

THE INDUSTRIAL TRIBUNALS

CASE REFS: 4871/17IT
6479/17IT

CLAIMANT: Sendogan Ustaoglu

RESPONDENT: Ministry of Defence

DECISION ON A PRE-HEARING REVIEW

The tribunal dismisses all claims made under case references 4871/17IT and 6479/17IT.

Constitution of Tribunal:

Employment Judge (sitting alone): Employment Judge Travers

Appearances:

The claimant appeared in person and represented himself.

The respondent was represented by Mr Warnock, Barrister-at-Law, instructed by the Crown Solicitor's Office.

REASONS

1. On 5 March 2017 the claimant was a member of the Army Reserve. On that date the claimant was on duty at the barracks when he alleges that he was the victim of bullying, harassment and racism by a junior non-commissioned officer. The claims to the tribunal arise from the claimant's unhappiness at the way in which the army dealt with his complaint following this incident.
2. The claimant has issued two claims. Case reference 4871/17IT was presented to the tribunal on 22 August 2017 and alleges racial discrimination. Case reference 6479/17IT was presented to the tribunal on 2 October 2017 and alleges that the way in which the respondent dealt with his complaint amounted to breach of contract and unfair dismissal. On 21 September 2017 the claimant resigned from the Army Reserve in circumstances which he says amount to constructive dismissal.
3. The respondent contests the claims on grounds of jurisdiction and on the substantive merits of the claims. This Pre-Hearing Review has been listed to deal with the following question:

“Whether the tribunal has jurisdiction to determine the claims made in the two claim forms lodged by the claimant in 4871/17 and 6479/17”.

4. The respondent says that the tribunal has no jurisdiction to consider an unfair dismissal/breach of contract claim made in respect of service in the armed forces.
5. The respondent concedes that the tribunal has jurisdiction to consider a discrimination claim but asserts that where such a claim relates to military service it is an essential pre-condition that a valid internal ‘service complaint’ has been made before presentation of the tribunal claim.

Case Reference 6479/17IT – Unfair Dismissal and Breach of Contract

6. It is well established that there is no contract between the Crown and a member of the armed forces. See, for example, **Quinn v Ministry of Defence [1997] EWCA Civ 2865, [1998] PIQR 387** at 396 per Swinton-Thomas LJ:

“... when Mr Quinn enlisted in the Royal Navy pursuant to the King's Regulations neither he nor the Crown had any intention to create legal relations. Further, as a matter of public policy, following the decisions to which I have referred there is binding authority that there is no such contract.”

7. The jurisdiction of an industrial tribunal is limited by statute. The effect of The Employment Rights (Northern Ireland) Order 1996 [‘ERO’] at Articles 236 and 237 (as substituted by ERO Schedule 2 paragraph 12) is that an industrial tribunal has no jurisdiction in respect of a claim for unfair dismissal made by a member of the armed services.
8. Consequently the claims for breach of contract and for unfair dismissal must be dismissed. As explained to the claimant during the hearing, a claim to an industrial tribunal alleging constructive dismissal is a claim for unfair dismissal.

Case Reference 4871/17IT – Racial Discrimination

9. An industrial tribunal does have jurisdiction to hear a claim by a member of the armed forces alleging racial discrimination. This jurisdiction may be exercised only where strict procedural requirements have been followed.
10. The Race Relations (Northern Ireland) Order [‘RRO’] at Article 71(7) provides that a member of the armed services is entitled to make a claim in respect of an allegation of racial discrimination relating to his military service.
11. The right of a soldier to make a complaint to an industrial tribunal alleging racial discrimination arising from his military service is subject to an important pre-condition. Article 71(8) of the RRO states:

“No complaint...shall be presented to an industrial tribunal...unless –

(a) The complainant has made a complaint to an officer under the service redress procedures applicable to him and has submitted that complaint to the Defence Council under those procedures; and

(b) The Defence Council has made a determination with respect to the complaint.”

12. The Armed Forces (Service Complaints) Regulations 2015 [‘the Regulations’] (made pursuant to section 340B of The Armed Forces Act 2006) set out the procedure for making and dealing with service complaints.
13. Regulation 4(1) provides that:

*‘A service complaint is made by a complainant **in writing** to the specified officer’* [emphasis added].
14. At regulation 4(2) the Regulations set out information which **must** be contained within a statement of complaint. This includes:

“The statement of complaint must state –

...

(e) the redress sought”.
15. By a written statement of complaint dated 14 April 2017 the claimant set out his complaint about the events of 5 March 2017. The complaint was contained in a standard printed army form [‘the Form’] which expressly stated that the complaint was made under the Armed Forces Act 2006. The complaint alleged that the claimant had suffered racial discrimination, bullying and harassment by reason of the conduct towards him on 5 March 2017 by LCpl White. The form was accompanied by a handwritten letter of the same date which set out the claimant’s complaint in detail.
16. The Form was completed by the claimant by hand. Box 5 of the Form was headed by the question, ‘What outcome or redress do you seek from this complaint?’ This box was not completed by the claimant. Consequently the Form failed to comply with the Regulations at regulation 4(2)(e) which requires that a written statement of complaint **must** state the redress sought.
17. On 20 April 2017 a meeting took place with the Officer Commanding 220 Squadron [‘OC’], Major Stevenson, who was the specified officer for the purposes of regulation 4(1) of the Regulations. Also present was Captain Blues.
18. The notes of that meeting were signed and dated 20 April 2017 by Major Stevenson and Captain Blues but not by the claimant. It is unclear why this is so. The notes record that: ‘The OC noted that Pte Ustaoglu had not completed box 5 of the SC form; resolution of the complaint. The OC asked Pte Ustaoglu what outcome he wanted from the complaint. Pte Ustaoglu was a little confused and not sure what he wanted at this time.’
19. The interview notes then go on to record that Major Stevenson explained that if he was satisfied that the claimant had been mistreated, ‘he would take appropriate actions as follows:
 - a. Administrative (AGAI 67) Action.
 - b. The OC indicated that he would seek a formal apology from LCpl White for Pte Ustaoglu.

- c. The OC asked Pte Ustaoglu if he was happy with the plan of action and Pte Ustaoglu indicated that he was.
- d. The OC indicated that once the investigation was completed and all actions were completed he hoped that Pte Ustaoglu and LCpl White would be able to work together again in a better working relationship.'
20. AGAI 67 refers to the army's internal sanctions regime under chapter 67 of the Army General and Administrative Instructions. Administrative action under AGAI 67 is a procedure which is different to, and distinct from, a service complaint.
21. The claimant told the tribunal that at the interview on 20 April he told Major Stevenson that he wanted an apology from LCpl White. This is consistent with the interview notes as set out at paragraph 19 above, these record that, 'The OC indicated that he would seek a formal apology from LCpl White for Pte Ustaoglu'.
22. The claimant told the tribunal that when he first completed the Form he wasn't sure what to put in Box 5.
23. The tribunal was provided with a form headed 'Appendix 2 to Annex P – Armed Forces Equality and Diversity Complaint/Incident Record' ['Appendix 2']. It has been completed in type-written form and signed by Captain Blues, Captain Chambers and Major Stevenson. The box for the complainant's signature is blank. The signatures all appear to be dated 20 April 2017.
24. Appendix 2 has boxes to describe:
- Nature of Complaint and Summary
 - Redress sought by Complainant
 - Advice given
 - Action/Conclusion
25. The details of the complaint in Appendix 2 include the following: '... Pte Ustaoglu also expressed concern by the lack of action taken after the event by those that witnessed it. This resulted in Pte Ustaoglu contacting the Equality Commission and being advised to complete a Service Complaint form'.

The redress sought by the complainant is recorded as, 'Initially Pte Ustaoglu did not confirm what form of redress he sought. He did not complete box 5 of the SC form. During the interview on 20 April 2017 he was unsure of what he wanted. Following the advice given below Pte Ustaoglu was content to proceed in that manner.'

The advice given was recorded as, 'Pte Ustaoglu was advised on the procedures and that this matter needs to be dealt with at an appropriate level. I outlined the course of action (COA) I would take to investigate the matter and if satisfied to uphold his complaint that appropriate administrative action would be taken and apology sought. Pte Usatoglu was also advised that if he was not satisfied with the outcome the matter could be raised further'.

26. Appendix 2 records the 'Action/Conclusion' as, 'Pte Ustaoglu agreed to the proposed COA. Investigation confirmed, in my opinion that bullying harassment took place and as such **disciplinary action was taken** [emphasis added]. **No evidence of racism was confirmed.**' The signatures on Appendix 2 are apparently dated 20 April 2017. The 'Record of Formal Interview' of LCpl White

signed by Major Stevenson is dated 25 May 2017. In these circumstances it is unclear to the tribunal how the officers were able to conclude on 20 April 2017 prior to the Formal Interview of LCpl White that, '... disciplinary action was taken. No evidence of racism was confirmed.'

27. The interview notes of 20 April 2017 record that Major Stevenson told the claimant that, 'he would be interviewing LCpl White and the witnesses that were named in Pte Ustaoglu's statement; witnesses are Cpl Mitchell, LCpl Hamilton and two Pte soldiers whose identity was yet to be established from the Christian names recorded in Pte Ustaoglu's statement'. No information is provided in the bundle as to when these interviews took place. Appendix 2 is dated 20 April 2017, consequently the tribunal assumes that these interviews must have taken place on a date before the apparent outcome of the investigation was included in Appendix 2. In a letter from Captain Hartle dated 22 September 2017 addressed to the claimant it is said that Major Stevenson ensured that, 'a full and thorough investigation was carried out'.
28. The record of formal interview of LCpl White dated 25 May 2017 states the reasons for interview as, 'over-zealous application of discipline'. The remedial action required is stated to be, 'Consideration of the situation and environment in delivery of authority'.
29. Major Stevenson informed the claimant of the outcome of the investigation by letter dated 25 May 2017. He referred to his decision to address the complaint, '...at the lowest level, relevant to the findings of my investigation. **As you had not completed Part 5 of the Service Complaint form** I detailed my proposed course of action [during the interview on 20 April] and you agreed with the way forward. I subsequently completed interviews of witnesses and found that it was not appropriate to progress a Service Complaint...I am of the opinion that until such times as you provide details of the outcome or redress you seek in line with Part 5 of the Service Complaint form the matter cannot progress accordingly. ACTION – I would request that you advise by response the outcome or redress that you seek from this process.'
30. The 25 May letter was received by the claimant on 9 June.
31. On 22 August 2017, the claimant issued his claim alleging discrimination on the grounds of race. The details of the claim simply stated, '[LCpl White] bullying, harassment, racism in Aldergrove. Witnesses [names of witnesses stated]. [LCpl White] he was out control swear and grab me'.
32. The claim form provided the following extra information: 'On 05/03/2017 this complaint I reported two time chain of command. I wait 6 weeks after complaint haven't hear anything then I put service complaint form. I was received outcome on 09/06/2017 I was told to my OC I'm not happy my outcome and I said I would like to take further to CO and he want me to remove complaint form or leaving like this and I said no and I'm not happy outcome then he told me, he will pass to CO since I haven't hear anything back yet. Since this complaint only been investigation not feel safe at the work so I'm not going and not getting any pay or benefits'.
33. On 21 September 2017 the claimant sent his letter of resignation to his regiment. He described how he felt that he had been treated unfairly and felt, 'threatened and intimidated and have lost my confidence and morale'. He wrote of his dissatisfaction with the way he had been treated since he made his complaint,

treatment which he believed amounted to, 'a breach of contract'. The claimant complained that when he had clearly stated that he was unhappy with the outcome of his complaint he was told that the matter would be passed to the Commanding Officer. He wrote, 'It appears that this did not happen and no further action has been carried out on my behalf'. The claimant wrote that for these reasons, 'I have lost confidence and trust and I have no option but to resign under constructive dismissal from my position in the Army'.

34. By letter dated 22 September 2017 Captain Hartle, Adjutant to the claimant's regiment wrote to the claimant, '...to ensure that you are fully informed of what was done by your chain of command at the time and then, if you still feel that more is required, signpost you to the options available'.
35. Captain Hartle set out the action which had been taken following the claimant's complaint. He then went on to provide information about how to complain about the outcome, including the service complaints procedure. Captain Hartle wrote, '... I would remind you that, as I believe you have already on several occasions been asked, you will need to provide clearly and accurately what redress or outcome you are realistically looking for in order to correct the disadvantage which has occurred. This will inform the Service Complaints team of what wrong you believe to have occurred to you as the administrative action already undertaken had eliminated the source of the issue'.
36. On 27 September 2017 the claimant wrote to Major Stevenson that, '20 April when I was come investigation interview you was asked to me what outcome I wanted and I told to you I want an apology and also make sure never happen again. And also on 25 May on outcome meeting I state the above to yourself, you said to me that can't force him to apologise to me'.

Conclusion in respect of the discrimination claim

37. The tribunal is grateful to the claimant for the impressively focussed and moderate way he presented his case. The tribunal is also grateful to Mr Warnock for the clarity and assistance he provided the tribunal.
38. Ultimately, the question for the tribunal at this Pre-Hearing Review is whether or not the claimant has complied with the statutory process for a member of the armed services wishing to make a claim in an industrial tribunal in respect of alleged discrimination.
39. Article 71(8) of the RRO is clear. A service complaint must have been made and the Defence Council must have made a determination in respect of the complaint. This is a provision which is unique to members of the armed forces but nonetheless it is one which must be complied with.
40. The Regulations are clear and in mandatory form. The service complaint must be made in writing, and one of the requirements of a service complaint as defined by the Regulations is that it sets out the redress sought by the claimant **in writing**. This was never done. Box 5 of the Form remained resolutely blank.
41. The tribunal has sympathy for the claimant when confronted with a previously unknown form to complete. As he told the tribunal, he did not complete Box 5 of the Form initially because he wasn't sure what to put. Box 5 poses a straightforward question, it is unfortunate that it was never completed.

42. The claimant's failure to complete Box 5 was drawn to his attention at the meeting on 20 April. The letter dated 25 May stated explicitly that, '...until such times as you provide details of the outcome or redress you seek in line with Part 5 of the Service Complaint form the matter cannot progress accordingly'. It was not enough for the claimant to express his desire to an apology in conversation, it had to be in writing.
43. The claimant's letter to Major Stevenson dated 27 September was sent too late to remedy the problem. By that date the claimant had already issued his claim alleging racial discrimination.
44. The tribunal notes that the claimant received the letter of 25 May on 9 June, nonetheless he did not provide any written account of the redress he sought until more than 3 months later on 27 September 2017.
45. The respondent relies on the case of ***Molaudi v Ministry of Defence UKEAT/463/10***. Silber J held at paragraph 27 that it is:

"...a pre-requisite for making a complaint of racial discrimination by a soldier to the Employment Tribunal is that he or she had previously made a valid service complaint to the army authorities, which had been determined on its merits."
46. In all the circumstances, pursuant to Article 71(8) of the RRO there is a jurisdictional bar to the claimant's claim being considered by the tribunal. Consequently the claim in respect of racial discrimination is dismissed.

Employment Judge:

Date and place of hearing: 19 April 2018, Belfast.

Date decision recorded in register and issued to parties: