Neutral Citation Number: [2024] EAT 18

Case No: EA-2021-000848-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 March 2024

Before :

MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

MS PATTI-MERNE EDWARDS

Appellant

- and –

MINISTRY OF DEFENCE

Respondent

- -
- -

Matthew Shankland, solicitor (of Sidley Austin LLP) for the **Appellant**
Adam Tolley KC, Julian Allsop & Anna Williams (instructed by Government Legal Department for the **Respondent**

Hearing date: 30 January 2024

- -

JUDGMENT

SUMMARY

Race and sex discrimination and victimisation

The claimant is a Lance Corporal in the British Armed Forces. Following a Preliminary Hearing, the Employment Tribunal ("ET") determined that it did not have jurisdiction to hear her claim for race discrimination as she had not made a service complaint about the "matter", as required by section 121(1) of the **Equality Act 2010** ("**EQA**") and refused her application to amend her claim to add claims for sex discrimination, harassment related to sex and victimisation, because she had not made a service complaint about those "matters" as required by section 121(1).

The claimant's service complaint concerned the same events as the subsequent ET claim. However, it was accepted that her service complaint did not refer explicitly to race or sex discrimination, harassment related to race or sex, or victimisation.

The Employment Appeal Tribunal dismissed her appeal, holding that the ET was correct to conclude that section 121 requires a complainant who subsequently brings an **EQA** claim to indicate in their service complaint that they are making allegations of discrimination or harassment based on one (or more) of the applicable protected characteristics under the **EQA** or (as the case may be) that they are making a complaint of victimisation because of an action that it can be seen is capable of amounting to a protected act. However, whether the act complained of to the Tribunal is the "matter" raised in the earlier service complaint, should be approached in a non-technical way, by identifying the substance of the service complaint, assessed as a whole. Consistent with this non-technical approach, the service complaint need not use the words "discrimination" "harassment" or "victimisation" and equally, there is no need for the service complaint to refer to the relevant protected characteristic/s by the terminology used in the **EQA** or to use the phrase "protected act". Such an approach is consistent with a purposive construction of section 121 and rights guaranteed by Article 6 of the **European Convention on Human Rights**.

The ET had correctly held that the text of the claimant's service complaint did not include anything that could fairly be understood to be an allegation that she had been discriminated against or harassed due to race or sex or that she had been victimised as a result of undertaking something that could amount to a protected act.

MRS JUSTICE HEATHER WILLIAMS:

Introduction

1. This is an appeal from the judgment of Employment Judge Oliver ("the EJ") sitting at the Bristol Employment Tribunal ("ET") promulgated on 23 August 2021, following a Preliminary Hearing on 29 July 2021. I will refer to the parties as they were known below. The EJ determined that: (i) the ET did not have jurisdiction to hear the claimant's claim for race discrimination as she had not made a service complaint about the matter as required by section 121(1) of the **Equality Act 2010** ("**EQA**"); and (ii) the claimant's application to amend her claim to add claims for sex discrimination, harassment related to sex and victimisation was refused because she had not made a service complaint about those matters as required by section 121(1) **EQA**, so that the Tribunal would not have jurisdiction to hear those claims.

2. Section 121 applied because the claimant is a Lance Corporal in the British Armed Forces, Royal Logistics Corps. In summary, section 121 provides that the Tribunal's jurisdiction in respect of Part 5 of the **EQA** (work), does not apply to a complaint relating to an act done when the claimant was serving as a member of the armed forces unless "the complainant has made a service complaint about the matter" and the complaint has not been withdrawn. The claimant had filed a service complaint on 25 July 2019. However, the EJ held that it did not cover the discrimination, harassment and victimisation claims that she sought to pursue before the ET.

3. Following a hearing under rule 3(10) of the **Employment Appeal Tribunal Rules 1993** (as amended) on 2 September 2022, permission to proceed to a full hearing was granted by HHJ Auerbach, on the basis of amended grounds of appeal.

4. The issues raised by this appeal concern, firstly, what is required in terms of the content of a service complaint in order to satisfy section 121(1) and, secondly, whether the claimant's service complaint met that requirement in respect of the ET claims that she subsequently sought to bring. These issues arise in a context where it is accepted that the claimant's service complaint contained a lot of factual detail about events that were also subsequently raised in the ET claim, but it did not expressly refer to race or sex discrimination, harassment related to race or sex or victimisation.

The amended grounds of appeal

5. The claimant's amended grounds of appeal are as follows:

> "1. The Tribunal erred in law by adopting too stringent and technical an approach to the question of what, on the true construction of the legislation, the content of a Service Complaint made by a Complainant...should comprise in order for the Tribunal to establish jurisdiction pursuant to Section 121(1) of the [EQA] over a claim concerning an act done to the Complainant in the course of their employment.
>
> 2. In particular it was an error of law for the Tribunal to determine that in a Service Complaint it is necessary:
>
> (i) for a Complainant to specify by the use of any particular language that they are alleging discrimination; and
>
> (ii) that a Complainant should specify which of the protected characteristics set out in EQA Section 4 are relied upon.
>
> 3. The Judge ought to have determined: first, that on their true interpretation, the requirements of EQA Section 121(1) are satisfied in circumstances where a cause of action under the EQA in respect of an act done emerges sufficiently from a fair and objective reading of the Complainant's account...of how she or he considers herself or himself to have been wronged; and, second, that the Appellant's Service Complaint met these requirements.
>
> 4. When assessing the question of the required content of a Service Complaint...the Tribunal paid insufficient regard to the fact that:
>
> (i) the requirements of the EQA Section 121(1) form a jurisdictional gateway; and therefore
>
> (ii) any interpretation...which imposes stringent technical requirements as to the content of a Service Complaint about a matter infringes a Complainant's right, under the Human Rights Act 1988 (the "HRA"), to obtain access to justice by bringing a claim about an act done in the course of their employment before the Tribunal.
>
> 5. In the circumstances of the Appellant's claims, and given the content of and elections contained in her Service Complaint...by applying the law in the manner set out in the Judgment and in taking the approach to the interpretation of the legislation that it did, the Tribunal erred in refusing to grant the Appellant permission to amend her ET1 and in dismissing the claims made in the Appellant's original ET1 for want of jurisdiction in each case. In the circumstances the Appellant's rights under the HRA were infringed."

Preliminary objection to Grounds 4 and 5

6. The respondent objected to Grounds 4 and 5 of the claimant's amended grounds of appeal, contending that arguments based on the **Human Rights Act 1998** ("**HRA**") and the **European Convention on Human Rights** ("**ECHR**") were not open to her as she had not made these submissions before the ET and, accordingly, it was not legitimate to criticise the ET for failing to consider a point which she had not asked it to consider.

7. In so far as there was any uncertainty as to the scope of the claimant's **HRA** challenge, Mr Shankland clarified during his oral submissions that Grounds 4 and 5 were advanced solely by reference to Article 6 **ECHR**, and that Articles 8 and/or 14 were not relied upon. He also accepted that the Article 6 issue fell to be resolved on the material that was before the ET and he confirmed that he did not seek to introduce any new evidence or facts on this issue.

8. I note that Article 6 was raised before the EJ to some extent. At that stage the claimant was represented by Ms Lainchbury, a solicitor from Sidley Austin LLP. The skeleton argument prepared for that hearing asserted that requiring a claimant to spell out in their service complaint, the causes of action that they subsequently raise with the Tribunal, would entail a level of detail that was not required by the legislative provisions (paras 5.10 and 5.11). Footnote 21 to this passage said that to do so would be contrary to Article 6.1 **ECHR**: "It would operate as an absolute bar to the enforcement of employment rights before the Employment Tribunal and that Tribunal, not the Armed Forces, is the specialist domestic forum for determining claims of discriminatory treatment in the work place".

9. It is common ground that **HRA** arguments were not referred to in the oral submissions made to the EJ. However, she did consider the effect of Article 6 at paras 54 – 55 of her Reasons (para 71 below).

10. Although the wording of Ground 4 refers to the EJ paying "insufficient regard" to the **HRA**, it is clear when Grounds 4 and 5 are read in full and in context, that the thrust of these grounds is a complaint that the EJ construed the section 121 requirement to have "made a service complaint about the matter" too strictly in light of the requirements of Article 6. I consider that this issue was before the EJ, given the contents of the claimant's skeleton argument, and I bear in mind that she felt able to address it. Additionally, it would be unrealistic and artificial for this Court to consider the content of section 121 without having regard to the requirements of Article 6 **ECHR**, not least because of the interpretative obligation that applies by virtue of section 3 **HRA** and the duty on the Court as a public authority, imposed by section 6 **HRA,** not to act incompatibly with Article 6. Furthermore, the respondent to the appeal accepted and indeed relies upon the decision of HHJ Eady QC (as she then was) in **Duncan v Ministry of Defence** UKEAT/0191/14/RN ("**Duncan**"), where she endorsed the Ministry of Defence's own approach that a purposive construction of section 121 was required in order to achieve a lawful balance with the complainant's right of access to a Court or Tribunal within a reasonable time (paras 32 below). A consideration of Grounds 4 and 5 will not involve the introduction of new evidence or a consideration of facts beyond those found by the EJ, as I have indicated. There is also no question of the respondent being prejudiced, as it has been on notice of the Article 6 issue since at least receipt of the amended grounds of appeal and Mr Tolley KC was able to make substantive submissions in response to the claimant's grounds.

11. Accordingly, I reject the respondent's preliminary objection to Grounds 4 and 5 and I will address

the substantive merits of these grounds.

The Legal Framework

The EQA 2010 provisions

12. Section 120 **EQA** provides (as relevant):

> "**120 Jurisdiction**
> (1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to –
> (a) a contravention of Part 5 (work);"

13. Section 121(1) **EQA** provides:

> "**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."

14. Section 121(2) identifies circumstances in which the complaint is to be treated for the purposes of section 121(1)(b) as having been withdrawn. Subsection (5) clarifies that the bringing of Tribunal proceedings does not affect the continuation of the procedures set out in the service complaint regulations.

15. The primary time limit that generally applies to proceedings on a section 120 complaint to the Tribunal is three months (section 123(1) **EQA**). However, section 123(2)(a) provides for a primary time limit of six months for proceedings brought in reliance on section 121. In both instances the Tribunal may extend the period where it considers it just and equitable to do so: section 123(1)(b) and 123(2)(b).

16. Claims for disability discrimination or age discrimination cannot be brought in relation to service in the armed forces: Schedule 9, para 4(3) **EQA**.

