EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr S Walsh		Ministry of Defence

Heard at: London Central (in public, in person) **On**: 2 May 2023

Before: Employment Judge Stout (sitting alone)

Representations
For the claimant: In person
For the respondent: Mr Fetto KC

RESERVED JUDGMENT ON PRELIMINARY HEARING

The Claimant's claim of direct discrimination because of perceived sexual orientation discrimination in relation to his discharge from the RAF in 1975 is dismissed because the Tribunal does not have jurisdiction to hear it.

REASONS

Background

1. Mr Walsh (the Claimant) was engaged as an officer in the Royal Air Force (RAF) between 26 September 1963 and 3 August 1975 when he was discharged, he says, because he was perceived (incorrectly) to be a homosexual and there was at that time a ban on homosexuals serving in the armed forces. The Claimant did not attempt to make a claim about this at the time, understanding that at the time discrimination on grounds of real or

perceived sexual orientation by the armed forces was lawful. He quickly obtained new employment and went on to pursue a successful civilian career.

2. In 2004 he instructed solicitors and obtained counsel's opinion regarding the possibility of a claim against the Ministry of Defence (MoD). He was informed he stood no reasonable prospect of pursuing such a claim, among other things in the light of the decision of the House of Lords in *Advocate General for Scotland v MacDonald* [2003] UKHL 34, [2003] ICR 937 to the effect that the Sex Discrimination Act 1975 (SDA 1975) did not cover discrimination because of sexual orientation as the proper comparator for a homosexual male in a claim under that act was a homosexual female.

3. In 2020 the Claimant received a medical diagnosis that caused him to re-evaluate matters and on 5 January 2021 he submitted a compensation claim to the MoD on 5 January 2021. This was dealt with as a historic complaint and answered by letter of 20 April 2022 from Wg Cdr P J McEneaney who explained (in summary) that, regrettably, at the time of the Claimant's discharge in 1975 discrimination on grounds of actual or perceived sexual orientation was lawful. Wg Cdr McEneaney explained that there was no longer enough information about his case to determine whether his description of events was correct, but acknowledged that what the Claimant described of his discharge appeared to have been unfair as he had not been given a chance to see the evidence against him or respond to allegations. She wrote: *"in 1975 your discharge was considered to be reasonable as well as lawful, even though what you experienced would not be countenanced today"*. She pointed him to avenues of support and recognition for service veterans.

4. The MoD has a service redress procedure for members and former members of the armed forces. The Claimant did not purport to make his complaint under that procedure, and the MoD did not consider it was dealing with his complaint under that procedure.

5. Following a period of ACAS Early Conciliation between 30 October 2022 and 11 November 2022, the Claimant commenced these proceedings on 20 November 2022.

6. In January 2023 the Claimant submitted an application to the European Court of Human Rights in Strasbourg against the UK Government, claiming violation of his rights under Articles 8 and 14 of the European Convention on Human Rights.

7. The MoD responded to the Claimant's Tribunal claim denying that the Tribunal had jurisdiction to hear the claim. The MoD also argued that the claim should have been rejected because it was commenced naming the UK Government as respondent, following a period of ACAS Early Conciliation to which the UK Government was also the named respondent, when the proper respondent should have been the Ministry of Defence. However, the claim was accepted and such arguments have recently been held to be precluded: *Sainsburys Supermarkets Ltd v Clark* [2023] EWCA Civ 386. At this hearing,

Mr Fetto KC agreed that the MoD should be named as the respondent to the claim.

The Tribunal's jurisdiction to hear the claim

8. For reasons explained briefly orally at the hearing in the course of hearing submissions and in discussion with the parties, and set out in writing here, I have decided that the Employment Tribunal does not have jurisdiction to hear the Claimant's claim for two reasons:-

   (1) The Employment Tribunal does not have jurisdiction to determine complaints of sexual orientation discrimination in respect of acts occurring prior to 1 December 2003 ("the time point"); and,
   (2) The Employment Triibunal does not have jurisdiction to determine complaints by former members of the armed forces unless they have made a prior service complaint that has been treated as valid by the armed forces ("the service complaint point").

(1) The time point

9. The Employment Tribunal is a creature of statute and only has jurisdiction to hear matters that the legislature has given it power to hear. Unlike the High Court, it has no 'inherent' jurisdiction. It also has no 'freestanding' jurisdiction under the Human Rights Act 1998 (HRA 1998) as it has not been given any such jurisdiction by way of subordinate legislation made under s 7 of that Act, nor is it a 'court' within the meaning of s 4(5) of that Act and so it does not have jurisdiction under that section to make a declaration of incompatibility in respect of any legislation that it might consider to be incompatible with the provisions of the European Convention on Human Rights (ECHR) incorporated into domestic law by s 1 to that Act ("the Convention rights"). The Employment Tribunal is obliged by s 3 of the HRA 1998 to interpret legislation compatibly with the Convention rights. I return to the extent of that obligation below.

