Neutral Citation Number: [2024] EAT 165

Case No: EA-2022-001341-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14th October 2024

Before :

THE HONOURABLE MRS JUSTICE STACEY

- -

Between :

MINISTRY OF DEFENCE

Appellant

- and –

MRS ANNE RUBERY

Respondent

- -
- -

Mr Ben Cooper KC and Mr James Chegwidden (instructed by Government Legal Department) for the **Appellant**
Mr Christopher Milsom (instructed by Wace Morgan Solicitors) for the **Respondent**

Hearing dates: 19th to 20th March 2024

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JUDGMENT

SUMMARY

Jurisdiction.

The question for determination was whether the ET had erred in reading down additional words into s.121 Equality Act 2010 to enable the claimant, a serving member of the armed forces, to bring a complaint of sex discrimination to the ET under the Human Rights Act 1998 about the statutory service complaints process available to members of the armed forces, that were excluded on a literal interpretation of s. 121 Equality Act 2010.

The EAT held that the ET had erred in finding that the claimant's rights under Article 6 read with Article 14 ECHR were breached since the respondent had justified the exclusion of complaints about the service complaints process from the jurisdiction of the ET. The MOD had satisfied the objective justification test and it was therefore not necessary to decide whether the applicable test was manifestly without reasonable foundation, or a more stringent test, since the more stringent test had been met.

The ET had also erred in concluding that it had power to read down the legislation to enable the claimant to bring ET proceedings about the service complaint procedure, since to do so was not possible and went against the grain of the legislation *(Ghaidan v Godin-Mendoza* [2004] 2 AC 557 SC at [33].

The cross-appeal failed and the EAT upheld the ET's finding that the European Union (Withdrawal) Act 2018 at the applicable time[1] prevented it from reading down the legislation, since the read down proposed "disapplied" an enactment and went beyond interpretation (see Schedule 1 para 3(2)(a) European Union (Withdrawal) Act 2018). The ET was therefore correct in its conclusion, but in any event the ET would not have been able to read down the legislation for the same reason that it could not do so in the Human Rights Act 1998 challenge.

[1] as it was prior to the changes wrought by the Retained EU Law (Revocation and Reform) Act 2023.

THE HONOURABLE MRS JUSTICE STACEY

Introduction

1. This appeal concerns the jurisdiction of the Employment Tribunal ("ET") under the Equality Act 2010 ("EqA 2010") to consider complaints by members of the armed forces about the conduct and outcome of complaints that have been made under the statutory service complaints procedure specific to the armed forces.

2. The appellant, the Ministry of Defence ("MOD"), is the respondent before the ET and the respondent to the appeal, Mrs Anne Rubery, is the claimant below. I shall continue to refer to the parties as they are before the ET.

3. In a judgment sent to the parties on 14 November 2022 following a preliminary hearing held on 20 July 2022 in the South East Regional office of ETs sitting in Watford, Employment Judge Hanning dismissed the respondent's application to strike out the claimant's claim. He concluded that the ET had jurisdiction to hear the claim. He found that the exclusion from the jurisdiction of the ET of complaints about maladministration and discrimination within a service complaint by s.121 EqA 2010 constituted a violation of the claimant's rights under Article 14 of the European Convention of Human Rights ("ECHR") read with Article 6 ECHR. He interpreted s. 121 EqA 2010 so as to avoid that violation in exercise of the duty in s.3 Human Rights Act 1998 ("HRA 1998") by reading additional words into that section. With the permission of the sift judge in this Tribunal, under rule 3, the respondent appeals both the finding of violation of the claimant's ECHR rights (ground 1) and the use of s.3 HRA 1998 to read the claimant's proposed additional subsection into s.121 EqA 2010 (ground 2).

4. Although it did not arise in light of his conclusions under HRA 1998, the Employment Judge also noted that s.121 EqA 2010 may be incompatible with retained EU principles of effectiveness and equivalence, but found that the European Union (Withdrawal) Act 2018 ("EU(W)A 2018") Schedule 1, paragraph 3, prevents a court or tribunal from disapplying any enactment or other rule of law on the grounds of incompatibility with EU law. With leave of the sift judge, the claimant cross appeals on

grounds that the ET erred in not applying retained general principles of EU law, arguing that EU(W)A 2018 did not have the effect found by the Employment Judge.

5. The jurisdiction of the ET to consider complaints of discrimination in the service complaint procedure have been raised in another claim, H v MOD (2601422/2020), which took place after the decision in this case was promulgated, before a differently constituted ET which reached a different conclusion and found that it did not have jurisdiction to consider H's claim.

6. I am grateful to both parties for their comprehensive and helpful submissions and meticulous bundle preparation.

Preliminary matters

7. At the outset of the hearing I granted the claimant's application to rely on additional documents (in addition to the supplementary bundle that had been agreed) which included background documents such as the original service complaint, extracts from the initial decision arising from the service complaint and the two stages of appeal. I rejected the respondent's submission that the underlying facts were prejudicial rather than helpful. Whilst the issues in this case are a matter of law, it is relevant and informative to understand the context and have sight of the underlying complaint and to see its progress through the internal procedure. It may also be relevant to the legal points raised.

8. Both parties criticised the other for moving the goal posts. The claimant argued that the respondent had shifted its ground in what it said was the legitimate aim relied on for excluding the service complaints procedure from the scope of potential ET proceedings, which was strongly disputed by the respondent. The respondent criticised the claimant for only before the EAT focussing on the difference between the way in which former armed service personnel are dealt with under the procedure as compared to serving personnel, as an "other status" under Art.14, whereas before the ET the "other status" of service personnel in contra-distinction to civilian employees was the focus of the argument.

Factual and procedural background

9. The claimant, Squadron Leader Mrs Anne Rubery, has served in the Royal Air Force ("RAF") for over 30 years, and is currently engaged as a Personnel Support officer Squadron Leader. On 27 September 2018 she submitted a service complaint that she had been mistreated, undermined, unsupported and mismanaged in the workplace by her chain of command. The complaint included a complaint of bullying and discrimination: "By excluding me from the opportunity to develop professionally by not supporting or informing me of any issues and offering a way forward in time to rectify this. By failing to take on any management of welfare despite going through IVF treatment and a permanent medical board. By informing me during an OJAR debrief I was good enough to be an 'Admin' Wg Cdr, but not a more 'Broad' Wg Cdr. By sending an email which contained a derogatory depiction towards a female." She also alleged dishonest and biased behaviour which had some overlap with the bullying and discrimination complaint. She identified a number of RAF officers who had behaved in the ways complained of and specifically Wg Cdr Bradley who was alleged to have used discriminatory and sexist language, and from her line management (Group Cpt Flynn, Wg Cdr Bedford and Wg Cdr Middleton) whilst undergoing IVF treatment.

10. Air Cdre Shaun Harris was appointed as the Decision Body ("DB") to determine her complaint under the service complaint procedure. He reviewed the evidence in the case file and obtained whatever additional evidence he considered he required, which was then disclosed to the claimant. The claimant considered that the disclosed evidence, such as Wg Cdr Bradley and Wg Cdr Ward's referring to her as "ballsy", and suggesting that she "grow a pair" in response to her allegations, constituted further instances of sex discrimination and wronged her. The DB agreed to consider these further allegations as part of the service complaint since she would have had no knowledge of this evidence prior to it being disclosed to her and could not therefore have raised it in her initial service complaint.

11. In brief introductory outline a service complaint may be made about any matter relating to the complainant's service in respect of which they consider themselves to have been wronged. It is not limited to allegations of discrimination under EqA 2010. It is a bespoke statutory complaints regime specific to the armed forces, currently governed by the Armed Forces Act 2006 ("AFA 2006"), the Armed Forces (Service Complaint) Regulations 2015 ("the Service Complaint Regs 2015") and the

Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015 ("the Miscellaneous Provisions Regs 2015"). An appeal against a service complaint decision may be brought to the Defence Council on a number of grounds and there is a further stage to the Service Complaints Ombudsman for the Armed Forces ("SCOAF").

12. Squadron Leader Rubery's service complaint was determined without an oral hearing, contrary to her request, by letter dated 30 October 2020 by the DB. It was largely dismissed and all her allegations of sex discrimination and harassment and dishonest and biased behaviour were dismissed. Where the claimant had seen poor and discriminatory treatment of her in her absences for IVF, the service complaints officer, Shaun Harris, found that "all available evidence shows that your Line Managers, and those who worked around you, were compassionate and caring about your medical situation and did not treat you less favourably because of your sex." He found that the term "ballsy" is used to describe each gender equally and nor was it discriminatory to use the phrase "grow a pair" which he concluded is also used in reference to both genders equally and the terminology used by Wg Cdr Bradley and Wg Cdr Ward did not meet the threshold of bullying.

13. One aspect of the service complaint was partially upheld to the extent that the claimant was wronged in not being informed that proposals to move her away from the "Typhoon swim-lane" were partially based on continued concerns about her performance. The DB also made an observation that Wg Cdr Bradley made some "poorly judged comments in his evidence in response to the service complaint, which – although not discriminatory against you – he would normally have been counselled about once they came to light." Since he had by then left the service it was no longer possible to provide him with such counselling. The claimant received an apology for those comments and was given an assurance that anonymised lessons from her service complaint would be shared with the HQ Air Diversity & Inclusion Team "to further reinforce in our training the potential impact of poorly judged colloquialisms" (a reference to use of the terms such as "grow a pair" and "ballsy"). The DB apologised for the delay in reaching a decision.

14. The claimant was dissatisfied with the outcome of the DB. On 1 December 2020 she exercised her right through the service complaint procedure to appeal both the findings of the outcome of the service

complaint and the way in which it had been dealt with, in part relying on the evidence of the officers about whom she had complained, whom she considered had used sexist language about her which she considered constituted more derogatory treatment of her. An appeal body ("AB") was appointed under the procedure. Her request for an oral hearing of the appeal was refused. Other than finding that there had been an inordinate delay in the determination of the service complaint so as to amount to maladministration, all other aspects of the appeal were dismissed by the AB on 28 April 2021. Under the service complaints procedure it was a requirement that both the complainant and the respondent maintain the confidentiality of all aspects of the investigation process and the outcome of both the DB and AB.

15. On 4 June 2021 the claimant presented a complaint to the SCOAF.

16. On 9 July 2021 the claimant lodged ET proceedings claiming sex discrimination and harassment in respect of the matters raised in her service complaint that had been rejected, as she was entitled to do under s.121 EqA2010. Those proceedings have been stayed by consent.

