



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Khepar

**Respondent:** Ministry of Defence

**Heard at: London Central (Remotely by CVP)**  
**On: 20 May 2022**

**Before: Employment Judge Heath**

## **Representation**

Claimant: Did not attend

Respondent: Mr M Paulin (Counsel)

# JUDGMENT

1. The tribunal does not have jurisdiction to hear the claimant's claim for unfair dismissal and this claim is dismissed.
2. The tribunal does not have jurisdiction to hear the claimant's claims at paragraphs 1 to 6, and 8 of his Grounds of Complaint on the basis that he has not made a service complaint under Section 121(1)(a) Equality Act 2010 about the matters set out in those paragraphs.
3. The tribunal does have jurisdiction to hear the claimant's claims set out in paragraph 7 of his Grounds of Complaint, as it is satisfied that he made a service complaint under Section 121(1)(a) Equality Act 2010 about the matters set out in that paragraph.
4. The tribunal does not strike out the claimant's claims at paragraph 7 of his Grounds of Complaint.

# REASONS

## **Introduction and issues**

1. This was an Open Preliminary Hearing ordered by EJ Joffe at a Case Management Preliminary Hearing on 10 January 2022. The issues which she directed to be determined are as follows: -

- a. Whether the Tribunal has jurisdiction to hear the claimant's unfair dismissal complaint, by reference in particular to sections 191 and 192 Employment Rights Act 1996;
  - b. Whether the Tribunal has jurisdiction to hear the claimant's complaints or any of them under the Equality Act 2010, by reference in particular to section 121 Equality Act 2010, alternatively whether any of the claims should be struck out on the basis that the claimant has no reasonable prospect of establishing that the Tribunal has jurisdiction to hear them pursuant to section 121;
  - c. Whether the discrimination claims should be struck out because the claimant has no reasonable prospect of establishing that they have been presented in time.
2. The tribunal directed that a further case management hearing at the end of the OPH if any of the claims proceeded.

### **Procedure**

3. On 10 May 2022 the claimant emailed the tribunal as follows: -

*"I am writing in respect of the Preliminary Hearing scheduled for 20 May 2022. As the Claimant I can confirm I am happy to proceed to PH, however I regret that I will not be able to attend in person. I am not represented and I understand the implications of not attending or being represented mean I will not be able to express my arguments for this to be moved forward to ET*

*I have, however, attached skeleton arguments that I would be grateful if you could put in front of the judge for the PH to consider".*

4. In response to an email sending him the instructions for joining the CVP room for the OPH, the claimant again emailed the tribunal on 19 May 2022 as follows: -

*"Thank you for these instructions, but as mentioned in my previous email, I will be unable to attend the hearing in person due to other commitments".*

5. I was provided with a 104 page bundle, two decisions of employment tribunals (*Edwards v Ministry of Defence* 1406413/2019 and *Greatorex v Ministry of Defence* 3204690/2021), Mr Paulin's skeleton argument dated 9 May 2022 and the claimant's undated skeleton argument .
6. In the light of the communication from the claimant, and having asked Mr Paulin's view, the tribunal decided to determine the issues in the absence of the claimant. He had made it clear that he would not attend the hearing although he understood that this might disadvantage him, and he had provided a helpful skeleton argument. I was mindful that the claimant's non-attendance might mean that he was not on an equal footing with the respondent, but balanced this against his candid and apparently informed express wishes, and the desire to avoid delay and incur additional expense.

