Neutral Citation Number: [2024] EWHC 669 (Admin)

Case No: AC-2022-MAN-000251

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Friday, 22nd March 2024

Before:
FORDHAM J

- -

Between:

THE KING (on the application of MARK MOSS)	**Claimant**
- and -	
THE SERVICE COMPLAINTS OMBUDSMAN OF THE ARMED FORCES (No.3)	**Defendant**

- -
- -

The Claimant in Person
Claire Palmer (instructed by SCOAF) for the **Defendant**

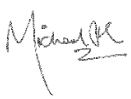
- -

Hearing date: 14.3.24
Draft judgment: 15.3.24

- -

Approved Judgment on Remedy

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



- -

FORDHAM J

FORDHAM J:

Introduction

1. On 21 December 2023 I handed down a 30-page judgment [2023] EWHC 3311 (Admin) allowing this claim for judicial review. I said at the end (§91):

> ***I will first receive written submissions and decide whether any further hearing is needed. I will then describe, in a short sequel judgment, what I decided about the appropriate remedy to grant and any question of costs or permission to appeal.***

2. There was a timetabled sequence of written submissions from Mr Moss (14.1.24), Ms Palmer for the Ombudsman (29.1.24) and a reply from Mr Moss (12.2.24). I invited and received draft orders from them both (1.3.24). I convened an oral hearing (14.3.24), as requested by both parties. I am grateful for their assistance. This is the short sequel judgment I promised.

Section 31(5)(a)

3. Section 31(5)(a) of the Senior Courts Act 1981 (SCA81) provides as follows:

> ***If, on an application for judicial review, the High Court makes a quashing order in respect of the decision to which the application relates, it may in addition – (a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court…***

An Outline

4. The Judgment speaks for itself and I am not going to summarise it. But here is an outline. The events centred around 2012 when Mr Moss's two existing service complaints – SC1 and SC2 (§8) – came to be closed (§§14-25), and his "wider matters" (§§10-13) were left unpursued. The target for judicial review (§3) was the Ombudsman's decision (18.3.22) in an Investigation Report (IR3), arising out of a s.340H(1)(a) "substance" investigation (§§1, 32, 34-35). There was also a decision arising out of a s.340H(1)(b) "maladministration" investigation, but I was not concerned with that (§33). IR3, and the preceding decisions, arose out of Mr Moss's service complaint (SC3) dated 14.5.14, with its "three elements" and claim for "redress" (§27), all rejected by the Appeal Body on 11.5.18 (§31). The Ombudsman's previous "substance" decision (22.2.21) had been held by Judge Sycamore not to discharge applicable public law duties (§37). I decided, by reference to three "key topics" (§46), that the "substance" decision in IR3 could not withstand scrutiny (§64). It was vitiated by the absence of a reasonable basis for the reasoned assessment in relation to: (i) the absence of an Assisting Officer (§§64-70); (ii) the failure to advise Mr Moss (§§71-73); and (iii) the reliance on post-meeting communications (§74). All of which was reinforced (§90) by a further feature (iv): concerns arising out of Mr Moss's claim that he dropped his service complaints having been told that "there was nothing to be gained" from them (§86).

Utility

5. I addressed the "utility" of granting judicial review, saying this about the importance of securing a lawful decision (§75):

> ***It could lead to a clear finding upholding [SC3] on the basis that Mr Moss was wronged… It could lead to the Ombudsman finding that there was a breach of a duty of care … It could lead to a response which considers detriment in terms of a loss of SC1, SC2 and the 'wider matters' being determined on their merits…***

The Appropriate Remedy

6. I am satisfied that the appropriate remedy is: (1) to quash the Ombudsman's s.340H(1)(a) "substance" decision dated 18.3.22; (2) to remit the matter to the Ombudsman with (a) a direction to reconsider the matter and reach a decision in accordance with the Court's findings in the Judgment and (b) a direction that the reconsideration be undertaken in conjunction with a new investigator. This Order reflects s.31(5)(a) of SCA81. The Ombudsman's s.340H(1)(a) "substance" decision dated 18.3.22 is "the decision to which the application [for judicial review] relates". The Judgment contains "the findings of the High Court". The direction about a new investigator is part of my "direction to reconsider".

The "Substance" Decision

7. Mr Moss and Ms Palmer were agreed that the Ombudsman's s.340H(1)(b) "maladministration" decision, also embodied within IR3, should stand undisturbed. That is correct. This was not "the decision to which the application [for judicial review] relates" (s.31(5)). I will identify here those parts of IR3 which constitute the Ombudsman's s.340H(1)(b) "maladministration" decision. They are: (a) the "summary findings" under the sub-headings "maladministration" and "recommendations"; and (b) the paragraphs addressing "maladministration" at IR3 §§48-77 and §§96-102. These will be untouched by my Order. Everything else in IR3 is the s.340(H)(1)(a) "substance" decision. I do not need to spell this out in the Order. I have done it here.

A New Investigator

8. Mr Moss and Ms Palmer agreed that the Ombudsman (Mariette Hughes) can properly retake the new "substance" decision. I agree and do not need to get into Ms Palmer's submission that this is a situation where "the statute provides for a single decision-maker" (HCA International Ltd v CMA [2015] EWCA Civ 492 [2015] 1 WLR 4341 at §67).

9. But we know that a very important role is played by the "investigator". In the Judgment (§40) I identified the question, in the context of the new paragraphs in IR3 (IR3 §§78-95), as to "whether the reconsideration and new reasons were the work of the same individual who was the decision-maker and had written the quashed paragraphs in IR2". I now know the answer. The Ombudsman (Mariette Hughes, newly appointed on 18.1.21: Judgment §1) took the IR3 decision (22.2.21), adopting and approving the reasoned assessment prepared and presented by the same investigator who had written and presented the IR2 reasoned assessment. The investigator is the individual who does "the work".

10. Mr Moss says what is now needed is a different investigator, to go over the evidence, consider the issues and write a fresh reasoned assessment. Ms Palmer disagrees. She submits that there is no "reasonably perceived unfairness" (see HCA §§68-71) justifying directing a different investigator. On this aspect, I agree with Mr Moss.

11. The investigator has a key, front-line role in considering the materials and the issues, forming a judgment, with a reasoned assessment, articulated through drafting the report for the Ombudsman to consider adopting. The investigator in this case wrote IR2. There was then Judge Sycamore's order (Judgment §39) which "surgically removed" certain paragraphs from IR3 (§91). A new decision was written up by the investigator and adopted by the Ombudsman (IR3). It contained the new replacement paragraphs, adverse findings and conclusions. The overall decision was undisturbed. Other paragraphs were repeated verbatim. Now, judicial review has again been granted and the "substance" decision in IR3 is being quashed. It is true that this is not because IR3 has been found vitiated by any apparent bias. But a prospective question arises, falling squarely within the remedial judgment and discretion of this Court. The question is about what should happen next. A fresh decision is needed. I have made several findings about several aspects of the reasoned assessment in the rewritten IR3, whose conscientiousness I have accepted (§§40, 91), but whose reasonableness I was not able to accept. I accept that there is a familiarity with the case, background and materials. But I think perception really matters. What is needed is not a redrafted decision document. What is needed is a decision retaken afresh. I do not think the investigator, or Mr Moss, should be put in the position of reconsidering the merits, making a reasoned assessment to put to the Ombudsman, articulating it through drafting and presenting a reasoned report, after the assessment and reasoning in two previous reasoned reports have successfully been judicially reviewed. I do not think the same investigator should now be being placed in that position. I do not think it is fair to anybody. The "substance" case now needs to have – and be fully "perceived" to have had – a fresh consideration on the merits.

12. Ms Palmer has cited HCA. I will be transparent. Absent authority, I would – I think – have expected the judicial review court's judgment and discretion, on this aspect of remittal with a "direction to reconsider the matter" (s.31(5)(a)) to be capable of extending more broadly than a "reasonably perceived unfairness" test. Especially if this is a prospective ruling on whether a future decision – if adverse – would (and not even could) be vitiated by apparent bias or procedural unfairness? In this case I have not needed to interrogate with Ms Palmer whether HCA was the last word or has been treated as universally applicable. That is because I am satisfied – in all the circumstances – that the particular risks and challenges of the present case mean that using the same investigator for the fresh decision would now cross the threshold of presenting an "unfairness" to Mr Moss, which would "reasonably" be "perceived". The use of a new investigator is part of the Court's "direction" to reconsider the matter (s.31(5)(a)). I consider it justified, as necessary, in all the circumstances of this case.

The Ombudsman's Invitations

13. Ms Palmer invited me to quash "the parts of the decision that conclude: (i) that the actions of Lt Col McCall in the meeting or subsequently were 'appropriate'; (ii) that the absence of an Assisting Officer was not material; and (iii) that the MOD did not breach the duty of care to the Claimant".

14. Alternatively, Ms Palmer invited me to quash "paragraphs 46-47 and 79-93" of IR3, directing the retaking of the decision in respect of the substance complaint as summarised on 2.12.19 (quoted in the Judgment at §34), while making a declaration that "the Ombudsman is entitled to include in the new decision such elements of the quashed paragraphs that do not conclude (i) that the actions of Lt Col McCall in the meeting or subsequently were 'appropriate'; and (ii) that the absence of an Assisting Officer was not

material". She accepted that if paragraphs of IR3 (eg. as to background or findings) were left undisturbed by the Court's Order: (a) it would be right for the Court to make clear that these are or may be materially incomplete so further paragraphs could or should be added; and (b) it would be appropriate for the Court to spell out the substance of the further points which are necessary or appropriate for inclusion.

15. Ms Palmer also told me that the Ombudsman would not oppose mandatory orders (SCA81 s.31(a)) requiring that "the Ombudsman shall substitute" the following "findings": (1) "A finding that the MOD breached its duty of care (in the sense of a wider duty of care and not a statutory duty) to the Claimant by failing to ensure that he had the benefit of an Assisting Officer and/or failing to enable him more time including the opportunity to speak with an Assisting Officer prior to deciding whether to close his service complaints and including enabling him to ensure that any closure of the SCs would not prevent him being able to pursue SC1 on the basis set out in the Withdrawal Letter"; (2) "A finding that the Claimant has therefore been wronged in respect of the process of the closure of SC1 and SC2 and therefore potentially lost the chance to pursue such matters as service complaints"; (3) "A finding that there should be a recommendation for a consolatory payment in accordance with the Financial Remedy Guidelines." In addition, I would direct that: "The question of the amount of any recommended Consolatory Payment shall be remitted to the Ombudsman for a decision".

16. Alongside all this, Ms Palmer invited recitals to an Order, recording "the Court noting that … significant parts of the decision set out background and decision-making in respect of parts that were not subject to successful challenge"; and "the Court confirming that its judgment did not conclude that there was an arguable breach of (i) any statutory duty of care owed by the Ministry of Defence or (ii) negligence by the Ministry of Defence in respect of the closure of the Claimant's Service Complaints".

17. In support of these various invitations, Ms Palmer submitted in essence as follows. (1) The starting-point is that the Court should make only such Order as gives effect to the judgment which the Court has handed down. But the invited alternative Orders embody what the Court has decided, or what the Court is to be understood to have decided and should now confirm, or what the Court is appropriately now deciding with the benefit of a further hearing and further submissions. (2) The Court's Order, taken together with the Judgment, "should define with clarity the error in the decision appealed against and thereby make clear what must be done in order to provide a determination in accordance with the opinion of the court" including "what matters the parties are entitled to develop" on any remittal, giving "guidance" to "assist the process without fettering the [decision-maker's] discretion" (R (Perrett) v Communities and Local Government Secretary [2009] EWCA Civ 1365 at §29). (3) The Court can quash the decision "for the reasons … explained" and "state expressly in the order" that the decision-maker "need not reopen or reconsider any other issue" (R (Essex County Council) v Education Secretary [2012] EWHC 1460 (Admin) at §85). (4) The Court can grant a declaration specifying those matters on which the Ombudsman "may not rely on any future consideration" (R (Balakoohi) v Home Secretary [2012] EWHC 1439 (Admin) at §121). (5) Clarity, finality and expectation-management are important in this case. Especially after a third round of judicial review, where the scope of the claim was clearly delineated (Judgment §46), where a number of grounds have previously been raised and found unarguable, and where the risk should be eliminated of these being raised all over again.

18. I have not been persuaded that Ms Palmer's proposed orders or recitals are appropriate. Nor am I persuaded that any of them become appropriate where a new investigator is going to be needed.

19. Here are my essential reasons. I think the Judgment is clear as to what I have decided, and all that I have decided. I am not prepared now to broaden the scope and resolve a new set of further issues. I am quashing "with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court" (Senior Courts Act 1981 s.31(5)(a)). Those "findings" are in the Judgment. I am not now going to make further "findings" on further matters. I am not prepared to give a prospective "advisory declaration"; or advice on decision-making or drafting. In relation to "duty of care" what I have decided was that this is "broader" than – while including – statutory and legal duties (Judgment §54). I made a number of findings about aspects of IR3 which did not have a "reasonable basis" with "legally adequate reasons". In addressing "utility", I identified a number of the things to which a lawful decision "could lead" (§75). I did not find a sole justifiable outcome. I emphasised my secondary supervisory review function, and the Ombudsman's primary decision-making function (§§57, 91).

20. I am not prepared to direct another "remittal" with certain paragraphs from the decision "surgically removed" (§91). I am not prepared to Order that background sections of IR3 are untouched, nor give a list of points which would need to be added to them to make those parts of a fresh decision complete and balanced.

21. The quashing of the "substance" decision, for reconsideration afresh, requires a fair and reasonable decision on the merits. It does not preclude the Ombudsman – assisted by the new investigator – from saying, in a fresh decision, things that were said in the quashed "substance" decision (IR3). The Court has made no order prohibiting that from happening. The Ombudsman and the investigator will do that if, for their part, they are satisfied that what is being said is relevant, fair, consistent with the Judgment, and a right thing to say on the merits. If that happens, and if Mr Moss then raises a criticism equivalent to one which has been previously found to be unsustainable, that will be visible. That visibility secures the safeguard.

22. I accept that the Court has the powers seen in Essex and Balakoohi. However, those cases, as I read them, were about designing an order to give effect to what had been decided in the judgment of the Court. I think particular care is needed with Perrett. There, the Court of Appeal was addressing the special position in a planning case where a decision is "not set aside" but the court will nevertheless "remit the matter" (see Perrett §§12, 18, 22, 27-28). That species of intervention was being distinguished from a case where a decision is "quashed or set aside", so that the decision-maker has to "reach a fresh decision" (§18). That was why there was "no reason to doubt the correctness of what was said in [an earlier case] about the effect of a quashing order" (§22).

23. I record here these further points. First, Ms Palmer accepted (but see §24 below) that the Ombudsman's powers would – in theory at least – extend to directing the MOD to reopen SC1, SC2 and the "wider matters", or directing the MOD to "consider" doing so. Secondly, she emphasised the prescribed purpose of "redress" as being "to put the complainant back in the position they would have been [in] had the wrong not occurred, so far as is possible". Thirdly, she accepted that it would be appropriate – on quashing and remittal – for the Ombudsman to consider "all relevant factors including those in the Judgment" and that it may be considered appropriate to invite a fresh round of

representations from Mr Moss, and from the MOD. Fourthly, she asked me to record – as I do – that Mr Moss told me that he accepts, in relation to the Assisting Officer, that the contents of JSP831 do not constitute a "statutory" duty.

Post-Judgment Clarification

24. This is a new paragraph, following circulation of this judgment in draft. The first point just recorded (§23 above) twice uses the word "directing". Ms Palmer acknowledges that she used the word "directing". Having reviewed the draft judgment, she tells me the Ombudsman wishes to clarify her position as being that the power would instead be limited to "recommending". She apologised to the Court and to Mr Moss. I am satisfied that it is appropriate to record this requested clarification of what is being accepted.

Mr Moss's Invitations

25. I turn to Mr Moss's invitations. He invited me: (1) to make an order recording that there have been breaches of a duty of care, including legal and statutory duty of care; (2) if possible, to exercise the judicial review court's powers to substitute the Court's own decision for that of the Ombudsman (SCA81 s.31(5)(b) and (5A); (3) if possible, to award damages (SCA81 s.31(4)); or (4) to make an order that the Ombudsman is legally required to address the "merits" of SC1, SC2 and the "wider matters".

26. I have not been persuaded to do any of this. I am and remain satisfied that I have identified the correct Order. I repeat my essential reasons (§19 above). I add this. The conditions in SCA81 s.31(5A) for the judicial review court retaking the decision are not satisfied (and, in any case, I have not found a sole justifiable outcome). As to damages, there is no cause of action in damages against the Ombudsman for the purposes of SCA81 s.31(4) (nor have I decided any issue about any liability in damages on the part of anyone else).

Costs

27. Leaving aside any issue as to the costs of or associated with the consequentials hearing, there was agreement that the Ombudsman pay Mr Moss's costs in the agreed sum of £2,000 by 4pm on 22.3.24. This aspect did not appear to require an Order from me and can be recorded in a recital. Following receipt of this judgment in draft, the parties agreed that the Ombudsman pay the Claimant's costs in respect of the hearing on 14.3.24 in the sum of £1,080 by 4pm on 17.4.24. This aspect too does not require an Order and can be recorded in a recital.

Permission to Appeal

28. Finally, there was no application for permission to appeal.

Order

29. I recorded the agreed costs in a recital. I ordered that: (1) The claim for judicial review is granted. (2) The Defendant's s.340H(1)(a) "substance" decision dated 18.3.22 is quashed. (3) The matter is remitted to the Defendant with (a) a direction to reconsider the matter and reach a decision in accordance with the Court's findings in the judgment [2023] EWHC 3311 (Admin); and (b) a direction that the reconsideration be undertaken in conjunction with a new investigator. (4) Save as agreed between the parties as recorded in the recitals, no order as to costs.