10. The parties have both referred to the Equality Act 2010 (EA 2010) as the potential source of the Employment Tribunal's jurisdiction in this matter, but in my judgment it is clear that the EA 2010 does not apply.

11. The Employment Tribunal's jurisdiction in respect of claims under that Act is created by Part 9 of the Act. Section 216(3) EA 2010 provides for that Part to come into force on a day appointed by order. The relevant order was the *Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010/2317* ("the Commencement Order").

12. By art 1 of that order the Employment Equality (Sexual Orientation) Regulations 2003 ("the Sexual Orientation Regulations") were defined as a

'previous enactment' (along with the other predecessor discrimination legislation, including the Sex Discrimination Act 1975 (SDA 1975).

13. By art 2 of that order, the substantive provisions of the EA 2010 came into force on 1 October 2010.

14. By art 7 of that order:

> Part 9 of the 2010 Act (enforcement) applies where—
> (a) an act carried out before 1st October 2010 is unlawful under a previous enactment, and
> (b) that act continues on or after 1st October 2010 and is unlawful under the 2010 Act.

15. The act about which the Claimant complains in these proceedings happened in 1975. It was not continuing as at 1 October 2010 and so Part 9 of the EA 2010 does not apply to it.

16. Article 15 of the Commencement Order is one of the 'saving' provisions in the order. It provides:-

> The 2010 Act does not apply where the act complained of occurs wholly before 1st October 2010 so that—
> (a) nothing in the 2010 Act affects—
> (i) the operation of a previous enactment or anything duly done or suffered under a previous enactment;
> (ii) any right, obligation or liability acquired or incurred under a previous enactment;
> (iii) any penalty incurred in relation to any unlawful act under a previous enactment;
> (iv) any investigation, legal proceeding or remedy in respect of any such right, obligation, liability or penalty; and
> (b) any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty may be imposed, as if the 2010 Act had not been commenced.

17. The act of discharge about which the Claimant complains in these proceedings occurred wholly before 1 October 2010 and so the EA 2010 does not apply to it. However, if it was unlawful under a previous enactment, then art 15 ensures that that previous enactment continues to apply to it, notwithstanding any other provision repealing that enactment.

18. Accordingly, although the Sexual Orientation Regulations were repealed with effect from 1 October 2010 by EA 2010, Sch 27 (a provision that was brought into force under art(2)(15)(f) of the Commencement Order), by art 15(b) of

the *Order* the Regulations were preserved for acts that occurred wholly before 1 October 2010.

19. The Sexual Orientation Regulations came into force on 1 December 2003 (reg 1). Part II of the Regulations made provision prohibiting discrimination in employment and vocational training. By reg 28, complaints of discrimination or harassment *"which is unlawful by virtue of any provision of Part II"* could be brought to an Employment Tribunal (subject to certain exceptions of no relevance to this case).

20. The Employment Tribunal's jurisdiction under the Sexual Orientation Regulations was therefore limited to acts of discrimination that were unlawful under Part II. However, the Regulations did not make anything unlawful until they were brought into force on 1 December 2003.

21. It is a normal principle of statutory interpretation that legislation is not retrospective in its effect unless the contrary intention is clearly stated. In the Sexual Orientation Regulations, there is no such apparent contrary intention. Indeed, the way regulation 21 is drafted makes this clear:

> Relationships which have come to an end
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> **21.**—(1) In this regulation a "relevant relationship" is a relationship during the course of which an act of discrimination against, or harassment of, one party to the relationship ("B") by the other party to it ("A") is unlawful by virtue of any preceding provision of this Part.
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> (2) Where a relevant relationship has come to an end, it is unlawful for A—
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> (a)to discriminate against B by subjecting him to a detriment; or
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> (b)to subject B to harassment,
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> where the discrimination or harassment arises out of and is closely connected to that relationship.
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> (3) In paragraph (1), reference to an act of discrimination or harassment which is unlawful includes, in the case of a relationship which has come to an end before the coming into force of these Regulations, reference to an act of discrimination or harassment which would, after the coming into force of these Regulations, be unlawful.

22. If the Sexual Orientation Regulations prohibited discrimination occurring prior to the coming into force of the Regulations, reg 21(3) would not have been drafted as it was.

23. It follows that discrimination occurring prior to 1 December 2003 was not rendered unlawful by the Sexual Orientation Regulations 2003, and Employment Tribunals were not given jurisdiction in respect of it by reg 28 of those regulations.

24. Prior to the Sexual Orientation Regulations 2003, the SDA 1975 was on the statute books, but it is clear from the *McDonald* case referred to above that the Claimant could not bring his claim under the SDA 1975. In any event, the SDA 1975 only itself only came into force on 29 December 1975 and only applied to service in the armed forces from 1 February 1995 when it was amended by *The Sex Discrimination Act 1975 (Application to Armed Forces etc) Regulations 1994* (1994/3276).

25. As it is, the Claimant was discharged from the RAF some months before the SDA 1975 came into force, 20 years before it applied to service in the armed forces and 38 years before it became unlawful to discriminate on grounds of sexual orientation in relation to work and the Employment Tribunal was given jurisdiction to hear such claims.

26. The Employment Tribunal does not therefore have jurisdiction to hear the Claimant's claim because it relates to an alleged act of sexual orientation discrimination that occurred prior to 1 December 2003 and which was not therefore unlawful under the Sexual Orientation Discrimination Regulations or within the Tribunal's jurisdiction under those regulations and there is no other source of jurisdiction that would enable the Tribunal to hear this claim.

27. I add that I have borne in mind the interpretative obligation in s 3 of the HRA 1998 as referred to above, but in my judgment there is no scope for that to apply here. Having regard to the guidance of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, it would plainly 'go against the grain' of the Regulations and amount to legislation rather than interpretation for me to extend the scope of the Regulations retrospectively so as to render unlawful actions that were not unlawful at the time and which the legislature has not determined should retrospectively be rendered unlawful.

The service redress point

28. A further reason why the Claimant's claim is outside the Tribunal's jurisdiction is because he has not made a service redress complaint that was accepted by the MoD as valid before bringing these proceedings. Nor could he have done.

29. By reg 36(2)(c) the Sexual Orientation Regulations applied to service in the armed forces as they did to employment, save that By reg 36(7) and (8) a complaint could only be presented by a member of the armed forces under those regulations if the person had already made a complaint in respect of the same matter to a member of the forces under the service redress procedures and had not withdrawn that complaint.

30. Provision in respect of the service redress procedures is currently made under the Armed Forces Act 2006 (the 2006 Act) and regulations made thereunder. Under s 340A of the 2006 Act a valid service complaint can only be made if a person is or used to be subject to 'service law'.

31. The Claimant was not at any time 'subject to service law' because that has only applied to members of the RAF since the coming into force of s 367 of the Armed Forces Act 2006 on 1 January 2008 (pursuant to reg 3 of the Armed Forces Act 2006 (Commencement No 2) Order 2007).

32. Prior to the coming into force of 'service law' in the 2006 Act on 1 January 2008, members of the armed forces were subject to different laws. The Claimant as a member of the RAF was subject to air-force law: see s 11(1) of the Air Force Act 1955. Prior to 1 January 2008, the service redress procedures applicable to the Claimant only permitted currently serving members to make complaints: see section 181 of the 1955 Act. The Claimant was as a matter of fact aware of this which is why he made no complaint when discharged in 1975: he was not permitted at that time to do so.

33. The Respondent pleads in its response to this claim that there was a transitional arrangement to the new system that applied to complaints submitted by 31 December 2015. The Claimant did not submit a complaint by that point either.

34. He cannot now make a service redress complaint about what happened in 1975 because he was not subject to service law at that point and so has no entitlement under s 340A of the 2006 Act to make a service redress complaint.

35. It was held by the EAT (Silber J) in *Molaudi v Ministry of Defence* (UKEAT/0463/10/JOJ) that in order for a complaint to count as a service complaint for the purposes of opening the 'gateway' to the Tribunal's jurisdiction, it has to be a valid complaint, accepted as valid by the MoD. That case concerned a race discrimination claim by a former member of the armed forces, where the service complaint had been rejected as invalid because it was out of time, but the legal provisions considered were the same as in the Sexual Orientation Discrimination Regulations 2003 and it is in my judgment binding on me. In this case, the MoD did not accept the Claimant's complaint as a valid service redress complaint, but simply responded to it as a historic complaint.

36. It follows that a second reason why the Employment Tribunal does not have jurisdiction over the Claimant's claim is because he has not made a service redress complaint before commencing proceedings.

Conclusions

37. I therefore determine as a preliminary issue that the Tribunal does not have jurisdiction to hear the Claimant's claim in respect of his discharge from the RAF in 1975.

38. In the light of the reasons set out above, it has not been necessary for me to determine whether, if there were an alleged act of discrimination falling with the Tribunal's jurisdiction, it would have been just and equitable to extend

time by 47 years to allow the Tribunal to hear that claim having regard to the time limits in reg 34 of the Sexual Orientation Regulations 2003.

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Employment Judge Stout

2 May 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

02/05/2023

FOR THE TRIBUNAL OFFICE