7. The claimant's skeleton argument raised the following issues, among others: -
  - a. He conceded that the tribunal did not have jurisdiction to hear his claim of unfair dismissal claim as he had been a member of the armed forces;
  - b. He conceded that the tribunal had no jurisdiction to consider discrimination complaints which had not been the subject of a service complaint, however "*he [i]mplores you to consider this long list of discriminatory behaviour in deciding whether or not to hear about the matter referred to as point 7 – where a service complaint was brought*".
8. It appeared to me that the concession relating to unfair dismissal was properly and fairly made by the claimant. It was not clear whether he was seeking to withdraw the claim, but I considered that it was clear that the tribunal had no jurisdiction to consider the complaint, and I dismissed it.
9. In relation to the discrimination claim, it seemed clear from the concession in the claimant's skeleton and from a reading of the service complaint that paragraphs 1 to 5 and paragraph 8 of the Grounds of Complaint that the matters in these paragraphs had not been raised in the service complaint. Again, it was not clear that the claimant was withdrawing them, but I dismissed them on the basis of the content of the service complaint and the concession.
10. The face of the claimant's skeleton suggested that he was solely relying on paragraph 7 (or "point 7" to use his words) of the Grounds of Complaint as being the complaint about which he made a service complaint. I raised with Mr Paulin the possibility that paragraph 6 of the Grounds of Complaint may have been the subject of a service complaint at section 2 (page 59-60 PH bundle). While there appeared to be a superficial similarity, Mr Paulin made the fair point that the claimant did appear on the face of his skeleton argument to be confining his attention to paragraph 7 Grounds of Complaint, and by implication at the very least, was conceding that there was no jurisdiction in respect of any other paragraph. I was also conscious of the fine line tribunals tread between assisting a litigant in person, and entering into the arena. In all the circumstances it did not seem appropriate for me to attempt to grapple with whether matters within paragraphs 6 of the Grounds of Complaint appeared in the service complaint.
11. I accordingly dismissed all of the complaints in the Grounds of Complaint, apart from paragraph 7, as they had not been the subject of a service complaint under section 121(1) EA.
12. The focus of the hearing was therefore:
  - a. To attempt to establish whether the matters raised in paragraph 7 of the Grounds of Complaint had been the subject of a service complaint (pages 53-62 PH bundle); and if so
  - b. To consider whether to strike out the claims in this paragraph if the claimant had no reasonable prospect of establishing that they were

brought in time.

## The law

### Unfair dismissal

13. Section 191 Employment Rights Act 1996 (“ERA”) provides: -

(1) *Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers.*

(2) *This section applies to—*

...

(e) *Part X, apart from section 101, and*

14. Schedule 2 Part II Para 16 ERA sets out the version of section 192 ERA that applies until such time as section 31 of the Trade Union Reform and Employment Rights Act 1993 has come into force. As this section has never been brought into effect, the version of section 192 that applies is as follows: -

*Section 191—*

(a) *does not apply to service as a member of the naval, military or air forces of the Crown, but*

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

15. The effect of this is that members of the armed forces (save for those caught by the exception at (b) above) do not have the right to bring an unfair dismissal claim.

### The Equality Act 2010 (“EA”) - jurisdiction

16. Section 120(1) EA gives the tribunal jurisdiction to determine complaints relating to Part 5 (work) of the EA.

17. Section 121 EA provides:-

(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.*

18. The Armed Forces Act 2006 and the Armed Forces (Service Complaints) Regulations 2015 (“the 2015 Regulations”) deal with service complaints.

Regulation 4 of the 2015 Regulations set out the procedure for making a service complaint.

19. The first instance tribunal decision in Edwards helpfully sets out the little case law there is on service complaints.

20. In Molaundi v MoD UKEAT/0463/10 the EAT found that:-

*“the purpose of the statutory scheme is to ensure that the complaint of racial discrimination by the soldier is in the first instance determined by a body deemed by the legislature to be the appropriate body to resolve such disputes with the Employment Tribunal being the body dealing with this matter at the next stage”.*

21. In Duncan v MoD UKEAT/0191/14 the EAT found that: -

*“a purposive construction of S121 [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”.*

22. While not binding on me, I found assistance both in the Edwards case itself and in the first instance case of Zulu v MoD 2205687/2018 and 2205688/2018 referred to in Edwards. In Zulu, EJ McNeill found: -

- a. Section 121 EA requires a link between “the matter” complained of in the service complaint and the “act(s) done” complained about in the claim to the tribunal.
- b. The word “matter” means something more general than “the act complained of” or “the act done” and means something broader than a “specific incident”. In section 121 the word “matter” is used to refer to how a person thinks they have been wronged in their service.
- c. The service complaint does not require the particularity of a pleading, but it requires more than a general complaint. It need not be overly legalistic.
- d. The purpose of the statutory service complaints process is to give an opportunity for complaints to be considered by military authorities before they are brought to a tribunal about the same matter. Not every detail of the wrong needs to be particularised in the service complaint.

### EA time limits

23. Section 123 EA provides: -

(2) *Proceedings may not be brought in reliance on section 121(1) after the end of—*

*(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

24. In Hendricks v Metropolitan Police Commissioner [2002] IRLR 96 the Court of Appeal held that the key issue in determining whether conduct extended over a period was whether there was an ongoing situation or state of affairs which amounted to discrimination. Numerous linked incidents could be evidence of a discriminatory state of affairs and thus an act extending over a period.

25. In terms of extending time, key relevant factors include the length of and reason for delay and whether the respondent has been prejudiced by any delay (Abertawe Bro Morgannwg University LHB v Morgan [2018] IRLR 1050). Other relevant considerations emerging from the authorities include the presence or absence of another remedy for the claimant if the claim does not proceed, the conduct of the parties after acts about which complaint was made, any medical condition of the claimant and how it may have affected his or her ability to present the claim, the extent to which professional advice was sought, and the content of any advice given.

26. The burden is on the claimant to persuade the tribunal to exercise its discretion in his or her favour (Robertson v Bexley Community Centre [2003] IRLR 434). Robertson said that extending time is the exception rather than the rule, but subsequent authority has confirmed that this does not mean the tribunal should extend time only in exceptional circumstances: time should be extended if it is just and equitable to do so (Pathan v South London Islamic Centre UKEAT/0312/13).

#### Rule 37 strike out

27. Rule 37 of the ET Rules of Procedure provides: -

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

28. In considering whether there is no reasonable prospect of success, the claimant's claim should be taken at its highest from a reading of the pleadings and any relevant documents in which the claim is set out (Cox v Adecco UKEAT/0339/19/AT).

29. Discrimination claims should only be struck out in the clearest and most obvious of cases. "In this field perhaps more than any other the bias in

*favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest” (Anyanwu v South Bank Students’ Union [2001] IRLR 305).*

30. In E v X, L and Z UKEAT/0079/20 the EAT observed “*When faced with a strike-out application arising from a time-point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another in any particular case*”.

### Conclusions on jurisdiction

31. Paragraph 7 of the Grounds of Complaint is in 4 sentences. Mr Paulin divided the potential allegations made into this paragraph into eight, with no disrespect to his approach, I will examine the paragraph sentence by sentence.

*First sentence - “2019-20 The Chief Instructor and my 1<sup>st</sup> reporting officer gave me no objectives for the year and every time I had an idea for something to do, an improvement/opportunity, he put me down and gave the idea to someone else”.*

32. The first point that Mr Pauline makes is that it is not possible to tell who the Chief Instructor and first reporting officer is. The claimant has not attended to clarify who he might be referring to in his pleading. The language makes clear (“*he put me down... He never gave me*”) that the two apparent roles are held by the same person. The heading of the paragraph makes clear that the timescale is 2019 to 2020. The further context the Grounds of Complaint is headed “*Description of discriminatory behaviour during the 12 year Army career*”.

33. If one then looks at the service complaint at page 60 of the bundle Section 2, one sees a series of complaints between March 2019 and June 2020. This section is headed “*I have been the victim of discrimination and very serious misconduct on the part of my 1RO Lt Col Moss*”. As I will come to shortly, if one looks at the detail of the allegations in this section of the service complaint, they bear a similarity to those in the Grounds of Complaint and are in exactly the same time period. While the claimant is not here to clarify precisely who he was talking about, it would be surprising, to say the very least, if he had a different first reporting officer (which I assume is what the abbreviation “1RO” means) who was also subjecting him to fairly similar behaviour, and who he simply chose not to refer to. I also note that at one point the service complaint refers to the actions of the “CI”, which I take to mean the Chief Instructor, who was also the first reporting officer. I have no hesitation in concluding that paragraph 7 Grounds of Complaint and section 2 of the service complaint outline complaints centred around the same individual, Lt Col Moss.

34. In the service complaint under the date **June 2019 to May 2020** the service complaint sets out that the claimant “*received no objectives for the entire reporting year despite asking several times for objectives and direction for what he expected of me*”. This is more or less what he went on to plead in the first sentence of paragraph 7 of the Grounds of

Complaint.

35. Under **September 2019** the claimant set out in the service complaint his asking to get involved in other courses, being refused, and other officers being assigned to do these courses. I am satisfied that the claimant here was saying that he was raising an idea for an improvement opportunity, and that the opportunity was given to someone else.
36. Under **October 2019** the claimant set out an opportunity to deploy to Mali as an Acting Major. He says he was refused this opportunity, and the chief instructor (or "CI") went on a deployment to Ukraine. I am satisfied that this comes within what is set out in the first sentence of the paragraph 7 of the Grounds of Complaint.
37. Under **January 2020** the service complaint refers to the claimant's request to fill a role in the College HQ. The claimant says that this was refused and another captain was allowed to fill a role at HQ. I am satisfied that this falls within the first sentence of paragraph 7 of the Grounds of Complaint, and also the third sentence which I will come to later.
38. Under **March 2020** the service complaint refers to the claimant's request to be first to support other units. He says this was refused and other officers were nominated. I am satisfied that this falls within the first and third sentence of the Grounds of Complaint.

Second sentence – "He never gave me any feedback on performance and never gave any reasons for my grading in the unit despite me asking several times".

39. Under the heading **June 2019** the service complaint specifically mentions that OJAR was delivered with no meaningful feedback on performance and a refusal to tell the claimant where he was graded against his peers. Under **June 2020** there is a reference to a bland OJAR and another refusal to tell the claimant where he was graded against his peers. I am satisfied that this falls within the second sentence of paragraph 7 of the Grounds of Complaint.

Third sentence – "He pushed white officers into prominent positions, but never me".

40. It is right to say that the claimant does not specify the ethnicities of anyone he appears to compare himself to in the service complaint. It is also right to say that the claimant has not attended to clarify any of this. However, there are numerous references in the service complaint to discrimination. He also makes reference to differential treatment between him and white male and one white female officer in the section 1 of the service complaint, and I consider that, read as a whole, the claimant is comparing himself, an Asian man, to white fellow officers.
41. As set out above, under **September 2019, January 2020** and **March 2020** the claimant has set out examples of other officers being put forward for opportunities the claimant says were refused to him. I am satisfied that this broadly comes within what he asserts at the third sentence of paragraph 7 of the Grounds of Complaint.



Fourth sentence – “Due to his attempts to career foul me I missed out on promotion twice”.

42. In the service complaint under the heading **January 2020** is a reference to having missed out on promotion again. I am satisfied that this falls within the fourth sentence of paragraph 7 of the Grounds of Complaint. On a broader basis I consider that the allegations of not getting objectives and refusing opportunities which were afforded to others could be considered allegations of “career fouling” the claimant.
43. I have focused in on the individual sentences themselves, but I also stand back and look at the paragraph as a whole. I also bear in mind the observations in Zulu that the service complaint is not a formal legal pleading and the approach should not be overly legalistic. I consider that paragraph 7 of the Grounds of Complaint sets out matters about which the claimant has made a service complaint. I consider, therefore, that the tribunal has jurisdiction to hear the complaints referred to in this paragraph.