17. The SCOAF completed its report on 21 December 2021[2]. In her report the SCOAF was critical of the way in which the claimant had been treated by her line management and found that she had not been given the support required and that various provisions had not been adhered to, but did not find that the claimant had been treated differently due to her sex. The SCOAF was also critical of factual inaccuracies in the AB's decision and found that its determination had been unsatisfactory in parts. She criticised the AB's failure to appreciate the failings of management and lack of support of the claimant. The failure of the AB to recognise that a supposedly humorous email called the "Texas Chilli Cook Off" (presumably the email complained of as a "derogatory depiction towards a female" in the original service complaint) was "wholly inappropriate… objectifies the female and is especially offensive to women" was subject to particular criticism by the SCOAF. The SCOAF was also critical of the reliance the AB placed on the fact that no-one else had complained by the AB and DB: "The fact that no one was apparently offended by or challenged the use of this language is no excuse for its use." The SCOAF found that there was an overly masculine culture in the unit which appeared to

[2]Only a few of the 40 pages were produced in the bundle for this tribunal.

show disregard for the female workforce. The SCOAF stated that "I do not consider the spirit of the RAF's Ethos, Core Values and Standards has been adhered to when the AB decided that the phrases or use of language were not considered to be objectively offensive, sexist or gender related." The SCOAF found the substance of the complaint to be partially upheld, but not on the grounds of discrimination or harassment. The SCOAF found that the AB had been correct in their finding of maladministration for the undue delay in the handling of the service complaint.

18. The claimant had also challenged the AB's decision not to agree to the claimant's request for an oral hearing of her complaint. The SCOAF rejected this ground of appeal since the AB had a discretion whether or not to hold an oral hearing and had fully explained their reasoning behind their decision.

19. The SCOAF recommended a payment of a "moderate consolatory payment in line with the SCO's [SCOAF] financial remedy guidelines" of £1,000- £2,000 and an apology. A number of officers and the AB were required to consider the implications of the findings set out by the SCOAF in her report and provide an action plan setting out how it would implement the recommendations, copied to the claimant within 3 months, and to keep her updated on progress on their implementation. The SCOAF considered that there were wider lessons to be learnt from the findings in their report and the RAF must reconsider how personnel are currently refreshed on their inclusion and diversity, equal opportunities and core values training.

20. Following the rejection of her service complaint, the claimant issued a further ET claim on 9 July 2021 – these proceedings and the subject of this appeal – alleging sex discrimination and victimisation in the service complaints procedure. The issues were summarised in the judgment below as follows:

    a. "Indirect discrimination in the respondent's practice of not holding oral hearings which amounts to an indirectly discriminatory PCP [provision, criterion or practice] in that (a) women are more likely to present service complaints; and (b) the failure to hold oral hearings presents additional barriers to proving discrimination.
    b. Victimisation in that service complaints (and the amendments) constituted a protected act and that because of the complaint, the respondent is alleged to have contorted its process in various ways so as to avoid upholding a discrimination complaint essentially by way of a wholesale failure to investigate certain matters (or an inadequacy of investigation), a failure to convene an oral hearing and the adoption of conclusions which were at odds with the facts."

21. The allegations of indirect discrimination and victimisation were made against both the DB and the AB.

The law

22. The applicable EU and ECHR law is set out below under the relevant issue headings, but the current domestic statutory provisions and legislative history is more conveniently set out here.

The current domestic statutory framework

ET jurisdiction

23. ETs are creatures of statute, without inherent jurisdiction (see Irwell Insurance Co Ltd v Watson [2021] ICR 1034, CA at [17]). Section 120(1)(a) EqA 2010 confers jurisdiction on the ET to determine complaints under the EqA 2010 relating to a contravention of Part 5 (Work), subject to s.121 EqA 2010. Part 5 applies to service in the armed forces as it applies to employment by a private person (s..83(3) EqA 2010 interpretation and exceptions clause) so that references to terms of employment, or to a contract of employment, are to be read as including references to terms of service.

24. However, unlike civilian employees and workers, members of the armed forces who wish to bring claims of discrimination and breach of the EqA 2010 in the employment context are required first to make a service complaint before bringing a claim about the matter complained of, since s.121 provides that:

> (1) Section 120(1) does not apply to a complaint relating to an act done when the complainant was serving as a member of the armed forces unless –
> a. The complainant has made a service complaint about the matter, and
> b. The complaint has not been withdrawn
> …
> (5) The making of a complaint to an employment tribunal in reliance on subsection (1) does not affect the continuation of the procedures set out in the service complaints regulations.
> (6) In this section –
> "the 2006 Act" means the Armed Forces Act 2006;
> "service complaints regulations" means regulations made under section 340B(1) of the 2006 Act."

25. Once a complaint has been made (and provided it has not been withdrawn), the service complaints procedure and ET procedure run independently of one another. ET and service complaint proceedings

may therefore run in parallel although in practice ET proceedings are usually stayed by consent until the conclusion of the service complaints procedure. That has not always been the case in respect of all complaints of discrimination. Prior to implementation of s.121 EqA 2010 on 1 October 2010, s.75(9)(b) Race Relations Act 1976 provided that no complaint could be presented to an ET unless the Defence Council had made a determination of the complainant's service complaint and ET claimants therefore had to wait until the outcome of their service complaint before commencing a claim in the ET.

26. Reference to a service complaint in s.121(1) is a reference to a service complaint which has been accepted as valid by the prescribed officer under the service complaint procedure, but a decision by the prescribed officer to refuse to accept what purports to be a service complaint can be challenged by judicial review (*Molaudi v MOD* UKEAT/0463/10/JOJ; case note at [2011] ICR D19, EAT; at [24] and *Crompton v UK* [2009] ECHR 42509/05 at [79])).

Service complaint provisions

27. The system for redressing service complaints is governed by Part 14A AFA 2006 headed "Redress of Service Complaints", ss.340A-340O AFA 2006, which was inserted by the Armed Forces (Service Complaints and Financial Assistance) Act 1015. Section 340A AFA 2006, with the heading "Who can make a service complaint", provides as follows:

> (1) If a person subject to service law thinks himself or herself wronged in any matter relating to his or her service, the person may make a complaint about the matter.
> (2) If a person who has ceased to be subject to service law thinks himself or herself wronged in any matter relating to his or her service which occurred while he or she was so subject, the person may make a complaint about the matter.
> (3) In this Part, "service complaint" means a complaint made under subsection (1) or (2),
> (4) A person may not make a service complaint about a matter of a description specified in regulations made by the Secretary of State."

28. Section 340B AFA 2006 provides for the procedure for making a service complaint and determining admissibility and confers on the Defence Council the power to make regulations about the procedure for making and dealing with a service complaint. The Defence Council is the body established pursuant to s.1 Defence (Transfer of Functions) Act 1964, which has powers of command and administration over His Majesty's armed forces. The procedure for making and dealing with a service

complaint are contained in the Service Complaints Regs 2015.

29. In so far as the service complaints procedure is concerned, where the Defence Council makes service complaints regulations, s340B(2) AFA 2006 stipulates a number of mandatory requirements to be provided for, such as specifying the description of the officer to whom the complaint may be made, time limits for making a complaint, and how issues of admissibility of a service complaint are to be dealt with. The Service Complaints Regs 2015 make provision about the procedure for making and dealing with a service complaint, setting out time limits, the appeal route and other procedural matters, which are set out in a little more detail as relevant below.

30. The Miscellaneous Provisions Regs 2015, reg. 3, Excluded Complaints, sets out two categories of complaints about which a person may not make a service complaint (as might be expected from the title of the regulation). The first category is set out in reg 3(1) which provides that a person may not make a service complaint about a matter within the Schedule to the regulations. Paragraph 1 to the Schedule lists a range of specific excluded matters, none of which are relevant to the facts of this case, such as a claim capable of being the subject of a claim for clinical negligence or personal injury against the MOD or a decision made under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011. Paragraph 2 to the Schedule then provides for an override to the list of excluded complaints where the complaint is an allegation that the complainant has been the subject of –

    (a) discrimination,
    (b) harassment,
    (c) bullying,
    (d) dishonest or biased behaviour or
    (e) a failure of the Ministry of Defence to provide medical, dental or nursing care for which the Ministry of Defence was responsible. (reg 5(2))

Reg 5(4) defines "discrimination" for the purposes of the regulation as follows:

> "In this regulation, "discrimination" means discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender reassignment, status as a married person or civil partner, religion, belief or sexual orientation, and less favourable treatment of the complainant as a part-time employee."

It therefore follows that an allegation of discrimination may be made in a service complaint about any of the matters listed in the Schedule to the Miscellaneous Provisions Regs 2015, but where the complaint is in relation to, for example, a complaint about a decision made under the Armed Forces

and Reserve Forces (Compensation Scheme) Order 2011 (which is listed in the Schedule at para 1(g)), but does not include an allegation of discrimination or any of the other matters listed in reg. 5(2), it is excluded from the service complaints regime.

31. The second category of excluded complaint is contained in Reg.3 (2) which sets out a list of excluded complaints:

> "3(2) A person may not make a service complaint about—
> (a) a decision under regulations made for the purposes of section 340B(4)(a) (admissibility of the complaint);
> (b) a decision under regulations made for the purposes of section 340C(2) (decision on the service complaint);
> (c) a decision under regulations made for the purposes of section 340D(2)(c) (decision relating to whether an appeal has been brought before the end of the specified period);
> (d) a determination of an appeal brought under regulations made for the purposes of section 340D(1) (appeals);
> (e) alleged maladministration (including undue delay) in connection with the handling of his or her service complaint;
> (f) a decision by the Ombudsman for the purposes of any provision of Part 14A of the Act;
> (g) the handling by the Ombudsman of a service complaint;
> (h) a decision for the purposes of regulations made under section 334(2) whether a service complaint could be made about a matter;
> (i) a decision under regulations made for the purposes of paragraph (b) of section 334(5) whether a service complaint, or an application referred to in that paragraph, could be made after the end of a prescribed period."

32. Thus, broadly speaking, complaints about the service complaint procedure are exempt by reg. 3(2). For the matters listed in reg.3(2) the exclusion of the complaint is absolute. There is no exception or override for allegations of discrimination or any of the other matters listed in reg.5(2) such as is contained in para 2 of the Schedule in relation to the matters that are excluded by reg.3(1).

33. A service complaint is made by making a statement of complaint in writing to a specified officer appointed by the Defence Council. It must specify a number of matters, including whether it includes a complaint of discrimination or harassment (Service Complaints Regs 2015 reg.4(2)(c)). The specified officer decides whether such a complaint is admissible (reg. 5 Service Complaints Regs 2015). It will not be admissible if it is about a matter excluded by reg.3(2) of the Miscellaneous Provisions Regs 2015 by s.340B(5)(a) AFA 2006.