The Armed Forces Act and service complaint provisions

17. Part 14A **Armed Forces Act 2006** ("**AFA 2006**") is headed "Redress of Service Complaints". Section 340A states (as relevant);

> "**340A Who can make a service complaint?**
> (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) .....
>
> (3) In this Part, 'service complaint' means a complaint made under subsection (1) or (2)."

18. Section 340B provides (as relevant):

> "**340B Procedure for making a complaint and determining admissibility**
> (1) The Defence Council may make regulations (referred to in this Part as 'service complaint regulations') about the procedure for making and dealing with a service complaint.
>
> (2) Service complaint regulations must make provision –
> (a) for a service complaint to be made to an officer of a specified description;
> (b) about the way in which a service complaint is to be made (including about the information to be provided by the complainant);
> (c) that a service complaint may not be made, except in specified circumstances, after the end of the specified period.
> 'Specified' means specified in the regulations.
>
> (3) The period referred to in subsection (2)(c) must be at least three months beginning with the day on which the matter complained of occurred."

19. Accordingly, where the Defence Council makes service complaint regulations, there is a mandatory requirement to include provision for the matters specified in section 340B(2).

20. Section 340C(1) states that service complaints regulations must provide for the Defence Council to decide, in the case of a service complaint that is found to be admissible, whether the complaint is to be dealt with by a person or panel of persons appointed by the Council or by the Council themselves. Pursuant to section 340C(2) regulations must provide for the decision-maker to determine if the complaint is well-founded and, where that is the case, to decide upon redress. Section 340F provides that the Defence Council may authorise a person to investigate a particular service complaint on behalf of the decision-maker.

21. The **Armed Forces (Service Complaints) Regulations 2015/1955** ("**the Service Complaint Regs**") are made by the Defence Council in the exercise of powers conferred by **AFA 2006**. Regulation 2 addresses interpretation: "service complaints process" means the process for the redress of service complaints under Part 14A of **AFA 2006**; "statement of complaint" means the statement referred to in regulation 4(1); and "specified officer" means the officer appointed in relation to that complaint in accordance with regulation 3. Regulation 3 provides that the specified officer is appointed by the Defence Council or by a person authorised by the Defence Council "for the purposes of deciding whether any service complaint is admissible".

22. Regulation 4 addresses how a service complaint is made. It states (as relevant):

> "**4 Procedure for making a service complaint**
> (1) A service complaint is made by a complainant making a statement of complaint in writing to the specified officer.
>
> (2) The statement of complaint must state –
> (a) how the complainant thinks himself or herself wronged;
> (b) the name , where known, of any person who is alleged by the complainant to be the

subject of the complaint or implicated in any way in the matter, or matters, complained about;
(c) whether any matter stated in accordance with sub-paragraph (a) involved discrimination, harassment, bullying, dishonest or biased behaviour, a failure by the Ministry of Defence to provide medical, dental or nursing care for which the Ministry of Defence was responsible or the improper exercise by a service policeman of statutory powers as a service policeman;
(d) if the complaint is not made within the period which applies under regulation 6(1), (4) or (5), the reason why the complaint was not made within that period;
(e) the redress sought; and
(f) the date on which the statement of complaint is made.

(3) The statement of complaint must also state one of the following –
(a) the date on which, to the best of the complainant's recollection, the matter complained about occurred or probably occurred;
(b) that the matter complained about occurred over a period, and the date on which, to the best of his or her recollection, that period ended or probably ended;
(c) that the matter complained about is continuing to occur;
(d) that the complainant is unable to recollect the date referred to in sub-paragraph (a) or (b).

(4) .....

(5) 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."

23. I highlight the requirement in regulation 4(2)(c) for the complainant to state whether the matter raised in the service complaint involved discrimination or one of the other subjects listed in that regulation. Mr Shankland accepted, when the point was put to him, that this presupposes that the complainant will identify which of the circumstances listed in regulation 4(2)(c) applies. Save for the reference to the improper exercise of the powers of a service policeman, the listed circumstances all appear to involve allegations of a kind that might well result in a Court or Tribunal claim. There is a correlation between the list in regulation 4(2)(c) and regulation 5 of the **Armed Forces (Service Complaints, Miscellaneous Provisions) Regulations 2015/2064** ("**the SCMP Regs**") (para 28 below), which concerns the circumstances in which an independent person must be involved in the determination of a service complaint.

24. Regulation 4(5) of the **Service Complaint Regs** explains what 'discrimination' means for these purposes. The list of characteristics replicates the protected characteristics provided for in section 4 of the **EQA**, save for the absence of age, disability and pregnancy and maternity; and the inclusion of part-time employees (who are covered by the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000**). Whilst nothing turns on it for the purposes of this appeal, it is curious that despite an apparently intended relationship with the EQA, the "grounds of" formulation from the pre-EQA legacy legislation is employed, rather than the "because of a protected characteristic" phraseology used in section 13

EQA; and "victimisation" is explained as being on the grounds of one or more of the listed characteristics, rather than because the complainant has done or is believed to have done or may do a "protected act", as in section 27 **EQA**. Mr Tolley was not able to indicate whether this a deliberate or unintended divergence from the Act.

25. Regulation 5(1) provides that after receipt of the statement of complaint, the specified officer must decide whether the complaint is admissible in accordance with the requirements of section 340B(5) **AFA 2006**.

26. Regulation 6 addresses the time limits for making a service complaint. The general rule, contained in regulation 6(1), is that "a person may not make a service complaint after three months beginning with the relevant day". The "relevant day" is the day on which the matter the person wishes to complain about occurred or, if it occurred over a period of time, the last day on which it occurred. However, regulation 6(4) provides that if a matter is or has been capable of being pursued under Chapter 3 of Part 9 of the **EQA** (which includes sections 120 and 121), a six month period applies, instead of the three months. Accordingly, there is a longer period of time for making a service complaint in respect of matters that are capable of being pursued as a claim under these provisions of the **EQA**. There is discretion to extend the time for making a complaint in relation to both the three month and the six month time limit, where the specified officer considers it "just and equitable to allow this" (regulation 6(6)).

27. Regulation 9 addresses decisions on the service complaint. Regulation 14(1) indicates that for the purposes of making a decision under regulation 9(2)(a) or (b) (as to whether the complaint is well-founded and as to redress), the decision-maker may request the complainant or such other person as they consider appropriate, to supply information or produce documents.

28. The **SCMP Regs** were made by the Secretary of State. Regulation 5 provides:

> "**5 Independent persons**
> (1) Paragraph (3) applies if –
> (a) the Defence Council act by virtue of section 340D(2)(d) or section 340M(2)(a) in relation to a service complaint; and
> (b) the statement of complaint made in accordance with regulations made for the purposes of section 340B(1) and (2) includes an allegation within paragraph (2).
>
> (2) An allegation referred to in paragraph (1)(b) is an allegation that the complainant has been the subject of –
> (a) discrimination;
> (b) harassment;
> (c) bullying
> (d) dishonest or biased behaviour

> (e) a failure of the Ministry of Defence to provide medical, dental, or nursing care for which the Ministry of Defence was responsible.
>
> (3) The Defence Council must appoint –
> (a) a person who is independent; or
> (b) a panel that includes at least one member who is independent.
>
> (4) 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."

Service complaints: the case law

29. **Molaudi v Ministry of Defence** UKEAT/0463/10/JOJ ("**Molaudi**") concerned an appeal under the earlier **Race Relations Act 1976** ("**RRA 1976**") provisions. Section 75(8) and (9) provided that if at the time when the act complained of was done, the complainant was serving in the Armed Forces and the discrimination in question related to the complainant's service in the Armed Forces, no complaint could be presented to the ET unless the complainant had (a) "made a service complaint in respect of the act complained of" and (b) the Defence Council had made a determination with respect to the service complaint. The appeal failed as the Employment Appeal Tribunal ("EAT") concluded that a "service complaint" for these purposes meant a complaint which could be considered substantively, so that a complaint rejected by the military authorities as brought out of time did not fall within that definition (paras 24 and 26 – 27). Mr Justice Silber continued:

> "27. ...If a valid service complaint was not a pre-requisite, then all that would be required to constitute a '*service complaint'* would be a simple short note made long after the event by a dissatisfied soldier saying that he has suffered from racial discrimination without giving any particulars and therefore not allowing the prescribed officer to make a sensible or realistic determination of it. This indicates clearly that what is required for a '*service complaint*' is a valid one, which is capable of being determined on its merits by the prescribed officer or the service authorities before any matter is brought before the Employment Tribunal.
>
> 28. I agree with Mr Serr, counsel for the Respondent, that the purpose of the statutory scheme is to ensure that the complaint of racial discrimination by the solider 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..."

30. Although the wording of section 121 **AFA 2006** is not identical to the **RRA 1976** provisions, the purpose is plainly the same, as the parties agreed. As I discuss below, Mr Tolley also relies upon Silber J's observation that what is required is a complaint "which is capable of being determined on its merits" by the service authorities before a claim is brought before the Tribunal. Mr Shankland, on the other hand,

emphasises the differences between the wording of the **RRA 1976** provisions and section 121 **EQA** which I have already referred to.

31. At para 1 of his judgment in **Williams v Ministry of Defence** [2013] EWCA Civ 626 refusing permission to appeal, Underhill LJ observed of section 121 **EQA**: "The policy is plainly that the service redress procedures should be pursued first, and indeed for that purpose the primary time limit for bringing proceedings in the Employment Tribunal is extended by three months (see section 123(2))".

32. Section 121 **EQA** was considered by HHJ Eady QC (as she then was) in **Duncan** (as I mentioned earlier when considering the respondent's preliminary objection). The claimant was a Corporal in the Royal Air Force who submitted various service complaints and subsequently brought an ET claim for sex discrimination, harassment related to her sex and victimisation. Her complaints had yet to be referred to the Defence Council, as they were being considered at the first stage of the service complaints process. Section 121(2), as then worded, provided, in summary, that a complaint was to be treated as withdrawn if it had not been referred to the Defence Council. The Employment Judge concluded that this provision required the claimant's complaints to be treated as "withdrawn" and that accordingly the Tribunal had no jurisdiction. Unsurprisingly the Ministry of Defence conceded the appeal, given, as HHJ Eady noted, the claimant had no right to apply to have her service complaints referred to the Defence Council and she would not have had such a right prior to the expiry of the time limit for bringing a Tribunal claim. Allowing the appeal, HHJ Eady agreed with the respondent 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", commenting that it was apparent that the appeal raised "issues of how the service complaint process is compatible with a complainant's Article 6 Convention rights to 'a fair and public hearing within a reasonable time by an independent and impartial tribunal...'" (paras 15 – 16). HHJ Eady went on to explain that the difficulty that had arisen for the claimant in that case could be overcome by a purposive construction of the legislation, so that section 121(2) was read as only operating a jurisdictional bar where the right to make a referral to the Defence Council has arisen but has not been exercised (para 17). She observed that failing to adopt this purposive construction to the legislation meant that the ET had effectively barred the claimant's right to have her complaints determined by an independent tribunal within a reasonable time (para 18).