### Conclusions on time limits

44. Employment judge Joffe defined the scope of this aspect of the hearing carefully. The issue is: -

*Whether the discrimination claims should be struck out because the claimant has no reasonable prospect of establishing that they have been presented in time.*

45. Section 123 Equality Act 2010 makes clear that a consideration of whether the claim is in time will involve the consideration of whether the claim was brought within six months of the act to which the proceedings relate, or “such other period as the employment tribunal thinks just and equitable”. If I find (as I have) that the complaints are out of the primary time limit, my focus on a strike out application will inevitably shift to considering whether the claimant has no reasonable prospect of establishing that it would be just and equitable to extend time.
46. I must stress that I am not determining a preliminary issue (under Rule 53(1)(b) ) as to whether the complaints are in time or not, but considering (under Rule 53(1)(c) ) whether to strike out the claim or part of it on the basis that the claimant has no reasonable prospect of establishing that the claims are in time. For the absolute avoidance of doubt, the claims in question are solely those raised in paragraph 7 of the Grounds of Complaint.
47. I am therefore applying the law applicable to applications to strike out. I also bear in mind that numerous authorities refer to the principle that only in the clearest and most obvious case should discrimination claims be struck out. The case of Anyanwu refers to the bias in favour of a claim being examined on the merits or demerits of its particular facts as being a matter of high public interest.
48. The authorities relating to strike out make clear that the claimant’s case must ordinarily be taken at its highest with the assumption that he will establish facts asserted in his claim is true. It was made clear in Cox,

taking the claimant its highest means not just the pleadings but any relevant supporting documentation made available to the tribunal.

49. On a generous reading of paragraph 7 of the claimant's Grounds of Complaint together with the service complaint, there is potentially a first act in March 2019, and a final act or omission in June 2020. The ET1 was presented on 8 September 2021, and so anything before 9 March 2021 is out of time subject to the just and equitable extension. On the most generous view the latest claim would be around 8 ½ months out of time and the first one two years out of time.
50. Mr Paulin was understandably focussed on the fact that the claimant had not attended and was not able to clarify anything or provide evidence. Looking at the observations of the EAT in *E v X, L and Z*, I can see that evidence is desirable on the question of whether there was a continuing act of discrimination. Although Ellenbogen J's observations at paragraph 50(5) seem to be about any strike out application arising from a time point, she concludes the paragraph referring to finding facts about whether one act led to another. It may be that when the question is whether it is just and equitable to extend time the need for oral evidence seems less compelling. In any event, the observation was that evidence was advisable not necessary.
51. Obviously there was no witness statement or oral evidence, but viewing the paragraph 7 of the Grounds of Complaint with the benefit of the service complaint the following emerges.
- a. The claimant opened section 2 of his service complaint with the sentence, over the course of 18 months under the command of Lt Col Moss I was marginalised, discriminated against and mismanaged.
  - b. He asserts he was provided no objectives from June 2019 May 2020.
  - c. He set out a number of allegations in the service complaint spanning the period March 2019 to June 2020 centred around his first reporting officer.
52. I consider that any suggestion by the claimant that there was ongoing continuing state of affairs could not be dismissed as fanciful. I bear in mind that the claimant is not specifically and explicitly making the argument that there was a continuing act, and I am mindful of the line I spoke about earlier between appropriately making meaning of a litigant in person's case, and entering the arena. Taking the case at its highest, including the service complaint and the skeleton argument, it could not be said there would be no reasonable prospect of the claimant establishing on the evidence that the allegations between March 2019 to June 2020 were continuing act ending in June 2020.
53. I turn now to extending time. Mr Paulin understandably focused on the fact that the claimant had not attended to expand upon any submission about time limits. However, on a strike out application, taking the claimant's case at its highest, I have regard to the documents put before me in the bundle which include the service complaint. I also have regard to submissions

made in the claimant's skeleton argument.

