2): If regulation 13(2) has that effect, the Tribunal must decide whether the result is incompatible with the claimant's convention rights (under Articles 8 and 14 of the ECHR).
>
> Step (3): If it is incompatible, the Tribunal must decide whether to read down regulation 13(2) under section 3 HRA 1998 so that it does not prevent the claimant from relying on regulation 7(2).

Counsel both agreed that those were the right steps. I agreed with them that they accurately set out the logical framework for deciding this issue.

57. Mr Tabori's fourth suggested step was that if (under Step (3)) section 3 could not be applied to remove any incompatibility with the convention rights, the Tribunal would need to decide whether to make a declaration of incompatibility under section 4 HRA 1998. In my view that is incorrect: the Tribunal is not a "court" as defined in section 4(5) HRA 1998 and so I have no power to make such a declaration. If Step (3) is in issue, I would have to have decided that the domestic law interpretation of regulation 13(2) (under Step (1)) is incompatible with the claimant's convention rights. But that is as far as I can go.

Second main issue: effect of regulation 7(3)(a)(iv), (v) and (vi) and (b)

58. The second main legal issue is whether the provisions of regulation 7(3)(a)(iv), (v) and (vi) and (b) (i.e. the provisions of regulation 7(3) relied on by the claimant as making his acts "protected acts") apply in the circumstances mentioned in paragraph 53a and b above. In other words, is Mr Tabori's alternative argument based on the words of regulation 7(3) correct as a matter of law? Like the main regulation 13(2) issue, this issue falls to be answered on the assumption that regulation 13(2) does exclude regulation 5 in the claimant's case.

    In these Reasons I call this issue "the main regulation 7(3)) issue".

59. Mr Tabori's position is that the relevant provisions of regulation 7(3) do not make any of the claimant's acts "protected acts" if regulation 13(2) excludes the regulation 5 right in relation to the unpaid activities in question. This was because the words of regulation 7(3) in issue simply did not cover situations where "These Regulations" (in the words of regulation 13) did not apply by virtue of regulation 13(2). For example, the claimant could not have done something "under these Regulations" (as required by regulation 7(3)(a)(iv)), such as pursuing his original service complaints, if the PTWR did not apply to him in relation to the unpaid activities.

60. Mr Powell's position is that that is not the correct reading of regulation 7(3). He says it does not matter whether the underlying regulation 5 right applies to the claimant in relation to the unpaid activities in question. The main purpose of regulation 7(2) is to prevent a reservist being victimised because of actions related to asserting the right not to be treated less favourably than a full-time person. It did not matter that the right was not actually infringed (save in the one case mentioned in paragraph 7(4)). It was not necessary for a reservist to demonstrate that the regulation 5 right was not excluded by regulation 13(2), as a precondition for relying on the regulation 7(2) right.

61. Although not mentioned expressly in paragraph 2 of EJ Lambert's CMO it involves similar considerations. I consider it appropriate to determine the main regulation 7(3) issue, for several reasons. Both counsel addressed the issue in detailed legal submissions and neither of them objected to me determining it. In my view the observations I make in paragraph 54 above about the need for finality apply equally to this issue. It does not depend on any disputed facts and is a purely legal issue that I am in a good position to deal with at this stage. If the respondent's position is not well-founded it would be better to deal with it fully at this stage rather than at the final hearing; and determining the issue would prevent any need to repeat the legal arguments. Furthermore, it is a similar sort of issue to the main regulation 13(2) issue: it is put forward by Mr Tabori as a consequence of the exclusion of regulation 5 by regulation 13(2).

    Third issue: effect of regulation 13(2) on regulation 5

62. The third issue is whether the assumption made in both main issues is correct. In other words, does regulation 13(2) exclude the regulation 5 right from

applying to the claimant in relation to the unpaid activities he complained about in his original service complaints.

I refer to that question in these Reasons as "the regulation 5 issue".

63. I found it difficult to understand the second consideration set out in paragraph 2.2 of EJ Lambert's CMO (paragraph 40 above) and quite how he thought it relates to the first. At a verbal level "expense claims" cannot themselves be a kind of service under RFA 1996, but the words must I think be referring to the question whether the unpaid activities in question are covered by the reference in regulation 13(2) to service so far as "consisting in undertaking training obligations" under section 22. I remain puzzled by the reference to regulation 7(2) as paragraph 2.2 appears to me to be describing the question whether regulation 13(2) operated to exclude the regulation 5 right. But I suppose it may be referring to the possible consequence on regulation 7(2) if that is the case. In any event, I consider in the light of counsel's submissions that that it is right for me to determine the legal issue I have described and that that is permissible despite the fact that the result is different from the consideration set out in the CMO.

64. Both counsel made detailed submissions on what I have called the regulation 5 issue although their analysis of its nature of the issue was different. Mr Tabori said it was essentially a legal issue while Mr Powell said that it was not. At the hearing I said that rather than spending more time on debating the purposes of the hearing I would leave open the question whether facts were in issue and, if so, whether I could address them in advance of the final hearing until after I had decided the two main issues.

65. I decided to do that partly because the point might become academic. But it was also because time was short. I felt I would need to consider carefully Mr Powell's arguments that factual issues are involved, including perhaps the nature and purposes of each unpaid activity. Also, I considered that I needed to hear the parties' legal submissions on all the issues before making my mind up about what regulation 13(2) means. It is drawing a line between two cases and it must be a question of interpretation what the line is and how far the excluded case covers different things that might be done by or to a reservist in different circumstances. Until I had answered that question, it would be impossible to tell for sure whether there are factual issues tied up with the effect of it on regulation 5 in relation to the claimant. Mr Tabori submitted, among other things, that if a reservist's only "service" at the material time was service under section 22 (or sections 22 and 27) then that is enough to answer the issue. But that assumes regulation 13(2) has the effect he asserts, which to me begs a question of interpretation.

66. I decided that I could not simply accept Mr Tabori's assertion that it is unarguable that all the unpaid activities in question are not caught by the reference in regulation 13(2) to section 22. It appeared to me that there might

be some force in Mr Powell's submission that there are both legal and factual issues involved in dealing with this issue. There were possible interpretations of regulation 13(2) that might mean there were factual issues to resolve in deciding whether a specific activity is covered by the carve-out in regulation 13(2) or not. For example, a claimant may say that attending a uniform fitting is not "training", and that the exclusion only applies to actual training. If that is right then the nature and purpose of the activity must become relevant. The respondent might say that the fitting is to be regarded as part of his training obligation or that it was an incidental and necessary part of acquiring the uniform needed to carry out the training activities. Again, if those are the correct legal tests the nature and purposes of a given activity might be in issue. There may be possible interpretations which would not involve factual issues, for example the respondent says that at times when a reservist's only service was service under section 22 everything done by or to that individual is covered by regulation 13(2). If that is the correct interpretation, then the facts relating to particular activities would be irrelevant.

67. It also occurs to me that there might be activities of a reservist that are not part of any specific kind of service (in the sense of a kind of service under a particular section of RFA 1996), such as attending a Remembrance Day parade or a social event. If that is so the question might arise in relation to the regulation 5 issue as to whether a particular unpaid activity is an activity of that description. That would probably involve factual issues.

68. I did not read paragraphs 1 and 2 of EJ Lambert's CMO as suggesting that I should end up determining (as opposed to considering the claimant's prospects of success on) the regulation 5 issue. If it were a pure question of law, that might have been the best approach. But if there are disputed questions of fact involved it would be likely to be inappropriate for me to determine them. But it might be appropriate to assess the claimant's prospects of success on it.

69. The discussion in paragraphs 65 to 68 above is intended only to illustrate why I believe that the meaning of regulation 13(2) in its interaction with regulation 5 requires careful consideration. In any event, my decision before counsel addressed me on the main regulation 13(2) issue was to leave open the question whether I should address the regulation 5 issue, and if so how, until after I determined the main issues. The position of the unpaid activities was not as clear as Mr Tabori suggested. As it turns out my decision on the two main issues makes the regulation 5 issue academic in these proceedings.

Documentation

70. I was provided with the following--

Before the first hearing day

- an agreed 582-page bundle, which included a witness statement from Commander Tina Grey, (Commander Maritime Reserves Policy Staff Officer for Naval Reserve Forces policy)
- a 20-page skeleton argument from the respondent.

Before the second hearing day

- an amended 843-page bundle of authorities (including two authorities referred to on the first day)
- 19 pages of additional submissions by the claimant on the issue of jurisdiction
- a 12-page supplementary skeleton argument from the respondent
- a draft list of issues from the claimant relating to his substantive detriment claims (reproduced as Annex A to these reasons).

After the hearing

- further submissions as to the impact of the decision in *Milroy* (as set out in paragraphs 35 and 36 above).

Procedure at the preliminary hearing and preliminary matters

Form of hearing

71. The preliminary hearing was conducted by video link. There were occasional connection difficulties, including loss of some time on the first day. However, these difficulties had no impact on the overall fairness of the proceedings.

Matters discussed on first hearing day (29 May 2024)

72. The first day was used mainly for my reading key documents identified by the parties and discussions on preliminary and other matters summarised below.

(a) recusal

73. I mentioned certain facts about myself to counsel, in case they wished to object to my involvement in the hearing. I thought it right to do so although I had provisionally concluded (subject to considering any objections) that I did not need to recuse myself on the ground of apparent bias.

74. The facts I disclosed were that (a) in addition to being a fee-paid judicial office holder, I am a civil servant employed part-time by the Cabinet Office in the Office of the Parliamentary Counsel, having previously been employed full-time there for many years, and (b) I drafted the Bill that became the Reserve Forces Act 1996 and, more recently, worked on the Bill of Rights Bill, which would have repealed section 3 HRA (a provision in issue in these proceedings). That Bill was introduced into Parliament in 2022 but was not enacted.

75. In a brief discussion with counsel I confirmed that I am not employed in the Government Legal Department, that I had no involvement in the drafting of the PTWR (which would have been drafted by a departmental lawyer in the DTI) and that I had no policy-making function in relation to the Bills I mentioned. Mr Tabori and Mr Powell took instructions and informed me that their respective

clients had no objection to my dealing with the preliminary hearing. I concluded that I could properly continue to act.

(b) timetable for the preliminary hearing and adjournment

76. On 17 May 2024 EJ Midgley directed the parties to provide an agreed timetable to cover reading, evidence, argument, and promulgation of judgment as the preliminary hearing he had listed for one day. The parties' agreed position was for 3 hours' reading time for the Tribunal and the rest of the day to be spent on evidence and submissions. That allowed around 2 hours for preliminary matters, evidence and submissions, and judgment (if not reserved).

77. It was obvious from the outset of the hearing that one day was insufficient. Both counsel agreed an adjournment was inevitable. I allowed myself two and a half hours for reading the key documents, before dealing with the following further preliminary matters and hearing oral evidence from Commander Gray.

(c) the purposes of the preliminary hearing

78. I informed counsel after reading the key documents that it was unclear to me (a) what I would need to determine or consider at the preliminary hearing, (b) whether there were disputed factual issues arising and, if so, what I could or should do in relation to them, and (c) why the respondent had been given permission to call Commander Gray. The first two points led to discussions about the purposes of the hearing and the issues as summarised above. I deal with Commander Gray's evidence in paragraph 86 below.

(d) is the main regulation 13(2) issue jurisdictional?

79. In his submissions about the purpose of the hearing, Mr Tabori asserted that the question whether regulation 13(2) had the effect of excluding liability for the regulation 7(2) claims did not, strictly, go to the Tribunal's jurisdiction as stated in paragraph 2.1 of EJ Lambert's CMO. That was because, under regulation 8(1), the Tribunal can deal with a claim made under regulation 7(2) whether or not it was misconceived because the claimant had no right under regulation 7(2). He referred me to the reasoning of the Court of Appeal judgment in R (*Manson) v Ministry of Defence [2005] EWCA Civ 1678.* Mr Powell's reply was that, if it matters, the issue is plainly one of jurisdiction.

80. I saw some force in Mr Tabori's submission, but note that the two employment judges who conducted the previous hearings in this case considered issues at the preliminary hearing to be jurisdictional. A similar approach was taken by Employment Judge Glennie in *OM v Ministry of Defence (Navy) (22 April 2020)*. However, I consider the point to be an academic issue in this case. A strike-out application has been made and, if the claims are bound to fail on the grounds put forward (as articulated above in the two main issues), it is clearly open to me to strike out the claims. It is not necessary for me to make any decision on Mr Tabori's argument because nothing turns on it in relation to the issues before me.

(e) details of the claims

81. The details of the regulation 7(2) claims were unclear to me. Mr Powell agreed to produce a list of issues summarising the claimant's allegations.

(f) counsel's written arguments

82. There was some confusion between counsel as to the details of each other's legal arguments. It emerged in discussions on Step (1) above that Mr Tabori had misunderstood the breadth of the legal arguments being put forward by Mr Powell. Mr Tabori had read Mr Powell's arguments on section 3 HRA 1998 as indicating acceptance of some or all of the respondent's case on the interpretation of regulation 13(2). Mr Powell said that was incorrect. I agreed that, if they wished, counsel could supplement their written arguments before the second hearing day. It was important for their legal positions to be clear.

(g) section 6(1) Human Rights Act 1998

83. I asked counsel whether section 6(1) HRA 1998 was relevant to the interpretation of regulation 13(2). This provides that it is unlawful for a public authority to act in a way incompatible with a convention right, a proposition that applies to a Minister of the Crown when making regulations. Both counsel told me that section 6(1) did not feature in their arguments, and that it was not necessary for me to consider the provision in interpreting the PTWR because there was no attack on the validity of the regulation. I decided that I would return to the point later if I thought it potentially relevant. Neither party subsequently relied on section 6(1) HRA in their arguments. As it turns out, my decision on "Step (1)" renders the point (if any) academic.

(h) departmental documents relating to the drafting of the PTWR

84. I asked counsel why the bundle includes internal MOD minutes and correspondence between MOD and DTI about the policy and drafting of the PTWR. So far as they go, the documents appeared to throw some light on the matters before me. But I queried whether it is permissible in law for me to rely at all on this material in interpreting the PTWR. That appeared to me highly doubtful in the light of the case law on admissible aids to construction of legislation (summarised below). Both counsel asserted that there are issues to which this material was relevant. They said that it was in the public domain, having been disclosed by the respondent in earlier employment tribunal proceedings about the PTWR. That did not fully answer my concerns. I indicated that I would need to decide whether it is proper for me to have regard to the documents in interpreting the PTWR.

85. Counsel referred me to one published DTI document that appeared to be different in kind and potentially admissible. This was a DTI consultation paper dated 17 January 2000 including a draft text for the regulations. They said that a number of the internal documents related to changes to that draft text. I accepted that a consultation paper might be a legitimate aid to construction as it was in the public domain well before the regulations were finalised, approved by Parliament in draft and made, but that was a decision for later.

(i) oral evidence from Commander Gray

86. Commander Gray gave sworn evidence in support of her witness statement. I agreed to this because she was present and ready to give evidence and Mr Tabori asserted that her evidence was relevant (a position not formally opposed by Mr Powell). I had some reservations as to whether it would, in the end, be right for me to resolve, or assess the claimant's prospects of success on, any disputed issues of fact addressed by her evidence. Any such issues were likely to engage numerous documents in the bundle and might require oral evidence from the claimant or others, as well as Commander Gray.

87. At pages 146 to 150 of the bundle a document dated 12 July 2022 seeks to clarify what paid and unpaid "support activity" forms part of the annual training commitment and contributes to the annual award of a Certificate of Efficiency and Bounty. Commander Gray confirmed there was an error in paragraph 3 of the document (on page 146) which refers to "s. 27" (of the RFA) when it should refer to "s. 22". Commander Gray said the annex specified what "support activity" falls within section 22. She agreed that the document in the bundle was issued after the claimant had submitted his service complaint about pay.

88. I do not consider it necessary to set out her evidence in any length as I have not, in the end, relied on it in reaching my decisions. Her evidence consisted mostly of answers to questions about (a) the basis on which certain activities by RNR members were paid or unpaid, (b) the activities that form part of the annual training commitment of a member of the RNR and/or other obligations or duties under section 27 RFA 1996, (c) how one can tell whether or not an activity falls within that commitment or those obligations or duties, and (d) whether the position on those matters changes from time to time and if so how and on what legal basis.

89. It appears that to some extent her evidence on those matters was directed at a point in dispute under the parties' skeleton arguments, namely whether the meaning of "training" for the purposes of section 22 depends on interpreting that section as a matter of statutory construction or can change according to subsequent decisions or actions of the claimant's employer. The respondent's written arguments refer to documents purporting to say what is covered by the term "training obligation", which I understood the claimant's skeleton argument to say included things that are not, objectively, "training".

90. Commander Gray also explained how what she saw as the voluntary nature of the ordinary activities of a member of the RNR sits with what regulation 13(2) and section 22 RFA refer to as "obligations". She said there is no compulsion for an RNR member to attend training or to do anything else under section 22. There was no disciplinary consequence for non-attendance, but there were consequences. Where activities are paid-for activities, non-attendance at training or other non-performance of the "training obligations" mentioned in regulation 13(2) would mean the reservist is not paid. In addition, a reservist who wishes to receive their annual bounty and certificate of efficiency for a year

must meet their relevant training performance standards (based on attendance and performance). Failure to receive the bounty and certificate for a year does not, of itself, affect an individual's position as a member of the RNR. However, a continuing failure to meet the annual training commitment over a significant period of time (for example by not attending any training for 6 months or more) might call into question a reservist's future as a member of the RNR. There are discharge procedures that can be followed in such cases.

91. The information summarised in paragraph 90 above appears to be accepted by the claimant. But Mr Powell does not accept that the framework Commander Gray described as detailing the correct scope of a volunteer reservist's annual training commitment was necessarily consistent with the reserve forces legislation. It appears to me that there might be some legal questions in relation to the framework she described. One is how far the RNR can decide for itself what counts as service under section 22 RFA 1996, including things that are not, objectively, training. The respondent may say that the system Commander Gray described is consistent with and follows from the relevant legislation. But the claimant may say in response that it is illegitimate for MOD to rely on this framework to expand the scope of regulation 13(2) to activities that are not "training". In any event, it is not necessary for me to make any decisions about the matters Commander Grey described in determining the two main issues before me. Those matters might be relevant to the regulation 5 issue.

Matters discussed on second hearing day (16 June 2024)

92. On the second day I heard counsel's submissions relating to Step (1) for resolving the main regulation 13(2) issue and the main regulation 7(2) issue. The following preliminary matters were discussed.

(j) procedure for hearing submissions

93. I agreed to a suggestion from counsel that I should hear oral submissions on Step (1) before hearing submissions on Steps (2) and (3) on the application of section 3 HRA . That ensured I heard all the Step (1) submissions on the same day. Mr Tabori made his submissions first.

94. There was insufficient time to hear all submissions on Steps (2) and (3). I agreed with Mr Powell's submission that it was better to adjourn to enable both counsel to make submissions on Steps (2) and (3) on the same day. Mr Tabori did not object.

(k) Mr Powell's list of issues for the regulation 7(2) claims

95. I was grateful to Mr Powell for producing a provisional list of issues for the regulation 7(2) claims (Annex 1 below). This illustrates the factual basis of the claims. He explained that it was produced in a hurry and it had not been possible to agree it with Mr Tabori. Mr Tabori told me that it did not take account of the respondent's detailed response to the claims and that he would need to read it against the pleadings. He took me briefly through the allegations and explained the various points taken by the respondent in resisting the claims. Mr Powell responded to one of Mr Tabori's points and confirmed that the claimant's

case alleged detriments by acts of the employer done on one or more of the grounds mentioned in regulation 13(3)(a) (iv), (v) and (vi) and (b).

(l) the internal government documents

96. I had further exchanges with counsel as to the admissibility of the internal departmental documents (see paragraphs 84 and 85 above), which I had read on the first hearing day on their advice. Mr Powell relies on this material as evidence of MOD's limited purpose in pushing for regulation 13(2) to be changed to the final text of the regulations. He said it was also relevant to his human rights arguments. Mr Tabori did not object to me considering the material and said it demonstrated that MOD was concerned about much more than the effect of regulation 5 on the reserve forces pension arrangements.

97. I informed counsel that I continued to have reservations as to whether the documents are a permissible aid to construction. I allowed them to take me to this material in the bundle and make submissions about it. I reserved my position on their admissibility.

(m) Mr Tabori's alternative argument on the wording of regulation 7(3)

98. Both counsel made detailed legal submissions on the issue I have called the regulation 7(3) issue. Mr Tabori's argument is a subtle one and I queried whether it was within the scope of the preliminary hearing for me to consider it. That was because it relates to the meaning of regulation 7(3), which is not mentioned in paragraph 2 of EJ Lambert's CMO. Both counsel were content that I should determine the legal issue. I allowed them to make their submissions while reserving my position as to whether it was appropriate for me to deal with it. My decision (explained above) is that it is appropriate for me to determine the main regulation 7(3) issue.

Matters discussed on third hearing day (25 June 2024)

99. On the third day I heard submissions on the human rights issues (Steps (2) and (3)), made on the hypothesis that the respondent had succeeded on Step (1). There was broad agreement between counsel as to what issues fall to be addressed in relation to Steps (2) and (3).

100. Mr Powell made his submissions first. He informed me that on instructions he now only relies on Articles 8 and 14 of the EHCR in support of his proposition that regulation 13(2) is incompatible with the convention rights (i.e. Step (2)). He no longer relies on Article 6(1) or Article 1 of Protocol 1.

Issues

Are the internal government documents admissible aids to interpretation?

101. Before dealing with the main issues, I must decide whether the government documents discussed above are legitimate aids to the interpretation of the PTWR. This refers to the DTI consultation paper from January 2000 and the internal minutes and correspondence described above.

102. There is one two-page document that appears twice in the bundle (at page 113 and page 576) which Mr Powell relies on as suggesting the real

purpose of regulation 13(2) was very limited. He referred to it as a briefing note, but it does not reveal who it was aimed at although it appears to have been produced within MOD given the detailed information in it. It may have been aimed at a Minister or senior official, but it does not say so. There is nothing in the document to suggest that it was in the public domain before the PTWR were either approved in draft by Parliament or made by the Secretary of State. So I have treated it as another internal MOD document.

103. A secondary issue is to identify what relevant information (if any) is revealed by the documents. Such information can only be taken into account if derived from documents that are legitimate aids to interpretation.

Should any of the regulation 7(2) claims be struck out?

104. I must decide first whether it is open to me to strike out some or all of the claims on the basis that they have no reasonable prospect of success. This depends on my decisions on the following issues, which I have described above:

(1) the main regulation 13(2) issue;
(2) the main regulation 7(3) issue; and
(3) if the respondent wins on either or both of those issues, the regulation 5 issue.

105. If I answer both main issues in favour of the claimant, then it was common ground that it would not be open for me to conclude that any of his claims have no reasonable prospect of success. The application to strike out the claims would have to be refused.

106. In deciding the main regulation 13(2) issue I must follow the Steps set out in paragraph 56 above. In relation to Step (1) I must determine the meaning of regulation 13(2) in domestic law, applying the principles of statutory interpretation summarised below but disregarding section 3 HRA 1998. As for Step (2), if it arises, I must decide (a) whether regulation 13(2) properly engages the claimant's convention rights under Articles 8 and 14 of the ECHR and (b) if so, whether the domestic law effect of regulation 13(2) is incompatible with those convention rights. This would involve identifying what the incompatibility (if any) is. If there is any incompatibility Step (3) requires me to decide whether section 3 HRA operates to remedy that incompatibility.

107. In deciding the main regulation 7(3) issue, I must follow the equivalent steps. The first step is to determine the meaning of regulation 7(3) in domestic law. If that decision is in favour of the respondent, I would need to consider the possible application of section 3 HRA 1998 in the same way as for the main regulation 13(2) issue.

108. If I find for the respondent on either of the main issues then I will have to make decisions about the regulation 5 issue, including whether to consider it further as a potential basis for striking out some or all of the claims. I have already described the things that would need to be considered.

109. If I do decide to consider the issue as a basis for striking out some or all of the claims, I would need to assess the claimant's prospects of success on that issue and decide if he has no reasonable prospect of success. It is possible that the answer might be different for different unpaid activities raised in the original service complaints.

110. The claimant's arguments on section 3 HRA 1998 appear to be limited to its effect on a domestic law interpretation of regulation 13(2) that results in the regulation 7(2) right not applying to the claimant in the circumstances of his case. They do not address any separate effect of regulation 13(2) in excluding the regulation 5 right from him in relation to all or any of the unpaid activities in question in his original service complaints. I do not, therefore, need to consider the possible application of section 3 as part of the regulation 5 issue.

111. If it is open to me to strike out any claims because they have no reasonable prospect of success, I must then decide whether to do so.

Facts

General

112. I have already set out background facts, which are not in dispute. It is not necessary to set out or find any further facts beyond (a) inferences that I consider can be drawn from the government documents described above, and (b) certain facts relevant to the making of the PTWR. That is because the two main issues are issues of law rather than fact. My decisions on them mean that the regulation 5 issue does not need to be considered further in these proceedings. I make no findings on any factual issues that might be relevant to that issue.

113. I make no findings in relation to any disputed questions of fact relating to the regulation 7(2) claims which fall to be decided at the final hearing. Mr Powell's list of issues shows the main factual allegations relating to the ingredients of the claims.

Inferences from the DTI consultation paper of 17 January 2000

114. I conclude below that the consultation paper is an admissible aid to the interpretation of the PTWR,. However, there are only limited inferences that I take from comparing the draft regulations in the consultation paper published on 17 January 2000 and the final version of the PTWR as made by the Secretary of State. The notes to the draft regulations throw no light on the issues in this case. There is no explanation of regulation 13.

115. The two substantive rights which ended up as regulations 5 and 7 applied only to "employees" in the draft regulations. The final text of the PTWR applies more generally to "workers", so increasing their scope. There are other

differences in the way the rights were expressed. None of these changes appear significant in terms of the issues before me.

116. Regulation 12 in the published draft applied certain Crown application provisions in ERA 1996 by reference. In the final text, regulation 12 spells out Crown application provisions for the regulations. This change is not significant for present purposes: the final text simply states that in general the PTWR (bar regulation 7(1)) apply to persons in Crown employment, subject to specific provisions for various special cases, including the armed forces.

117. Regulation 13(1) of the published draft is very different from the final text. It provided (so far as material):

> "(1) These Regulations shall have effect in relation--
>
> (a) subject to paragraph (2), to service as a non-combatant member of the armed forces, and
>
> (b) ... ."

Paragraph (2) was the provision requiring a service complaint to be made before initiating employment proceedings. The quoted words appeared to exclude service as a combatant, although there is no explanation of this or of what "non-combatant" meant.

118. In the final text, regulation 13(1)(a) provides that all members of the armed forces (i.e. both regulars and reservists) are covered by the PTWR in relation to all kinds of service. This may duplicate the effect of regulation 12, but it must have been thought helpful to state the whole story about service personnel in regulation 13.

119. Regulation 13 of the published draft does not refer to unfair dismissal (regulation 5(1) of the draft, corresponding to regulation 7(1) in the final text). The final text of regulation 13(1)(a) excludes paragraph 7(1), consistently with the fact that unfair dismissal law does not currently apply to service personnel. It also introduced the new exception to the general proposition in regulation 13(1)(a) that the PTWR apply to service personnel.

120. The changes to regulation 13 were clearly significant. All regular service personnel were covered by the final text (not just non-combatants), apart from regulation 7(1). Reservists were to be covered in the same way except in so far as their service was undertaking the activities specified in regulation 13(2). That draws a line between (a) ordinary activities under sections 22 and 27 and (b) activities not carried out under either of those sections, which are not excluded by regulation 13(2) and so are subject to the PTWR by virtue of regulation 13(1). A comparison between the two versions of the text does not reveal any more about where the line is to be drawn in practice.

121. The significant changes to regulation 13 before the PTWR were made suggest that MOD was not fully engaged in the preparation of the PTWR before the draft was published in January 2000. I would expect MOD to have been the prime mover in settling the policy behind the final text of regulation 13. That is

because they were responsible for the armed forces and would have the expertise and knowledge as to the impact of the PTWR on them.

Inferences from internal government documents in the bundle

122. I conclude below that the views of officials and others disclosed by the internal departmental documents are not admissible aids to interpretation of the PTWR. I have not relied on any inferences from the internal government documents in my interpretation of the PTWR.

123. However, I was taken to the documents by counsel in their submissions and they invited me make inferences of fact from them. I read them carefully on the morning of the first hearing day as I was told they were key documents. So, in case my conclusion on admissibility is wrong in law, I summarise in Annex B to these Reasons the inferences that can be drawn from them. Even if I could take them into account I doubt whether those inferences would have had much impact on the issues before me. The case law is clear that inferences from external sources of this kind have to be treated with considerable caution.

The powers and process used for making the PTWR in 1999/2000

124. The explanatory note to the PTWR states that they were intended to implement the PTW Directive. The PTWR were in fact made under section 19(1) ERA 1999 (as cited in the recital before the main text), which imposed a duty on the Secretary of State to make regulations for the purpose of securing that persons in part-time employment are treated no less favourably than persons in full-time employment. That is plainly the main purpose of the regulations contemplated by section 19(1).

125. The Explanatory Notes for the Bill that became ERA 1999 explain that a specific regulation-making power was needed because section 2(2) of the European Communities Act 1972 could not be used to fully implement the relevant EU Directive, owing to the way the UK had signed up to the Social Chapter of the EU Treaties. The idea was that regulations under section 19 would "implement" the PTW Directive, even though the UK was not strictly obliged to do so.

126. Section 19 allows some discretion as to how to achieve the main purpose set out in subsection (1). It spells out various things that the regulations could do, including (among other things) creating exceptions and offences or making provision similar to provisions of ERA 1996. The latter power appears to be the legal basis for regulation 7.

127. The ambit of the duty and powers under section 19 constrained what the Secretary of State could do in the PTWR. He was required by law to stay within the statutory powers. This means the PTWR could not produce an effect outside the scope of the powers available under section 19.

128. The duty was imposed on "the Secretary of State", which refers to a holder of the notionally single office of that name. That office is in practice held by a number of individuals at any one time, each usually being the senior

Minister in a Government Department. Any of those individuals can exercise any function of "the Secretary of State", but in practice each has responsibility for distinct policy areas. In 1999/2000 the policy responsibility for the PTWR lay with the Secretary of State for Trade and Industry and his department (DTI). DTI would have been expected to liaise with other interested departments, such as MOD for armed forces matters.

129. The making of the PTWR was, therefore, a matter for the Secretary of State for Trade and Industry (Stephen Byers MP). The law allowed the PTWR to be signed by a more junior DTI Minister, which is what happened. It was signed by Alan Johnson MP (Parliamentary Under-Secretary of State for Competitiveness, Department for Trade and Industry) for the Secretary of State. But, legally, the maker of the regulations was the Secretary of State.

130. A wealth of information about the production of statutory instruments has been publicly available for years in guidance on making statutory instruments published by the Government and in textbooks about statute law or statutory interpretation. I consider that I can take judicial notice of the facts set out in paragraphs 131 to 136 below as to the position in 1999/2000 (some of which is also confirmed by the DTI consultation paper from January 2000, the Explanatory Note to PTWR and a research paper published by Parliament when the draft SI was awaiting Parliamentary approval).

131. In terms of producing the text, the PTWR would have been drafted by a DTI lawyer working from policy proposals (written and/or oral) from DTI policy officials whose aim would be to meet the requirements of DTI Ministers and the Government as a whole. There was no guarantee that the DTI drafting lawyer would be a senior lawyer or would have had much prior experience of drafting legislation. That could limit their ability to develop or query policy instructions in drafting the text, in the way parliamentary counsel are trained to do in relation to legal instructions for a Bill from departmental lawyers.

132. It would have been for the drafting DTI lawyer to work out from whatever policy instructions they were given how best to change the law to meet the policy. They could consult their colleagues and there were processes for what were referred to as "second lawyer checks" and "third lawyer checks" to ensure that a draft SI was formally satisfactory. The end result would be approved by the relevant Minister or Ministers.

133. However, that process was very different from the normal process for producing a Government Bill. There departmental lawyers worked up separate policy proposals into detailed written legal instructions to parliamentary counsel. Parliamentary counsel then set to work analysing, querying and, if need be, challenging the instructions in correspondence with the instructing lawyers in the course of drafting the Bill. If introduced into Parliament by the relevant Minister, the Bill would go through various Parliamentary processes, usually involving a period of scrutiny by each House .The time taken for that also allowed time for further reflection by Ministers, officials and lawyers in the responsible department, and by parliamentary counsel.

134. The PTWR were required by section 42 ERA 1999 to pass through the affirmative procedure in Parliament: they had to be laid in draft before and approved by each House. Usually, formal approval by each House followed a short time limited debate. That would be preceded by consideration by one or more parliamentary committees, including the Joint Committee on Statutory Instruments. So Parliament had a role in the process leading to the making of the PTWR. But they were not made by Parliament. The content, and the decision to make them, remained the responsibility of the maker, the Secretary of State. Also, the Parliamentary process for approving draft SIs would have involved far less Parliamentary or public scrutiny than would happen if the same provisions had formed a Parliamentary Bill. Another significant difference is that Bills can be amended by Parliament, so that if points are spotted on the drafting they can usually be addressed by amendments. There is however no procedure available for either House to amend draft regulations laid for approval. Occasionally a draft instrument may be withdrawn due to criticism or comments made in Parliament, but it is very rare for Parliament to decline to approve a draft instrument laid before it.

135. The above information is largely background information. But it demonstrates that the position of subordinate legislation is a little different from primary legislation. It is also potentially relevant in considering questions of interpretation that the policy and the wording of a subordinate instrument such as the PTWR is likely to have received less consideration and scrutiny, both before and after being laid before Parliament and approved, than one would normally expect in the case of a Bill or its passage through Parliament.

Applicable law

Striking out and deposit orders

136. Under Rule 38(1)(a) of the Employment Tribunal Procedure Rules 2024 (which corresponds to Rule 37(1)(a) of the Employment Tribunal Procedure Rules 2013 as they stood at the time of the preliminary hearing) a claim may be struck out (in whole or part) if the Tribunal considers that it has no reasonable prospect of success. That threshold is clearly met if the Tribunal concludes that a claim is bound to fail on a ground relied on by the respondent.

137. Striking out claims is discretionary. An employment tribunal must first determine that it is open to it to strike out a claim and then decide whether to do so. However, if at a preliminary hearing the tribunal concludes that a claim is bound to fail on a ground relied on by the respondent, strike out will be the usual outcome.

138. Under Regulation 40(1) (Rule 39 in the previous procedure rules) an employment tribunal may make a deposit order against a party where it considers that a specific allegation or argument in a claim, response or reply has little reasonable prospect of success. This requires the party to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument. Making a deposit order is also a two-stage process, requiring the tribunal to determine that it is open to it to make a deposit order

(i.e. the test of “little reasonable prospect of success” is met) before then deciding whether to do so.

Relevant legislation

139. The key provisions are set out in paragraph 3 above. The legal framework established the PTWR is as follows.

140. The PTWR confer rights in 3 substantive regulations (5, 6 and 7), with the regulation 5 right being the main provision to which all the other substantive provisions are linked, directly or indirectly. Regulations 1 to 4 deal with introductory matters, general definitions and other similar topics, including the application of regulation 5 in particular situations.

141. Regulation 5 gives a part-time worker the right not to be treated by their employer less favourably than a comparable full-time worker. The wording is based on the PTW Directive. I note that paragraph (2)(b) allows a difference in treatment to be justified on “objective grounds”. This means some differences do not infringe the right, but the wording does not give much indication of when that will be the position.

142. Regulation 6 allows a worker to demand a written statement of reasons for different treatment where the worker considers their right under regulation 5 has been infringed. A failure to respond without reasonable excuse or an evasive or equivocal answer allows an employment tribunal to draw adverse inferences, including that the right has been infringed.

143. Paragraph (1) of regulation 7 provides that dismissal of an employee (but not a worker who is not an employee) is unfair dismissal if done on the ground that he or she has done an act within paragraph (3). The grounds listed in paragraph (3) indicate that paragraph (1) provides a remedy to those who are dismissed on grounds linked to the assertion of rights conferred by the provisions of the PTWR (including the right under regulation 7(2)).

144. Paragraph (2) of regulation 7 confers a right on a worker not to be subjected to detriments other than dismissal on a ground listed in paragraph (3). The overall aim is the same as for paragraph (1), but this is done by conferring a separate statutory right not to be victimised. That does not cover the dismissal of an employee (see paragraph (5)), because a remedy for that is already given by paragraph (1). Dismissal of a worker who is not an employee is covered as a detriment for the purposes of paragraph (2).

145. Paragraph (3) of regulation 7 lists the acts of an employee or worker that are protected, which are things done in connection with asserting rights under the PTWR, including a right under regulation 6, 7(2) or 8, as well as 5. This appears to cover all the main things a person might do to assert or rely on such a right. They are all protected acts as far as paragraph (1) or (2) is concerned.

146. I note that most of the individual items in the list appear on their face to be relatively specific and mutually exclusive from each other (i.e. paragraph (3)(a)(i), (ii), (iii), (iv) and (v) and paragraph (3)(b) so far as relating to each of those items). I am less sure about paragraph (3)(a)(v) (and (3)(b) so far as

relating to it). Whether there is any overlap between that item and the other items in the list is a question of interpretation. As a matter of words, there could be some overlap. But it may be that, properly interpreted, item (v) would be read as mutually exclusive with all the other items in the list.

147. Paragraph (4) of regulation 7 states that if the ground for dismissal or detriment is either that the worker has alleged that the employer has infringed the regulations (paragraph (3)(a)(v)) or that the employer believes or suspects that the worker will do so (paragraph (3)(b)), then neither paragraph (1) nor paragraph (2) applies if the allegation in question is (or would be) both false and made in bad faith. That means that an allegation that is (or would be) untrue but is made in good faith is still covered and can be the basis for an automatic unfair dismissal claim or a detriment claim under regulation 7(2). Paragraph (4) only applies to paragraph (3)(a)(v) and (b) (so far as relating to it).

148. Regulations 8 and 8A deal with complaints to employment tribunals regarding infringements of regulation 5 or 7(2). Regulation 6 has its own "sanction" provision so cannot be the basis of an infringement complaint. Nor is regulation 7(1) mentioned, because the right to complain to an employment tribunal about unfair dismissal is conferred by ERA 1996. That Act also gives employees a right not to be victimised in terms similar to regulation 7(2).

149. Regulation 9 applies section 203 ERA 1996 so as to restrict employers from trying to contract out of rights under the PTWR. Regulation 10 and the Schedule deal with consequential amendments of primary legislation. Regulation 11 deals with the liability of employers/principals for acts done by employees/agents.

150. Regulations 12 to 17 deal with special cases. These all deal with individuals whose employment status is atypical in some way, and who might not be covered correctly by the PTWR in the absence of the provision made by the relevant regulation. Regulation 12 ensures that the PTWR bind the Crown and apply to Crown servants, whether or not they would otherwise be employees or workers as defined in the regulations. Members of the regular or reserve forces are in Crown employment for these purposes.Their position is further spelled out in regulation 13. Regulations 14 to 16 apply the regulations to Parliamentary staff and police constables. Regulation 17 disapplies the regulations in the case of fee-paid judicial office holders (although their exclusion by has been successfully challenged in a number of employment tribunal cases)

151. Regulation 13(1)(a) states that "These Regulations" (apart from regulation 7(1)) apply to service as a member of the armed forces or to employment by a reserve forces association. Members of the armed forces are therefore unable to rely on regulation 7(1) and, by virtue of paragraph 7(5), they are also unable to rely on dismissal as a detriment for the purposes of regulation 7(2). The exclusion of regulation 7(1) (but not 7(5)) must have been intended to mirror the position of members of the armed forces in relation to unfair dismissal under section 192 ERA 1996 (as it had effect in 2000 and still

has effect) which provides in effect that the law of unfair dismissal does not apply to them.

152. Regulation 13(2) provides for a limited exception in the case of service of reservists so far as consisting of undertaking training obligations under section 22 or regulations under section 4 of that Act or voluntary training or additional duties under section 27. The other cases excluded by regulation 13(2) are not material in the claimant's case. The rest of regulation 13 deals with the requirement for members of the armed forces to bring a service complaint before presenting an employment tribunal complaint.

Correct approach to interpreting legislation

153. Both counsel made submissions as to the correct approach to establishing the meaning of the PTWR. Mr Tabori invited me to focus on the words of regulation 13(2) as well as his view of the policy intentions and the logic behind them. Mr Powell also relied on his reading of the words but was perhaps a little more focused on the purposes of the provisions in issue, and the anomalous and/or unreasonable results that he said would follow if Mr Tabori's approach was correct. Mr Tabori also referred to anomalies he said would result if the claimant's position was correct in law.

154. It was common ground between counsel that it is for me to focus on meaning of the words used in the PTWR. I agree. It is clear law that the correct approach to legislation that requires interpretation is always to examine and interpret the words used in their legislative context in order to establish their meaning and effect. The voluminous case law supports an approach along these lines. Different judges have used different words to express broadly the same idea. Judicial tastes differ as to the terminology to use (for example some senior judges avoid the term "intention" or "legislative intention"), but the overall principle is clear.

155. Under the modern approach to interpretation, context is always potentially relevant and can be decisive, and not just in cases where there is some ambiguity or uncertainty as to the literal meaning of the words used. For example, in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, Lord Steyn said:

> 'The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it.'

In *R (Fylde Coast Farms Ltd) v Fylde Borough Council [2021] UKSC 18* Lord Briggs and Lord Sales said this:

> 'Even where particular words used in a statute appear at first sight to have an apparently clear and unambiguous meaning, it is always necessary to resolve differences of interpretation by setting the particular provision in its context as part of the relevant statutory framework, by having due regard to the historical context in which the relevant enactment came to be made and…to arrive at an interpretation which serves, rather than frustrates, [its] purpose.'

156. The last line of that passage picks up a further thought in relation to legislative context, which is that if the legislation in dispute has an ascertainable purpose (or purposes) that is also a relevant part of the context. Here "purpose" refers to the purpose of the maker of the legislation as ascertained from the legislation itself. The maker of the PTWR was "the Secretary of State" in relation to the PTWR and Parliament (more accurately the Queen in Parliament) in relation to RFA 1996 and HRA 1998.

157. In *R (Quintaville) v Secretary of State for Health* 2003 2 WLR 692, HL Lord Bingham said this:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

I take from this passage the idea that it is essential to have regard to any ascertainable purpose(s) of the PTWR in general or of any relevant provisions when interpreting its text. Although the passage refers to Parliament's purpose (or intention) the same principle applies, in my view, to regulations made by a Minister and his or her purpose. There is no reason for them to be subject to a different approach.

158. There is an additional consideration when interpreting subordinate legislation. It must be read in the light of the specific powers under which it is made, which will limit what the legislation may or must contain or the effects it may or must achieve. The powers will often expressly identify or delimit the purposes of the instrument as well. However, in the case of the PTWR, this consideration does not appear to be relevant to the issues before me. All the provisions in issue appear to fall within the powers given by section 19 ERA 1999, whatever the answer is to the issues before me.

159. I take the case law summarised above to mean that the main issues before me are to be answered by establishing the correct meaning of the words of regulations 7(2) and (3) and 13(2), having regard to the legislative context in which they appear and the purpose or purposes of the regulations generally or of particular provisions (so far as properly ascertainable). That includes consideration of the legal framework of the PTWR. Put another way, I must decide what the words were intended to mean by the maker, in their context and having regard to any relevant purpose.

160. In general, the" intention" of the maker as a part of statutory interpretation is a notional concept as the primary source for identifying it is the legislation itself. The actual subjective intentions of the maker or the person proposing a Bill are not, in principle, directly relevant to interpretation. They only become of potential relevance if expressed in a document that is regarded in law as an admissible aid to construction.

161. In *Bogdanic v. Secretary of State for the Home Department [2014] EWHC 2872 (QB).* Sales J ruled that evidence from a Home Office official as to

the policy intention behind an immigration Act was not relevant. Internal policy thinking had no bearing on the question of construction. He said:

> "The subjective policy intent of the Secretary of State or of those in his or her department is irrelevant to the question of interpretation before the court".

The result might have been different if the material had been made public before the Bill was enacted.

162. In practice it is the responsibility of various officials to work out the detailed policy and wording of Government legislation, on behalf of Ministers. It is not unusual to see references in decided cases to the intention or purpose of the drafter or the policymakers, as well as to that of the maker. But it is, ultimately, the intention of the maker of the legislation that is in issue, however artificial that may seem in practice.

163. Sometimes a question of interpretation arises, after legislation is enacted or made, on a point that was never considered beforehand. There can be no actual subjective intention in such a case. But this does not mean that it is inappropriate to look for the notional legislative intention.

External aids to interpretation

164. It is axiomatic that the primary source for interpreting legislation (including in identifying its purposes or the intended effect) is the words of the legislation itself, in its legislative context. There is a wealth of case law and commentary in the leading academic textbooks on statutory interpretation to bear this out. But it is sometimes legitimate for a court or tribunal to have regard to information derived from certain other documents for certain limited purposes, under the rules of interpretation established by case law. I refer to these as "admissible documents".

165. The theoretical rationale for most kinds of potentially admissible documents is that if they were publicly available, and available to Parliament, before passing a Bill, Parliament would or could have relied on them in deciding whether to pass the Bill. That is an important factor because the purpose or intention in issue when interpreting an Act is that of Parliament and not the sponsoring Minister or department, departmental officials or parliamentary counsel. This is why documents must, if admissible, be examined to see what light they throw on the "legislative intention" (or purpose) of the maker

166. The broad category of admissible documents includes such things as--

1. departmental consultation papers and draft legislation published for consultation *(PNPF Trust Co Ltd v. Taylor [2010] EWHC 1573 (Ch));*
2. Law Commission Reports, including draft law reform Bills *(R v G [2003] 3WLR 1060);*
3. explanatory notes for an Act, where available to Parliament before the Bill is passed (*Flora v. Wakom (Heathrow) Ltd [2006] EWCA Civ 1103),Natural England v Cooper [2024] EWHC 625 (KB));*

4. the Explanatory Note accompanying a statutory instrument *(Pickstone v Freemans Plc [1989] AC 66, 127*);

5. Ministerial statements in debate relevant to the meaning of particular provisions, under the limited principle in the well-known case of *Pepper v Hart.* The case law imposes various conditions that must exist before consideration of such statements is legitimate.

The above list is not exhaustive.

167. In general, documents that were not publicly available and available to Parliament before a Bill is passed are not admissible documents. This is a further reason for excluding documents referring to views of those involved in the preparation of legislation (see *Section 24.10 of Bennion. Norbury and Bailey (2020)).* In *Re Agricultural Sector (Wales) Bill 2014* UKSC 43, the Supreme Court said:

> "38. This correspondence was never referred to in Parliament. It represented the views of the Welsh Government and the Government in Westminster which were never made public or disclosed to Parliament.
>
> 39. In our view it would be wholly inconsistent with the transparent and democratic process under which Parliament enacts legislation to take into account matters that have passed in private between two departments of the Executive or between the Executive of the UK and a devolved Executive. We therefore refused in the hearing of the reference to admit the correspondence. We refer to it no further."

168. That case demonstrates clearly that the reasons for rejecting internal government documents go wider than the fact that they were not in the public domain before legislation is passed or made. Other decided cases have emphasised various reasons for excluding such documents. For example, (a) the documents are almost inevitably private and confidential when created and are likely to remain so for years, which makes them inaccessible to the public, (b) the maker of the legislation will not usually have been aware of the documents or their content and (c) it might give the Government an unfair advantage if it could choose to make public and then rely on selected documents in litigation.

169. The upshot of the case law is that internal views of officials expressed in private in relation to the preparation of legislation are not, as a matter of law, relevant to the interpretation of that legislation. That rule applies to contemporary documents in which views were expressed at the time the legislation was being drafted or passed, as well as to subsequent evidence as to what those views were.

170. The law relating to admissible documents for interpreting an Act applies equally to subordinate legislation such as the PTWR, subject only to adaptations necessary to reflect the different characteristics of subordinate legislation. One of those differences is that the PTWR was made by the Secretary of State, not Parliament, so the relevant legislative intention or purpose is that of the Secretary of State.

The permissible use of admissible aids to interpretation

171. As to what a court or tribunal can properly do with admissible documents, this can vary from case to case. But the case law clearly establishes that there is a need for considerable caution before relying too heavily on material external to legislation in interpreting it. That is especially the case if one party is relying on it as somehow displacing what would otherwise be the meaning attributed to the wording of the legislation (see the speech of Lord Nicholls in *R v. Secretary of State for Transport and the Regions and another, Ex p. Spath Holme Ltd [2001] AC 349, 395-398).*

172. In many reported cases the courts have found external material to be useful in helping identify the overall purpose or context for disputed legislation rather than as a reliable guide to the intended meaning of specific provisions.

173. There are a number of reasons why caution is advisable. These documents are secondary material, usually produced for particular purposes other than elaboration of the meaning of the legislative text for the benefit of parliamentarians or the public. There are potentially all sorts of reasons why a law may be enacted (by Parliament) or made (by the maker of a statutory instrument) and not all will necessarily be mentioned in external documents made available to the court or tribunal. It is usually impossible to know how far the maker was aware of, or shared, any views expressed by others. Indeed, in the case of internal departmental documents, it may not be clear what the final conclusions of officials were and how far the maker in fact accepted them as a basis for enacting or making the final text of the legislation.

174. I can see no reason or justification for treating subordinate legislation differently to Acts on this point. The great majority of case law in this area is concerned with the meaning of Acts, but the principles apply to subordinate legislation (as nearly as they can to allow for their different characteristics).

Relevance of EU law

175. Neither counsel relied on the contents of the PTW Directive as part of their legal submissions about the effect of the PTWR. That was presumably because a Directive is no longer to be regarded as having “direct effect” and so determinative of the legal effects of UK implementing legislation, in a situation where there is a conflict between that legislation and the Directive. This follows from Brexit, and the operation of the European Union (Withdrawal) Act 2018 and the Retained European Law (Revocation and Reform) Act 2023.

176. It is clear, however, that the PTWR were intended to implement the PTW Directive. For this reason it is not surprising that regulation 5, the key right under the PTWR, is in similar terms to article 4.1 of the Framework Agreement attached to the Directive. Accordingly, the PTW Directive is a part of the context in which the PTWR were made and, to that extent, could still be of potential relevance in understanding their context. However, I have not identified any way in which that consideration impacts directly on the issues before me. The Directive appears to have nothing to say about the subject matter of regulation 7. It permitted Member States to create additional

protections for part-time workers (clause 6.1 of the Framework Agreement annexed to the Directive): regulation 7 appears to have been included in the PTWR as a matter of domestic policy. The PTW Directive does not address the position of the armed forces of Member states, although it does say that member States have an element of discretion in defining the employment relationships to be covered by the equal treatment right.

Conclusions

Admissibility and relevance of government documents

177. Having set out the applicable law I can deal briefly with my conclusions on the admissibility of the government documents I was referred to.

The DTI consultation paper and the change in policy for regulation 13

178. The DTI consultation paper published on 17 January 2000 articulates and explains to some extent the DTI's legislative proposals as they stood on that date. The paper was in the public domain well before the PTWR were made on 8 June 2000 and was available to Parliament when approving the regulations in draft. The Secretary of State for Trade and Industry would have been aware of it, as it was issued by his Department. Accordingly, under the applicable law summarised above, it is an admissible aid to interpretation. I can properly have regard to anything it reveals which is relevant to the issues.

179. I have already dealt in paragraphs 114 to 121 above with the inferences I take from a comparison between the published draft regulations and the final text of the PTWR. The changes made to the final text between January and June 2000 clearly helped create some of the issues before me. But in the absence of any contemporary and public explanation of the changes and the policy behind them, I do not regard the inferences I have identified as being of any real assistance in resolving the issues before me.

The internal government documents

180. I have concluded that the internal government documents in the bundle are not admissible aids to the interpretation of the PTWR. It follows that I cannot take account of information disclosed by the documents in determining any of the issues before me. I have not done so.

181. That is an inevitable conclusion under the applicable law summarised above. It is clear law that such documents are never admissible for the purpose of informing the interpretation of the legislation (see in particular the extract in paragraph 154 above from the decision of the Supreme Court in *Re Agricultural Sector (Wales) Bill 2014).* The position might be different for documents that in the public domain before the legislation is enacted or made. I have seen nothing to suggest that the documents or their contents were in the public domain before they were made.

182. Both counsel referred to the documents in submissions about the purposes of regulation 13(2). They told me that the documents were properly included in the bundle because they were relevant documents in the public

domain, following disclosure in earlier employment tribunal proceedings. Clearly, public disclosure could alter the otherwise confidential nature of such documents. But I have not identified any reason to think that it makes them any more admissible as an aid to construction of that legislation. All the other reasons for excluding them discussed above are unaffected by public disclosure. Accordingly, I do not accept that public disclosure of the documents after the PTWR were made makes them admissible. I had some reservations whether the disclosure of the material in earlier employment proceedings necessarily makes them sufficiently "public" to regard them as in the public domain, but that is a different question and not one I need to resolve.

The main regulation 13(2) and 7(3) issues: general

Introduction

183. Counsel made lengthy complex written and oral submissions as to the legal effects of the relevant provisions of the PTWR and I have considered all of them (and the documents and authorities they referred me to) in reaching my decisions on the two main issues. I am grateful for those submissions, which demonstrated the difficulty of the issues and helped steer me towards my decisions. I have reached a clear view on the correct interpretation of regulations 13(2) and 7(3), applying the legal principles summarised above. I do not propose to separately address every submission made to me.

184. There are matters relevant to both main issues that I set out in this section of these Reasons. In accordance with the applicable law, I must consider the words of the relevant provisions, their legislative context and the purposes of the PTWR generally and any relevant provisions. I will deal with the words of the relevant provisions in relation to each issue separately, but I shall set out what I understand the relevant purposes to be under this heading

General purposes of the PTWR

185. It is clear from the duty in section 19 ERA 1999 and the statement at the start of the explanatory note to the PTWR that the main purpose of the regulations is to secure parity of treatment by employers as between part-time and full-time workers. That was in line with the PTW Directive and is referenced expressly in the title of the PTWR. The main provision which achieves that purpose is regulation 5 - the statutory right not to be treated less favourably. That purpose is supported by conferring other specific rights in regulation 6 and 7 and by making dismissal of an employee for doing a protected act automatic unfair dismissal.

Regulations 5 to 7

186. The purpose of regulation 5 is to promote equal treatment of part-time and full-time workers by giving part-time workers an enforceable and meaningful statutory right not to be treated less favourably. That is subject to various limited exceptions or qualifications elsewhere in the PTWR.

187. The purpose of regulation 6 is to support the purpose of regulation 5 right by requiring employers (in most cases) to explain apparent differences in

treatment on request by a worker who suspects the right has been infringed. The words are “considers that his employer may have treated him in a manner which infringes a right conferred on him by regulation 5”. That suggests that the right to request a written statement does not turn on whether the suspicion is correct so long perhaps as it is genuinely held.

188. The immediate purpose of regulation 7 is to give protection from victimisation (by dismissal or imposing detriments) on the ground that the employee or worker has done a protected act within regulation 7(3). The wider purpose is to support regulation 5 (as well as regulations 6 and 7 themselves). This is all achieved by making dismissal of employees automatic unfair dismissal (paragraph (1)) and by conferring on workers a right not to be victimised (paragraph (2)). This must have been intended to discourage victimisation by employers as well as to reduce the fear of workers that they might be victimised if they do a protected act. Regulation 7 is similar to other provisions in employment legislation, which are designed for the same purpose and have existed, and been relied on in employment proceedings, for many years. Their purposes are all more or less the same.

189. Regulation 7(1) is separate from 7(2) because its purpose was to fit a new head of automatic unfair dismissal into the existing legislation about unfair dismissal, for employees but not members of the armed forces. The right in regulation 7(2), which does apply to members of the armed forces (subject to regulation 13(2)), covers all detriments other than dismissal.

190. The purpose of regulation 7(3) is to define the actions of a worker that are acts protected under regulation 7(1) and 7(2). It appears to identify the main ways in which a worker might (a) do things to assert or rely on rights under the regulations or (b) do other things connected with asserting or relying on such rights, such as giving evidence in proceedings under the regulations.

191. The purpose of regulation 7(4) is to ensure that false allegations of an infringement of the PTWR are not covered by regulation 7(2), if made in bad faith. Regulation 7(4) only applies where the protected act in question is the one mentioned in regulation 7(3)(a)(v) (or regulation 7(3)(b) so far as relating to it). Why that is so is harder to ascertain from the text. But I note that item (v) in the list is a relatively loose and broad ground and potentially includes making allegations to persons other than the employer. The other grounds are much more specific.

Regulation 13

192. The purpose of regulation 13(1)(a) is clearly to secure that the PTWR (apart from regulation 7(1)) apply to all members of the armed forces. That is of course subject to regulation 13(2) and the need to make a service complaint before presenting a complaint to an employment tribunal.

193. Regulation 13(2) is clearly designed to create a limited exclusion from regulation 13(1) for reservists in relation to things done under the specified provisions. A case was being carved out of the general proposition. As for the purpose of doing that, there must have been policy reasons for carving that

case out. The main provision in the regulations is regulation 5, so I consider that one purpose must have been a wish to protect the terms of service applicable to the activities specified in the provision. The terms of service of a reservist in the position of the claimant (see paragraph 11 above) are tailored to the performance of ordinary activities each year. It is understandable that MOD and/or DTI might want to protect them from attack under regulation 5. I imagine that this policy was thought to be consistent with the PTW Directive.

194. I have found it harder to be sure whether another part of the purpose of regulation 13(2) was to exclude or limit the availability of the regulation 7(2) to reservists. That is not surprising, as it is the existence or nature of its interaction with regulation 7(2) that is in dispute in the main regulation 13(2) issue.

195. I do not agree with Mr Tabori's submissions to the effect that the purpose of the proposition in paragraph 13 was to exclude regulation 7(2) in the claimant's circumstances. That purpose is not one that I would readily infer from the words used. Nor would I infer that the idea was simply for the PTWR to have no application of any kind to a reservist at a time when they were not performing duties under any specific section of RFA 1996 other than section 22 (or sections 22 and 27). The reference to a reservist's service "in so far as" it consists of "undertaking training obligations" or "undertaking voluntary training or additional duties" strikes me as doing something narrower than that, simply as a matter of English. Ascertaining the legislative intention here is a matter of statutory interpretation, which I address further below. In my view the words do not make clear what wider purpose regulation 13(2) has in relation to regulation 7(2) (if any) beyond that mentioned in paragraph 193 above.

196. It would certainly be easier to ascertain any such purpose as regards regulation 7(2) if regulation 13 said more about that interaction, one way or another. If serious policy consideration of that interaction had taken place I would have expected it to generate detailed questions as to how the interaction was intended to operate. It appears to me that there are several different ways in which the policy might have been intended to work.

197. One approach might have been that in the claimant's situation (his only formal obligation being a training obligation under section 22) nothing in the regulations applied. But if that was the policy it could have been expressed in more direct language. Another approach might have been that the application of the regulation 7(2) right to a reservist should turn on whether regulation 13(2) excludes the regulation 5 right (in relation to matters alleged to have infringed that right). But if the drafter had been told that was the policy, I would have expected the point to have been spelled out. It might also have been necessary to examine the details of the list in regulation 7(3)(a) to ensure it was fully consistent with the policy. Yet another approach might have been to focus on whether different elements of the regulation 7(2) right all relate to the case excluded by regulation 13(2). For example, the availability of that right might depend on the position when the alleged infringement of the paragraph 7(2) right takes place. Suppose a reservist is subjected to detriments shortly after starting a period of service on call out: would it necessarily be the policy that they could not make a complaint of infringement of the regulation 7(2) right

simply because the underlying infringement of regulation 5 took place when the reservist was serving only under section 22 (or sections 22 and 27). Anything like that would have needed to be spelled out.

198. Yet another approach might have been to focus on whether actions taken by a reservist to make a service complaint and then an employment tribunal complaint asserting an infringement of regulation 7(2) are part of or relate sufficiently to the case excluded by regulation 13(2) so as to be covered by the exclusion. Mr Powell appeared to accept that something along these lines might be a possible reading of regulation 13(2) when he said that making a service complaint is not part of service under section 22 or 27. I agree that the reading is open to me on the words of regulation 13(2). That was my initial reading of the PTWR, although the parties' written arguments soon made me realise that its interpretation requires more detailed analysis. It appears to me that this reading of regulation 13(2) would in practice have much the same effect as an interpretation that simply reads the exclusion as not applying to regulation 7(2) in the claimant's case. In any event, if this reading did have the result of preventing reliance on the regulation 7(2) right, I would still have to consider the context and the relevant purposes before deciding whether it is the correct interpretation.

199. I would not be surprised if there were other possible policy approaches to the interaction between regulation 13(2) and regulation 7(2). Those mentioned above assume there was to be an effect on the regulation 7(2) right. It is of course also possible that the policy might have been for there to be no impact on the availability of the right. I have certainly found it hard to identify a plausible reason for a policy effectively permitting a reservist to be victimised as a result of seeking in good faith to uphold their regulation 5 right by making a service complaint about their treatment, simply because the underlying regulation 5 right was excluded by regulation 13(2). Things might be different if unfounded complaints of infringement are generally not covered by the regulation 7(2) right, but counsel agreed that that is not in fact the case. For example, regulation 7(4) confirms that "untrue" allegations made in good faith are covered by regulation 7(2).

200. The matters mentioned in paragraphs 197 to 199 are merely intended to demonstrate that there were various choices open to DTI or MOD in the interaction with regulation 7(2). My point is that the words used in regulation 13(2) do not quite match any of them. That is one reason why establishing their effect requires proper interpretation in line with the applicable law summarised above. That may also suggest that the impact on regulation 7(2) was not in fact considered (or considered properly) before the text was finalised.

The main regulation 13(2) issue: Step (1)

201. I will now deal with Step (1) as set out in paragraph 53 above: does regulation 13(2), as a matter of domestic law, exclude the claimant's regulation 7(2) claims in circumstances where the regulation 5 right is excluded by regulation 13(2)? This requires me to disregard, at this stage, Mr Powell's arguments about section 3 HRA 1998.

The statutory wording

202. The words of regulation 13 that fall to be interpreted are:

> (1) These Regulations shall have effect in relation—
>
> (a) subject to paragraphs (2) and (3) and apart from regulation 7(1), to service as a member of the armed forces .... .
>
> (2) These Regulations shall not have effect in relation to service as a member of the reserve forces in so far as that service consists in undertaking training obligations [under the specified provisions of legislation] or consists in undertaking voluntary training or duties under section 27 of the Reserve Forces Act 1996.

203. The natural meaning of "service as a member of the armed forces" in regulation 13(1), for reservists, is to cover everything that they do in their capacity as a member of a reserve force. It appears "service" is used as a term similar to "employment". Regulation 13(2) is concerned only with "service as a member of the reserve forces". That term also appears at first sight to cover everything a reservist does in their capacity as such. The words "in so far as that service consists in" indicate that the proposition identifies a subset of "service as a member of the reserve forces". That means there must be service that is or may be carried out by a member of the reserve forces that is not excluded and to which regulation 13(1) applies. That certainly includes activities involved in service under any section of RFA 1996 other than 22 or 27. What is less clear to me is whether everything done by (or to) a reservist is to be regarded as part of the case excluded by regulation 13(2) at a time when, for example, they are not doing things under any section other than section 22 (or sections 22 and 27). In other words, can some of the things done by (or to) that reservist to be seen as part of their service as such, but not as part of service under any specific section of RFA 1996? That question is an aspect of the regulation 5 issue.

204. The term "These Regulations" appears in both regulation 13(1) and 13(2), although in my view its meaning needs to be considered separately in each context because they are different.

205. In paragraph (1)(a) of regulation 13 the idea is that all service personnel are covered by the whole of the PTWR (apart from regulation 7(1), subject only to paragraphs (2) and (3). This would apply to everything done by or to them in their capacity as members of the armed forces.

206. In the context of paragraph (1)(a) the expression "These Regulations" cannot be read literally as there are obviously provisions (such as regulations 14-17) that have no application whatever to members of the armed forces, even after making the adaptations mentioned in regulation 12(3). One has to read something like "so far as relevant" or "unless the context otherwise requires" into a provision like regulation 13(1). There is also an element of circularity in that regulation 13 is itself part of "These Regulations". To avoid that circularity, it would appear to be necessary to read the expression as referring to provisions of the PTWR other than regulation 13. Paragraph (1) does not need to address

the application of regulation 13 because on its face the whole of regulation 13 already addresses the position of the armed forces.

207. I agree with Mr Tabori that In paragraph (2) of regulation 13, the expression “These Regulations” also appears at first sight to refer, as a matter of English, to the whole of the regulations including all the provisions conferring rights. But, as with regulation 13(1), the position is not quite as simple as that. Regulation 13(2) can only exclude from 13(1) things that would otherwise have been covered by it: so “These Regulations” in paragraph (2) does not include regulation 7(1), provisions that are irrelevant to members of the armed forces or regulation 13 itself. If there are provisions which have no practical application to members of the reserve forces (having made the adaptations mentioned in regulation 12(3)) then they too would need to be excluded from “These Regulations”.

208. The main regulation 13(2) issue involves the question whether the expression “These Regulations” in regulation 13(2) covers regulation 7(2) in the circumstances of the claimant’s case. I will come to that, but I note that it is clear for the reasons given above that the expression cannot to be read literally. So while Mr Tabori’s submissions on the meaning of that expression as a matter of normal English clearly have some force, I accept Mr Powell’s submissions that the answer depends on a more difficult question of interpretation. As a matter of domestic law this requires me to apply the principles of interpretation I have summarised under “applicable law” above. It would not in my view be a significant adaptation of the expression to interpret it as being subject to a further exclusion or to limits (based on the context and relevant purposes) in relation to its impact on regulation 7(2). The case law is clear that even a complete departure from the apparent literal meaning of words as a matter of English is sometimes required as the result of applying the principles of interpretation. But I do not see an interpretation that excludes regulation 7(2) (in the claimant’s case) from the scope of regulation 13(2) or limits what in regulation 7(2) is excluded by regulation 13(2), as a complete departure from the literal meaning of its words.

209. I accept that as a matter of words, regulation 13(2) could be read as covering regulation 7(2). But even then it appears to me that the words could be read in more than one way. I do not view the reading that regulation 7(2) is excluded because regulation 5 is excluded in the claimants case,as the most natural way of reading the words. The reading mentioned in paragraph 198 is an alternative – that the words only exclude regulation 7(2) if the claimant’s acts in making his complaint about infringement of regulation 7(2) fall within the case excluded by regulation 13(2). Indeed, I consider that it is arguably a more natural reading of the words.

210. Mr Tabori’s other main submission was that the words of regulation 13(2) mean that nothing in the PTWR applies to a reservist when they have no duties under any section of RFA 1996 other than section 22 (or sections 22 and 27). I do not see this as a natural reading of the words because it is not quite what regulation 13(1) and 13(2), read together, actually say. The PTWR apply to

everything done by a reservist (paragraph (1)(a)) except "undertaking training obligations" or "undertaking voluntary training or additional duties" of the relevant kinds (paragraph (2)). It seems to me that the exception appears narrower than the reading suggested by Mr Tabori. As a result, it may or may not follow that an activity like attending a uniform fitting is necessarily within "undertaking training obligations". That question is a matter of statutory interpretation.

211. It follows from the above discussion that while the words of regulation 13(2) are not inconsistent with Mr Tabori's submissions, I do not see them as pointing strongly towards them. But I do accept that the words taken on their own do suggest (because of the expression "These Regulations) that regulation 13(2) might have an impact on regulation 7(2).

Effect of the context and purposes of the PTWR: discussion

212. In my view the legislative context in which the words of regulation 13(2) appear, and the purposes of the regulations, are pointers to a narrower reading of the words of regulation 13(2) in relation to regulation 7(2).

213. The overall aim of the PTWR was to prevent unequal treatment of part-time and full-time workers, in line with the PTW Directive. The PTWR were to apply to all members of the armed forces, subject to a limited exception in regulation 13(2). As explained above, one purpose must have been to protect terms of service relating to ordinary activities from attack under regulation 5. There may be other differences in the way reservists who only carry out such activities are treated compared with full-time service personnel. In any event, the different terms of service make it perfectly rational to have a policy designed to exclude the regulation 5 right.

214. There are relatively few exceptions from the PTWR, no doubt because of the need to remain consistent with the PTW Directive. In my view the nature of the default position (the application of regulation 5 and the rest of the PTWR to workers, including service personnel) is such that any limited exception should not be construed more broadly than it needs to be to deliver its purpose(s). In the context of the main regulation 13(2) issue this means considering whether the purpose was also to disapply regulation 7(2) in the circumstances of the claimant's case. Mr Tabori contends that the exception applies to exclude the application of regulation 7(2) to the claimant in those circumstances. In my view the fact that that interpretation would extend the scope of the exception beyond its impact on regulation 5 and so reduce the effectiveness of regulation 7(2) to support the key regulation 5 right is a pointer against that interpretation. Things might be different if there was a plausible policy reason for the scope of regulation 13(2) to exclude the claimant from the regulation 7(2) right, even though in other situations the fact there was no infringement of regulation 5 does not prevent reliance on regulation 7(2). I have not identified one.

215. Mr Tabori submitted that if the policy was to exclude the regulation 5 right, it made sense for the policy to have also been to exclude the regulation 7(2) right. He said the two necessarily went together and that the wording of regulation 13(2) was self-evidently designed to achieve this without any distinctions. In my view that does not follow, as the two rights have very different purposes. Regulation 5 is the main right designed to deliver the "equal treatment" policy of both section 19 ERA1999 and the PTW Directive. Regulation 7(2) is there to support the effectiveness of regulation 5, but it does that by seeking to give those that seek to assert rights under the PTWR some confidence that if they do so they will not be victimised by their employer and/or that there is a remedy if they are victimised. There is also a more general access to justice issue at play here – that assertion of one's statutory employment rights ought not to lead to victimisation. It seems to me counter-intuitive to think that the policy would have been, in the circumstances of the regulation 13(2) issue, to deny a claimant the regulation 7(2) right.

216. Regulation 7(2) is an example of a relatively common kind of provision in employment legislation. I do not consider it would be effective to meet the purpose described in paragraph 188 above if it does not apply where a mistake is made by a reservist who is seeking to assert or rely on a right under the PTWR (or to assist a colleague who is doing that, by giving evidence) as to whether the regulation 5 right has been infringed. That is because that person would not know for sure when doing that whether that was the case. There is seldom any certainty as to the result of litigation. Nor would they necessarily know that their protection from victimisation would be lost if the underlying allegations are ill founded because of the exclusion of the regulation 5 right by regulation 13(2).

217. Those results of the respondent's position on the main regulation 13(2) issue would in my view create a very uncertain, and arbitrary, legal framework, with traps for the unwary. An informed reservist acting in good faith who was aware of the law might be put off from taking action for fear of victimisation for which there might be no remedy. An uninformed one would be taking a chance in seeking to complain about an alleged infringement of regulation 7(2), as the protection given by regulation 7(2) might not apply. A partially informed one might believe there was protection against victimisation (on the face of regulation 7(2)) and discover too late (after being victimised and presenting a complaint) that the protection does not apply. Conversely, employers might well be better informed than their workers and so able to take advantage of a gap in the coverage of regulation 7(2).

218. Those are the reasons why I conclude that the purpose described in paragraph 188 would not be achieved if a reservist who believes their right under regulation 5 has been infringed cannot rely on regulation 7(2). I have no reason to suppose that the claimant did not believe that his original service complaints had reasonable prospects of success and were worth pursuing. Nor do I have any reason to suppose that he was acting in bad faith when he made them. He would not have known then whether they would ultimately prove to be

well-founded, factually or legally. He might well have thought that regulation 7(2) applied in the face of the PTWR to protect him from victimisation if he made those complaints.

219. Counsel agreed that in some situations making a regulation 5 complaint in good faith would still be a protected act for the purposes of regulation 7(2), even if it turned out to be factually unfounded. It was different, according to Mr Tabori, where the complaint was unfounded because the application of the regulation 5 right was excluded by regulation 13(2). However, if the policy was for the regulation 7(2) right to protect a reservist who cannot in the end prove an infringement of regulation 5, it seems to me very odd indeed not also to protect one in the claimant's position. Again, I have not identified any plausible policy reason for distinguishing between different situations where complaints under regulation 5 turn out not to be well-founded.

220. The points discussed above lead me to conclude that answering Step (1) in favour of the respondent would produce a result that is clearly contrary to the purpose of regulation 7(2). I accept that only one specific class of worker is in issue in Step (1), but I do not see that that makes much difference to the analysis. If (as Mr Tabori asserts) the correct interpretation is that the claimant has no protection from victimisation, despite the otherwise broad reach of that protection for reservists, that would be an unsatisfactory result. That result could have a chilling effect on other members of the reserve forces who contemplate doing an act listed in regulation 7(3). It would be even more unsatisfactory if the result happened by accident, because the point was not spotted or considered before the text of the PTWR was finalised.

221. I have not identified anything in the legislative context in which regulation 13(2) appears or the purposes I have ascertained from the PTWR that is a significant pointer towards the respondent's position on Step (1).

Submissions made on behalf of the respondent

222. I have already referred to some of Mr Tabori's submissions on Step (1). I address some of his main submissions on Step (1) under this heading.

223. Mr Tabori submitted that the regulation 7(2) claims are simply misconceived in law because they relate to the claimant's service as a member of the reserve forces so far as consisting in undertaking training obligations under section 22. His allegations relate to unpaid activities in respect of which the regulation 5 right did not apply owing to the operation of regulation 13(2). If the regulation 5 claims were bound to fail then the regulation 7(2) claims must be misconceived as well.

224. I do not accept that the position is as simple as this argument suggests, for reasons I have already discussed. I do not consider that the exclusion of regulation 5 in a reservist's case necessarily means that they cannot rely on regulation 7(2) if they consider they have been victimised for a protected act

relating to the regulation 5 right. I do not see that as the result of the words of regulation 13(2) as a matter of English, but even if that was a natural reading of the words, I would not regard it as consistent with the legislative context or the purposes of the PTWR. To me they point to a different result, in favour of the claimant.

225. The argument mentioned in paragraph 224 was presented in a number of different ways. One was that because the claimant was only carrying out training to meet his training obligation under section 22, everything he did was excluded by regulation 13(2) because it must relate or be part of his service under that section. Another was that regulation 13(2) must have been intended to produce the result that where a reservist's right under regulation 5 is excluded by regulation 13(2) (in relation to alleged infringements of the right) then the regulation 7(2) right must have been intended to be automatically excluded. These submissions struck me as begging the very question posed in Step (1), which is whether the "legislative intention" (as explained above under "applicable law") was that the regulation 7(2) right is excluded in that situation. I do not accept that there is any automatic consequence for regulation 7(2) of the exclusion of regulation 5 (in a reservist's case) by regulation 13(2). That is because I have been unable to find any strong pointers from the words, the context or the ascertainable purposes that that was the legislative intention.

226. My conclusions on Mr Tabori's arguments in favour of his interpretation of the impact of regulation 13(2) on regulation 7(2) are supported to some extent by my view that if that result was the actual subjective intention of those involved in producing or making the PTWR, the wording would have come out differently. But I do not regard this as a significant part of my reasoning.

227. Both counsel made submissions to the effect that if the drafter of the PTWR had meant the regulations to produce a result contrary to their reading of regulation 13(2), the drafter would or should have made that clearer. I certainly agree that the wording could have been clearer and more explicit, whatever the policy was on the interaction between regulations 13(2) and 7(2). But in my view that observation does not in itself point to any particular answer to Step (1). Further analysis is required before one can conclude, for example, that the absence of certain words is significant in terms of a question of interpretation.

228. Mr Tabori submitted that regulation 7(1) was specifically excluded from regulation 13(1) by express words in paragraph (a) and that if the intention (of the maker or the drafter) was to exclude regulation 7(2) from the scope of 13(2) then express provision on the point would have been made, and was needed. Mr Powell disputed whether the exclusion of regulation 7(1) had any significance in relation to the interpretation of regulation 13(2). One problem with a submission of the kind made by Mr Tabori is that it assumes the point was considered in the preparation of the PTWR. That may not have happened. But, more importantly, I consider that the submission does not have much force because there is a real practical difference between the significance of the

impact of regulation 13(1) on regulation 7(1) and the significance of its impact on regulation 7(2).

229. The first of those matters is obvious and deals with an important area of policy for MOD. I would expect MOD to have noticed that without an exclusion for regulation 7(1), regulation 13(1) would create an enforceable "automatic unfair dismissal" right for reservists, when the law of unfair dismissal does not otherwise apply to members of the armed forces. Once that potential impact of regulation 13(1) on regulation 7(1) was spotted (after the publication of draft regulations in January 2000 it appears, as the point was not mentioned in the draft) the only possible way of addressing an expressed policy wish to avoid that potential effect would be to exclude regulation 7(1) expressly.

230. The second of those matters is nowhere near as obvious or as significant in policy terms. If the policymakers' focus was on the impact of regulation 5 on the ordinary activities of reservists, it might be understandable for them not to notice an issue as to what the impact of regulation 13(2) on regulation 7(2) should be and whether it matters that regulation 5 might have been excluded by regulation 13(2). It is in my view an unjustified jump in logic to say that because of the express exclusion of regulation 7(1) the absence of a reference to regulation 7(2) in regulation 13(2) means it was necessarily intended to be excluded. Not only is the point a relatively subtle one affecting only reservists, but it would not have presented a binary choice like that involved in the question whether regulation 7(1) should apply to members of the armed forces. There were different options and choices would need to have been made.

231. For the reasons in paragraph 228 to 230 I do not accept that the argument based on the absence of an express exclusion of regulation 7(2) has the significance asserted by Mr Tabori. Furthermore, for the reasons I have already discussed I regard the results of the alternative interpretations advanced by Mr Tabori to be unsatisfactory in terms of the purposes of the PTWR and the provisions in issue. I would certainly have expected those responsible for producing the PTWR, if they wanted the policy to be as Mr Tabori put forward, to have realised that the result might appear unreasonable and/or unclear, at least to some readers. In those circumstances I would expect the wording to be clearer as to the intended result. Otherwise, there would be a real risk of not achieving it.

232. It was common ground between counsel that there are situations where regulation 7(2) can be relied on despite an underlying complaint under regulation 5 not being well-founded. Mr Tabori submitted that the situation in issue in Step (1) is not one of those situations, and that that must have been the intended result. Mr Powell took the opposite view. He said there is no policy logic to disapplying regulation 7(2) simply because the alleged "protected acts" of the claimant related to pay matters excluded by regulation 13(2) from regulation 5. I agree with Mr Powell's argument on this point: there is no

plausible policy reason I have identified for removing the protection of the regulation 7(2) right in the claimant's circumstances.

Conclusions on Step (1)

233. Drawing together my conclusions about the words of regulation 13, the context and the relevant purposes, I must now decide how to answer the question posed by Step (1).

234. I do not see the words of regulation 13(2) as themselves being a significant or decisive pointer to an interpretation in favour of the respondent. Nor do I see an interpretation in favour of the claimant as a significant departure from the words used in regulation 13(2), which are in my view equivocal at best as to the interaction (if any) between regulations 13(2) and 7(2). In particular, the expression "These Regulations" in both paragraph (1) and (2) of regulation 13(2) cannot be read literally, and so require interpretation.

235. The alternative interpretations Mr Tabori advocates are not supported by the legislative context or the purposes of the PTWR. Indeed, I conclude above that the results would be incompatible with those purposes. In my view it is this point that is the strongest pointer towards the answer to the question posed by Step (1) being in favour of the claimant's position.

236. I conclude therefore that the correct reading of the PTWR as a matter of domestic law requires the question posed by Step (1) to be answered in favour of the claimant. He is not prevented from relying on regulation 7(2) on the grounds put forward by the respondent. That is because regulation 13(2) does not exclude the regulation 7(2) right in circumstances where the regulation 5 right is excluded by regulation 13 in the claimant's case,

237. I note that my conclusion avoids what appear to me to be arbitrary and capricious results in terms of when acts by a reservist are or are not protected by regulation 7(2). An employer has various defences open to it in terms of whether there was an infringement of regulation 7(2) on the facts. The respondent has raised all kinds of defences of that kind in its pleadings. None of them are affected by my answer to the main regulation 13(2) issue. But if the respondent is right about the answer to that issue, the claimant could succeed on all the factual points, but lose simply because of the effect of regulation 13(2) on regulation 5 as far as the unpaid activities in question are concerned. I see that as arbitrary because in other situations it does not matter whether the alleged infringements of regulation 5 are true (at least if made in good faith). And I see that as capricious because the claimant would not be in a position to know that regulation 13(2) had that effect on regulation 5 in his case, at the time he first made his service complaints.

238. It is not necessary, in answering the question posed in Step (1), for me to determine the meaning of regulation 13(2) for all purposes. It is enough for me to decide that the matters referred to in the main regulation 13(2) issue do not prevent a person in the claimant's provision from relying on regulation 7(2). I

am not, therefore, making any wider decision on its meaning than is necessary to answer the specific issue before me.

The main regulation 13(2) issue: Steps (2) and (3) and final decision

239. Having decided Step (1) in favour of the claimant, the precondition for the application of Steps (2) and (3), dealing with the possible effect of section 3 HRA 1998, is not met. For this reason I have not made any decisions on the questions posed in Steps (2) and (3). Also, the application of section 3 presupposes that as a matter of domestic law regulation 13(2) has a particular effect. It is that effect that has to be considered to determine if it engages particular Convention rights and is incompatible with any rights that are engaged. It would in my view be artificial to attempt to deal with the human rights issues on a hypothetical basis.

240. This means that the main regulation 13(2) issue is answered by my decision on Step (1) in favour of the claimant.

The main regulation 7(3) issue

241. Mr Tabori's argument was, as I understand it, that the descriptions of protected act in regulation 7(3) relied on by the claimant in the regulation 7(2) claims do not catch a situation where regulation 5 is excluded from applying (in relation the unpaid activities in question) by regulation 13(2).

242. For paragraph (3)(a)(iv) this would mean reading "has ... done anything under these Regulations" as not covering a case where the thing done was based on a complaint of an infringement of regulation 5 in circumstances where regulation 5 is excluded by regulation 13(2). The same would go for making allegations "that the employer had infringed these Regulations" as provided in paragraph (3)(a)(v). Mr Tabori asserts that the employer cannot have infringed the regulations where regulation 5 has been excluded. And in the case of paragraph (3)(a)(vi) the argument is that one cannot forego a right that does not exist, in the claimant's case.

243. Mr Powell did not accept these submissions, saying in effect that the more natural reading of the words in regulation 7(3) is for the relevant acts to be protected whether or not the regulation 5 right was excluded by regulation 13(2). He also submitted that regulation 7(4) expressly contemplates that a claim based on paragraph (3)(a)(v) (allegation that the employer has infringed the regulations) might be false without affecting the protection offered by regulation 7(2), unless made in bad faith) He said that suggested that other provisions in regulation 7(3) apply where any underlying complaint relying on regulation 5 is not well-founded, even if the reason is the operation of regulation 13(2) to exclude regulation 5. Mr Powell also made arguments relying on the context in which regulation 7(3) sits and the relevant purposes of the PTWR.

244. As for the words used in the list set out in regulation 7(3)(a), I do not consider that the effects suggested by Mr Tabori is their natural meaning. It is a subtle reading of the words.

245. Although not in issue in this case, I do not consider that his argument would be realistically open to him on items (i), (ii) or (iii) as they are all expressed in neutral terms. For example, the current proceedings appear to me to be proceedings under "these Regulations" whether or not they are well-founded. That was, after all, the reading of regulation 8 Mr Tabori relied on to say that the issues at the preliminary hearing were not jurisdictional (see paragraphs 79 and 80 above).

246. The position in relation to the way the other items in the list (the ones relied on by the claimant) are worded is perhaps slightly more open to argument. The position of each needs to be considered.

247. I would not naturally read item (iv) as excluding the situation where a worker purports to act under the PTWR in a case where, for whatever reason, the relevant right relied on does not apply. I cannot see any reason for thinking that is the result intented where regulation 13(2) excludes the regulation 5 right in relation to the unpaid activities in question.

248. As for item (v), the claimant has alleged that his employer infringed regulation 5. Why should it matter, save in the case of bad faith, whether the allegations are false. That is something that most claimants acting in good faith will not know when deciding to make relevant allegations. Again, I do not consider that the natural meaning of the words is that put forward by Mr Tabori.

249. That conclusion is confirmed by regulation 7(4), which provides that where a worker has alleged that the employer has infringed the regulations (or that the employer believes or suspects that the worker has done that or intends to do it), regulation 7(2) does not apply if the allegation is false and not made in good faith. That must mean that an untrue allegation of infringement made in good faith is covered. It appears to me that it would be very artificial to draw a distinction here between an allegation that is not well-founded only because of the operation of regulation 13(2) on regulation 5 (in the claimant's case) and an allegation that is untrue for some other reason. To me the term "untrue allegation" is well capable as a matter of words of covering the former case. I can see the argument that it might mean "factually untrue" as a matter of words, but that would make regulation 7(4) an incomplete statement about the effect of item (v), which I doubt would have been intended.

250. Finally, the words of item (vi) suggest to me that it is about not agreeing to give up a particular right on which the worker might otherwise rely. Contracting-out of the PTWR is addressed by regulation 9. In practice the situation covered by item (vi) would presumably be likely to arise where a worker has asserted the regulation 5 right in relation to particular allegations of infringement. I cannot see that the words themselves suggest that it makes any difference, in such a case, that it turns out that the right does not apply because of the effect of regulation 13(2) on regulation 5. I accept, though, that there room for argument as to exactly what the words used in item (vi) cover.

251. I also consider that Mr Powell's point about the wider significance of regulation 7(4) has some force. The fact regulation 7(4) is limited to allegations

of infringement (item (v) in the list) is in my view a modest pointer to a broader reading of the other specified protected acts, including those relied on by the claimant (items (iv) and (vi)). It seems for example that issues of good or bad faith are not directly relevant to them.

252. For the above reasons, I do not read the words of regulation 7(3)(a)(iv), (v) or (vi) in the list of protected acts as narrowly as Mr Tabori invited me to read them. The claimant also relies on regulation 7(3)(b) in relation to those items, but the analysis of that follows from my analysis of them.

253. However, even if the words themselves do suggest that Mr Tabori's reading was or might be correct, I would still need to consider their legislative context and the relevant purposes of the PTWR.

254. I have already expressed my conclusions as to what those purposes are. In my view they have a similar impact on the interpretation of regulation 7(3) as I have decided they have on the interpretation of regulation 13(2). That is for reasons corresponding to those I have given in relation to Step (1) of the main regulation 13(2) issue. I do not propose to repeat all my reasoning for Step (1) but I do consider it applies by analogy to the interpretation of regulation 7(3). Mr Tabori's argument would make the availability of the protection offered by regulation 7(2) dependent on whether any underlying complaints of infringement of regulation 5 are excluded by regulation 13(2). That is in my view contrary to the purposes of regulation 7(2) and would produce an unsatisfactory result for the same reasons I have given in relation to Step (1). Again, it is unclear to me why MOD or the DTI would have adopted a policy that, in effect, allows a reservist to be victimised in the circumstances of the regulation 7(3) issue.

255. The balance of argument in answering the regulation 7(2) issue is, if anything, stronger in favour of the claimant's position than it was on the main regulation 13(2) issue. That is because there is less tension, in my view, between the context and purposes and the words. I do not see the words used in regulation 7(3) as providing much support for Mr Tabori's preferred interpretation. It is unnecessary in my view to read them in a way that reduces the scope of regulation 7(3) and thus reduces the protection offered by regulation 7(2).

256. My decision is therefore that acts by a member of the reserve forces in the claimant's situation are not prevented from being protected acts within regulation 7(3) because of the operation of regulation 13(2) to exclude regulation 5. The opposite view is not sustainable in the light of the context in which regulation 7(3) appears and the relevant purposes of the PTWR.

257. In view of my decision on the interpretation of regulation 7(3) as a matter of domestic law, issues relating to section 3 HRA 1998 become academic, for the same reasons I give in relation to Steps (2) and (3) under the main regulation 13(2) issue.

258. That means that the answer to the main regulation 7(3) issue is determined by my decision in favour of the claimant as to the meaning in domestic law of the provisions of regulation 7(3) that are in issue.

The regulation 5 issue

259. In view of my decisions on the two main issues, the regulation 5 issue is academic. The claimant can rely on regulation 7(2) in making his claims, even if regulation 13(2) excludes the regulation 5 right in relation to the unpaid activities in question in these proceedings. It will not be an issue that arises at the final hearing. It follows that it is unnecessary for me to consider this issue further and I do not do so.

The decisions in "*Milroy*" and other employment tribunal cases

260. I have read the decision of the Scottish employment tribunal in the *Milroy* case mentioned in paragraphs 35 and 36 above. I have also read the parties' written submissions about its possible impact on the issues before me. I have concluded that it has no significance in terms of affecting the balance of argument on those issues. It is not a binding precedent and in my view the issues decided in that case were different to those before me, not least because of the impact of EU law on the outcome.

261. The written and oral submissions of the parties also touched on other decisions on the application of the PTWR, whether to members of the armed forces or other categories of worker. I did not understand any of those submissions to suggest that any of those decisions were directly in point in terms of the issues before me or were binding on me in terms of the legal issues involved. I have concluded that none of the decisions in question have any particular significance in terms of affecting the balance of argument on the issues before me.

Final decisions

Strike out

262. My decisions in favour of the claimant on the two main issues mean that the grounds put forward for striking out his claims are not well-founded. Accordingly, it is not open to me to strike out the claims as having no reasonable prospect of success. The application to strike out the claims is therefore refused, which means that they can proceed to a final hearing. The next step may be to list a case management hearing, but that may depend on whether the respondent appeals against my Judgment.

Deposit order

263. I can deal with this issue briefly. Neither party presented a case for me to make a deposit order. Nor have I identified any possible basis for making a deposit order against either party based on the matters specified in paragraph 2 of EJ Lambert's CMO or anything else I have considered in addressing the two main issues before me. That is because the two main issues involve questions of law which I have determined for the purposes of these proceedings. My

decisions on them dispose completely of the grounds put forward by the respondent for striking out the claims. Accordingly, it is not open to me to make a deposit order against either party and I do not do so.

Employment Judge Hogarth
Dated: 2 April 2025

Sent to the parties on
04 April 2025 By Mr J McCormick
For the Tribunal

ANNEX A
CLAIMANT'S DRAFT LIST OF ISSUES FOR HIS REGULATION 7(2) CLAIMS
"REGULATION 7(2) 7 (3): CLAIMANT'S LIST OF ISSUES

The Claimant relies upon the following Protected Acts under Regulation 7(3)(a) iv, v & vi and (b)

Protected Act 1
The Claimant challenging Lt Cdr Lees statement that admin work should be done in a reservists own time by saying he not believe it to be lawful and could amount to less favourable treatment as a Part-Time worker on the 20th of October 2021.
Protected Act 2
Subsequent verbal requests which asserted his right to payment
Protected Act 3
The Claimant's email to Lt Cdr Goulder on 9/11/2021 asserting his right to payment.
Protected Act 4
Text/Whatsapp exchanges with Cdr Davies prior to 19th January 2022 meeting (below)
Protected Act 5
19th January 2022 meeting with Cdr Davies
Protected Act 6
Submission of a Service Complaint April 2022

The Claimant also relies upon 7(b) ie. that the employer suspects that the worker has done or intends to do any of the things mentioned in s. 7(3)(a).

Did the Claimant suffer the following detriments?

(1) Non- payment of the following payment requests
08/09/21 - 0.25 RSD – HRG account management and accommodation booking.
19/10/21 – 0.25 RSD – Uniform tailoring at HMS Drake.
05/11/21 – 0.25 RSD – Uniform Tailoring at HMS Drake.
08/11/21 – 0.25 RSD – CRM fireside meeting.
03/01/22 – 3hrs - service complaint drafting
10/02/22 – 43 minutes - writing appeal decision to CO.
16/01/22 – 30minutes – JPA check, JPA Report admin, competencies check,

employer notification form.

01/02/22 – 45 minutes – insert slip processing, TAO submission, trace and move form, social media posts and audiogram appointment arrangement.

07/02/22 – 25 minutes – employment notification letter and training summery to Lt Short.

08/02/22 – 2hrs 35 minutes – PCP completion, bounty weaver, defence gateway admin, accommodation booking, RSD review, email admin. ID card collection from HMS Vivid.

17/02/22 – 1hr – MTO Force generation meeting with Lt Cdr Dunn.
17/02/33 – 2hrs – Tailoring / Seamstress appointment HMS Drake.
24/04/22 - 5 hrs – service complaint finalisation.
11/03/22 – 2hr 20 minutes uniform collection from HMS Drake. Force Generation meeting with WO Perry.

28/03/22 – 2 hr 17 minutes – JPA objectives admin, errors reported to JSU Bristol and President. Report summary emailed to CPO White..

(2) Following the Claimants email to Lt Cdr GOULDER on 09/11/21 requesting payment for the fireside meeting with Commodore Maritime Reserves and for personal exercise related admin on 08/09/21; he was told to attend a face to face meeting with the CO Cdr DAVIS which caused him great anxiety as there was no explanation given for the meeting.

(3) CPO HARROP who also attended the same fireside chat meeting was paid for her attendance but the claimant was not.

(4) Advising the Claimant that 'we are clamping down on this generally' following his requests for payment.

(5) Informing the Claimant on the same day that he was not required to attend this meeting with no explanation being offered.

(6) On the 10th November 2021 Lt Cdr GOULDER putting in place a process for the Claimant to request payment for work undertaken to go through the whole Divisional system (through his first- and second-line manager, the UOO Lt Cdr GOULDER, to the XO Lt Cdr LEES to the CO Cdr DAVIS). The Claimant contends that the process was put in place to single him out with its sole purpose to frustrate the claimant's payment requests and make it difficult for the claimant to gain authorisation from the CO.

(7) Taking 28 days for a response declining the request despite being supported by his first- and second-line manager.

(8) Cdr DAVIS informing the Claimant whilst he was entitled to make a formal complaint, she did not "recommend" this as the most sensible course of action; a scarcely veiled threat.

(9) Ostracism of the claimant.

The Claimant asserts that there is a causal connection between the detriments as set out above and the Protected Acts as the detriments are the Respondents response to the Claimants Protected Acts."

ANNEX B

FACTS SHOWN BY THE INTERNAL GOVERNMENT DOCUMENTS IN THE BUNDLE

1. The following information can be drawn from the documents as to the views and role of MOD officials regarding the policy and drafting of provisions of the PTWR:
   - MOD was not closely involved in the PTWR project prior to January 2000, although DTI had shared at least one draft with them (MOD lawyer minute of 15 October 1999 raises concerns on "the draft regulations", including the word "non-combatant" and the approach to reserve forces. MOD letter to DTI in December 1999 expressed concern about application to reserve forces).
   - MOD was aware in 1999 that application of PTW Directive to reserve forces was problematical (MOD letter to DTI of 20 September 1999 refers to practical problems extending the Armed Forces Pension Scheme to reservists).

- Before the PTWR were made, terms of service (including pensions, pay and allowances) were re-examined with a view to avoiding unnecessary differences between reserve and regular service personnel.
- Various benefits were available to volunteer reservists, designed for them. However, conditions of service for those in "ordinary service in the volunteer reserve" did not mirror those for "full time service". Some differences were seen as inevitable unless terms were changed in a way likely to be less appealing to civilians considering joining. MOD knew this might create legal problems.
- MOD had a particular concern about extending pension arrangements to "ordinary activities" of a reservist, which were casual in nature. The scheme was not designed for those who only carry out such activities. Administration would be costly for small periods of time across a year (when a reservist was "on duty") and it would take years to qualify for a significant entitlement. Most volunteer reservists would end up with very small pensions if the scheme was extended to cover them.
- MOD thought some kinds of reserve service could be regarded as full-time. There were some regular personnel who could be regarded as part time.

2. One informative document is a letter of 21 March 2000 from MOD to DTI commenting on a recent draft of the regulations. It states that the exception in regulation 13--
    - should mention sections of superseded Acts still applying to serving reservists who joined before RFA 1996 came into force
    - should only apply to those carrying out activities under sections of legislation referred to in it

    It also says the MOD legal adviser thought regulation 13 should start by saying the regulations apply to members of the armed forces, because of doubts as to whether they were equivalent to "employees" or "workers". The following wording for the exception was proposed:

    "*These regulations do not apply to--*

    Members of the reserve forces undertaking training obligations under sections 38, 40 or 41 of the Reserve Forces Act 1980 or under section 22 of the Reserve Forces Act 1996 or pursuant to regulations made under section 4 of the Reserve Forces Act 1996; or

    Members of the reserve forces undertaking voluntary training or duties under section 27 of the Reserve Forces Act 1996".
3. The substance of regulation 13(2) in the final PTWR text is similar to MOD's proposed wording, but not identical as a matter of substance as well as lay out. For example the drafter opted to refer to "service", of the kinds put forward by MOD. It is not clear why, or whether this was thought to produce exactly the same result as the MOD draft.
4. A letter sent by the Secretary of State for Trade and Industry (Stephen Byers MP) to other Cabinet Ministers (including the Defence Secretary) sought collective policy agreement to his proposals for implementing the PTW Directive, shortly before publication of the DTI consultation paper. It refers to officials' discussions with MOD to ensure "the regulations have the desired effect on access to pension schemes and on the Reserve Forces". That was optimistic, given the significant changes to regulation 13 made later once MOD expressed detailed concerns.
5. Nothing in the documents suggests that at any time before the PTWR were made (a) anyone from DTI questioned MOD about the policy or the wording of regulation 13(2), or its interaction with regulations 5 or 7(2), or (b) anyone in MOD spotted or considered any interaction between regulation 13(2) and regulation 7(2) or (3).

6. The documents shed little light on views within DTI. They are from MOD files, judging by their markings. Even if all relevant material in MOD files in in the bundle there is an obvious risk that other relevant documents exist in DTI files but have not been disclosed. For example, there is nothing sent to or from the drafter. I would have expected a drafter to have sought clarification of the detailed policy proposals for regulation 13 given the significant changes from the consultation draft. In particular, the policy line being drawn by regulation 13(2) in relation to regulation 5 and the position of regulation 7(2) might have required elucidation. Instructions to drafters given in the form of a draft (rather than a description of the detailed policy wishes and the reasons for them) are notoriously unreliable. But the drafter may have simply assumed that MOD knew what they wanted and that DTI accepted the general idea behind the MOD draft.
7. The application of regulation 5 (the main right and the one mandated by the PTW Directive) was the focus of the MOD's policy concerns about the consultation draft text of regulation 13 and the forces. But this may have been considered at only a relatively high level of generality, without delving into details. There is one document (some kind of briefing note from March 2000) which suggests the exclusion in regulation 13(2) was there because of the pension position of reservists not serving under a section other than 22 or 27. But other documents indicate that the concern about regulation 5 and reservists went beyond the pensions issue.
8. I conclude from my observations above that MOD officials were content to accept a policy giving the regulation 5 right to all members of the armed forces, subject to the reserve forces exception in regulation 13(2). That related to MOD concerns about terms of service for reservists who simply undertake training and voluntary duties on a casual basis, which were not comparable to those for "full-time" service personnel. Pensions were a major concern due to the cost and complexity of covering such "casual" ordinary activities of reservists); but so were other conditions of service, including pay.
9. There was a difference of opinion between counsel as to the scope of the MOD's concerns about regulation 5 and reservists undertaking ordinary activities. Mr Tabori was right to say the concerns went beyond "pensions". However, Mr Powell was right to say that the concerns expressed in the documents were limited, covering pensions and other terms of service or enagement. In particular, the sorts of point underlying the issues before me do not appear to have been in in the mind of anyone in MOD when considering the wording of regulation 13(2).
10. Overall, the documents throw a little light on the thinking behind regulation 13, which originated in the wording proposed by MOD (see paragraph 2 above). But I emphasise the risk mentioned in paragraph 6 and the limited weight to be accorded to external aids to construction under the case law described under "Applicable law" in my Reasons.