33. None of the appellate cases that I have summarised were directly concerned with the question of what a service complaint required by way of its content in order to satisfy section 121 **EQA**. That question did arise in an ET case, **Zulu & Gue v Ministry of Defence**, Case Numbers 2205687/2018 and 2205688/2018 ("**Zulu**"), a decision of Employment Judge McNeill QC. Whilst this decision was not binding upon the EJ, she did refer to it quite extensively, both parties to this appeal cited it in their submissions and in my judgement it contains a very helpful analysis of the material provisions. Accordingly, I will refer to it in some detail.

34. The circumstances in **Zulu** were somewhat different from the present case in that there was no doubt in that instance that both claimants, who were members of the Armed Forces at the material time, had alleged race discrimination in their service complaints; the question was whether they could include certain incidents in their Tribunal claims for race discrimination and harassment related to race which had not been mentioned in their service complaints. A second issue was whether they could bring Tribunal claims for victimisation. Employment Judge McNeill found that, in terms of section 121, the ET had jurisdiction to hear the complaints of race discrimination and harassment related to race, save for two incidents (one where the complaint had been withdrawn and one that occurred many years before the subject matter of the service complaint), but that it did not have jurisdiction to hear their complaints of victimisation.

35. Employment Judge McNeill's analysis of the applicable principles was as follows:

> "(66) It was not in issue between the parties and is plainly correct that s121 requires a link between 'the matter', complained of in the service complaint, and the 'act(s) done' complained about in the claim to the employment tribunal...The real issue is how close the link between the two complaints must be in order for a claimant to cross the jurisdictional threshold in s121(1)(a). As is clear from regulation 4 of the 2015 regulations, while the service complaint may not require the particularity of a pleading or claim form, it requires more than just a general complaint.
>
> .....
>
> (68) Nevertheless, the word 'matter' in ordinary language does mean something more general than 'the act complained of' or 'the act done'. I accepted the Claimants' submission that there was a material change in wording as between s121 and its predecessor provision in the RRA... I concluded that 'matter' meant something broader than 'a specific incident', as the Respondent submitted.
>
> (69) Interpreting s121 in the context of the SC process, the word 'matter' in s121 is used to refer to how a person thinks they have been wronged in relation to his or her service. That is the essential basis for a service complaint under s340A(1) of the AFA. The service complaint must be particularised to some extent as set out in regulation 4 of the 2015 Regulations but the primary requirement is for the complainant to say 'how he thinks himself wronged'. Pursuant to regulation 4, the service complaint must be in writing but further clarification of a service complaint may take place at interview as occurred in the current cases.
>
> (70) The purpose of the statutory SC process is to give an opportunity for complaints, which may subsequently be brought to an employment tribunal, first to be considered by the

> military authorities. That means that there must be sufficient detail in the service complaint to make it possible for a decision to be made in relation to it before a claim is brought to the employment tribunal about the same matter. However, that does not mean that each and every detail of the wrong complained of must be particularised in the service complaint form.
>
> (71) The AFA and 2015 regulations set out the requirements for a service complaint but a service complaint is not the same as a pleading. Although a significant degree of particularity is required in a service complaint, the approach to a service complaint should not be overly legalistic. The SC process is there to resolve complaints outside the structure of a court or even tribunal process. Indeed, in discrimination matters, the military authorities have the opportunity to resolve the complaint before any tribunal process commences. Complainants are asked to attach relevant documents to their service complaint form and the process may involve an interview at which complainants may further explain their complaints. Where complainants have incorporated documents by reference into their service complaints which clarify or elaborate upon their service complaint, as the Second Claimant did, or have clarified or elaborated upon their written complaints at interview, there is no reason to construe the meaning of 'service complaint' narrowly so as to exclude those further particulars. The 'service complaint' is the complaint about the wrong which the complainant wishes to have redressed."

36. Having identified the applicable approach, EJ McNeill proceeded to find that both claimants' service complaints complained about an environment of racial harassment and a failure to deal with reports of race discrimination. Although some of the specific acts alleged in their claims to the Tribunal were not referred to in their service complaints, with the exception of the two incidents I referred to earlier, the complaints to the Tribunal were of acts alleged to be part of the environment of racial harassment complained about in the service complaint process, and thus were within the meaning of the "matter" in section 121 (para 72). On the other hand, the complaints of victimisation did not form any part of the service complaints and were "different in character" from the complaints of an environment of racial harassment that went unsanctioned (paras 74(i)).

Article 6 ECHR

37. Article 6.1 **ECHR** provides 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..."

38. It is well established that Member States may impose limitations upon the right of access to Courts and Tribunals without infringing the requirements of Article 6. As the Grand Chamber of the European Court of Human Rights explained in **Zubac v Croatia** (2018) 67 E.H.R.R. 28 (with the footnotes omitted):

> "77. The right of access to a court must be 'practical and effective', not theoretical and illusory. This observation is particularly true in respect of the guarantees provided by art.6, in view of the prominent place held in a democratic society by the right to a fair trial.

> 78. However, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the state, which regulation may vary in time and in place according to the needs and resources of the community and of individuals. In laying down such regulation, the Contracting States enjoy a certain margin of appreciation...Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with art.6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

39. To similar effect, see the judgment of the majority of the Grand Chamber in **Nait-Liman v Switzerland** [2018] ECHR 51357/07 at paras 113 – 115, and **Momčilović v Croatia** (2019) 69 E.H.R.R. 14 at paras 41 – 43.

The material facts

40. The claimant has been employed by the respondent since 9 April 2012. She is originally from Dominica (a Commonwealth nation) and is black. In April 2017 she was promoted to the rank of Lance Corporal and initially transferred to the 32 Regiment Royal Artillery and, subsequently to the 47 Regiment Royal Artillery. She suffered an injury whilst on a training course, which led to her having knee surgery to both her knees in March 2018. During the period covered by her service complaint, Sergeant Richard Anderson was her immediate senior officer and higher up the chain of command (amongst others) were Squadron Sergeant Major Maddern-Wellington (the "SSM") and Office Commanding Workshop Major Christopher Maitland (the "WOC").

The service complaint

41. As I have indicated earlier, the claimant filed a service complaint on 25 July 2019. The complaint was made on a prescribed form. The first part of the form contained pre-printed guidance notes including the following:

> "1. Before submitting a service complaint or at the earliest opportunity, you may want to seek the advice of your Assisting Officer (AO) for help in completing this form...
>
> 2. If possible you should seek advice from the unit Equality and Diversity Advisor (EDA).
>
> 3. .....
>
> 4. In setting out how you allege that you have been wronged, provide the facts as clearly as you can. You must set out:

> a. the date(s), time(s) and location(s). If you cannot remember the date(s) of the incident complained of, you should say so;
> b. the incident itself or, if there was more than one, each of them. If the incident(s) occurred over a period you should say when the period ended or when the last incident occurred.
>
> 5. If your complaint is about bullying or harassment, you should also provide:
> a. details of who you believe is bullying or harassing you;
> b. details of anyone who witnessed the incident(s);
> c. the effect that the incident(s) had on you; and
> d. any attempt you have made to resolve the matter.
>
> 6. Regulation 5 of the [Service Complaint Regs] refers to the type of conduct described below. If behaviour under one or more of these categories is alleged, sections 3 and 4 of the form must be completed:
> a. discrimination (in this context 'discrimination' means...[the regulation 4(5) **Service Complaint Regs** definition is then given];
> b. unlawful harassment;
> c. bullying;
> d. dishonest or biased behaviour;
> e. a failure of the MOD to provide medical, dental or nursing care for which the MOD was responsible; or
> f. the improper exercise by a service policeman of statutory powers as a service policeman.
>
> 7. Make clear what redress (outcome) you seek from this complaint...
>
> 8. Once you have completed the form, submit a signed and dated copy to your SO (normally the Commanding Officer)."

42. The form then had a number of sections for a complainant to complete. Section 1 is for the complainant to enter their formal details. The pre-printed text then states that the complainant claims: "that I have been wronged as set out in paragraph 2 below" and "that I seek the redress specified in paragraph 5 below".

43. Section 2 of the form begins with the pre-printed text "I believe that I have been wronged in the following manner:". The claimant then gave a detailed account covering 14 pages of single-spaced text and spanning incidents from March 2018 to April 2019. She summarised her complaint in the opening paragraph as follows:

> "I have experienced a sequence of events post-surgery to present which are best characterised as a failure of duty of care by my COC, unfair and unnecessary intimidation by the COC during my recovery path; culminating in an unjustified recommendation for non-retention in the Service, based on prejudiced evidence."

44. The claimant then grouped her concerns into four categories, A – D. She summarised the first of these (A) as: "There was a severe breakdown in communication which affected the delivery of mandatory duty of care and an unwillingness of relevant personnel to mitigate the risks. This exposure engendered a challenging and prolonged recovery path". The narrative that the claimant then set out under this category

included incidents where meals had not been collected for her as arranged, appropriate transportation was not made available to take her to medical appointments and she was expected to move rooms across the camp to unsuitable accommodation. She said that these events had played a significant role in the delay of her recovery and unnecessarily increased her pain and suffering. She indicated that her commanding officer had failed to provide the necessary support to enable an effective return to duty.

45. Category B was summarised by the claimant as: "There were significant failings in the welfare system and the way support was delivered throughout my prolonged recovery". The instances that she then referred to included: failing to assist her with welfare and grocery purchases; a mismanaged visit to Tedworth House where she had expected to receive additional support; failing to make appropriate arrangements for her to attend the funeral of a close friend; and additional instances where there were inadequate transportation arrangements to take her to medical appointments.

46. The Category C instances were introduced by the claimant as follows: "Unfortunately, by challenging the failings of my care whilst TNE I became subject to persistent intimidation and unfair reprisals by the COC". She referred to an incident where she had been pressurised to take block leave, despite her indicating that this would compromise her recovery. She described her SSM telling her during a discussion about the block leave that: "I am better off than other Commonwealth soldiers in the Troop since I travel home alternate years or periodically once a year". She also described an occasion where the SSM had pressured her into sharing medical information inappropriately. She said that she thought the SSM had seen her as "being insubordinate" when she had gone above his authority to speak to Dr Acton in relation to the leave issue. The claimant then raised concerns over being rushed to move into alternative accommodation and an occasion on 12 December 2018 when she was unfairly threatened with disciplinary action by the SSM.

47. Category D was introduced as follows: "I feel the COC has failed to recognise the real mental and physical impact of their indiscretions on me and failed to safeguard me appropriately". She raised concerns about the contents of the Occupational Report presented by the SSM in February 2019, which led to the recommendation for her non-retention in the service; and the imposition of a disciplinary sanction on 25 February 2019 when she was absent from a block inspection. In relation to the latter incident, the claimant contrasted her treatment with that of Pte Mason-Green (another female soldier). She said that "at that point, I

felt I was being unfairly persecuted in a short space of time and I had no one to confide in". After saying that she felt "continually harassed", the claimant described an incident on 5 April 2019 when she was had been told that she faced disciplinary sanction for not being on parade, although she had an exemption from doing so. She then referred to an incident on 4 April 2019 where information about her being posted to the QM department was announced at a Troop gathering rather than discussed with her privately. She said that this made her feel "excluded and exposed".

48. Section 3 of the form set out the following question: "Does your complaint include allegations of bullying, harassment, discrimination or any other allegation specified in regulation 5(2)" of the **SCMP Regs**. The claimant ticked the box for "yes". The form instructed that if she had indicated "yes", she should proceed to complete sections 4a-c (as well as sections 5 and 6).

49. The pre-entered text at the commencement of section 4a said: "State which category (or categories) you consider your complaint falls into (see note 6 a- f), why you believe it falls within that category (or categories) and details of the relevant conduct". The reference to "note 6 a – f", was plainly a reference to the categories listed in guidance note 6 at the start of the form (para 41 above).

50. The claimant began her section 4a entry with the following summary: "Throughout this lengthy ordeal, it feels like I have become the sacrificial lamb, discredited and dismissed repeatedly. I have been demoralised, humiliated, disrespected, alienated and excluded in the workplace". She then entered approximately six pages of single spaced typed text. She referred to being bullied by her SSM in December 2018 when she had been threatened with disciplinary action. This was a reference to the incident she had detailed in section 2 of the form. Next she referred to being bullied by the WOC on 23 April 2019 during an interview about the non-retention recommendation that she sought to have postponed so that she could have representation present. She said that the WOC intimidated her into signing a personal statement that she was not happy with and that "I was almost bullied into signing the document without the opportunity to have representation, but managed to hold my ground somewhere between fear and anxiety". She also said of this incident: "It is clear that there was some prejudice which affected the WOC's judgement".

51. The claimant then referred to further incidents where she had felt disparaged, with the opening words: "I was demoralised and regularly undermined by the SSM who made no attempts to hide his disgust for me". One of the aspects she referred to was a failure by her COC to report on her progress and areas for

improvement when all other officers at her level in the Troop had received their appraisals. She said that this "clearly demonstrates unequal treatment and an element of exclusion where I have been sidelined within the Troop". She went on to say that she did not believe that there was an excuse for the way that she had been treated, but that her WOC may have been fed incorrect information "tainted by the prejudice of mySSM". She then referred in detail to aspects of the written response to the second APP 18 statement provided by the WOC, which she said she believed was delivered with "an intent to discredit me" in order to support the recommendation for her non-retention. She added that the SSM and the WOC had demonstrated poor leadership qualities and inadvertently encouraged their subordinate seniors to treat her "unfairly and abhorrently". She gave examples of the latter, including instances where she said she had been humiliated and ridiculed by Sgt Anderson. She then said:

> "...I felt that I had lost my integrity as a soldier, as a JNCO, as a female and as an adult amongst my colleagues...I believe that I have been repeatedly disrespected by my seniors because my SSM has continuously disrespected and treated me inappropriately for a prolonged period of time.
>
> I have been made to feel insecure in my current job role, in my trade and insecure about my future. If this is what soldiers recovering from injury should expect then it appears that the values and standard of the British Army is a ruse.
>
> No solder recovering from illness and/or injury should be subjected to such callous treatment amongst the ranks...Soldiers recovering from illness/injury should be wholly supported irrespective of whether they are returning to work or exiting the service.
>
> I have been chastised and treated unfairly, repeatedly with serious impact on my health. This is directly related to an unacceptable level of inappropriate behaviour which has persisted unchecked."

52. In her concluding paragraph to this part of the form, the claimant said:

> "I was unfairly treated and a thorough investigation needs to be conduct with appropriate action to follow...Ironically, this is a clear demonstration of why the Armed Forces is again facing serious media scrutiny for failing to battle the '...culture of bullying and sexism'. Additionally, on 16 July19 Sky News quoted an unnamed Ministry of Defence spokesperson who said: 'Bullying and harassment have no place in the armed forces and will not be tolerated....' How will serving personnel trust the system and the Armed Forces when the COC continues to perpetrate injustice unscathed?"

53. After the quote referred to a "culture of bullying and sexism" a footnote included a link to an article in the Daily Telegraph newspaper entitled, "'Middle aged white chiefs' a problem as Armed Forces battle culture of bullying and sexism, report warns...". It is agreed that the article did not refer to the claimant and that it was not included in the materials before the EJ.

54. Section 4b of the form asked the claimant to identify who she believed had behaved towards her "under a category (or categories) of behaviour you have described in 4a". The claimant specified her SSM

and WOC. In section 4c she gave details of witnesses. In section 5 of the form the claimant set out the redress that she was seeking and in section 6 she addressed time limits. The pre-printed text at the beginning of section 6 referred to the default time limit of three months and to the time limit being six months "if your complaint is about discrimination" (para 26 above). It went on to say that the complainant should indicate why their complaint should be considered if it was made outside of the time limit. The claimant then entered text explaining why she had not made her complaint earlier. Her text was written on the premise that the three month time limit applied. She concluded by saying that she had "continuously been subjected to repeat episodes of intimidation, unfair treatment, exclusion and disrespect".

55. The admissibility letter in relation to the claimant's service complaint dated 21 August 2019 determined that some of her complaints had been made outside of the three month time limit and that it was not just and equitable to extend time in respect of those elements of the complaint. The claimant applied for a review of the admissibility decision, but did not contend that the six month time limit was applicable. The Service Complaints Ombudsman for the Armed Forces duly reviewed the admissibility decision. The determination dated 7 October 2019 also proceeded on the basis that the three month time limit was applicable.

The ET proceedings

56. On 27 December 2019 the claimant filed her original ET1 and supporting statement. She was unrepresented at this stage. In section 8 of the ET1 form she ticked to indicate that she had been discriminated against on the grounds of race and disability. Her supporting statement largely repeated the contents of sections 2 and 4a from her service complaint form, in some instances using slightly different language. The supporting statement contained three passages in particular that had not appeared in the service complaint.

57. Firstly, after referring to the response to the final Appendix 18 (as she had in section 4a of the service complaint) the claimant said: "These behaviours were carried out during an extended period of temporary disability and were clear acts of discrimination which directly and indirectly affected my recovery". Secondly, towards the conclusion of her text, after alleging that she had been unfairly treated, she said that the COC needed to be held to a higher level of accountability: "if not it sets a terrible precedence for

the Armed Forces 2020 vision and the national stance on discrimination at work". Thirdly, she concluded her text with the following additional paragraph:

> "It is imperative that external agencies like the Employment Tribunal play a more pivotal role in the revision of Equality & Diversity in the Armed Forces in order to align practice with the Equality Act 2010 which formed the basis of anti-discrimination law in the United Kingdom. Unfortunately, service personnel are subject to service law which more than often restricts our ability to obtain fair recourse when faced with employment disputes in service...
>
> I have found it extremely difficult to relive these incidents and the humiliation I felt is still raw. Every time I watch news coverage about discrimination in premiership football, I feel that bitter taste of injustice; knowing that I was wronged and nothing has been done to ensure these improprieties stop for myself and other serving personnel. It feels like the minority will always suffer, particularly when financially constrained."

58. On 9 March 2023, the respondent filed its ET3 and particulars of response. The respondent applied to strike out the disability claim and sought a stay of the proceedings pending determination of the service complaint. The proceedings were initially stayed until 22 September 2020, when a Preliminary Hearing took place before Employment Judge Christensen. She listed a further Preliminary Hearing to determine whether to strike out the disability discrimination complaint and to conduct further case management in relation to the race discrimination claim. As noted in the Record of the Preliminary Hearing promulgated on 25 September 2020, EJ Christensen explained to the claimant that it was not possible for the Tribunal to identify the particular claims that she was pursuing from her narrative claim and she was encouraged to seek legal advice (para 6). Para 12 and 13 noted that an issue had arisen as to whether the claimant had raised a service complaint in relation to race discrimination. At that stage it was thought that determination of this issue could be assisted by having the outcome of the service complaint, which was then expected in October 2020.

59. On 31 October 2020, the claimant instructed Sidley Austin LLP. On 4 December 2020, her solicitors served a draft amended ET1 and amended details of claim on the respondent, who objected to the amendment. On 6 January 2021, the claimant's solicitors filed an application to amend with the ET. On 19 February 2021, the claimant withdrew her disability discrimination claim. On 19 July 2021, the claimant's solicitors filed and served an updated amended ET1 and an updated amended details of claim.

60. Section 8.1 of the proposed amended ET1 indicated that the claimant was pursuing claims that she was discriminated against on the grounds of race and sex. The box below was completed as follows: "In addition to a claim for direct race and sex discrimination pursuant to s13(1) of the Equality Act 2010..., the Claimant further brings claims against the Respondent employer for (i) harassment related to race and sex

pursuant to section 26(1) of the Equality Act, and (ii) victimisation pursuant to section 27(1) of the Equality Act". The amended details of claim (and the subsequent, updated version) substantially comprised new text that had not appeared in the original claim, albeit the same incidents were referred to. The document began by saying that the claimant was a black woman and originally from Dominica. The following then appeared in a section headed "Overview of this Claim":

> "3.3 While recovering from that surgery, both before and after she returned to duty, the Claimant was the victim of a sustained and targeted ongoing campaign of racially and/or gender motivated harassment, discrimination and victimisation by the members of her CoC identified below in this statement of case.
>
> 3.4 In the course of the period from March 2018 to the present day, the Claimant was made aware, by their words and actions, that at all material times (and despite unequivocal medical advice to the contrary), members of her CoC were of the opinion that she was (or was likely to be) malingering following surgery and that, as a consequence, she was not welcome within their unit and/or that she should not be allowed to serve.
>
> 3.5 The relevant personnel took and acted on this view of the Claimant's actual or likely attitude and habits because the Claimant has the protected characteristics of being black, from Dominica, not of British origin and female. This is to say that, because of her protected characteristics, the relevant personnel stereotyped the Claimant as someone who would pretend to be ill or injured in order to escape work or duty and treated her accordingly.
>
> 3.6 At all material times, the mistreatment of the Claimant by the Respondent and/or its employees (as set out below) was related to and/or because of her race and gender.
>
> 3.7 As a result of the attitude of the relevant actors in the CoC towards the Claimant, the directions of service medical personnel as to the requirements for the Claimant's recovery and her rehabilitation from surgery were ignored and/or interfered with by those individuals. This was to the detriment of the Claimant's career prospects and her mental and physical health and wellbeing. The decline in the Claimant's mental and physical health was documented in detail by service medical personnel and evidence to that effect will be adduced in due course.
>
> 3.8 In summary, the Respondent's employees' campaign against the Claimant included, amongst other things:
>
> (a) the Claimant's basic rights as a serving soldier (e.g. to food and reasonable accommodation) being denied her;
>
> (b) the Claimant's reasonable requests for support in her recovery not being considered properly or at all;
>
> (c) no or no reasonable or effective support being given to aid her recovery;
>
> (d) unwarranted disciplinary action being instigated against her;
>
> (e) the Claimant's rights to leave (holiday) being improperly interfered with;
>
> (f) the Claimant being mocked and abused by her superiors in front of other personnel; and
>
> (g) the Claimant being refused any or any proper appraisal and annual reports in accordance with Army General Administrative Instructions and her rights generally."

61. At para 3.11 the claimant alleged that the appropriate hypothetical comparator in her case was a white male soldier serving in a support arm at the rank of Lance Corporal, who suffered a similar training injury to their lower limbs.

62. After a section headed "Factual Background", the document set out what were described as "Particulars of Discrimination, Harassment and Victimisation" under the following sub-headings: "(A) The Respondent's failure to support the claimant through her recovery"; "(B) Administrative and Disciplinary Matters"; "(C) Annual Reports"; and "(D) Abuse of the Mediation Process". The incidents identified in relation to sections (A), (B) and (C) were the incidents that had been referred to in the service complaint. However, in addition, after the description of the incident/s, the text set out how it was alleged that this amounted to discrimination. The first part of section B concerned the dispute over block leave. Taking this as an example, after the circumstances were described, the text then said:

> "8.11 The actions of SSM Maddern-Wellington amount to discrimination in that he treated the Claimant in this way because of her protected characteristics. No comparable soldier in the Claimant's circumstances, who was not being discriminated against by the relevant actors because of their race and/or sex would reasonably have been reprimanded for doing the very thing that they were directed to do by their SSM...
>
> 8.12 Further, SSM Maddern-Wellington's conduct amounted to harassment in that that it was conduct related to the Claimant's protected characteristics which had the effect of violating the Claimant's dignity...and creating a degrading, humiliating and offensive living and working environment for the Claimant...
>
> 8.13 In addition, the Respondent's employee SSM Maddern-Wellington's acts amounted to victimisation of the Claimant for the purposes of section 27 of the Equality Act. In particular, the Respondent and its employee SSM Maddern-Wellington took disciplinary action and/or reprimanded the Claimant thereby causing her detriment because (i) the Claimant had done a protected act and/or (ii) they believed that the Claimant had done or may do a protected act. For these purposes, the protected act in question was the Claimant in substance reporting to the RMO that she had been the victim of discrimination in respect of her treatment over leave."

The ET's decision

63. After summarising the procedural background, the EJ identified the issues that were before her, namely:

(i) Whether to grant the claimant's application to amend her claim. In turn, involving: (a) whether the matters set out in the amended claim had been raised in a service complaint so that the ET had jurisdiction; and (b) whether the amendments should be permitted in accordance with the usual principles for deciding such applications; and

(ii) Whether a service complaint had been raised in relation to the claimant's original claim of

race discrimination so that the ET had jurisdiction.

64. The EJ noted that the parties were agreed that she should determine the second of these issues as well at this juncture, given that she was already considering the same point in relation to the amendment application (paras 10 and 11, Reasons). At this stage, a decision on the service complaint remained outstanding (para 59, Reasons).

65. The EJ explained that she had been provided with a bundle of documents, skeleton arguments and a large bundle of authorities. She also had a witness statement from the claimant, who was not cross-examined.

66. Under the heading "Relevant facts" the EJ referred to the contents of the claimant's service complaint. At para 19 of her Reasons she observed that: "At no point in the lengthy service complaint form does the claimant use the word 'discrimination'. She does not make any specific reference to being treated differently because of her race or sex". The EJ then referred to the original claim to the ET and the contents of the proposed amended claim.

67. Under the heading "Applicable law" the EJ set out the material provisions of the **EQA**, the **AFA 2006** and the **Service Complaint Regs**. She then cited the cases that I have referred to above, **Molaudi**, **Williams**, **Duncan** and **Zulu**. At paras 32 – 33 she set out a detailed summary of the decision in **Zulu**, including listing the principles that were identified by EJ McNeill. At para 34 she said that she had considered the provisions of the **ECHR**, although the parties had not made any submissions on these provisions. She set out the terms of Article 6 and referred briefly to Article 14 (paras 34 – 35). No complaint is made about her summary of the legal principles.

68. The EJ then set out her conclusions. Firstly, she explained why she had concluded that pursuant to section 121 **EQA**, the ET did not have jurisdiction to consider the proposed amendments to the claim to add claims for sex discrimination, harassment related to sex and victimisation. She said:

> "39. The key question is – what is "the matter" that needs to be included in a service complaint, in order for an individual to bring a "complaint" about an "act done" under the EqA? Is simply a description of the events and acts done by a respondent which form the basis for a claim? Or is it necessary for the service complaint to specify that there has been unlawful discrimination?
>
> 40. The decision in ***Zulu*** makes it clear that a service complaint is not required to be the equivalent of legal pleadings, the approach should not be overly legalistic, and it is not necessary to particularise each and every detail of the wrong complained of. I agree with the approach taken in this decision. It would be an unfair barrier to claimants if they were required to set out the equivalent of detailed legal pleadings in a service complaint before being permitted to bring a claim to the

Employment Tribunal.

41. However, I also agree that the service complaint must set out the "wrong" that the complainant wishes to have redressed. As stated in ***Zulu***, the purpose of the service complaint process is to give an opportunity for potential Employment Tribunal complaints about discrimination to be considered by the military authorities first. As stated by Silber J in ***Molaundi*** [sic]**,** the purpose of the statutory scheme is to ensure that a complaint of discrimination 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. As quoted by Eady J in **Duncan**, "*…the statutory aim is to enable the Armed Forces to determine complaints internally prior to litigation..*" A service complaint must, therefore, contain sufficient detail to make it possible for a decision to be made in relation to it before a claim is brought about the same matter.

42. If this is the purpose of section 121(1) EqA, it appears to me that this requires a complainant to specify that they are making allegations of discrimination, rather than a general complaint about unfair treatment. Otherwise, the military authorities would not have the opportunity to investigate the very allegations which would then lead to an Employment Tribunal claim. It is not possible to make a free-standing claim about bullying or other unfair treatment to the Employment Tribunal. There will only be a valid claim if the allegations are of discrimination or harassment based on one of the protected characteristics under the EqA, or victimisation based on a protected act under the EqA.

43. The ***Zulu*** case involved a different situation. The claimants had made it clear in their service complaints that they were making allegations of race discrimination, but the respondent disputed that all of the incidents relied on had been set out in the service complaints. The military authorities did, therefore, have the opportunity to investigate the overall allegations of race discrimination that were then pursued before the employment tribunal. Race discrimination was the "wrong" complained of in that case. I note that the claimants were not permitted to pursue claims of victimisation, as these did not form any part of the service complaint.

44. The claimant's representative submitted that it is not necessary for the "technical causes of action" to be included in a service complaint. I agree to the extent that legal pleadings are not necessary – for example, using technical terms or specifying which types of discrimination (direct, indirect etc) are being complained about. However, that is different from a requirement to indicate to the respondent that this is a complaint about discrimination, and which protected characteristics are relied on, as opposed to general bullying or unfair treatment.

45. I therefore find that section 121(1) EqA requires a potential claimant to specify in a service complaint that the "wrong" they are complaining about is discrimination, including the protected characteristic(s) relied on if applicable. Section 120 gives the Employment Tribunal jurisdiction to determine a "complaint" relating to a contravention of Part 5 – unlawful discrimination at work. Section 121 specifies that in Armed Forces cases this does not apply to "a complaint relating to an act done" unless the complainant has made a service complaint about "the matter". The "complaint relating to an act done" is a complaint of discrimination, and so a service complaint about "the matter" must also be a complaint of discrimination.

46. I have looked carefully at the claimant's service complaint to decide whether it contains sufficient information about the new complaints in her amended claim to meet the requirements of section 121 EqA. I find that it does not, for the following reasons.

a. There are two references to sex or gender in the 45 page document. The first reference talks about losing integrity as a "female". This is as part of a list of other characteristics, in relation to one incident only. The second reference quotes a

> newspaper report about "a culture of bullying and sexism", in the context of her overall complaint that is put on the basis of bullying and unfair treatment rather than sex discrimination. Neither of these references specifies that the claimant is alleging sex discrimination or harassment.
>
> b. The general allegation now made in the amended claim is that a male soldier would have been treated differently, in relation to all of the incidents complained of by the claimant. She also alleges harassment related to sex. There is nothing in the service complaint which would tell the respondent that the claimant thought she was treated in this way because of her sex, or that she was subjected to harassment related to sex.
>
> c. Individuals are not expected to use legal language or technical pleadings in a service complaint. However, there are various ways an individual can make it clear that the "wrong" they are complaining about is a type of unlawful discrimination, for example simply by saying "I think this happened to me because I am female". The closest the service complaint comes to alleging discrimination is the claimant's references to having a "temporary disability". This might arguably be seen as a complaint about disability discrimination, but the claimant is not able to make this type of claim.
>
> d. The service complaint also contains no reference to a protected act that could form the basis of a victimisation claim, or allege a detriment as a result of a protected act. The word "victimisation" is used once, in box 5 of the service complaint form which asks what outcome or redress is sought. This is used in a colloquial sense in a sentence complaining about "relentless victimisation and distress". The service complaint does not set out any facts which could form the basis of a victimisation claim – i.e. allegations that the claimant had made a complaint about unlawful discrimination and was treated badly as a result.
>
> e. The claimant did tick the box "yes" in response to the question "*Does your complaint include allegations of bullying, harassment, discrimination or any other allegation specified in regulation 5(2) of the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015?"*. However, this is not sufficient to tell the respondent that she was making a sex discrimination or victimisation claim. The tick box also covers bullying. The claimant's response to the following question, which asks the individual to state which category the complaint falls into and why, refers only to bullying and unfair treatment."

69. At paras 47 and 52 the EJ explained that the claimant's explanation in her witness statement as to why she was reluctant to specify race discrimination in her service complaint could not avail her, as section 121 did not confer any discretion upon the Tribunal to permit a claim to proceed if its requirements had not been complied with.

70. The EJ then explained why she concluded that a service complaint had not been raised in relation to the claim of race discrimination made in the original ET claim:

> "51. Again, I have looked carefully at the claimant's service complaint to decide whether it contains sufficient information about a complaint of race discrimination to meet the requirements of section 121 EqA. I find that it does not, for the following reasons.
>
> a. The original claim does not explain the basis on which the claimant is alleging race

> discrimination. The general allegation now made in the amended claim is that a white male soldier would have been treated differently, in relation to all of the incidents complained of by the claimant. The amended claim also says that treatment was "*because the Claimant is black, from Dominica, not of British origin*". This indicates that the claimant's intention was to bring a race discrimination claim based on colour, nationality or national origin.
>
> b. There is only one potential reference to race discrimination in the service complaint – the allegation that the claimant was told, "*I am better off than other Commonwealth soldiers in the Troop since I travel home alternate years or periodically once a year*". There is nothing in the service complaint to indicate that the claimant is complaining she was treated differently because of her colour, nationality and/or national origin. The comment about being better off than other Commonwealth soldiers is an isolated incident, it is unclear how this would be an allegation of race discrimination, and it does not show an unfavourable difference in treatment. At no point does in the service complaint the claimant mention race discrimination, or allege that her treatment was because of her colour.
>
> c. As already noted, individuals are not expected to use legal language or technical pleadings in a service complaint, but there are various ways an individual can make it clear that the "wrong" they are complaining about is a type of unlawful discrimination. There appears to be nothing in the service complaint to tell the respondent that the claimant was complaining about a "wrong" of race discrimination.
>
> d. As noted above, ticking the box "yes" in response to the question about whether the complaint includes allegations of bullying, harassment or discrimination is not sufficient to tell the respondent that she was making a race discrimination claim. The tick box also covers bullying. The claimant's response to the following question refers only to bullying and unfair treatment."

71. At paras 54 – 55 the EJ addressed whether her interpretation of section 121 **EQA** was compatible with Article 6 of the ECHR. After referring to **Duncan** and the need for a purposive construction of the section, she said:

> "55. My decision means that the claimant is currently unable to bring her race discrimination claim before the Employment Tribunal, and has been refused permission to amend her claim to add complaints of sex discrimination, harassment and victimisation. Her complaints relate to events in 2019 and earlier, and she has not yet been given a right of access to the Tribunal. This is to be balanced against the aim of enabling the Armed Forces to determine complaints internally prior to litigation. My interpretation of the EqA is that it is necessary to specify that a service complaint is about discrimination, including the protected characteristic(s) relied on. This is so the military authorities have the opportunity to resolve the potential claim. They are unable to do this if the service complaint does not specify that it is a complaint about discrimination, which is the only basis on which a claim can be made to the Tribunal. I find that this does achieve a lawful balance between the statutory aim and a complainant's right of access to the Tribunal."

The submissions

The claimant's submissions

72. During his oral submissions, Mr Shankland confirmed that the EJ's alleged misdirections were contained in paras 42, 44 and 45 of her Reasons, in holding that section 121 **EQA** required the service

complaint to specify that an allegation of discrimination was being made and to identify the protected characteristic(s) relied upon (Ground 2 of the amended grounds). He accepted that Ground 1 was, as he put it, another way of asserting the same thing and that it did not add a free-standing contention to Ground 2.

73. As HHJ Auerbach noted, at the rule 3(10) hearing Mr Shankland accepted that it was "not contended that it would be sufficient for a service complaint merely to describe the factual conduct complained, if that description contained nothing whatsoever from which it could be inferred that it was alleged that the conduct in question had some connection to an EqA protected characteristic". At the appeal hearing he indicated that the correct approach was as set out at para 12 of his skeleton argument, namely, that the ET should have assessed objectively whether the claimant's subjective explanation of the matter "reveals acts capable of forming causes of action based on discrimination and by reference to protected characteristics even though the Claimant did not herself attach the correct 'label' to them". He described this as an amplification of the approach referred to in Ground 3, that the Tribunal should consider whether a cause of action under the **EQA** in respect of an act done "emerges sufficiently from a fair and objective reading" of the claimant's account. He said that it was incumbent on a complainant to set out in the service complaint how they were wronged, but not necessarily why they were wronged. He emphasised that regulation 4 of the **Service Complaint Regs** did not require a complainant to specify the protected characteristic that they relied upon and that the purpose of regulation 5 of the **SCMP Regs** was to determine whether an independent person should be involved in the complaint's determination, not to impose a jurisdictional bar.

74. Mr Shankland emphasised that a service complaint should be assessed in a non-technical way, considering the whole document in the round. He noted that it was an internal, lay process and one in which the complainant would be able to supplement the account of their complaint during the investigation process. He said that it should be remembered that service complaints could be brought by service personnel as young as sixteen and with varying degrees of formative education.

75. Seeking to draw support from the reasoning at para 72 of **Zulu**, Mr Shankland said that as EJ McNeill found that facts could be put before a Tribunal that had not been included in the service complaint if the relevant overall environment had been sufficiently explained in the complaint, it ought to follow that section 121 did not preclude a claimant from raising legal causes of action before the Tribunal that were not mentioned in the complaint but which were revealed by the facts that were included within it.

76. Mr Shankland also submitted that assistance as to the correct legal approach could be derived from appellate case law considering the analogous question of whether particulars of claim did or did not disclose a particular cause of action. In this regard he relied in particular upon the judgment of HHJ Auerbach in **McLeary v One Housing Group Ltd** (2019) UKEAT/0124/18/LA ("**McLeary**") and the Court of Appeal's reasoning in **Mervyn v BW Controls Ltd** [2020] EWCA Civ 393, [2020] ICR 1364 ("**Mervyn**").

77. In addition to misdirecting herself as to the applicable test, Mr Shankland submitted that the EJ had erred in the application of her test to the claimant's service complaint. Contrary to her earlier reasoning, she had looked for particular technical words or phrases and for technical causes of action. He submitted that considered in the round and "read fairly with the Claimant's personal characteristics in mind, the overall atmosphere described in the Service Complaint, the words used in it and the materials that it refers to all strongly indicate that this was...about harassment and discrimination based on race and sex (and subsequent victimisation as a result)". He drew attention to particular aspects of the service complaint, which I address during the course of my discussion and conclusions below.

78. In relation to Article 6 **ECHR**, Mr Shankland reiterated the importance of a non-technical approach given that section 121 **EQA** operates as a jurisdictional bar. He emphasised that Convention rights must be practical and effective, rather than theoretical or illusory. He submitted that placing technical requirements on those who made service complaints rendered their access to the ET "practically impossible".

The respondent's submissions

79. Mr Tolley submitted that the claimant's grounds failed to identify any error of law in the EJ's self-directions and were simply a challenge to the evaluative assessment she had undertaken in relation to the particular service complaint.

80. He submitted that EJ McNeill in **Zulu** and the EJ in the present case had correctly identified the applicable legal principles, including the purpose of section 121. Specifically, the EJ's reasoning in her paras 42, 44 and 45 represented a correct statement of the law. He emphasised the passage in Silber J's judgment in **Molaudi**, which I have cited earlier (para 29 above), that a service complaint must be capable of being determined on its merits. He accepted the correlation between regulation 4(2)(c) of the **Service Complaints Regs** and regulation 5 of the **SCMP Regs**, but he submitted that the purpose of the regulation 4(2)(c)

requirement went beyond the need to identify whether an independent person should be involved in its determination; regulation 4(2) identified matters that the military authorities should have an opportunity to investigate before a claim made in respect of them was determined by a Court or Tribunal. He also noted the correlation between the **EQA** time limit provisions applicable to claims that engaged section 121 and the time limit provisions that were applied to service complaints concerning discrimination pursuant to regulation 6 of the **Service Complaint Regs** (paras 15 and 26 above). Furthermore, whilst the instruction at section 4a on the service complaint form, that the complainant should state which of the para 6(a) – (f) category or categories the complaint fell within and why they believed this to be so, went beyond regulation 4(2) of the **Service Complaint Regs**, it was necessary for the military authorities to have this content in order to understand the substance of the complaint.

81. Mr Tolley took issue with the claimant's contention that the EJ had required technical language or causes of action to be identified; he said that the EJ's reasoning showed that she recognised that it was the substance of the service complaint that was important for present purposes. He submitted that it was not sufficient for a claimant to merely make a general allegation of bullying or unfair treatment, which may or may not involve discrimination or victimisation. He suggested that on the claimant's approach the section 121 test would be met by the inclusion of almost any event in the service complaint that was to the complainant's detriment. Furthermore, that an allegation of discrimination was part of a complaint as to "how" the person had been treated within the meaning of regulation 4(2) of the **Service Complaints Regs**. He also emphasised the guidance that was provided in the pre-printed parts of the complaint form and the availability of sources of support and advice, as identified at paras 1 and 2 of that guidance (para 41 above).

82. Mr Tolley sought to draw an analogy with the case law regarding the now repealed section 32 of the **Employment Act 2002** ("**EA 2002**"), which provided for a jurisdictional bar to the pursuit of various claims, including those based upon the predecessor legislation to the **EQA**, if a grievance had not been submitted in accordance with the **Employment Act 2002 Dispute Resolution Regulations 2004** ("the **2004 Regulations**"). In this regard, he cited the judgment of Burton J (then President of the EAT) in **Shergold v Fieldway Medical Centre** [2006] ICR 304 ("**Shergold**") and the Court of Appeal's subsequent decision in **Suffolk Mental Health Partnership NHS Trust v Hurst and others** [2009] EWCA Civ 309, [2009] ICR 1011 ("**Suffolk**").

83. Mr Tolley emphasised that the claimant's service complaint had contained no explicit references to discrimination, harassment or victimisation. Further, that a consideration of the substance of the complaint did not assist the claimant; her text did not include anything which could fairly be understood to be an allegation that she had been discriminated against or harassed or victimised. The claimant had not asserted at the time that the longer time limits applicable to discrimination applied in her case and her service complaint had not been understood as one that raised allegations of discrimination.

84. As regards Article 6 **ECHR**, Mr Tolley emphasised that it did not follow from the ET's decision to determine the issue of jurisdiction against the claimant that there was an infringement of her Article 6 rights. The statutory framework pursued the legitimate aim (amongst others) of enabling the Armed Forces to determine complaints internally prior to litigation, as the EJ had found. Furthermore, the restriction was appropriate and proportionate. It was open to the claimant to bring Tribunal claims of race and sex discrimination, harassment and victimisation if she had raised a service complaint about these "matters", which she had been able to do.

Discussion and conclusions

The section 121(1)(a) EQA requirement

85. I will first consider the phrase "about the matter" in section 121(1)(a), in order to address when the section 121 jurisdictional bar applies. I will then turn to the specific grounds of appeal.

86. The effect of this provision is that the Tribunal will have no jurisdiction to determine a complaint relating to "an act done when the complainant was serving as a member of the armed forces" unless they "made a service complaint about the matter".

87. I accept that a purposive construction should be applied to this statutory provision, as explained by HHJ Eady QC (as she then was) in **Duncan** (para 32 above).

88. In terms of the context of the section 121 requirement, the following are of particular significance:

i) Section 340B(2)(b) of the **AFA 2006** provides that service complaint regulations (if made) *must* make provision for the way in which the complaint is to be made "including about the information to be provided by the complainant" (para 18 above). In turn, regulation 4(2) of the **Service Complaint Regs** stipulates that the complaint must state "(a) how the

complainant thinks himself or herself wronged" and "(c) whether any matter stated in accordance with sub-paragraph (a) involved discrimination, harassment, bullying, dishonest or biased behaviour, a failure by the Ministry of Defence to provide medical, dental or nursing care for which the Ministry of Defence was responsible or the improper exercise by a service policeman of statutory powers as a service policeman" (para 22 above). As I have already noted, Mr Shankland rightly accepted that regulation 4(2)(c) envisages that the complainant will identify in their service complaint *which* of the circumstances there listed applies (para 23 above). Indeed any suggestion to the contrary – that it would be sufficient for a complainant to simply recite the regulation 4(2)(c) list – is untenable. Accordingly, there is a legislative requirement for a service complaint to include a statement of how the complainant believes that they were wronged and, where it is the case, that this involved discrimination and/or harassment; and

ii) As identified by Silber J in **Molaudi**, the purpose of the statutory scheme is to ensure that complaints of discrimination are in the first instance determined by a body deemed by the legislature to be the appropriate body for resolving such disputes, with the ET dealing with the matter at the next stage (para 29 above). Whilst the **EQA** does not stipulate that the service complaint must have been determined by the Defence Council *before* the claim is presented to the Tribunal, as was required under the **RRA 1976** provisions (para 29 above), the purpose of the current provision is in keeping with the earlier provisions. As indicated by my earlier citation of the authorities, this has also been identified as the purpose of section 121 **EQA** and the parties accept this proposition. Accordingly, there remains force in Silber J's observation that a service complaint is one that is "capable of being determined on its merits by the…[decision-maker] before any matter is brought before the Employment Tribunal", particularly if "brought" is now read in the sense of "decided by" the Tribunal. (Where a claim is presented before the service redress procedure has concluded, the ET proceedings will usually be stayed: **Williams** at para 1.) The intention that the internal process is resolved first is also reflected in the extended six months' time limit provisions that apply to both the service complaint and the EQA claim (paras 15 and 26 above). Whilst the **Service Complaint Regs** contemplate that further information may be provided before a

complaint is determined (para 27 above), the investigation will, inevitably, be framed by the terms of the complaint that has been made.

89. The wording of section 121 makes clear that the "matter" about which the service complaint must be made is the complaint to the Tribunal "relating to an act done when the complainant was serving as a member of the armed forces". Accordingly, I agree with the observations of EJ McNeill in **Zulu** (para 35 above), that section 121 requires there to be a sufficient link between the "act(s) done" that are complained of in the Tribunal claim and the content of the service complaint, but that usage of the word "matter" suggests that the requirement may be met by something more general than a complaint about the "act done".

90. Given the requirements of the **Service Complaint Regs**, the service complaint should state how a person thinks that they have been wronged in relation to their service; and whether the contents contain the "matter" that forms the subsequent complaint to the ET about "an act done" is to be judged in that light. I also agree with EJ McNeill's observations that the requirements for a service complaint are not equivalent to those that apply to a pleading and that although "a significant degree of particularity is required in a service complaint, the approach to a service complaint should not be overly legalistic". This is consistent with the purposive approach to the provision that is required.

91. In my judgement, the question of whether the act complained of in the Tribunal claim was "the matter" raised in the earlier service complaint is to be approached in a non-technical way, by identifying *the substance* of the service complaint, reasonably read and assessed as a whole.

92. I consider that the EJ was correct to conclude that section 121 requires a complainant who subsequently brings an **EQA** claim, to have indicated in their service complaint that their complaint alleges discrimination and/or harassment and the protected characteristic that they rely upon, or, where the Tribunal claim is one of victimisation, that they were victimised because of some action that it can be seen is capable of amounting to a protected act. For the avoidance of doubt, and consistent with the applicable non-technical approach, the service complaint need not use the words "discrimination" "harassment" or "victimisation"; the question is whether in substance and considered reasonably in the round, this was the nature of the allegation being made. Equally, there is no need for the service complaint to refer to the relevant protected characteristic/s by the terminology used in the **EQA** or to use the phrase "protected act". Again, it will depend upon the substance of what is said. By way of illustrative examples only (and recognising that

ultimately it will always depend upon the variables of context and contents of the particular complaint), a sex discrimination allegation would likely to be clear from a service complaint that said of an incident "no male officer would have been treated like that"; or an allegation of race discrimination, where the complainant said they believed "it happened because I am black". I agree with the EJ that service complainants would not be expected to distinguish between technical concepts such as "direct discrimination" and "indirect discrimination". Nor would I expect fine distinctions between the **EQA** concepts of "discrimination" and "harassment" or between the various grounds comprising "race" in section 9(1) **EQA** to be applied to what was said in the service complaint.

93. I arrive at the conclusions expressed in the first sentence of the previous paragraph for the following reasons:

(i) In light of the statutory purpose I have identified at para 88(ii) above. A complaint of discrimination cannot be investigated and determined as such, if there is no apparent allegation of discrimination and/or the basis of the same in the service complaint;

(ii) In light of the legislative requirement for a service complaint to include a statement of how the complainant believes that they were wronged and (where this is the case) that it involved discrimination or harassment (para 22 above). A claim of discrimination / harassment can only be brought under the **EQA** if it concerns one of the **EQA** specified protected characteristics applicable to service personnel and thus this is "the matter" referred to in section 121(1)(a). Equally the essence of a claim for victimisation under the EQA is detrimental action taken in response to a protected act;

(iii) Mr Shankland agreed that in light of regulation 4(2) of the **Service Complaint Regs**, it was incumbent on a service complainant to say "how they were wronged". I agree with Mr Tolley that in relation to a complaint of discrimination, the "how" a person was wronged includes the fact that they were treated adversely for a prohibited reason, indeed this is the crux of a discrimination complaint. (Mr Shankland's submission on this point confused that contention with the question of what motivated the alleged discriminator to behave in that way, which is legally irrelevant to liability); and

(iv) Absent this interpretation, the contents of the service complaint would be untethered from

> and insufficiently linked to the subsequent Tribunal **EQA** claim. As Mr Tolley observed, if Mr Shankland was correct that all that was required was for the complaint to include acts that *could* found a discrimination claim if it was subsequently said in the ET claim that the acts in the service complaint constituted less favourable treatment because of a protected characteristic, the inclusion of almost any adverse event in a service complaint would meet the test. Such a broad approach would deprive section 121 and the reference to "the matter" of any meaningful content and would not meet the legislative purpose that I have already identified.

94. I also mention for completeness, that, contrary to the claimant's submission, there is no inconsistency between this conclusion and the reasoning of EJ McNeill in **Zulu**. I have already indicated my agreement with her helpful analysis. However, in **Zulu** both service complaints clearly stated that allegations of race discrimination were made and so the issue that I am concerned with did not arise in that case.

95. In considering the proper interpretation of section 121 **EQA** I was not greatly assisted by the claimant's reliance upon case law concerned with whether an ET claim disclosed a particular cause of action (para 76 above) or by the respondent's reliance upon the **2004 Regulations** case law (para 82 above). For the reasons that I go on to summarise, both contexts are distinct from the present situation, such that it would not be safe to draw a specific parallel or analogy.

96. The EAT's decision in **McLeary** was concerned with whether the Tribunal should have appreciated that the claimant's pleading included a claim of discrimination in relation to an alleged constructive dismissal, as opposed to being confined to earlier acts which had been struck out on the basis that they were out of time. Having considered the pleading, HHJ Auerbach concluded that the Tribunal was in error as a discriminatory constructive dismissal was "clearly" part of the claim and that the allegation "shouts out" from the pleading (paras 82 and 88). The Court of Appeal in **Mervyn** (and the EAT in the three subsequent authorities I was also shown), applied a similar approach in considering whether the Tribunal at the substantive hearing should have departed from or considered departing from an agreed list of issues, which was said not to encompass all of the claims in the original pleading. Particular considerations will apply in that context. Firstly, more is required by way of identifying causes of action in a legal pleading, in comparison to a service complaint. Secondly, in circumstances where parties have proceeded to prepare for

the substantive hearing on the basis of an agreed list of issues, it is unsurprising that a relatively high threshold has to be surmounted before a Tribunal can be expected to depart from that. As I indicated to Mr Shankland during the hearing, I was slightly surprised that in citing these authorities he appeared to be advocating for a stricter test for section 121 than that identified by the EJ or contended for by the respondent. In response, he indicated that, on reflection, he did not rely upon any specific requirement that the service complaint must "shout out" the complaint of discrimination that is subsequently made to the Tribunal, but he emphasised that these cases showed that the pleading should be read as a whole and considered in the round. That is not controversial; I have already accepted that a service complaint should be considered in that way for the purposes of the section 121 **EQA** test.

97. The case law relating to the **2004 Regulations** did concern a jurisdictional bar applicable if an earlier grievance had not been submitted, such that there is a superficial similarity between those circumstances and the section 121 situation. However, it is plain from the judgments in **Shergold** (at paras 17, 18, 26 – 30 and 36-37) and in **Suffolk** (at para 57), that much of the reasoning turned on the particular wording of the provisions in the **2004 Regulations**, the particular statutory scheme and the importance of discouraging satellite litigation. The Court's reasoning in **Suffolk** also related to the particular complexities of equal pay claims.

Grounds 1 and 2

98. Mr Tolley's first submission that Grounds 1 and 2 did no more than challenge the EJ's evaluative assessment, was obviously incorrect and I was somewhat surprised that it was pursued at the hearing. Ground 2 specifically asserted that the EJ had erred in law in holding that section 121 **EQA** required a service complaint to specify discrimination and the protected characteristic relied upon. Accordingly, Ground 2 clearly raised a potential error of law in the self-directions that the EJ had given.

99. However, it follows from the conclusions that I have already set out, that I find that the EJ was correct in identifying that for the purposes of section 121 **EQA,** a complainant must indicate in their service complaint that they are making allegations of discrimination or harassment based on one (or more) of the applicable protected characteristics under the **EQA** or (as the case may be) that they are making a complaint of victimisation because of an action that it can be seen is capable of amounting to a protected act. It follows

that paras 42, 44 and 45 of her Reasons do not contain any error of law. Furthermore, in so far as Ground 2 is based on the proposition that the EJ found that a complainant should use "particular language" to satisfy these requirements, the assertion is misconceived. The EJ was at pains to point out that technical or particular language was not required, see for example paras 40, 44, 46c, 46d and 51c of her reasoning (paras 68 and 70 above).

100. I have already noted that Ground 1 does not contain a free-standing complaint (para 72 above). I have also explained that the EJ did not adopt a technical approach to what section 121 required in terms of the content of a service complaint. She did not require the service complaint to contain any particular "label" or "magic word" as Mr Shankland alleged during submissions.

Ground 3

101. The first part of Ground 3 is also focused upon what section 121 requires as a matter of law. I have explained why I reject the claimant's contention that it is sufficient if the contents of the service complaint contain events or conduct that could give rise to an **EQA** complaint of discrimination if it was subsequently stated in the Tribunal claim that this amounted to less favourable treatment because of a protected characteristic (para 93 above).

102. The second part of Ground 3 concerns the EJ's conclusions that in respect of her claim for race discrimination and her proposed amended claims of sex discrimination, harassment related to sex and victimisation, the claimant had not made a service complaint about these matters. For the reasons set out below I do not consider that the EJ's assessment involved any error of law.

103. Having correctly identified what section 121 required, the EJ carefully considered the detail of the claimant's service complaint in the context of the proposed amended claims of sex discrimination, harassment and victimisation (her para 46) and the original claim of race discrimination (her para 51). Her reasoning shows that she, quite rightly, focused on the substance of what was said, rather than requiring particular, legalistic words to have been used in the service complaint. Taking this approach, she permissibly concluded for the detailed reasons that she gave that the text of the complaint did not include anything which could fairly be said to have been an allegation that the claimant had been treated in the manner complained of because of her sex, had been subjected to harassment related to her sex, had made a complaint about

unlawful discrimination and been treated badly as a result, or had been treated adversely because of her race (her paras 46b, 46d and 51d).

104. Mr Shankland sought to draw support from the reasoning at para 72 of **Zulu** (paras 36 and 75 above). However, I do not see how that assists him. The position is materially distinct, as EJ McNeill's reference to acts being part of "the environment of racial harassment complained about in the service complaint" was in a context where clear complaints of race discrimination and race based harassment had been articulated in the service complaints.

105. In so far as Mr Shankland also suggested that the EJ should have taken into account the claimant's "personal characteristics" (para 77 above), the submission is unsustainable. Firstly, there is no indication that the case was put in that way before the EJ. More fundamentally, there is no basis whatsoever for suggesting that simply because a service complaint is made by a woman, an allegation of sex discrimination can be inferred and/or because it is made by a black soldier, an allegation of race discrimination can be inferred.

106. The claimant's submissions on this aspect of the case were largely no more than the expression of disagreement with the EJ's conclusion. In so far as the claimant asserts that the conclusion was perverse or otherwise legally flawed, the submission is groundless.

107. It is accepted that the very detailed account set out in the claimant's service complaint contained no explicit reference to discrimination, harassment or victimisation. In my judgement, the EJ was also correct to find that there was nothing in the text that *in substance* amounted to allegations to that effect. In other words, there was no assertion, for example, that the claimant had been treated in the manner complained of because she was a woman, or because of her race or because she had made an earlier complaint of discrimination.

108. It is instructive to consider what did appear in the service complaint, as well as what did not. I have set out its terms in detail at paras 43 – 54 above. Read fairly and looked at in the round, the thrust of her complaint was that she had been insufficiently assisted and supported during her recovery from surgery, that she had then been isolated and bullied by commanding officers after she challenged the failings in her care and that this had had an adverse mental and physical impact upon her.

109. In addition to not ascribing the way she was treated to her race or to her sex, the claimant positively put forward other reasons for it, namely: that it was because she had challenged the failings in her care and, in relation to the leave issue, had tried to go above her SSM (para 46 above); and that it concerned her

position as a soldier recovering from injury (para 51 above). I also note that some aspects of the complaint positively suggested that race and sex was not being relied upon: in one respect she contrasted her treatment with that of another female soldier (para 47 above); and in another respect she said that she was treated differently from all others of equivalent rank in the Troop (para 51 above).

110. I turn to the particular passages in the service complaint that were relied upon by Mr Shankland. The claimant's use of words and phrases such as "intimidation" "excluded" "disrespected" "prejudice" "continuously harassed" "unfairly" "unequal treatment" "humiliated" and "an unacceptable level of inappropriate behaviour" have to be seen in the context of the claimant's lengthy narrative. These words do not in themselves indicate conduct that comes within the **EQA**, for example there are all sorts of reasons why a person may be treated unfairly or disrespected. I have included each of the passages that Mr Shankland relied upon when setting out the service complaint. In each instance there was no indication that the use of these words was in the context of less favourable or adverse treatment because of or related to her sex or race. Furthermore, these were not words used in a vacuum, they appeared to relate to the complaints that I have summarised at para 108 above.

111. As the EJ noted, there was only one reference to race in the service complaint, namely when the claimant described her SSM telling her during a discussion about the block leave that she was "better off than other Commonwealth soldiers in the Troop since I travel home alternate years or periodically once a year" (para 46 above). This was an isolated reference and not one that appears to be an allegation of less favourable treatment compared to others of a different race, to the contrary the claimant appears to be saying that the SSM was unsympathetic to her position about the block leave, claiming she was in a better position than other soldiers who were also from Commonwealth countries.

112. Similarly, as the EJ also noted. there were only two references to gender in all the details of the complaint. Firstly, the claimant said that conduct she had identified left her feeling that she "lost my integrity as a soldier, as a JNCO, as a female and as an adult amongst my colleagues" (para 51 above). This was a reference to the impact upon her, not to the grounds of or reason for her treatment. The second reference was to a "culture of bullying and sexism" in the armed forces, as referred to in the footnoted Daily Telegraph article (para 53 above). However, this was not an article about the claimant's own experiences.

113. Furthermore, there were no references in the service complaint that amounted in substance to an

allegation of victimisation and Mr Shankland did not identify any.

114. I also agree with the EJ that simply ticking the box in section 3 of the service complaint (para 48 above), did not assist the claimant's position, given the breadth of circumstances outside of any **EQA** claim that this could include.

115. I have summarised the contents of the proposed amended details of claim to contrast what was being said at that stage (paras 60 – 62 above). Whilst the same events were relied upon, this was the first time that claims of discrimination, harassment and victimisation were articulated.

116. Whilst I regard it as no more than a secondary supporting point, it is of some note that the claimant did not seek to rely on the extended time limits applicable to a discrimination service complaint and nor was her complaint understood in that way by those who determined whether or not it was brought in time (paras 54 – 55 above).

Grounds 4 and 5

117. The first part of Ground 4 asserts that the EJ paid insufficient regard to the fact that section 121 EQA operated as a jurisdictional bar. There is no basis for this assertion; she was clearly mindful of the impact of finding that section 121 was not satisfied and, as I have already indicated, she identified and applied the correct test.

118. The remainder of Ground 4 is incorrect as a matter of law. It is not the case that "any interpretation...which imposes stringent technical requirements as to the content of a service complain about a matter infringes" a complainant's Article 6 **ECHR** rights, for the reasons I have already addressed at paras 38 - 39 above.

119. As regards Ground 5, I have already indicated that Mr Shankland accepts that this must be determined on the basis of the material before the EJ. Furthermore, as I understand it, there is no challenge to the finding at her para 55 that the rationale behind section 121 was "so that the military authorities have the opportunity to resolve the potential claim" (para 71 above) and that this amounted to a legitimate aim. The challenge is to her assessment that section 121 achieved a lawful balance between that aim and a complainant's right of access to the Tribunal, so that there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (para 38 above).

120. It is not suggested that the EJ erred in law in terms of the test that she applied or the approach that she took. The ground seeks to challenge her evaluative conclusion in this regard, with which the claimant disagrees. Mr Shankland's central submission was that the right of access to a court must be "practical and effective", whereas the EJ's interpretation of section 121 **EQA** had made access to the ET for service personnel wishing to claim discrimination "practically impossible" (para 78 above).

121. I reject that submission. Section 121 does not render access to the ET practically impossible for members of the armed forces, including the claimant, who wish to bring a discrimination claim in respect of events during their service and nor is the very essence of the right of access impaired. A member of the armed forces is able to bring a Tribunal claim for discrimination, harassment and/or victimisation provided they have raised a service complaint about the matter/s. As I have earlier explained, there is no requirement for the service complaint to use any particular, technical or legalistic language and the question will be judged by reference to the substance of the service complaint, read as a whole. The pre-printed guidance contained within the service complaint form directs the complainant to potential sources of advice in relation to completing the form and the text indicates in clear terms that if the complaint includes allegations of discrimination or harassment this should be stated and the relevant protected characteristics are listed (paras 41 and 48 – 49 above). In so far as Mr Shankland sought to derive some support from the decision in **Duncan,** the circumstances were very different. In that instance the ET's application of section 121 had prevented the claimant from bringing a claim as a result of circumstances over which she had no control, namely when the complaint was referred to the Defence Council.

Outcome

122. For these reasons, I reject each of the claimant's grounds of appeal and dismiss the appeal.