54. I also have regard to the way a tribunal would approach an application for a just and equitable extension of time, although I stress that I am hearing an application to strike out and thus myself considering whether there is no reasonable prospect of the claimant making good such an application. The authorities focus on, broadly speaking, the length of and reasons for the delay and whether the delay has prejudiced the respondent. Other factors might be the presence or absence of any other remedy for the claimant if the claim is not allowed, the conduct of the parties subsequent to the act of which complaint is made, the medical condition of the claimant, including whether such condition might have prevented or inhibited the making of the claim, the extent to which any professional advice was sought or given.

55. At paragraph 6 of the service complaint form the claimant addressed time limits for making a service complaint (page 58 PH bundle). He wrote: -

*“As discrimination has taken place- I believe I am within the timelines as per the guidance above. However it is also worth explaining that I did not submit a complaint earlier for the following reasons:-*

- I was not sufficiently versed in the complaints pro ss to know it was an option*
- As my CoC were part of the problem I did not feel able to talk to anyone about this*
- Psychologically I had shut myself off and was» in su ival mode, it was not until I left the unit and signed off that I actually realised what had been happening*
- Covid and WFH made it difficult to find anyone I could trust and talk to about it so I didn't feel able to raise the issue with anyone even in my new unit”*

56. At page 67 of the bundle is a letter from Dr stamps, a consultant psychiatrist. The letter confirms that the claimant had been under the Defence Primary Health Care Department of Community Mental Health since 8 January 2021. He had presented with depression triggered by occupational issues, including alleged racial discrimination. The letter observes that the claimant engaged well with 15 therapeutics sessions and had been provided medication. As the claimant has left the armed forces his care was transferred to the NHS.

57. Paragraph 3 of the claimant skeleton deals with “Timing”. The claimant set out at paragraph 3 b) that he did not know of and was not advised of any time limits on submitting an ET1. At paragraph 3d) he made the point that had he submitted his ET1 earlier it would have made no difference as tribunal proceedings would effectively be stayed until resolution of the service complaint. Also at paragraph 3c) he wrote, about his state of health: -

*“In the period covered by the service complaint and until long past*

*submitting the service complaint I was in a state of severe depression, which has been confirmed by a medical professional and that statement has been sent to the court. I therefore did not have the mental capacity to think about an ET or the timelines associated with one, the service complaint was already taking a huge toll on my health and I could not add to that”.*

58. I also read, albeit not in any great depth, the Service Complaint Decision of 11 March 2022. Mr Paulin acknowledged the thoroughness with which the investigator went into the complaints. Numerous witnesses were identified, annexes prepared, witness statements taken and almost 130 footnotes appear in the decision.
59. Taking the claimant’s case at its highest, having regard to the relevant documents put before me, I considered that it is not a fanciful notion that the claimant could persuade a tribunal to extend time.
60. Taking the case at its highest, the claimant’s own claim is that he had “severe depression”. The severity is unsupported, but there is independent medical evidence that he had sought treatment for depression from 8 January 2021, received therapy and medication for his condition and was still under the care of Defence mental health services and would be discharged into the care of the NHS on his discharge from the armed services.
61. Taking the case on extension of time at its highest, there is independent medical evidence of depression which the claimant himself says was severe and inhibited him from engaging with the tribunal process, the time limits of which he did not know about. He appears not to have had the benefit of professional advice. The respondent carried out what appears to be a thorough and well-documented investigation of the service complaint, taking evidence from those implicated and from potential witnesses. No specific prejudice to the respondent in terms of delay was flagged up by the respondent. It may well be that in due course these factors do not persuade a tribunal that it would be just and equitable to extend time. However, in my judgment, at this stage it cannot be said that there is no reasonable prospect of establishing that it would be just and equitable to extend time. This would be the case if the extension is to June 2020 or even March 2019 if there were no question of a continuing act.

### **Case management**

62. EJ Joffe indicated that there would be a case management hearing if any claims proceeded. It was not possible to do this in the claimant’s absence. The parties will be contacted by the tribunal to set up a case management PH.

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Employment Judge **Heath**

20 May 2022 \_\_\_\_\_  
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

23/05/2022.....

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FOR THE TRIBUNAL OFFICE