34. If the complaint is admissible, the specified officer must refer it to the Defence Council, which decides whether the complaint is to be dealt with by a person or panel appointed by the Defence Council or by the Defence Council itself (regs. 5(3) and 9(1) Service Complaints Regs 2015). Any person or panel

appointed must be authorised to grant appropriate redress (AFA 2006, s.340C(3)). The person or body which the Defence Council has decided should deal with the complaint – the DB - will carry out such investigation as they see fit and then determine whether the complaint is well-founded and, if so, what redress (if any) should be granted, and notify the complainant in writing of the decision and their rights of appeal (reg 9(2) and 14 Service Complaints Regs 2015).

35. If the first decision was made by a person or panel appointed by the Defence Council, there is a right of appeal to the Defence Council, which will again decide whether to appoint a further person or panel to determine the appeal or to determine the appeal itself (Service Complaints Regs 2015, regs. 10 & 13(1)). In the case of a service complaint that includes a complaint of discrimination, the Defence Council must appoint a person who is independent, or a panel that includes at least one independent member, to hear the appeal, and they must again be authorised to grant appropriate redress (Miscellaneous Provisions Regs 2015, reg. 5; AFA 2006, s340D(4)). The person or panel may then carry out such investigation as they see fit and will then determine whether the complaint is well-founded and, if so, what redress (if any) should be granted. If the Defence council decides that an appeal cannot be proceeded with, because it has not been brought on at least one valid ground or has been brought out of time, it must notify the complainant in writing of the decision and their right to apply for a review of that decision to the SCOAF (Service Complaints Regs 2015, regs. 11, 12, 13(2)-(3) & 14).

36. The complainant may then apply to the SCOAF for a review of the Defence Council's decision. The SCOAF may investigate the substance of the service complaint and/or any complaint of maladministration or undue delay in respect of its handling for herself and determine whether any of those matters are well-founded (AFA 2006, s340H(1)&(6)-(7)). In conducting an investigation into any such matters, the SCOAF has the same powers as the High Court to compel attendance and examination of witnesses and/or production of documents (AFA 2006, s340J). Obstruction of the SCOAF's investigation is a contempt of court (AFA 2006, s340K).

37. If the SCOAF upholds any complaint, she may make recommendations for redress (AFA 2006, s340L(1)-(2)). In particular, where the SCOAF has upheld a complaint of maladministration or undue delay in respect of the conduct or outcome of a service complaint itself, she may make "any

recommendations that the Ombudsman considers appropriate, including recommendations for the purpose of remedying (a) the maladministration or undue delay to which the finding relates, and (b) any injustice that the Ombudsman considers has been sustained, in consequence of the maladministration or undue delay, by the complainant" (AFA 2006, s340L(3)).

38. The Armed Forces (Service Complaints Ombudsman Investigation) Regs 2015 ("the SCO Investigation Regs 2015") make provision about SCOAF investigations and the procedure to be followed, the decisions the SCOAF is required to make, and provisions concerning the preparation and confidentiality of the SCOAF draft report of an investigation and the like.

Domestic legislative history

39. The respondent relies on the legislative history of EqA 2010 and AFA 2006 in support of its argument that HRA 1998 cannot be used to interpret s.121 EqA in the way contended for and as was done by the ET. It is therefore necessary to set it out in some detail. It is noted above that the previous requirement for a service complaint to have been determined before ET proceedings could be lodged under s.75 Race Relations Act 1976 were repealed on implementation of s.121 EqA 2010 on 1 October 2010, but in other respects there were no changes brought about by the implementation of EqA 2010 to access to the ET by armed forces personnel. Indeed the explanatory notes to the EqA 2010 state at para 396 that s.121 "is designed to replicate the effect of provisions in the previous legislation."

40. At the time of the enactment of EqA 2010 the service complaint procedure was governed by ss.334-339 AFA 2006 and the regulations made thereunder: the Armed Forces (Redress of Individual Grievances) Regulations 2007 (the "Individual Grievances Regs 2007") and the Armed Forces Redress of Individual Grievances (Procedures and Time Limits) Regulations 2007. Under those provisions, as with the current regime, there were two categories of excluded complaints. Under reg. 3 of the Individual Grievances Regs 2007 a person could not make a service complaint about a matter within Schedule 1 to those regs. Schedule 1 para 1 listed similar matters to those contained in para 1 of Schedule to the Miscellaneous Provisions Regs 2015 and the Schedule to the Individual Grievances Regulations 2007 also exempted from the list of excluded complaints in para 1 of the Schedule, complaints including allegations of discrimination, harassment, bullying and dishonest, improper or

biased behaviour, in similar terms to the Miscellaneous Provisions Regs 2015. By reg. 4 Individual Grievances Regs 2007 a person could not make a service complaint about a decision of the Defence Council or its delegate as to whether a service complaint was well-founded and any decision as to redress. As with the current regime, there was no override to the exclusion for discrimination and victimisation complaints about such matters.

41. The position was modified 5 years later with the Armed Forces (Service Complaints and Financial Assistance) Act 2015 ("the 2015 Act") which repealed ss.334-339 AFA 2006 and introduced new primary legislation and the amendments set out in Part 14A AFA 2006 which came into force on 1 January 2016 together with the suite of service complaint statutory instruments set out above. The main changes were the introduction of the SCOAF and procedural changes not directly relevant to the issues in this case. The Individual Grievances Regs 2007 were repealed. The successor to reg 4 of the Individual Grievances Regs 2007 is reg. 3(2) Miscellaneous Provisions Regs 2015, which effectively excludes the same matters that had previously been the decisions of the Defence Council (or its delegate) under the repealed sections of AFA 2006.

42. Schedule 1 to the 2015 Act made consequential amendments to s.121 EqA 2010 in paras 12-15 to reflect changes, not relevant to this case, such as when a service complaint is treated as being withdrawn and consequential amendments required to take account of the creation of the SCOAF, none of which are relevant to the issues in this case.

43. An Explanatory Memorandum to the Miscellaneous Provisions Regs 2015 prepared by the MOD was laid before parliament at the time of coming into force of the package of statutory instruments required to implement the new service complaints system for the armed forces. In it, the Parliamentary Under Secretary of State (Minister for Defence Personnel and Veterans) stated that in his view the provisions of the Miscellaneous Provisions Regs 2015 are compatible with the rights set out in ECHR (para 6.4). The policy background was explained as follows:

> "7.1 Members of the armed forces have no contract of employment and no system of collective bargaining. Disobedience to lawful commands are offences under the 2006 Act, pay and other benefits are determined and altered unilaterally, and historically the rights of service personnel to bring legal claims against the Crown are also limited. It has therefore long been recognised that members of the armed forces should have some other effective way of obtaining redress for grievances.
> …

> "7.4 The regulations in this instrument have the following aims
> …..
> By excluding matters from being raised as a service complaint, the intention is to prevent repeat complaints, challenges to decisions made in the internal system or by the Ombudsman, and otherwise to exclude complaints where adequate alternative remedies are available."

44. It is common ground that the status of the explanatory memorandum is admissible as an aid to construction, for identifying the legislative purpose, the mischief at which the legislation is aimed, the legislative context, or for any other logical value that it has: *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956, HL, §§2-5 per Lord Steyn.

ET proceedings and decision

45. In light of the dispute about how the case was put below it is necessary to delve a little into the procedural history and trace through how the respondent put its case on proportionality. In the respondent's ET3 they simply relied on the wording of ss.120 and 121 EqA 2010 to assert that the ET had no jurisdiction to consider the claim, without engaging with HRA 1998 or the EU or ECHR law. That was unsurprising since the claimant did not address the jurisdictional difficulties in the ET1 and attached particulars of claim. It was not for the respondent to anticipate and meet arguments that had not been made. In the respondent's supplementary skeleton argument served 5 days before the preliminary hearing on 20 July 2022, after it had become clear that the claimant would be relying on articles 6, 14 (and at that stage also article 8) ECHR to read down a non-literal interpretation of the statute, they identified the aim being pursued as:

> "achieving adequate (though not absolute) finality of the internal SC process and its protection from repeat claims, or concurrent external claims. Owing to the availability of referral to SCOAF and judicial review in the High Court the measure balances the legitimate statutory aim of enabling the Armed Forces to determine complaints internally prior to litigation, while at the same time preserving a service-person's right to access a court if ultimately dissatisfied with the internal outcome and/or Ombudsman review." [44].

46. In their grounds of appeal before this tribunal the justification for the overall legislative framework is stated to be "the prevention of concurrent proceedings of the SC [service complaint]/SCOAF process and the ET only as to an SC panel's handling of the SC process itself." [7.3]. The source of the aim derives from the explanatory memorandum to the Miscellaneous Provisions Regs 2015 set out above. I am satisfied that consistent with the less formal procedural requirements in the ET the respondent's case has been sufficiently set out, has remained sufficiently consistent and the claimant (who is

represented by very experienced counsel in this area) was on notice and aware of the issues being raised against her in advance of the preliminary hearing. Of the three perceived mischiefs that were identified requiring some complaints to be excluded described in the explanatory memorandum at para 7.4 (i) preventing repeat complaints, (ii) preventing challenges to decisions made in the internal system or by the SCOAF, and (iii) otherwise to exclude complaints where adequate alternative remedies are available, the respondent was squarely relying on (ii).

47. As to the respondent's criticism of the claimant changing her position in relying on the "other status" of being a serving member of the armed forces compared with an ex-service personnel, although the claimant's 36 page submissions before the preliminary hearing did not majorly focus on the differential treatment as between current and serving armed forces personnel under the service complaint regime and access to the ET, it was clearly identified as a formulation of one of the two relevant statuses relied on – namely (1) being a member of the armed forces; or alternatively (2) active as compared to past service in the armed forces" [59] which are both said to be capable of falling within the scope of "other status" in the written submissions.

48. I am therefore satisfied that the claimant's statement of case has also remained sufficiently constant and the respondent (who is also represented by very experienced counsel in this field) has not been taken by surprise or disadvantaged in any way by what is merely a change of emphasis. In any event, both sides confirmed that they had had time to prepare and meet all the points advanced against them as they now understood them.

ET decision

49. Before the ET and this tribunal it is common ground that applying ordinary principles of construction, the literal effect of s.121 EqA 2010 read with AFA 2006 and the Miscellaneous Provisions Regs 2015 is that a member of the armed forces cannot bring a claim under the EqA 2010 about the conduct or outcome of a service complaint because they cannot first bring a service complaint about such matters and without a service complaint the ET has no power to consider a claim. The ET does not have jurisdiction to consider the claim unless the statutory provisions breach the claimant's ECHR and/or retained EU law and the statute can be interpreted and construed purposively so as to comply with the ECHR or retained EU law.

50. Before the ET the claimant's argument succeeded under HRA 1998. It was conceded that access to the ET fell within the ambit of Art 6 ECHR and that the status of being a serving serviceperson constituted "other status" for the purposes of Art 14. Service personnel and civilian employees were found to be in an analogous situation as regards the enforcement of complaints of discrimination, the ET finding that "there is an obvious difference in treatment in that service personnel are barred from the Employment Tribunal but civilians are not". The judge rejected the respondent's argument that there is no analogy between service personnel and civilian workers/employees because civilians have no statutory appeal route with the following reasoning:

> "79. In my judgment, in light of the decisions in *Michalak* and *P* as well as *Chief Constable of Avon and Somerset Police v Eckland* [2022] ICR 606, it is clear that the Employment Tribunal is the appropriate forum for complaints of this nature and access to SCOAF or judicial review are not. Neither of the latter offers the expertise, independence and remedial powers inherent in the Employment Tribunal.
>
> 80. It seems to me that service personnel and civilians seeking to complain of discrimination in the handling of their internal complaints are in a directly analogous position and this is not altered by the fact the service personnel may have some limited additional remedies."

51. The ET also rejected the respondent's arguments on justification and found that Art 14 discrimination was not objectively justified. The aim relied on by the respondent, as set out in the ET decision, was securing "adequate (though not absolute) finality of the internal service complaint process and its protection from repeat claims, or concurrent external claims" [81]. The ET found that whilst finality and the prevention of repeat claims were legitimate aims, there was no evidence that exclusion of the ET was the intended aim:

> "82. I accept that the aims of finality of the internal SC process and protection from repeat claims are legitimate ones and the exclusion of complaints about that process, in and of itself, would be a proportionate means of achieving them. But the result of the exclusion is more than simply that service personnel cannot make a service complaint; it also bars their access to the Employment Tribunal.
>
> 83. There is no evidence that this was the intended aim, nor rightly, is it said that this would be a legitimate aim. It is obviously not a proportionate means of achieving the actual stated aim. Barring a claim from the Employment Tribunal is a much broader outcome than is needed to achieve finality of the internal SC process.
>
> 84. The reference to 'concurrent external claims' being an aim of the 2015 Regulations cannot be right. Service personnel may currently make a service complaint and then submit a claim to the Employment Tribunal. There is no requirement to wait for the service complaint to be determined before the Employment Tribunal may be seized of the matter. Nothing in the 2015 Regulations changed that save in respect of complaints about the SC process itself.
>
> 85.I am therefore satisfied that the respondent has not shown justification for barring of

complaints of discrimination about the SC process from the jurisdiction of the Employment Tribunal.

Conclusion
86. By excluding such complaints from the service complaint process, the effect of the 2015 Regulations is to make it impossible for a claimant to bring to the Employment Tribunal a complaint about discrimination in the service complaint process itself.

87. While that may well be incompatible with the retained EU principles of effectiveness and equivalence, the Tribunal is barred from disapplying the material provisions by paragraph 3 of Schedule 1 of EUWA 2018.

88. However, I consider that the natural reading of the legislation would be inconsistent with the claimant's rights under (at least) Articles 6 and 14 of the ECHR and it is therefore appropriate to interpret s121 EqA 2010 in such a way as to avoid that violation.

89. In my judgment, the simplest way to achieve this would be to read in the words "where the complainant is entitled to do so, " to the start of s121(1)(a). However that would have a much broader effect than is required for this claim so I am content to adopt the claimant's suggestion there be read in:
"(1A) Section 121(1) is not applicable to the extent that the matter is an excluded matter as defined by Reg.3(2) Armed Forces (Services Complaints Miscellaneous Provisions) Regulations 2015."

90. In light of the above I dismiss the respondent's application to strike out the claims.".

52. The judge found that the claimant's suggested construction and proposed modification to the wording of s.121 EqA 2010 did nothing to undermine the stated intent and result of the regulations and would not fly against the grain of s.121 EqA 2010. The underlying purpose of s.121 EqA2010 was for the services to deal with its complaints in the service complaint process first. He found that even on the respondent's own case, finality is not absolute since recourse to judicial review and SCOAF remain and he found that the applicable regulations did not intend to oust the jurisdiction of the ET. The judge rejected the respondent's argument that it was not a permissible use of the s.3 HRA 1998 power because it cut across a fundamental feature of the legislation and strayed into policy questions which were for parliament to decide. The judge therefore read in an additional subsection to s.121 EqA 2010 as set out above (paragraph 51, sub-paragraph 89).

53. The Tribunal also considered the issue of whether it could disapply any provision on the grounds of incompatibility with general principles of EU law. As is clear from the extract above, the judge concluded that had it been necessary, he would have concluded that the exclusion of complaints of sex discrimination in the service complaints procedure would have been incompatible with the EU general

principles of effectiveness and equivalence. But since 31 December 2020, the effect of Sched. 1, paragraph 3 of EU(W)A 2018 prevented a court or tribunal from disapplying any enactment or other rule of law on the grounds of incompatibility and the ET was barred from relying on incompatibility as grounds to disapply or quash the operative part of s.121 EqA 2010.

Issues in the appeal

54. The broad issues arising in the appeal identified by the parties were stated to be:

    1. What is the scope and effect of the service complaints regime, including the SCOAF powers and procedures?
    2. Does a literal reading of s.121 EqA and s. 340A AFA 2006 together with the Miscellaneous Provisions Regs 2015 breach Article 14 read with Article 6 by treating members of the armed forces differently from other comparable occupational groups in a way that is not justified?
    3. If so, is it permissible to "read down" the legislation so as to achieve a compatible interpretation under s.3(1) HRA 1998?
    4. Alternatively, does such a literal reading breach retained general principles of effectiveness and/or equivalence under EU law?
    5. If so, can effect be given to those principles in light of the UK's withdrawal from the EU and para 3 of Schedule 1 to EU(W)A 2018 which, after the end of the implementation period on 31 December 2020, prohibits the disapplication of any enactment on grounds of incompatibility with general principles of EU law?

55. After the hearing counsel helpfully produced a more detailed table of the issues between them and their respective positions for which I am grateful.

Issue 1: What is the scope and effect of the service complaints regime, including the SCOAF powers and procedures?

56. The framing of the issue by the parties was wider than is needed for determination of this appeal. In so far as is necessary the provisions of the service complaints regime and SCOAF powers have been set out above and are discussed below where relevant to the legal issue for determination. It is not

proposed to undertake a free-standing analysis suggested by the wording of issue 1.

Issue 2: Does a literal reading of s.121 EqA and s.340A AFA 2006 together with the Miscellaneous Provisions Regs 2015 breach Art 14 read with Art 6 by treating members of the armed forces differently from other comparable occupational groups in a way that is not justified?

57. The Claimant relies on Articles 6 and 14 of the ECHR: Article 6: that "In the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law….''; and Article 14: that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour…or other status".

58. The claimant no longer relied on article 8, article 6 as a freestanding claim or article 1 protocol 1. The sole issue was whether there was a breach of ECHR article 14 read with article 6, since article 14 is not a freestanding right.

59. The parties agreed that the ET considered the correct test, set out by Lady Black in *R(Stott) v Secretary of State for Justice* [2020] AC 51 at [8] that identified the following 4 questions.

    (i) Are the circumstances within the ambit of another Convention right?

    (ii) Is there a difference in treatment on the ground of one or other of the characteristics listed in Art 14 or "other status"?

    (iii) Are the claimant and the person who has been treated differently in analogous situations?

    (iv) Is the difference in treatment objectively justified?

60. The parties also agreed that questions 3 and 4 overlap and in some cases it may be helpful to focus primarily on justification.

61. Only questions 3 and 4 were contentious. As for questions 1 and 2, it was common ground that the circumstances in the claimant's case are within the ambit of another Convention right, namely article 6. It is also agreed that there is a difference in treatment between the claimant, as a serving officer in the RAF, and that of a civilian worker or employee. There are two status relied on, or two aspects of otherness in the one "other status" (nothing turns on the distinction if indeed there is one): being a member of the armed forces as compared to a civilian worker, and being a serving serviceperson as

compared to a former serving personnel.

Analogous situation

62. The respondent challenges the ET's conclusions that members of the armed forces are in an analogous situation with other occupational groups of workers or employees, suggesting there had been a failure by the ET to engage sufficiently with the specific character of the statutory service complaints regime which is a bespoke statutory complaints and appeal process with further recourse to the SCOAF. Mr Cooper KC submitted that civilian employees and workers do not have access to such a scheme which was in some respects better than the opportunities and remedies available through the ET, with the consequence that civilians are in a disanalogous situation to service personnel. It was also wrong for the ET to have concluded that ETs are necessarily the appropriate forum for complaints of this nature. He placed great emphasis on the exclusion from the ET jurisdiction of discrimination by occupational qualification bodies where the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal by s 120(7) EqA 2010. These provisions were said by Mr Cooper to be of a piece with s.121 EqA 2010 – they are another example of parliament giving express consideration to the treatment of complaints of discrimination about proceedings or decisions in respect of which a statutory right of appeal is available, and decided to exclude such matters from the jurisdiction of ETs.

63. Mr Milsom sought to uphold the ET's conclusion set out in paragraph 50 above in [80] of the ET decision.

64. A qualifications body is an authority or body which can confer a relevant qualification (s.54(2) EqA2010) and a relevant qualification is an authorisation, qualification, enrolment and similar matters which are needed for, or facilitate engagement in, a particular trade or profession (s.54(3) EqA2010). Obvious examples include the Solicitors Regulatory Authority and the General Medical Council. The simple point is that a qualifications body acting in its capacity as a qualifications body is not in any sense an employer of those on whom it confers qualifications etc. It is performing a different and specialist function, albeit in the broad field of employment since qualifications and accreditation for particular trades and professions provide access to employment and are thus apt for inclusion within the jurisdiction of the ET for determination of allegations of breach of EqA 2010. The relationship

between a qualifications body and individuals who seek or obtain a qualification that the body is authorised to give is very different to that of an employer and an employee or worker. An employee or worker is in a far more analogous position to those who do not have employment contracts with their employer, such as a police officer, member of the armed forces, religious ministers and judges, for example, than the relationship between a trainee lawyer seeking to be enrolled as a solicitor and the Solicitors Regulatory Authority.

65. The thrust of the respondent's argument did not address how it could be said that an ex-service person who had made a service complaint about their time in service could be said to be in a disanalogous position to a service person who had also made a service complaint but had remained in post. Yet the ex-service member would have access to the ET for a complaint about a matter in reg. 3(2) Miscellaneous Provisions Regs 2015 and the service member would not. I can see nothing whatsoever disanalogous in their respective situations. Their situations are otherwise entirely similar.

66. Furthermore, for the reasons discussed below in issue 4, the service complaints regime and access to SCOAF is not analogous. If the Employment Judge had conducted the detailed analysis of the differences between the ET procedure and powers and the service complaints regime, that the respondent says it should have undertaken, it would have reached the same conclusion.

67. The real question at the heart of this issue is whether the differences between the "other status" categories relied on are justified – see *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 [38] and *Steer v Stormsure Ltd* [2021] ICR 1671 CA [50]. I agree with both parties acknowledgement that there is considerable overlap between questions 3 and 4 in *Stott* (see *Stott* at [8]) and it is more helpful to focus on whether the difference in treatment can withstand scrutiny (*R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 [3]).

Justification

68. I have accepted, as explained above, that the respondent has consistently said that its explanation for the difference in treatment is that contained in the explanatory memorandum to the Miscellaneous Provisions regs 2015 at 7.4 which states that the intention of the exclusions of certain complaints from the service complaint regime regulations is (1) to prevent repeat complaints; (2) to prevent challenges to decisions made in the internal system or by the Ombudsman, and (3) otherwise exclude complaints

where adequate alternative remedies are available. Something may have been a little lost in translation at [81] of the ET judgment which summarises the respondent's justification but nothing much turns on it. The claimant and the ET understood what the respondent's explanation was.

69. The reasoning in the ET decision was as follows:

> "81. As to justification, Mr Chegwiddin [sic] relies on the legitimate aim of securing "adequate" (but as he accepts not absolute) finality of the "internal SC process and its protection from repeat claims, or concurrent external claims."
>
> 82. I accept that the aims of finality of the internal SC process and protection from repeat claims are legitimate ones and the exclusion of complaints about that process, in and of itself, would be a proportionate means of achieving them. But the result of the exclusion is more than simply that service personnel cannot make a service complaint; it also bars access to the Employment Tribunal.
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> 83. There is no evidence that this was the intended aim nor, rightly, is it said that this would be a legitimate aim. It is obviously not a proportionate means of achieving the actual stated aim. Barring a claim from the Employment Tribunal is a much broader outcome than is needed to achieve finality of the internal SC process.
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> 84. The reference to 'concurrent external claims' being an aim of the 2015 Regulations cannot be right. Service personnel may currently make a service complaint and then submit a claim to the Employment Tribunal. There is no requirement to wait for the service complaint to be determined before the Employment Tribunal may be seised of the matter. Nothing in the 2015 Regulations changed that save in respect of complaints about the SC process itself.
>
> 85. I am therefore satisfied that the respondent has not shown justification for barring of complaints of discrimination about the SC process from the jurisdiction of the Employment Tribunal.

70. The respondent had two grounds of challenge. The first was that the Employment Judge applied a strict proportionality test when the correct standard to apply was whether the difference in treatment between the a serving member of the armed forces and a civilian worker was irrational or manifestly unreasonable. The second challenged the reasoning of the conclusions: that without a detailed analysis of the differences between the service complaints regime and the ET route of dispute resolution the justification assessment was defective because it could not then conclude that the alternative remedies were inadequate. There was also a more general challenge that the decision had failed sufficiently to grapple with the specific issues in the case.

Discussion and analysis

71. I shall first concentrate on the explanation put forward by the respondent for the difference in treatment, side stepping for the moment the disagreement between the parties about the level of

scrutiny required to determine legitimacy (whether to apply the test of whether the measure was a proportionate means of achieving a legitimate aim, or whether the decision required only some rational explanation, or not to be manifestly without reasonable foundation in order to be justified).

72. It is agreed and accepted that it is a legitimate aim to seek to avoid repeat complaints and to avoid a decision making procedure from becoming bogged down in interminable challenges to that decision making procedure, by way of interlocutory applications and complaints about every decision resulting in satellite litigation that impedes the decision making process and the authority of the decision making bodies at the various stages – DB, AB and finally the SCOAF. It assists in achieving finality of litigation, preventing complaints from taking longer than necessary, and achieving the timely resolution of complaints. In a service environment where high morale and discipline is essential in what is often a closed environment, potentially involving active service, long-running unresolved complaints, like festering sores, are to be avoided if possible. Evidence is not needed for that proposition, it is self-evident and commonsense.

73. The means adopted to achieve that aim is the list of excluded complaints in reg. 3(2) Miscellaneous Provisions Regs. 2015.

74. In this case the complaints that the claimant would like to air before an ET are (1) allegations that the exercise of the discretion to refuse her request for an oral hearing at DB and AB level was refused (framed as indirect discrimination) and (2) a head-on challenge to the findings and outcome of both decisions – criticising both the DB and AB for failing to reach conclusions on some of her allegations, and for accepting the management witnesses' account of events instead of hers, and for not upholding her allegations of discrimination and victimisation (framed as victimisation). She is prevented from doing so by Reg.3(2)(b) which excludes a service complaint about a decision of the DB and Reg.3(2)(d) which excludes a service complaint about a decision of the AB. Since she cannot bring a service complaint about these matters, she is also precluded from lodging ET proceedings. A classic catch-22. A civilian worker would, in principle, be able to include these as allegations in a claim before the ET, subject to compliance with the ET rules of procedure, time limits and so on. So too would an ex-service personnel, provided the matters complained of had arisen during their period of service and not after they had already left.

75. Under the service complaint procedure the claimant was able to challenge the decisions internally through the procedure. The DB allowed her to expand her complaint after the claimant had seen what her line managers had said about her in response to her service complaint. She was then able to appeal the DB decision to the AB and then onward apply for a review to the SCOAF. The excluded matters in reg. 3(2) which cannot form the basis of a service complaint, are within the scope of the appeal and SCOAF process.

76. The AB and SCOAF did indeed criticise the way in which the officers about whom she had complained had responded to her allegations in their evidence to the DB. The SCOAF was critical of the AB and she understood that it was part of her remit to consider if there had been further maladministration in the handling of the service complaint during the DB and AB procedure as part of the internal appeal process (another excluded matter under reg. 3(2)(e) – maladministration in connection with the handling of the service complaint).

77. The claimant may, and has, brought her service complaint about her treatment by her line managers to the ET. Since the DB agreed to amend her service complaint to include her managers' response to her complaint, this too will be in scope of the ET. If her claim is successful and compensation comes to be considered, how her service complaint was dealt with by the DB, AB and SCOAF may well be considered as a possible aggravating or mitigating factor affecting the extent of the injury to her feelings – both sides will have competing arguments to be deployed in this regard. Although the ET will not be able to treat the matters raised in the second ET1 as free-standing complaints on which findings of discrimination and victimisation can be made, there is a wide power to make recommendations which could include recommendations about the service complaints procedure, the holding of oral hearings and the like.

78. The disadvantage to the claimant of the ET not having jurisdiction over the matters listed in reg. 3(2) since they are excluded matters has to be assessed against the adequacy of the service complaints appeal process and the SCOAF and any other remedies available. Adequate does not mean identical.

79. I accept that there is a disadvantage to the claimant of not being able to rely on the excluded matters in reg. 3(2). But bearing in mind and balanced against her rights under the service complaints procedure; that this is satellite litigation from her substantive complaint; and thirdly the ability of the ET to

consider some aspects albeit through a side wind (see *Z v Hackney* [2020] UKSC 40 [2020] 1 WLR 4327 [78-79]) I conclude that the means adopted to achieve the respondent's legitimate aim is proportionate.

80. Thus, on both the so-called strict proportionality test of establishing a proportionate means of achieving a legitimate aim, or the test of manifestly without reasonable foundation, or at any point on the spectrum between the two, the respondent has justified the exclusion from the jurisdiction of the ET as a free-standing complaint a decision on a service complaint by the DB (reg. 3(2)(b)), the determination of an appeal by the AB (reg. 3(2)(d)), and alleged maladministration in connection with the handling of a service complaint, (reg. 3(2)(e)).

81. The ET erred in concluding that the respondent had not justified the different treatment of the claimant.

Issue 3: Can HRA 1998 be used to interpret s.121EqA 2010 so as to allow the claim to be pursued?

82. This issue is now academic in light of my conclusion on issue 2 that there has been no breach of ECHR since the respondent has justified the impugned measure. But I will deal with it nonetheless since it has been fully argued.

83. S.3 HRA 1998 provides that:

> "(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."

84. The wide ranging power to read words into domestic law so as to ensure compatibility with ECHR rights is limited by what it is "possible" to do. It permits departure from the strict and literal application of the words the legislature has chosen, does not follow conventional rules of construction, does not require ambiguity in the statutory wording under consideration, and requires a purposive approach. The precise form of the words to be implied does not matter, it is the substance that counts.

85. The dividing line between what is and what is not possible was delineated by Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 SC and has been applied consistently in the subsequent case law at [33]:

> "Parliament however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental features of

> legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention -compliant, and the choice may involve issues calling for legislative deliberation."

86. In addition to only being able to adopt a meaning consistent with a fundamental feature of the legislation and only making decisions that a court is equipped to do, a third constraint on the exercise of the power, not relevant to this case, but mentioned for the sake of completeness, is where the interpretive obligation would give rise to important practical repercussions which the court is not equipped to evaluate (*Vodaphone 2 v HMRC* [2010] Ch 77 as approved in *Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust* [2016] ICR 903 CA.

87. The parties agreed that the scope of the interpretative obligation as a matter of HRA 1998 and under EU law is co-extensive and the authorities are equally applicable to both jurisdictions and the reasoning and outcome will be the same under both jurisdictions (see for example *Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust* [2016] ICR 903, CA [48] and *R (on the application of Z v Hackney LBC*.

88. The dispute between the parties was twofold: (1) whether the proposed interpretation was inconsistent with a fundamental feature of the legislation, and (2) if the proposed read-down would engage policy questions properly a matter for Parliament.

89. The relevant paragraphs of the ET judgment are as follows:

> "64……In my judgment it is right that the limitation [Miscellaneous Provisions Regs. 3(2)] was imposed to provide finality within the SC process. If complaints could be made about the complaints process itself then in theory there is scope for an infinite number of complaints about the handling of each iteration of the same initial complaint.
>
> 65. But that is not the same thing as providing complete finality and deliberately intending to exclude the jurisdiction of the Employment Tribunal. As Mr Chegwiddin [sic] notes, the handling of the SC could be challenged by SCOAF referral or via judicial review in the High Court. The finality was only within the SC process (and I did not understand Mr Chegwiddin [sic] to saying it went further than that).
>
> 66. There is nothing to suggest the 2015 Regulations intended to oust the jurisdiction of the Employment Tribunal. Mr Chegwiddin [sic] referred me to the Explanatory Note but this does not mention the Employment Tribunal. The extract cited explains that the intention was "to prevent repeat complaints, challenges to decisions made in the internal system or by the Ombudsman". None of that is inconsistent with the Employment Tribunal dealing such a 'process' complaint.

> 67. In any event, the claimant is asking the Tribunal to interpret s121 EqA 2010 not the 2015 Regulations. Were the effect of s121 EqA 2010 to be altered to permit the Employment Tribunal to have jurisdiction of the claimant's complaint, that would do nothing to undermine the stated intent and result of the 2015 Regulations. They would still exclude the claimant's complaint from the SC process and provide that process with the desired finality. The only change would be enable the claimant to bring the complaint to the ET as an additional remedy to those the respondent concedes would otherwise still exist.
>
> 68. Similarly, such a revision would not 'fly against the grain' of s121 EqA 2010. The underlying purpose of s121 is for the services to deal with its complaints in the SC process first. In my judgment, an interpretation which excludes from that requirement only those complaints which are themselves excluded from the SC process is not so inconsistent as to amount to 'flying against the grain'.
>
> 69. I further do not accept the submission that this would risk the ET 'wading into the second prohibited category identified by Lord Nicholls, namely "requir[ing] courts to make decisions for which they are not equipped" and which involve "issues calling for legislative determination".
>
> 70. I was referred to *Steer v Stormsure Ltd* [2021] IRLR 172 but this is a very different situation. There, the remedy sought would have extended the jurisdiction of Employment Tribunals in respect of interim relief to a new and potentially very large category of claims. Here we are concerned only with a limited number of claims. It is not even every member of the armed services claiming they have suffered discrimination but only those who complain of discrimination (or victimisation) in the handling of the service complaint itself.
>
> 71. I am therefore satisfied that, if it is required, the Tribunal may legitimately read-in in such a way as to permit this claim."

Relevant service complaint authorities on s.121 EqA 2010 and HRA/EU

90. The courts and tribunals have some form for adopting a purposive interpretation and construction of s.121 EqA 2010 and the jurisdiction of the ET in discrimination cases to comply with article 6 rights in the context of the armed forces service complaints procedure. No previous cases have been directly on point, but both sides, for different reasons, have prayed in aid the case law in this area and it is therefore necessary to deal with it.

91. In *Duncan v MOD* (UKEAT 0191/14/RN, 2 October 2014 (unreported)), the parties agreed that the ET decision below had been wrong and should be overturned. In her judgment HHJ Eady QC set out her reasons for her decision to approve the consent order sought, which she did not treat as a mere formality since she was being asked to overturn a ruling by an Employment Judge. On the wording of the regulations at that time, a service complaint was treated as having been withdrawn if it had not been referred to the Defence Council. The claimant in that case had made allegations of sex discrimination, harassment and victimisation which she had submitted in a service complaint in accordance with the procedure, but it had not been referred to the Defence Council. The ET treated the

service complaint as having been "withdrawn" and therefore dismissed the claimant's claim for want of jurisdiction in the ET. However, since it was not in the claimant's power to refer her service complaint to the Defence Council, the respondent MOD accepted that "a purposive construction of s.121 [is] required to achieve a lawful balance between the statutory aim to enable the armed forces to determine complaints internally prior to litigation and a complainant's right of access to a Court/Tribunal within a reasonable time" in order to comply with Art. 6 ECHR. The MOD as respondent in the case proposed that the difficulty could be overcome by a purposive construction of the legislation so that s.121(2) EqA 2010 should be read so as to operate as a jurisdictional bar only where the right under the regulations then in force to make a referral to the Defence Council had arisen and had not been exercised by a claimant. The appeal was thus allowed.

92. In *Gue & Zulu v MOD (Jurisdiction Decision)* 2205687/2018 and 2205688/2018 8 May 2019 ET (unreported), the issue before EJ McNeill QC concerned the question of whether matters raised in ET proceedings had been raised in the service complaint as required by S.121(1)(a) EqA 2010 which requires the complainant to have made a service complaint "about the matter" prior to lodging their ET claim. Although it is a first instance decision and therefore not binding, in this tribunal before Heather Williams J in *Edwards v MOD* [2024] EAT 18, [2024] ICR 687 the analysis by EJ McNeill QC was approved and adopted and described as "very helpful" [33]. Both claimants had made service complaints alleging certain incidents of race discrimination, race related harassment, of an environment of racial harassment and a failure to deal with reports of racial harassment. The issue was whether they could advance before the ET a number of other incidents of alleged race discrimination or harassment that the respondent said had not been raised in the service complaints. EJ McNeill QC found that apart from two incidents, the complaints were alleged to be part of the environment of racial harassment complained about in the service complaint process and thus came within the meaning of the "matter" in s.121. The two incidents that could not be included were victimisation complaints that were different in character to the service complaint allegations and an incident that was so stale that it would have been ruled inadmissible under the service complaint procedure had it been included in the service complaint that had been made. EJ McNeill QC concluded that her interpretation did not require either the amendment or disapplication of any part of s.121 EqA 2010

[117] and therefore did not need to have recourse to s.3 HRA 1998 or the read down principle. EJ McNeill QC did not therefore say what she would have done had she needed to amend or disapply the wording of the statute to comply with article 6, but it can be inferred from her decision that she would have relied on s.3 HRA 1998 had it been necessary to do so.

93. The case of *Edwards v MOD* raised a different point to *Gue & Zulu* about whether a claimant had made a service complaint about the matter subsequently sought to be raised in ET proceedings. The service complaint made by the claimant in that case did not refer explicitly to sex or race discrimination, harassment related to race or sex, or victimisation. In the ET1 claim form, she relied on the same incidents as had been raised in the service complaint as allegations of race discrimination. She subsequently applied to amend her claim to add claims of sex discrimination, harassment related to race or sex and victimisation causes of action. The question was whether she had "made a service complaint about the matter" (s.121(1)(a) EqA 2010) to confer jurisdiction on the ET to consider the claims. Two of the five grounds of appeal argued that the dismissal of the claim by the ET breached her article 6 ECHR rights. Heather Williams J dismissed the appeal. In reaching her conclusion that the ET had been right to strike out the claimant's claim she did not consider that the claimant's article 6 ECHR rights had been infringed so there was therefore no need for her to look beyond the literal meaning of s.121 EqA 2010.

94. The cases therefore do not take the issue any further forward, but in deference to the time spent in argument on the issue by Mr Milsom, have been considered carefully. His submission was that the cases demonstrate that the MOD accepts in principle that there must be a reading down into s.121 EqA 2010 to conform to ECHR, where it is necessary to do so. That proposition is uncontroversial as a general principle, but each case will be specific to the issues raised. The issues in this case are not the same as either *Duncan* or *Zulu & Gue*.

Consistency with a fundamental feature of the legislation

95. As noted in the explanatory memorandum (at [7.4]), one of the purposes of excluding some complaints that would otherwise fall wide ambit of potential complaints set out in s.340A(1) of "any matter relating to his or her service" was to prevent challenges to decisions made in the internal system or by the SCOAF. The allegations in the claimant's ET1 in this case fall squarely within that

category.

96. Section 121 EqA 2010 cannot be read in isolation as it is an interlocking code with the service complaints regulations and Part 14A AFA 2006 as is apparent on the face of s.121 EqA 2010 which begs the question: What is a service complaint and how can or does it come to be withdrawn? The answer is contained in the suite of service complaint regulations of 2015 and the underpinning primary legislation in s.340A onwards in part 14A AFA 2006. The fact that the predecessor provisions in the 2007 regs were also interlocking with EqA 2010 on its implementation, and the predecessor legislation in Race Relations Act 1976 strengthens the point.

97. The central difficulty for Mr Milsom is that his proposed interpretation of s.121 EqA 2010 directly contradicts the wording of the legislation by seeking to make a matter which is excluded from being made a service complaint by Reg 3(2) of the Miscellaneous Provisions Regs 2015 something that is not excluded. It therefore goes exactly against the grain of the wording of the statutory provision.

98. I accept that the EqA 2010 was designed to give effect to EU law, but where, as here, it is sought to read down the exact opposite of the literal meaning of the words, it is not possible to do so.

99. It becomes obvious when one looks at the wording read down into s.121 EqA 2010 by the ET (with the changes to the statute consisting of additional words italicised and emboldened):

> "s.121 Armed forces cases
>
> (1) Section 120(1) does not apply to a complaint relating to an act done when the complainant was serving as a member of the armed forces unless –
>
> (a) the complainant has made a service complaint about the matter and
>
> (b) the complaint has not been withdrawn.
>
> ***(1A) Section 121(1) is not applicable to the extent that the matter is an excluded matter as defined by Reg 3(2) Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015."***

100. It reverses the meaning of that part of the section.

101. The facts and context of this case are different to and distinguishable from the case of *Duncan* in which a purposive approach was possible. In *Duncan* the fundamental feature of the legislation at that time was for the MOD to determine complaints internally before they could be brought to an ET, so

that if a complainant had withdrawn his or her complaint which prevented it from being resolved internally, they could not bypass the service complaint procedure and continue with an ET claim. It therefore followed that where a service complaint was treated as withdrawn in circumstances outside the complainant's control through no fault of hers, it went with the grain of the legislation and was consistent with its fundamental feature to clarify that s.121(2) EqA 2010 would only operate as a jurisdictional bar where the right to make a referral to the Defence Council had arisen and had not been exercised.

102. In *Duncan* the wording of s.121(2) was not intended to deprive a member of the armed forces who had made a valid service complaint about a matter that she was entitled to raise which she had not withdrawn, from bringing an ET claim. Rightly, therefore, the MOD conceded the appeal and the matter could be resolved by the agreed wording interpreting and clarifying s.121(2) EqA 2010.

103. In this case it was a deliberate and intentional provision to exclude from the service complaints procedure, and thus the jurisdiction of the tribunal, the matters listed in reg. 3(2) of the Miscellaneous Provisions Regs 2015. Parliament had clearly thought about it and differentiated between matters appearing in para 1 of the Schedule to the Miscellaneous Provisions Regs. 2015, and the override for discrimination matters contained in para 2 of that Schedule, and the list of excluded matters in reg 3(2) for which there is no such override. This was not the case of an inadvertent consequence occurring through a side wind or infelicity of wording creating an unintended result.

104. Mr Cooper also relies on the legislative history to establish the point, which further demonstrates that this was not an inadvertent omission but a deliberate legislative choice. Regulation 3(2) is a fundamental feature of the legislation for the purposes of the issue in this case.

105. It follows that the ET erred in re-writing s. 121(1) EqA 2010 in the way that it did and the claimant's claim should have been dismissed.

EU law

106. The Recast Equal Treatment Directive 2006/54/EC ("the Recast Directive") provides the framework for implementing the principle of equal treatment of men and women in matters of employment and occupation. Equality between men and women is a fundamental principle of EU law under Articles 2, 3 and 141 EC Treaty.

107. The claimant relies on the following recitals to the Recast Directive

> 28. The effective implementation of the principle of equal treatment requires appropriate procedures to be put in place by the Member States.
> 29. The provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal treatment.
> …
> 33. It has been clearly established by the Court of Justice that in order to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate in relation to the damage sustained. It is therefore appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to take his/her job application into consideration.
> …
> 35. Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive."

And the following articles:

> Article 24: Victimisation
> Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.
>
> Article 25: Penalties
> Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.

108. It is accepted by the respondent that the principle of equal treatment between men and women under the Recast Directive requires the right of service personnel to pursue discrimination complaints before the ET (see *Sirdar v Secretary of State for Defence* [2000] ICR 130; *Kreil v Germany* [2002] 1 CMLR 36).

109. The issues in the cross-appeal are whether the service complaint and SCOAF procedure provides an effective remedy for the claimant's inability to take her claim to the ET; and whether it contravenes the EU law principles of effectiveness and equivalence; if so, whether s.121 EqA2010 can be interpreted to accord with EU law under the *Marleasing* principles which will be the same answer to the interpretive question under s.3 HRA 1998 above; and the impact, if any, of the EU(W)A 2018.

Issue 4: EU principles of equivalence and effectiveness

110. In light of my conclusions on issue 3, this ground of appeal is also academic, but I deal with it because it has been raised.

111. It is a requirement of EU law to afford protection against sex discrimination for service personnel (subject to some exceptions, such as service in certain special combat units, none of which apply here - see for example *Kreil v Germany* [2002] 1 CMLR 36 ECtHR, 141 EC Treaty, recitals 28.29.33 and 35 and Arts 24-25 Recast Directive). Protection against victimisation is also an essential part of ensuring effectiveness (*Coote v Granada Hospitality Ltd* [1999] ICR 100). Protection against discrimination and victimisation are directly effective rights. In EU law there is an obligation to ensure that judicial and/or administrative procedures are available to those who consider themselves wronged by failure to apply the principle of equal treatment. The procedures under national law must comply with the general principles of effectiveness and equivalence with the right to an effective remedy. The parties agreed that the principles of equivalence and effectiveness constitute general principles and are part of retained EU law.

112. The respondent submitted that the test of effectiveness is whether the enforcement of an EU rights is rendered either virtually impossible or excessively difficult (*Totel Ltd v Revenue and Customs Commissioners* [2018] 1 WLR 4053, SC @[7] per Lord Briggs) and submitted that the SCOAF provides an effective route for enforcement. The claimant relied on *R (Unison) v Lord Chancellor* [2017] 3 WLR 409 per Lord Reed @[106]: "the procedural requirements for domestic actions must not be "liable to render practically impossible or excessively difficult" the exercise of rights conferred by EU law: see for example, *Impact v Minister for Agriculture and Food* (Case C-268/06 [2009] All ER (EC) para 306."

113. The judgment of the ET on this point is set out in [79]- [80] of its decision at paragraph 50 above. The criticism advanced by the respondent is that the ET failed to analyse the specifics of the service complaint and SCOAF procedure in sufficient detail to be able to reach such a conclusion.

The law

114. The principle of equivalence is essentially comparative. In this case it involves comparing the ET process with the service complaint and SCOAF procedure, to see if they are equivalent. The principle of effectiveness involves a qualitative test, which invalidates a national procedure if it renders the

enforcement of a right conferred by EU law either virtually impossible or excessively difficult (see *Totel* @ [7])[3]. Both principles must be satisfied.

115. As noted in *Totel* at para 6:

> "…it has been repeatedly stated by the CJEU that it is for the courts of each member state to determine whether the national procedures for claims based on EU law fall foul of the principle of equivalence, both by identifying what if any procedures for domestic law claims are true comparators for that purpose, in order to decide whether the procedure for the EU law claim is les favourable than that available in relation to a truly comparable domestic claim. This is because the national court is best placed, form its experience and supervision of those national procedures , to carry out the requisite analysis: see *Palmisani v Instituto Nazionale della Previdenza Sociale* (INPS) (Case C-261/95) [1997] ECR I-4025, at para 38 and *Levez v TH Jennings (Harlow Pools) Ltd* (Case C-326/96) [1999] ICR 521, para 43."

116. When considering claims for breach of EU equality law in the employment field, the courts in this jurisdiction have consistently found that ETs are the appropriate forum for determination of claims and the enforcement of rights. In response to an argument that the availability of an appeal to the Police Appeal Tribunal was sufficient to satisfy the effectiveness and equivalence principles, Lord Reed in *P* stated at para 29:

> "The principle of equivalence entails that police officers must have the right to bring claims of treatment contrary to the Directive before employment tribunals, since those tribunals are the specialist forum for analogous claims of discriminatory treatment under our domestic law. They are expert in the assessment of claims of discriminatory treatment, and have the power to award a range of remedies including the payment of compensation, even in cases where the dismissal or other disciplinary action itself stands. They therefore fulfil the requirements of the principle of effectiveness. To leave police officers with only a right of appeal to the Police Appeals Tribunal would not comply either with the principle of equivalence, since analogous complaints under domestic law can be made to an employment tribunal, nor with the principle of effectiveness, since (for example) the Police Appeals Tribunal cannot grant any remedy in cases where the discriminatory conduct is not such as to vitiate the decision of the misconduct panel."

117. More recently, In *Eckland* it was argued by the Chief Constable that the availability of a claim that Mr Eckland could pursue under the EqA 2010 for disability discrimination against the Chief Constable in the County Court under Part 3, "Services and Public Functions", complied with the EU equivalence and effectiveness principles such as to defeat the claimant's argument that the ET had jurisdiction to determine his claim. The claimant sought to challenge the actions of an independent panel appointed by the Chief Constable in misconduct proceedings under the Police (Conduct) Regulations 2012. Underhill LJ noted at para 36:

[3] In this case nothing turns on whether there is a difference between what is "virtually" impossible and "practically" impossible.

> "…even if the peculiarities of the police disciplinary system mean that issues of misconduct fall to be determined by an independent body exercising public functions, those functions nevertheless arise out of, and in the context of, the employment relationship."

118. On a comparison of the features of County Court proceedings and the ET, the Court of Appeal noted material differences between the two jurisdictions, the most significant of which were that, in the British system it is the ET which has the appropriate expertise for determining discrimination disputes in the employment field, the fundamental difference in costs regime, the difference in fee regime and the different remedy powers as between a County Court and the ET, about which Underhill LJ said this:

> "39. Fourth, the employment tribunal has powers as to remedies in a discrimination case which a County Court does not. By section 124(2) it may:
> "(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; (b) order the respondent to pay compensation to the complainant; (c) make an appropriate recommendation."
> Subsections (3)–(7) contain various provisions supplementing subsection (2). I note in particular that by subsection (7) the employment tribunal is empowered to increase any amount of compensation awarded if a respondent has failed without reasonable excuse to comply with a recommendation made under subsection (2)(b). By contrast section 119(2) empowers the County Court to grant
> "any remedy which could be granted by the High Court— (a) in proceedings in tort; (b) on a claim for judicial review".
> That empowers it to award compensation and declaratory relief but not to make a recommendation."

119. In *General Medical Council & ors v Michalak (Solicitors Regulation Authority & ors intervening)* [2017] 1 WLR 4193; the claimant had sought to bring ET proceedings against a qualifications body alleging sex, race and disability discrimination in the course of its fitness to practice procedure to determine whether she should continue to be registered as a medical practitioner. In provisions specific to the jurisdiction of the ET in relation to qualifications bodies set out in s.120(7) EqA2010, an ET does not have jurisdiction "in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal." Judicial review proceedings were held not to be "in the nature of an appeal" since challenging the legality, or even possibly proportionality, of a decision, cannot partake of the nature of an appeal:

> "which entails a review of an originating decision in all its aspects. Thus, an appeal body or court may examine the basis on which the original decision was made, assess the merits of the conclusions of that body or court from which the appeal was taken and, if it disagrees with those conclusions, substitute its own." [20].

Analysis and conclusions

120. The general point made forcefully in both *P*, *Michalak* and *Eckland* is that disputes arising in the context of employment, which includes the service covenant, are best dealt with by ETs – the specialised forum for the resolution of disputes between employee and employer, with particular expertise, experience and training in discrimination law. Professional qualifications bodies are not analogous and *Khan v General Medical Council* [1996] ICR 1032 is not apt. The words of Hoffman LJ at 1043E-F cannot bear the weight sought to be placed on them by the respondent. For the reasons set out above, I do not consider the qualifications body statutory appeal regime to be an apt comparator. Decisions of qualifications bodies within the employment context under EqA 2010 are somewhat *sui generis* and do not "arise out of, and in the context of, the employment relationship" (see Underhill LJ in Eckland at [36]). They are different to allegations of discrimination in the conferring of professional qualifications, hence the need for specific and unique provisions in EqA 2010 concerning qualifications bodies. Parliament specifically restricted the scope of s.120(7) to qualifications bodies.

121. For that reason, a true comparator is not a worker or employee seeking to allege discrimination and harassment in the process and decision of a qualifications body, but an employee or worker challenging the outcome of an internal grievance/complaint and the appeal process.

122. It is said by the respondent that the ET erred in finding the situations to be analogous and wrongly treated the authorities as establishing that the ET is necessarily the appropriate forum because it failed to give the close and careful consideration and analysis required in the particular context of the service complaints regime to assess if they amounted to a material difference.

123. In order to test the respondent's argument, let us see what a closer analysis of the features of the service complaints procedure, as compared to the ET procedure, would demonstrate.

124. A public hearing with the cross-examination of witnesses is afforded as of right in the ET. In the service complaints regime there is no right to a hearing at DB, AB or SCOAF level. The ET is a party v party tribunal and does not conduct its own investigation, although it may make enquiries of witnesses appearing before it. Under the service complaints procedure it is at the discretion of the decision making panel to carry out such investigation as they see fit. In this case neither the DB, AB

or SCOAF saw fit to hold a hearing, or interview witnesses or allow cross examination. Indeed the failure of the DB and AB to agree to requests for a hearing by those who bring service complaints of discrimination is the practice relied on in the indirect discrimination complaint in the claimant's ET1 in this case.

125. The decision made by DB and AB and the SCOAF is not public unlike an ET decision where the open justice principle applies, subject to the usual exceptions.

126. As to remedy the ET has long experience in calculating the correct level of compensation in discrimination cases and apply the *Vento* bands arising from the guideline case of *Vento v Chief Constable of West Yorkshire (No. 2)* [2003] ICR 318 including ET Presidential Guidance: Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879, which is updated annually. The current *Vento* bands are £1,200-£11,700 for less serious cases, a middle band of £11,700- £35,200 for cases that do not merit an award in the upper band and an upper band of £35,200- £58,700 for the most serious cases with the most exceptional cases capable of exceeding £58,700. The SCOAF has power to make recommendations concerning the redress that should be granted, including what is termed a "consolatory payment" to remedy injustice or other wrongs found during an investigation. Her recommendations are not binding and the Defence Council can reject a recommendation and if a consolatory payment be accepted by the Defence Council, if the amount exceeds MOD's financial delegation or if the matter is considered contentious (meaning likely to cause public or political controversy or have repercussions for Government Departments), HM Treasury approval is required (see SCOAF Financial Remedy Guidelines version 1.2). The purpose of a remedy or redress is to put the complainant back in the position they would have been had the wrong not occurred so far as possible or recognise the impact the injustice caused by maladministration has had on the complainant. The redress scales are set at £500-£1,000 for low levels, £1,000-£2,000 for injustices with a moderate impact and £2,000 - £3,000 for high levels. The SCOAF guidance states that "nothing in this guidance prevents the consideration and recommendation of *Vento* payments in service complaints where a breach of the Equality Act 2010 has been established", but nor do the guidelines require *Vento* to be followed, unlike the ET.

127. It was submitted that rarely in practice, if ever, does the Defence Council reject a recommendation by the SCOAF and that ET recommendations are not legally binding. ET financial awards are however legally binding and enforceable in the County Court and the ET has the power to impose financial penalties for non-compliance with recommendations made.

128. In terms of the panel, before an ET a discrimination claim is heard by a three-person panel made up of a legally qualified Employment Judge and two lay members recruited for their specialist knowledge of workplace matters. In the service complaints regime, at DB level there is no requirement for the person or panel appointed to deal with the complaint to be independent. At AB level the requirement is for Defence Council to appoint either one independent person, or a panel of whom only one member is required to be independent.

129. Having considered the differences between the service complaints regime and the ET procedure it is clear that they are not equivalent. The service complaints and SCOAF regime are less favourable and the differences are quite considerable. Nor does the availability of judicial review satisfy the equivalence principle (see *Michalak* at [20] above).

130. The service complaint and SCOAF appeal process and judicial review cannot be regarded as equivalent to the right to bring complaints under reg.3(2)(b), (d) and (e) under reg 3(2) read with s.121 EqA2010. It is therefore not necessary to consider whether it also infringes the principle of effectiveness, but the failure to hold an oral hearing to resolve allegations of the type raised by the claimant in her service complaint arguably stray into the area of making it practically impossible or excessively difficult to exercise the rights conferred by EU law (see for example, *R (Unison) v Lord Chancellor* [2017] 3 WLR 409 @[106]).

131. The ET did not err in its decision on equivalence and effectiveness. However **t**he parties agreed that the principles on reading down in EU law and the *Marleasing* line of case law is the same as that under s.3 HRA 1998, and for the reasons set out above, it is not possible to read down the words sought by the claimant.

Effect of EU(W)A 2018 (issue 5)

132. The fifth issue in the case is also no longer necessary to resolve given my findings on the inability of

the ET to read down the legislation as argued for by the claimant. But again I will deal with it for the sake of completeness. The question between the parties is whether Sched. 1 para 3(2) EU(W)A 2018 and the provisions of the EU(W)A 2018, in force at the material time, prevent reading down which has the substantive effect of disapplying any enactment, so that the reading down sought by the claimant is precluded since it would disapply s.121 EqA 2010.

133. The ET 1 claim form was received in the ET on 9 July 2021 and raises allegations occurring in the period 30 October 2020- 28 April 2021. The dates are significant as it is after the enactment and coming into force of EU(W)A 2018 and after IP completion day on 11pm 31 December 2020 (EU(W)A 2018, s.1A(6), European Union (Withdrawal Agreement) Act 2020 s39(1)-(5)) and before the end of 2023 and the coming into force of s.5(A4) EU(W)A 2018 which provides that no general principle of EU law is part of domestic law after the end of 2023 (an amendment made in the Retained EU Law (Revocation and Reform) Act 2023 s.22(5)). It is therefore necessary to consider the EU(W)A 2018 in its unamended form in the period from 11.01pm 31 December 2020 – 1 January 2024.

134. At that time, EU-derived domestic legislation, as it had effect in domestic law immediately before IP completion day, continued to have effect in domestic law on and after IP completion day, under s.2(1) of the EU(W)A 2018, subject to a number of exceptions. The only exception at that time relevant to this case was that contained in Sched 1 para 3(2):

> "3… (2) No court or tribunal or other public authority may, on or after IP completion day –
>
> (a) disapply or quash any enactment or rule of law, or
> (b) quash any conduct or otherwise decide that it is unlawful,
> because it is incompatible with any of the general principles of EU law."

135. The parties agreed that EqA 2010 is EU-derived domestic legislation within the meaning of s1B(7)(b) EU(W)A 2018 and therefore continued to have effect in domestic law as it did immediately before IP completion day subject (amongst other things) to paragraph 3 of Schedule 1 (s2(1) & (3)).

136. All rights, powers, liabilities and obligations available under the EC Treaty remained available pursuant to EU(W)A 2018, s4, subject (amongst other things) to paragraph 3 of Schedule 1 (see s4(3)). The supremacy of EU law applied at the material period pursuant to EU(W)A 2018, s5(2), subject (amongst other things) to paragraph 3 of Schedule 1 (see s5(6)). *Marleasing* was retained EU

case law and the principles of effectiveness and equivalence were retained general principles of EU law, within the meaning of EU(W)A 2018, s6(7). Any question as to the validity, meaning or effect of any retained EU law was to be decided in accordance with retained general principles and retained EU case law, pursuant to EUWA 2018, s6(3), subject (amongst other things) to paragraph 3 of Schedule 1 (see s6(7)).

137. In *Secretary of State for Work and Pensions v Beattie & ors* [2022] EAT 163, Eady P considered Sched 1 para 3 in some detail and the case law to date. She held that even if the EU rights relied on by the claimants in that case were still to be treated as retained EU law it could "no longer provide a basis for the disapplication or quashing of any enactment or other rule of law that has been found to be incompatible with such a general principle" ([137(2)]).

138. The two very narrow issues between the parties were firstly whether the reading down proposed by the claimant would be to "disapply" or "quash" an enactment or other rule of law (para 3(2)(a) of Sched. 1) and thus now be impermissible post IP completion day; or be an interpretation, in which case, in principle, it would not be impermissible. The second, alternative, route relied on by the claimant was whether reading down was a necessary consequence of the case of *Duncan,* a decision made before IP completion day, the claimant relying on Sched. 8, para 39(6) as an exception to the prohibition in Sched 1 para 3 on disapplication and quashing.

139. The explanatory notes and *Bennion on Interpretation* support the agreed position between the parties that the *Marleasing* principle continued to apply to the interpretation of domestic legislation passed or made before IP completion day in the period under consideration and is an aspect of the principle of EU supremacy (pp.953-4).

140. It would seem that the intention of para 3(2) of Sched.1 is, in part, to identify the scope or limitations to that principle. In this case, the issue is relatively clear cut. The proposed read down seeks to disapply reg 3(2) Miscellaneous Provisions Regs.2015. For the reasons that make reading down impossible as set out above, the proposed alterations to the statutory wording go beyond interpretation and amount to disapplication. The read down seeks to disapply reg.3(2) Miscellaneous Provisions Regs 2015 and is therefore caught by the prohibition in para 3(2) Sched 1 of EU(W)A 2018. Inserting words that a particular section is "not applicable to the extent that…." amounts to a disapplication.

141. On the second issue, I do not read the proposed reading down as being a necessary consequence of the dicta in *Duncan*. The issue in *Duncan* was not on all fours with this case – see the discussion above.

142. The ET was correct to conclude that s.121 EqA 2010 when read with reg 3(2) Miscellaneous Provisions Regs 2015 breach the retained EU principle of equivalence that was in force at the time. But the ET is barred from reading down the interpretation sought by the claimant, as to do so would be disapplying an enactment. The ET was therefore correct to dismiss the claim based on EU law. It is not material to the outcome, but I find that it would not have been possible to read down the legislation in any event as to do so would go against the grain of the statutory wording and the ET erred in this regard.

143. I have addressed the principle grounds of appeal. There were a number of subsidiary and minor points, such as a comparison with the now repealed compulsory pre-ET litigation grievance procedures in s.32 Employment Act 2002, all of which have been considered but none of which would alter my central conclusions.

Summary and disposal

144. The appeal therefore succeeds. Under the HRA 1998 the ET erred in finding that the claimant's rights under Article 6 read with Article 14 ECHR were breached since the respondent has established that it used proportionate means to achieve its legitimate aim of preventing repeat challenges and challenges to decisions made in the internal system or by the SCOAF. In any event, had that not been the case, the ET had no power to read down the legislation since to do so went against the grain of the legislation. The cross-appeal against the ET's finding that the EU(W)A 2018 prevented it from reading down the legislation also fails. The ET was correct in its interpretation, and in any event, if it was wrong about that, it would not have been able to read down the legislation for the same reason as in the HRA 1998 challenge.

145. This appeal concerned only points of law. Neither side suggested that this was a case that should be remitted back in the event of the appeal or cross appeal being allowed, but invited this tribunal to exercise the powers of the ET and substitute its decision for that of the ET. They were correct to do so. Applying the law correctly the ET had to strike out the claimant's claim insofar as it challenged the service complaint process. It could not have decided the case differently and there are no open

questions that require remission for further consideration.

146. The decision of the ET is therefore quashed and substituted with a decision striking out the claimant's claim under appeal. It does not of course affect the remainder of her ET claim that is currently stayed pending this appeal.