



EMPLOYMENT TRIBUNALS

Claimant: Revd M D Pons

Respondent: Ministry of Defence

Heard at: Exeter (via CVP)

On: 26 March 2025

Before: Employment Judge Murdoch

Representation

Claimant: Mr Hirst, solicitor

Respondent: Mr Allsop, counsel

JUDGMENT

The complaint of victimisation is struck out, on the grounds that the Employment Tribunal has no jurisdiction to hear the claim pursuant to paragraph 4(3) of Schedule 9 Equality Act 2010.

REASONS

Background

1. The claimant was enlisted to the Royal Navy in 2012 as a Chaplain. The Royal Navy falls under the remit of the respondent. The claimant was a serving member of the armed forces during his time with the Royal Navy.
2. The claimant and his wife are the adoptive parents of two disabled children with complex and serious health needs who require care from the claimant and his wife.
3. In February 2023, the respondent asked the claimant to go to UK Maritime Component Command in Bahrain. Due to his caring responsibilities, the claimant says that he told his employer that this would be problematic. Ultimately, in January 2024, the respondent decided not to extend the claimant's offer of employment.

Claims

4. It was agreed by the parties that the claimant was presenting two claims as follows:
 - a) Direct religion or belief etc discrimination (section 13 of the Equality Act 2010); and
 - b) Victimisation (section 27 of the Equality Act 2010).

The hearing

5. This preliminary hearing took place on 26 March 2024.
6. In terms of paperwork, I received a hearing bundle of 150 pages with index, an extension of service application of 3 pages and an authorities bundle of 671 pages. The parties said they had sent skeleton arguments to the Tribunal the day before the hearing but they had not made their way to me, so I asked for them to send directly to me, and I adjourned briefly to read them. The parties agreed that they were in possession of the same paperwork and agreed those were all the documents that I needed to see for today's hearing.
7. Neither party presented any witnesses. Both parties made oral closing submissions, which lasted almost two hours. I reserved judgment.

Purpose of today's preliminary hearing

8. By a Case Management Order sent to the parties on 1 March 2025 Employment Judge Volkmer ordered that this public preliminary hearing should determine the following issues:
 - "2.1. Whether the Tribunal has jurisdiction to hear parts of the claimant's claim:
 - 2.1.1. the respondent asserts that disability discrimination legislation does not apply to members of the armed forces. By virtue of Schedule 9 paragraph 4 of the Equality Act 2010, Part 5 (Work) does not apply to service as a member of HM Armed Forces in so far as it relates to the protected characteristic of disability. As such the Tribunal has no jurisdiction to hear any complaint from the claimant relating to disability, including alleged victimisation relating to the same and the complaint at paragraph 2 of the List of Issues should be struck out. The claimant's position is that this prohibition does not apply to victimisation complaints.
 - 2.1.2. before an individual is able to bring a complaint of discrimination of any kind relating to service in the Armed Forces, Service personnel are required to have filed a valid Service Complaint in respect of the act complained of. Specifically, the Tribunal does not have jurisdiction to hear the complaint unless in accordance with s121(1) Equality Act 2010 (a) a valid Service Complaint in respect of the same

matter has been submitted and the complaint has not been withdrawn (or is to be treated as withdrawn). The respondent's position is that no Service Complaint was filed in relation to the complaints set out a paragraphs 1.2.5 to 1.2.7 inclusive of the List of Issues. The claimant's position is that he did raise the allegations in his Service Complaint.

2.2. if relevant after the above, consider whether any of the complaints should otherwise be struck out or a deposit order made...

2.3. consider whether any further case management orders are appropriate."

9. Following correspondence between the parties, the Service Complaint jurisdictional challenge (para 2.1.2 of CMO as set out above) is no longer before the Tribunal. The claimant withdrew the allegations to which it related, as he accepted that no discrete Service Complaints were issued regarding point 1.25 to 1.27 of the original list of issues as set out in the CMO.

10. It was agreed that the purpose of today's hearing was three-fold:

- (a) Whether the claimant's victimisation claims should be struck out on the grounds that the Tribunal has no jurisdiction to hear the claim pursuant to paragraph 4(3) of Schedule 9 to the Equality Act 2010 ("EqA 2010");
- (b) Whether (a matter raised by the Tribunal, of its own volition), the claimant's victimisation claims should be struck out because the protected acts are complaints about associative discrimination under section 20 EqA 2010, which is not justiciable *per se*;
- (c) If, and in so far as the claimant's claim survives (a) and (b) above, whether the Tribunal should order a deposit to be paid by the claimant under Rule 39 of the Employment Tribunal Rules of Procedure 2013 on the basis that the claimant's claim(s) has little reasonable prospect of success?

11. In this judgment, I have dealt with issues (a) and (b) in paragraph 10 above – i.e. the strike out application for the victimisation claim – but I deal with the third issue in relation to the deposit order in the case management order that I have issued alongside this judgment. This is because the deposit order issue is not finally determinative of any aspect of this claim.

Issue 1: Whether the claimant's victimisation claims should be struck out on the grounds that the Tribunal has no jurisdiction to hear the claim pursuant to paragraph 4(3) of Schedule 9 EqA 2010

Legislative exclusion

12. Paragraph 4(3) of Schedule 9 EqA 2010 sets out a general exception in discrimination claims which is applied to service personnel:

"this Part of this Act [Part 5], so far as relating to age or disability, ...does not apply to service in the armed forces".

13. Part 5 EqA 2010 is entitled 'work' and includes provisions relating to employment (employees, contract workers etc), occupational pension schemes, equality of terms (e.g. sex equality, pregnancy and maternity equality etc). Part 5 also includes the prohibition against victimisation in the workplace in section 39(4) EqA 2010, which makes it unlawful for an employer to victimise employees. Therefore, victimisation, as claimed in this case, falls within the scope of the general exception.
14. Paragraph 4(3) of Schedule 9 EqA 2010 is the product of a choice by Parliament to derogate from Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
15. Recital 19 to this Directive stated as follows:

"...in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces..."
16. Article 3(4) of this Directive states that:

"Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces."
17. The lawfulness of the exception set out in paragraph 4(3) of Schedule 9 EqA 2010 was upheld by the High Court in *R (Child Soldiers International) v Defence Secretary* [2016] 1 WLR 1062. In this High Court judgment, it was found that Article 3(4) of the Directive had a plain and unambiguous meaning. At paragraph 9 and 44 respectively, Kenneth Parker J stated as follows:

"In my view, the meaning [of Article 3(4) of the Directive] cannot be plainer. Member states are unambiguously given an unqualified and unrestricted power not to apply the Directive to the armed forces..."

"...Parliament has plainly exercised the power granted by Article 3(4) of the Directive to derogate from the general prohibitions in the Directive."
18. Article 3(4) permits a member state entirely to disapply the Directive, in so far as it concerns age and disability discrimination, in relation to the armed forces. And the United Kingdom chose to do so through enacting paragraph 4(3) of Schedule 9 EqA 2010.
19. In short then, Parliament lawfully derogated from the relevant piece of EU law at the time. It is clear that Parliament intended that Part 5 of the Equality Act 2010, in relation to age or disability, did not apply to service in the armed

forces. There is nothing to suggest that Parliament intended anything other than a complete exclusion here.

Human Rights Act

20. Section 3(1) of the Human Rights Act 1998 provides that: "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."
21. Section 4 of the HRA permits a higher court (e.g. High court, Court of Appeal or Supreme Court) to make a declaration of incompatibility if it determines that primary legislation is incompatible with a Convention right.
22. The Employment Tribunal does not have the power to make a declaration of incompatibility under section 4 of the HRA, but it is obligated to read legislation in a way that is compatible with Convention rights under section 3 of the HRA.
23. The claimant relies on section 3 of the HRA, arguing that I must read and give effect to paragraph 4(3) of Schedule 9 EqA 2010 in a way that is compatible with the claimant's Convention rights. The claimant relies on the following three Convention rights:
 - (a) Article 6 - Right to a fair trial;
 - (b) Article 8 - Right to respect for private and family life; and
 - (c) Article 14 - Prohibition on discrimination.
24. The claimant's representative accepts that a court cannot adopt a meaning which goes against the grain of the legislation, that is to say, which is inconsistent with a fundamental feature of the legislation, and the Tribunal cannot make decisions for which they are not equipped.
25. The claimant submitted to me today that in order to interpret paragraph 4(3) of Schedule 9 EqA 2010 compatibly with Article 6, 8 and 14 of the ECHR, I could, and should, read in following words:

*"this Part of this Act [Part 5], so far as relating to age or disability, **other than for victimisation claims**, does not apply to service in the armed forces."*
26. I listened and read both party's submissions on this point. I agreed with the respondent that reading these words into the legislation goes against the core essence of the intention of Parliament, which was to enact a complete derogation. There is nothing to suggest that Parliament wanted to treat victimisation any differently in the complete exclusion that is paragraph 4(3) of Schedule 9 EqA 2010. The nature of this derogation was in relation to all matters of age and disability discrimination. The claimant is essentially asking me to circumvent Parliament's wishes, which was clearly to adopt a complete exclusion. I find, therefore, that reading in words to the legislation that would effectively exempt victimisation from the derogation would go against the grain of the legislation.

27. I do not think that Parliament could have intended not to include victimisation in its complete exclusion, otherwise members of the armed forces could be subjected to age or disability discrimination, and then to circumvent the legislative exclusion, they could simply make a complaint about it, and turn it into a victimisation complaint. It would effectively become a back door route to accessing the legislation that Parliament clearly sought to exclude for members of the armed forces.

28. We can see from recital 19 of the Directive that the EU allowed the derogation so that member states could safeguard the combat effectiveness of their armed forces. This Tribunal is not in a position to decide what might assist MOD safeguard the combat effectiveness of their armed forces. I therefore agree with the respondent that the Employment Tribunal is not the right function of the constitution to read in the claimant's suggested wording. This Tribunal cannot make decisions for which they are not equipped. The question of whether victimisation should be outside the complete exclusion of paragraph 4(3) of Schedule 9 EqA 2010 would much more appropriately be debated and decided by Parliament.

Conclusion

29. For the above reasons, I have decided to strike out the claimant's victimisation claim – on the basis that there is no reasonable prospect of success – because the Tribunal has no jurisdiction to hear the claim pursuant to paragraph 4(3) of Schedule 9 EqA 2010.

Issue 2: Whether the claimant's victimisation claims should be struck out because the protected acts are complaints about associative discrimination under section 20 EqA 2010, which is not justiciable *per se*

30. I did not need to consider whether to strike out the claimant's victimisation claim on this basis, as I had already struck out the claimant's victimisation claim under issue one.

Issue 3: Should the Tribunal make a deposit order on the basis that the claimant's claims have little reasonable prospect of success?

31. I have dealt with this issue in the corresponding case management order.

Approved by:

Employment Judge Murdoch

Date: 08 April 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON
30 April 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE