EMPLOYMENT TRIBUNALS

Claimants: (1) Mr N. Zulu
(2) Mr H. Gue

Respondent: Ministry of Defence

Heard at: Central London **On:** 1 March 2019 (and in chambers on 4 and 30 April 2019)

Before: Employment Judge McNeill QC (sitting alone)

Appearances
For the claimants: Mr C. Milsom, Counsel
For the respondent: Mr S. Tibbitts Counsel
(written submissions on equivalence: Ms Claire Darwin, Counsel)

JUDGMENT – PRELIMINARY HEARING

(1) Subject to time limit issues which have not yet been determined, the employment tribunal has jurisdiction to hear all the Claimants' complaints against the Respondent, save as set out in paragraph (2) below.

(2) The employment tribunal does not have jurisdiction to hear the First and Second Claimants' complaints of victimisation, the First Claimant's complaint about an incident occurring in 2009 and the First Claimant's complaint about a lack of career progression. Those claims are dismissed.

REASONS

(1) Mr Zulu (the First Claimant) and Mr Gue (the Second Claimant) served as members of the Armed Forces in the 3rd Battalion The Parachute Regiment (3 PARA) until their formal discharge on 1 June 2018. The First Claimant attained the rank of Lance Corporal and the Second Claimant was a Private.

(2) The First and Second Claimants bring complaints to this tribunal of harassment related to race, direct race discrimination and victimisation, relying on their colour, nationality and/or national origins. They describe themselves as black soldiers of South African and Ugandan nationality/national origin respectively.

The Respondent accepts (subject to limitation arguments) that the tribunal has jurisdiction over some but not all of the Claimants' complaints. The Respondent contends that some of the Claimants' complaints are excluded by the jurisdictional hurdles applying to the Armed Forces in s121(1)(a) and (b) of the Equality Act 2010 (EqA).

(3) Sections 120 and 121 of the EqA provide as follows:

> **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);
>
> …
>
> **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 (b) the complaint has not been withdrawn.

The reference to a "service complaint" is to a complaint brought by a member of the Armed Forces within the statutory service complaints process (the SC process) set out in the Armed Forces Act 2006 (AFA) and the accompanying Armed Forces (Service Complaints) Regulations 2015 (the 2015 Regulations). Service complaints are made to a specified officer (SO) whose decisions are subject to a limited power of review by the Service Complaints Ombudsman (SCO).

(4) At a preliminary (case management) hearing on 1 October 2018, EJ Pearl ordered, with the parties' agreement, that there should be a preliminary hearing to determine whether any part of the Claimants' claims was outside the jurisdiction of the tribunal because of the operation of s121. The Respondent initially sought to advance a further jurisdictional argument on limitation but accepted at the start of this preliminary hearing that, in light of EJ Pearl's order, the sole jurisdictional issue before the tribunal was the s121 issue.

(5) In summary, the Respondent contends that certain complaints brought by the Claimants to the tribunal were either not raised by them as service complaints at all or were ruled inadmissible in the service complaints process. In accordance with s121, as interpreted by the Employment Appeal Tribunal (EAT) (Silber J) in **Molaudi v Ministry of Defence** UKEAT/0463/10/JOJ, those complaints are not valid complaints over which the tribunal has jurisdiction.

(6) The Claimants dispute this. They contend, in summary, that as a matter of ordinary domestic law statutory construction, s121 does not bar all or any of their claims. Furthermore, s121 must be interpreted in a manner compatible with Articles 6, 8 and/or 14 of the European Convention on Human Rights (ECHR), Council Directive 2000/78/EC (the Framework Directive) and the EU Charter of Fundamental Rights (the Charter) and in accordance with the European law principles of effectiveness and equivalence. If so interpreted, none of the Claimants' claims are barred. If s121 cannot be interpreted in such

a way as to permit their claims to proceed, any jurisdictional hurdle should be disapplied in accordance with the Charter.

(7) Both parties provided written submissions which were developed in oral argument. Following the conclusion of the hearing, the Claimant was granted permission to pursue an argument in relation to equivalence which was not raised at the hearing on 1 March 2019. The parties agreed that there was no need for a further hearing and both parties provided written submissions on the issue of equivalence on 18 April 2019.

The Facts

(8) The following background facts are taken from the chronology provided by the parties and from the documents in the agreed bundle prepared for the preliminary hearing. Two witness statements from each Claimant were also provided but the Claimants did not attend to give evidence and I could not give their statements any significant weight where their evidence was contentious.

(9) On 31 August 2017, the SCO notified the SO that the First Claimant wished to make a service complaint. The complaint was about a lack of career progression which he attributed to racism. He alleged that his Chain of Command (CoC) delayed his chances of progression. He felt his career had been destroyed and that someone should be held to account. He was concerned he might be victimised for coming forwards.

(10) That complaint, with the First Claimant's agreement, was dealt with informally through mediation.

(11) On 9 October 2017, the First Claimant signed a document headed "Confirmation of Withdrawal of Service Complaint". In that document, it was stated that the First Claimant's service complaint was closed due to the delivery of an agreed informal resolution. The First Claimant confirmed that no external pressure had been applied to him in making his decision.

(12) On 21 February 2018, the First Claimant made a further service complaint. He gave the following particulars of his complaint:

1. September 2014: During a platoon training session outside D company accommodation, Sergeant Andy White referred to me as 'a black cunt'. This incident was reported and passed up the chain of command. I did not receive any feedback as to how this complaint was handled by the commanding officer.
2. July 2017: A group of 3 PARA members were having a party in A company accommodation. During the party, one of the individuals took a photograph of himself and his friends alongside a Nazi flag alongside a regimental flag. He posted the photograph on social media.
3. November 2017: During deployment on Exercise Askari Storm, I worked alongside the Kenyan Defence forces. On numerous occasions, I witnessed a number of British soldiers make racial comments towards the Kenyan soldiers and Kenyan locals, such as 'niggers', 'choggies', 'shit hole country', 'African idiots'. The chain of command has been made aware of these incidents however no action has been taken.
4. On 23 January 2018: Whilst Mr Gue and Mr Kebede were having a conversation in my room, we noticed that photographs of me and Mr Gue, which were stuck on Mr Gue's door, had been drawn on in permanent marker. The drawings contained racial slurs and pictures of swastikas.

5. On 7 February 2018: Mr Kebede returned from deployment to find a notebook on his bed that had been vandalised with racial slurs such as 'nigger', 'paki', 'go back to your country' . These slurs were written over several pages which had been ripped out of the notebook and thrown over his bed. Mr Kebede has requested termination from active service following this incident.

(13) The First Claimant stated that his complaints fell into the category of "discrimination and harassment on the grounds of race". The outcome or redress which he sought was "an apology, immediate release from the army and financial compensation".

(14) On the same day, a service complaint was made by the Second Claimant. He made the same complaints as the First Claimant. In addition, he made the following complaints:

1. January 2014: The door to my accommodation was vandalised. The porch was urinated on, empty beer bottles were broken against the door, and racial slurs were written on the door. As I was new to the Battalion at this stage, I did not report these events for fear of repercussion.

….

5. 9 January 2018: Following the events that occurred during Exercise Askari Storm, and my past experience of racial discrimination, I handed in my resignation. I wrote two letters to the commanding officer highlighting my grievances and outlining the instances of racial harassment I had suffered during my employment. I was interviewed by the chain of command and was assured that action would be taken to ensure those problems did not happen in the future. My application for early release states that I have requested early release from the army due to 'personal reasons'. Despite me informing the Officer in Command of my reasons for leaving the army, no record has been made of my grievance in relation to the racial harassment I have suffered. I believe this is a deliberate attempt by the army to cover up the true reasons for his [sic] resignation, which has left me feeling angry and disillusioned about the way the army has handled my complaints.
6. 23 January 2018:….
7. 25 January 2018: I reported the incident of 23 January 2018 to the Officer in Command who informed the Royal Military Police. I attended an interview with the RMP and half way through giving my statement the police officer taking the statement was called outside the room. The officer then returned and said this was not a police matter and should be dealt with by the Commanding Officer. When I informed the Commanding Officer of this, he [sic] was told to return to the RMP to give a statement. I felt extremely let down by the failure of the Commanding Officer and RMP to deal with this complaint adequately.

(15) The Second Claimant also categorised his complaint as "discrimination and harassment on the grounds of race". He too asked for "an apology, immediate release from the army and financial compensation".

(16) The Second Claimant's complaint about the reason stated on his application for early release referred back to early January. On 10 January 2018, he was interviewed by his commanding officer (CO). This followed his submission of a notice to terminate his service (NTT) on 8 or 9 January 2018. The discussion at interview covered whether there was racism in the unit, harassment, offensive flags, a "picture with the EDL leader", racial abuse against other members of the unit involving racist slurs and drawings and "issues in Kenya where racial slurs were being discussed". The reference to "personal reasons" as his reason for leaving the army at best clouded and at worst deliberately concealed his stated reasons for wishing to leave the army..

(17) Both Claimants were (separately) interviewed in relation to their complaints on 3 March 2018 by the SO, Lt Col Hargreaves. In both cases, the SO recognised that the incidents complained of were abhorrent. The First Claimant said that the racist incidents had forced him "to choose between his career and his morals". He expressed anger "at those who have done nothing". The Second Claimant, referring to his interview with the RMP, said that he had been to the police about the racist graffiti but that the interview had been stopped. He referred to "systematic failings" which were not only affecting 3 PARA. In both cases, the SO asked for more detail. He wanted, among other things, names of offenders, but the Claimants were reluctant to give these. The SO noted in the First Claimant's interview that not all of the incidents complained of by him were directed specifically at him.

(18) Both Claimants provided revised service complaints on 5 March 2018. The revised complaints did not include new complaints but gave some further particulars of the earlier complaints. The First Claimant said that the incident of 23 January 2018 was the one that lead to his final decision to terminate his service. The Second Claimant said that it was the overall treatment of Kenyans on Exercise Akari Storm that lead to his final decision to terminate his service. Both Claimants went on to say the following:

> That is not to say that the other incidents above did not play their part in leading up to this point but this was the final tipping point. These issues in their entirety have convinced me that a racist environment is allowed to exist within some areas of 3 PARA and not enough is being done by the chain of command to take it seriously or properly sanction those responsible. I also wish to point out a lack of moral courage amongst other members of the unit who have been bystanders to the events outlined above and failed to uphold the British Army's Values and Standards (including NCOs). I feel that I can no longer serve as a [non-commissioned officer/soldier] under these conditions.

(19) The Claimants stated in their revised complaints that although some of the incidents did not happen directly to them, the fact that they happened and the way in which the unit dealt with issues of racism meant that they could no longer serve in the unit "in good faith or conscience". They stated that they no longer had faith in the unit to sanction those responsible for engaging in racist behaviour. They asked for those who had discriminated to be held accountable for their actions and for further teaching in "Values and Standards – Respect for Others". They asked for "an honest and open discussion/investigation" with others involved in the Kenya incidents so that they were not given sole responsibility for naming those involved. The Second Claimant also asked that the real reason for the termination of his service be stated rather than using words such as "perception" and "personal circumstances".

(20) The Second Claimant at paragraph 5 of his original complaint (and paragraph 3 of his revised complaint) referred to letters that he had sent to his CO highlighting his grievances and outlining instances of racial harassment relied on. The letters were undated and were not attached to either the original or revised service complaint, even though the form on which the complaints were submitted requested that relevant supporting documents should be enclosed. The Respondent did not, however, dispute that these documents had been received.

(21) One letter was headed “Racial discrimination and disparity in the British Army”. The Second Claimant alleged that racial discrimination and disparity were still very much alive in the Parachute Regiment and being “permitted and allowed to flourish by the chain of command at every level of the command structure”. The Second Claimant referred to Nazi/SS flags alongside pictures of Hitler being proudly displayed in the confines of the block as well as confederate flags displayed in the windows. The Second Claimant stated that “members also proudly brag of their exploits within far-right racist groups, case in point, recent pictures of EDL leader Tommy Robinson splashed all over Facebook”.

(22) The other letter was headed “The British Army’s guide to jovial racism and how to turn a blind eye”. This reads more like an article and makes a number of trenchant remarks about racism in the British Army. The Second Claimant highlighted the use of offensive discriminatory language without fear of reprisal and referred to “blasé or purposefully blind ignorance shown by the army to a deeply entrenched problem”.

(23) For a period of about eight months, the Claimants’ service complaints were stayed while potential criminal allegations were investigated. During that period, on 1 June 2018, both Claimants left the army on formal discharge.

(24) On 14 June 2018 following early conciliation, both Claimants presented their claims to the tribunal. Responses to their claims were presented on 18 September 2018.

(25) Neither Claimant in his claim form relied on the incident of 7 February 2018 referred to in his service complaint.

(26) By a letter dated 8 November 2018 from the SO, the First Claimant was informed that three of his service complaints were admissible but that two of his complaints were inadmissible. These were (1) the complaint that a member of 3 PARA took a photograph of himself and his friends with a Nazi flag and a regimental flag and posted the photo on social media (‘the Nazi flag complaint’) and (2) the complaint about the 7 February 2018 incident. The latter is not relied on by the Claimant in his claim form and I do not consider it further. The first complaint was held to be inadmissible because the First Claimant had said neither that he was involved in the incident in any way nor that he reported the incident to his CoC.

(27) The Second Claimant received a similar letter on admissibility from the SO dated 9 November 2018. In the Second Claimant’s case also, the SO ruled that five complaints were admissible but that three complaints were inadmissible. These were (1) his complaint in relation to the September 2014 incident involving the First Claimant and Sergeant Andy White, (2) the Nazi flag complaint and (3) the complaint about 7 February incident. The SO ruled that the first complaint was inadmissible as it did not relate to the Second Claimant’s service in the Armed Forces and that the Nazi flag complaint was inadmissible because the Second Claimant was not involved in the incident in any way. In relation to the third complaint, this has not been pursued further.

(28) When the SO said that the Nazi flag complaints were inadmissible because the Claimants were not "involved" or, in the case of the First Claimant, that he had not reported the incident, this could only be a reference back to the definition of a service complaint in s340A of the AFA which requires that the complaint should be about a matter "relating to" the soldier's service. There is no separate requirement that a soldier must have been "involved" in a matter in order for his or her complaint to be admissible. There was no explanation by the SO as to why matters which were relied on by the Claimants as part of the racist environment that lead to them terminating their service were not matters "relating to" their service. Racial harassment and discrimination do not require that a discriminatory act is targeted at the complainant and the Respondent's Counsel, while not conceding the point, did not dispute that these matters could properly fall within the tribunal's jurisdiction to hear complaints under the EqA, but for s121.

(29) Both Claimants appealed to the SCO against the SO's findings that some of their complaints were inadmissible. The First Claimant appealed only in relation to the finding that the Nazi flag complaint was inadmissible. The Second Claimant appealed against the findings on admissibility both in relation to the September 2014 and the Nazi flag complaints.

(30) By letters dated 9 January 2019, the SCO notified the Claimants that the SO's rulings on the complaints which he found to be inadmissible were correct. She then went on to find that certain complaints which were held to be admissible by the SO were inadmissible and she recommended that the SO reconsider his decision on those complaints. The SCO's powers to review are limited to rulings by the SO that a complaint is inadmissible (regulation 7 of the 2015 regulations). She did not have the power to review decisions that complaints were admissible.

(31) By letters dated 20 February 2019, Brigadier (Retired) C.A. Findlay wrote to the Claimants in his capacity as the authorised representative of the Defence Council in respect of service complaints. He confirmed that he disagreed with the SCO in relation to the complaints ruled admissible by the SO which the SCO had subsequently ruled to be inadmissible. The complaints ruled admissible by the SO therefore now proceed through the service complaints process. Although it is more than a year since the service complaints were submitted, the process remains in its very early stages. It appears that the complaints have not yet been referred to the Defence Council. If they have been, the Claimants had not yet been notified at the time of the hearing on 1 March 2019 who would be dealing with their complaints, whether a person or persons appointed by the Defence Council or the Council themselves.

The complaints which the Respondent contends fall outside the tribunal's jurisdiction

(32) The parties produced an agreed "list of issues" which was, in essence, a list of the allegations made in the Claimants' complaints to the employment tribunal which the Respondent submitted should be dismissed at this preliminary hearing by virtue of s121 of EqA. These were as follows:

The First Claimant

(i) Harassment (Race) (s26 EqA)
   a. Witnessing a Ugandan private being called “nigger” in 2009;
   b. The display of Nazi flags and assorted memorabilia by members of the Second Claimant’s rifle company in their rooms;
   c. The display of Confederate flags;
   d. The photograph of 3 PARA members with Tommy Robinson in October 2016;
   e. The photograph of personnel in July 2017 with Nazi flags as a backdrop;
   f. The warning by British Army Training Unit Kenya (BATUK) staff not to behave badly as they would “go to prison and get AIDS”;
   g. Private Walker describing Nelson Mandela as a terrorist and Cpl Kinell’s agreement with the same.

(ii) Direct racial discrimination (s13 EqA)
   a. The First Claimant relies on the same matters as are relied on under the heading “Harassment” and the Respondent repeats its contentions in relation to those matters;
   b. The ongoing failure to promote the First Claimant to Corporal; and
   c. Cpl Kennell’s complaint as to the First Claimant undertaking preparation time for his training course.

(iii) Victimisation (s27 EqA)
   a. Subjecting the First Claimant to the following detrimental treatment because he did protected acts (which are not admitted):
      - Failing to comply with confidentiality obligations in respect of complaints made;
      - Failing to take any or any adequate steps to investigate and/or redress the protected acts made;
      - Cpl Kinnell raising a complaint about the First Claimant/differential treatment by Sgt Murray.

The Second Claimant

(i) Harassment (Race)
   a. The display of Nazi flags and assorted memorabilia by members of the Second Claimant’s rifle company in their rooms;
   b. The display of Confederate flats;
   c. The photographs of 3 PARA members with Tommy Robinson in October 2016;
   d. The photograph of personnel in July 2017 with Nazi flags as a backdrop;
   e. The warning by British Army Training Unit Kenya (BATUK) staff not to behave badly as they would “go to prison and get AIDS”.
   f. Private Walker describing Nelson Mandela as a terrorist and Cpl Kinnell’s agreement of the same.

(ii) Direct Discrimination

a. The Second Claimant relies on the same matters as are set out under the heading "Harassment" and the Respondent repeats its contentions in relation to those matters.

(iii) Victimisation

a. Subjecting the Second Claimant to the following detrimental treatment because he did protected acts:

- Failing to comply with confidentiality obligations in respect of the complaints raised;
- The conduct of Cpl Mitton on 25 May 2018.

The Law

(33) Sections 120 and 121 of the EqA are set out in paragraph (3) above.

Service Complaints - Statutory Framework

(34) The system for redressing service complaints (the SC process) is governed by sections 340A to the 340O of the AFA (inserted by s2(1) Armed Forces (Service Complaints and Financial Assistance) Act 2015). Section 340A defines who can make a service complaint:

> **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)…

(35) The procedure for making a complaint and determining admissibility is set out in s340B of the AFA. By s340B(1), the Defence Council is given the power to make regulations about the procedure for making and dealing with a service complaint. S340B also sets out matters which the regulations must provide for. Those matters include provision for the determination of the admissibility of service complaints and a review by the SCO where the officer to whom the service complaint is made decides that the complaint is not admissible. S340B(5) provides that:

> (5) …. a service complaint is not admissible if—
> …
> (b) the complaint is made after the end of the [limitation period prescribed by the regulations]….; or
> (c) the complaint is not admissible on any other ground specified in service complaints regulations.

(36) S340C requires service complaints regulations to provide for the decision-making process on service complaints, to be carried out by the Defence Council itself or a person or persons appointed by the Defence Council. S340D requires service complaints regulations to provide for an appeal to the Defence Council when such a decision is made.

(37) The 2015 Regulations set out the procedure for making a service complaint in regulation 4:

(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 wronged;
(b) any allegation which the complainant wishes to make that the complainant's commanding officer or his or her immediate superior in the chain of command is the subject of the complaint or is implicated in any way in the matter, or matters, complained about;
(c) whether any matter stated in accordance with subparagraph (a) involved discrimination, harassment, bullying, dishonest or biased behaviour…
(d) if the complaint is not made within [the limitation period specified in the regulations] 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…
(4) …
(5) In this regulation, *"discrimination"* means discrimination or victimisation on the grounds of colour, race, ethnic or national origin….

(38) Regulation 5 provides that after receiving a statement of complaint, the SO:

(1) …must decide whether the complaint is admissible in accordance with section 340B(5) [of the AFA];
(2) For the purposes of section 340B(5) a service complaint is not admissible if –
(a) the complaint does not meet the requirements of …section 340A(1)…
(3) …
(4) If the specified officer decides that any part or all of the service complaint is not admissible, he must notify the complainant in writing of the decision, giving the reasons for the decision and informing the complainant of his or her right to apply for a review of the decision by the Ombudsman.

(39) Regulation 6 provides for a three-month time limit for making a service complaint, extended to six months for a claim made or capable of being made under s120 of EqA. This is subject to a "just and equitable" extension.

(40) Pursuant to Regulation 7, the SCO may review a decision that a service complaint is not admissible. A decision in relation to admissibility is binding on the complainant and the SO (Regulation 7(3)).

(41) The Regulations further provide for the Defence Council to decide whether a complaint should be dealt with by the Defence Council itself or "a person or panel of persons appointed by the Council" (Regulation 9) and for an appeal process to the Defence Council (Regulation 10).

(42) The employment tribunal does not have jurisdiction to review or overrule a decision made by the SO (or the SCO).

Provisions of ECHR relied on by Claimants

(43) The Claimants rely on Articles 6, 8 and 14 of the ECHR:

(i) Article 6: that "In the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a

reasonable time by an independent and impartial tribunal established by law….";

(ii) Article 8: that "everyone has the right to respect for his private and family life"; and

(iii) Article 14: that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour…or other status". It was of course common ground that there was no free-standing claim under Article 14.

Framework Directive

(44) The Claimants rely on the following provisions:

(i) Recital 35: "Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive";

(ii) Article 9(1): "Member States shall ensure that judicial and/or administrative procedures…for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment"; and

(iii) Article 17: "Member States shall lay down rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive".

The Charter

(45) The Claimants rely on Articles 21 and 47 of the Charter:

(i) Article 21: Non-discrimination: "Any discrimination based on any ground such as race, colour, ethnic or social origin…property…or sexual orientation shall be prohibited"; and

(ii) Article 47: Right to an effective remedy and a fair trial: "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented".

(46) Article 52(3) of the Charter provides that: "insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the Convention".

Effectiveness

(47) The principle of effectiveness is fundamental to EU law and the ECHR jurisprudence. Procedural requirements, in accordance with the principle of effectiveness, must not render "practically impossible or excessively difficult" the exercise of rights conferred by EU law, as recently confirmed and explained in **R(Unison) v Lord Chancellor** [2017] 3 WLR 409.

(48) Procedures applying to a directly effective right to be treated in accordance with the principle of equal treatment under EU law must comply with the general principles of effectiveness and equivalence and with the right to an effective remedy under Article 47 of the Charter: **P v Commissioner of Police for the Metropolis** [2018] ICR 560. In **P,** a statutory process which entrusted certain decisions to a person who might benefit from judicial immunity was held not to constitute a bar to a claimant bringing a claim to her directly effective right to equal treatment in the employment tribunal.

(49) Employment tribunals are the specialist forum for determining claims of discriminatory treatment under domestic law and fulfil the requirements of the principle of effectiveness: **P** (Lord Reed, paragraphs 28 and 29). They can award a comprehensive range of remedies to meet the variety of difficulties arising in employment: **GMC and others v Michalak** [2017] 1 WLR 4193 SC.

(50) Further, the right to an effective remedy is a fundamental provision of EU law so that provisions which prevent an effective remedy must be disapplied when rights fall within the ambit of EU law: **Benkharbouche v Embassy of the Republic of Sudan** [2016] QB 347 SC.

(51) In **Molaudi**, the EAT considered Article 7 of the (now superseded) Racial Discrimination Directive 2000/43/EC (the Race Directive) and held that it did not preclude "measures which specify a procedure which must be pursued before a claim can be brought in the Employment Tribunal, especially where such requirement does not act as an absolute bar to bringing their claims". The EAT considered that the fact that a decision of the military authorities could be challenged by way of an application for judicial review meant that there was no absolute bar to the bringing of a claim.

(52) Neither Article 6 nor the Charter were referred to in **Molaudi**. The Respondent accepted that **Molaudi** was not binding on the tribunal from an EU law perspective but submitted that it was persuasive. It was open to the Claimants to rely on their rights under the Charter as directly effective rights and if the ordinary domestic law interpretation of s121 barred the exercise of the Claimants' Charter rights, the bar should be removed.

Equivalence

(53) The procedural rules applying to claims based on EU law must be no less favourable than those governing similar domestic law claims. In considering equivalence, the purpose and essential characteristics of the allegedly similar causes of action fall to be considered. The parties referred to **Levez v T.H. Jennings (Harlow Pools) Ltd** [1999] ICR 521, 545-546**;**

Transportes Urbanos y Servicios Generales SAL v Administratiòn del Estado [2010] 2 C.M.L.R. 39, [35]-[36]; and **Totel Ltd v Revenue and Customs Commissioners** [2018] 1 WLR 4053 [6] and [11].

(54) In order to establish equivalence, there must be a sufficiently similar domestic action but, in focusing on whether a cause of action is comparable, the focus should be on substance over form: **Preston v Wolverhampton Healthcare NHS Trust (No. 2)** [2001] 2 AC 455. It is for each member state to establish its own procedures for the vindication of rights conferred by EU law and it is for the courts of each member state to identify what domestic law claims are true comparators and whether the procedure applying to the EU claim is less favourable than that applying to the domestic law claim: **Totel**.

General principles of interpretation

(55) Subject to any inconsistency with EU law, s121 falls to be interpreted in accordance with its ordinary natural meaning and in the context of the AFA and the 2015 Regulations, which embody and govern the service complaints process.

(56) Where directly effective EU rights are in issue, however, EU law is both "the starting point" and "the finishing point" of the analysis: **P** [27]. If the provisions of s121 bar the bringing of directly effective EU law rights, those provisions must be disapplied. Disapplication does not entail an amendment of the legislation. Words may be added (or removed) to indicate how a statutory provision should be interpreted in a particular type of case in order to avoid a violation of EU law (Lord Reed [34]).

(57) In relation to the ECHR, the employment tribunal does not have the power to make a declaration under s4 of the HRA that s121 is incompatible with the HRA. The extent of its power is to interpret domestic law under s3 of the HRA in a way which is compatible with the ECHR where possible. The tribunal may be able to read words into the statutory provision or disapply provisions but not where doing so would change the key principles and scope of the legislation: **Ghaidan v Godin-Mendoza** 2 AC 557, HL.

Analysis and conclusions

(58) The Respondent's grounds for submitting that the tribunal does not have jurisdiction to consider certain complaints made by the Claimants are that (1) those complaints were not raised as service complaints at all; or (2) the complaints were raised as service complaints but were ruled inadmissible by the SO (and subsequently by the SCO on review) and are therefore not "valid" service complaints as required by s121(1)(a) as interpreted in **Molaudi.**

Complaints not raised as service complaints

(59) The Claimants submitted that all their complaints were raised as service complaints. As a matter of ordinary statutory construction, the reference to having made a service complaint "about the matter" in s121(1)(a) does not

require that each and every act of discrimination later relied on in the complaint to the tribunal should have been set out in the service complaint. A "matter" is a broad notion. This reflects the reality that a soldier, who may be as young as sixteen "with various degrees of formative education" should not be expected to fully plead particulars of claim under the service complaints procedure. "The matter" referred to in the Claimants' service complaints was an environment of racial harassment which went unsanctioned, combined with a failure to respond adequately to grievances raising race discrimination. This "matter" covered all of the acts alleged in the Claimants' complaints to the tribunal. This issue was not considered in **Molaudi**.

(60) At the time that **Molaudi** was decided, the predecessor provision to s121, s75(9) of the Race Relations Act 1976 (RRA), was in force. Section 75(9) provided that:

> (9) No complaint to which sub-section 8 applies [a complaint about discrimination in the armed forces] shall be presented to an Employment Tribunal under section 54 unless:
> (a) the complainant has made a service complaint in respect of the act complained of…

In S75(9) the words "act complained of" were used. These words were replaced in s121 by the words "the matter". The Claimants submitted that the replacement of "the act complained of" by "the matter" indicated a deliberate loosening of the previous statutory wording.

(61) The Claimants relied by way of analogy on s18A(1) of the Employment Tribunals Act 1996 (ETA) which is part of the early conciliation regime in the employment tribunal and provides that:

> (1) Before the person ('the prospective claimant') presents an application to institute relevant proceedings in relation to any matter, the prospective claimant must provide to Acas prescribed information, in the prescribed manner, about that matter.

(62) The EAT interpreted the word "matter" in s18A broadly in **Science Warehouse Ltd v Mills** [2016] ICR 252, **Drake International Systems Ltd v Blue Arrow Ltd** [2016] ICR 445 and **Compass Group UK & Ireland Ltd v Morgan** [2017] ICR 73. In **Drake**, Langstaff J interpreted "matter" as follows, distinguishing it from the word "claim":

> "A "matter" may involve an event or events, different times and dates, and different people. All may be sufficiently linked to come within the scope of "that matter"".

(63) The Respondent submitted that the terminology used in s121 of the EqA was not significantly different from that in s75(9) of the RRA. The EAT in **Molaudi** stated that the RRA had been "re-enacted" in the EqA and that was consistent with the explanatory notes to s121 of the EqA. In two cases post-dating **Molaudi, Duncan v MOD** UKEAT/0191/RN and **Williams v MoD** [2013] EWCA Civ 626, in the latter following an application for permission to appeal made to the Court of Appeal, the statutory aim of s121 was said to be that the service redress procedures should be brought first, enabling the Armed Forces to determine complaints internally before a tribunal claim was brought. This

implied that the service complaints and the complaints before the tribunal were one and the same.

(64) The Respondent further submitted that the analogy between s121 of the EqA and s18A of the ETA was fundamentally flawed because:

(i) S18A and the authorities interpreting s18A post-dated the enactment of s121;
(ii) The same words can bear different meanings in different pieces of legislation;
(iii) The purpose of the early conciliation legislation was quite distinct from the purpose of the service complaints provisions. The former facilitates discussions between the parties prior to litigation but does not involve any determinations. The service complaints process, in contrast, provides for determining admissibility, determining matters on their merits and a right to appeal. The clear intention of the legislation surrounding service complaints is that the primary forum for the determination of complaints is under the service complaints process; and
(iv) The word "matter" should be considered in the context of s121 as a whole. In s121 of the EqA the word "matter" follows and refers back to the words "the act done" whereas in s18A of the ETA the words "the matter" were preceded by the words "any matter".

(65) The clear intention of parliament, the Respondent said, was that s121 of the EqA should be read in conjunction with the AFA and the 2015 Regulations which embody and govern the SC process. S340A of the AFA and regulation 4 of the 2015 Regulations use the word "matter" to refer to what is being complained about. Regulation 4 of the 2015 regulations requires that a complaint sets out how the complainant thinks they have been wronged and the date or time period of the matter or matters complained of.

(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 reference to the "service complaint" in s121 is a reference to the complaint made in the SC process. The claimant must have made a complaint under the SC process about a matter before pursuing a similar complaint before the tribunal, even though the two complaints may run in parallel and there is now no requirement that the complaint under the SC process should be concluded before the tribunal claim is heard. Given that the SC process may be a lengthy process, as these cases show, the employment tribunal process may be completed before the SC process. A stay of proceedings pending a decision in the SC process is a matter for the tribunal's discretion. 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.

(67) I rejected the Claimants' analogy between s121 of the EqA and s18A of the ETA. In contrast to s121, the word "matter" in s18A is not referable to

words, such as “act done”, which might limit its interpretation. In any event, s18A serves a very different function from s121 and is not subject to the type of contextual interpretation appropriate to s121, which must be read together with the provisions relevant to service complaints made under the SC process.

(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. Although the EAT referred in **Molaudi** to the EqA as having “re-enacted” s75(8)-(10) of the RRA, this did not amount to a determination of any point in contention between the parties in that case. Neither this reference nor the explanatory notes to s121 which described s121 as being “designed to replicate the effect of the provisions in the previous legislation” override the need to interpret the statute in context and in accordance with the ordinary meaning of the words used. 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.

(72) Both Claimants in their service complaints complained about an environment of racial harassment and a failure to deal with reports of race discrimination which were brought to the attention of their CoC. Although some of the specific acts alleged in their complaints to the tribunal were not referred to in their service complaints, I concluded that, with the exception of the few matters set out below, all of their complaints to the tribunal were of acts alleged to be part of the environment of racial harassment complained about in the SC process. Where clear and detailed allegations illustrating an alleged prevailing racist environment over a period of time were set out in the Claimants' service complaint forms, and were then elaborated upon in the claim form, I concluded that the complaints in the claim form did fall within the meaning of the "matter" within s121 so that the jurisdictional pre-condition was met.

(73) In relation to the Second Claimant, in particular, in one of the letters referred to in his service complaint, he stated as follows:

> This Regiment's history is long known for fighting the Nazis and their racist regime during WW2, but what dumbfounds me is how members promote and proudly display Nazi/SS flags alongside pictures of Hitler himself in the confines of the block (that is only a stone's throw away from BHQ) and if this isn't enough, coupled alongside this are confederate flags displayed in the windows. In addition to this: members also proudly brag of their exploits within far-right racist groups, case in point, recent pictures of EDL leader Tommy Robinson splashed all over Facebook.

This letter was incorporated by reference into the Second Claimant's service complaint. Even if I had considered that other complaints did not fall within the "matter" complained of in his service complaint, I would have concluded that his complaints about the display of Nazi flats and assorted memorabilia, the display of confederate flags and the photos of 3 PARA members with Tommy Robinson were part of his service complaint.

(74) Applying the above analysis, the complaints of acts done which do not form part of the matters complained of in the service complaints are:

(i) The complaints of victimisation, which do not form any part of either Claimant's service complaint and are different in character from the complaints of an environment of racial harassment which went unsanctioned and a failure to deal with race discrimination grievances when raised; and

(ii) The First Claimant's complaint that a Ugandan private was called "nigger" in 2009, which is close in nature to other allegations made in the SC process and repeated in the complaint to the ET but was many years distant from the other matters complained of and did not fall temporally within the scope of the particular environment complained of in the SC process.

(75) In relation to the First Claimant's claim for direct racial discrimination arising out of his lack of career progression, different considerations apply. This complaint was made as a service complaint, but was not pursued as a formal

service complaint. Following a mediation, the complaint was withdrawn by a document dated 9 October 2017 and signed by the First Claimant headed "Confirmation of Withdrawal of Service Complaint". The employment tribunal does not, by virtue of s121(1)(b) of the EqA, have jurisdiction to determine a complaint to it when the service complaint has been withdrawn.

(76) The First Claimant submitted that this complaint should be permitted to proceed. There was no formal withdrawal of the complaint because the complaint was only resolved informally. Subsequent complaints of race discrimination were relevant events which should remove any bar to the bringing of this complaint.

(77) I rejected that argument. The complaint was withdrawn. Under the clear wording of s121(1)(b) and, subject to consideration of EU law principles, it could not be brought to the employment tribunal.

(78) In relation to these matters which I have found were not brought by way of service complaints at all or were withdrawn and therefore fall outside the jurisdiction of the tribunal on an ordinary domestic law interpretation of s121, I have considered whether EU law requires that s121 is interpreted in such a way as to allow these complaints to proceed.

(79) The requirement to make a service complaint as a pre-condition to bringing a complaint to the employment tribunal is a procedural requirement. Domestic law procedural requirements are not contrary to EU law unless they make it impossible in practice or excessively difficult to bring a claim or they contravene the principle that procedural rules applicable to claims based on EU law should be no less favourable than the rules applying to similar claims based solely on domestic law.

(80) S121 requires only that a claimant first make a service complaint under the SC process before making a claim about the same matters to the employment tribunal. The procedural requirements applying to service complaints are straightforward. Individual complainants may be assisted in preparing a service complaint by an Assisting Officer and are encouraged to seek advice from an equality and diversity adviser. Provided that a service complaint is made, the claimant may bring a complaint to the tribunal for any alleged breach of his or her right to equal treatment. These straightforward procedural requirements do not make it impossible or excessively difficult to bring a claim.

(81) As to equivalence, the sole type of claim relied on by the Claimants as an equivalent domestic law claim is a personal injury claim brought by Armed forces personnel. The Claimants contend that a domestic law personal injury claim (in particular a stress at work claim) is equivalent to their claims based on EU derived rights. It is not a pre-condition to bringing a personal injury claim that armed services personnel should first have gone through a service complaints procedure and there is no requirement for a preliminary determination of admissibility before bringing such a claim. The Claimants' EU derived rights would be subject to more drastic hurdles than domestic comparable rights if s121 was interpreted so as to preclude their claims and the

Respondent's justification defence could not "leave the starting-block" if the principle of equivalence was properly applied.

(82) The Respondent disputed that a claim for personal injury was a comparable claim for these purposes and invited the tribunal to consider the purpose, cause of action and essential characteristics of the two actions. A personal injury claim involves establishing breach of duty, causation and damage. Damages for distress and injured feelings which do not amount to a recognisable psychiatric injury are not recoverable in personal injury claims. Such claims are brought in the civil courts under their general jurisdiction in relation to contractual and tortious claims. In contrast, the employment tribunal's jurisdiction in relation to the statutory tort of discrimination is limited to the specific acts or omissions in relation to which discrimination is prohibited by the EqA. The range of remedies is set out in the EqA and includes compensation for injury to feelings. Damages for personal injury may be awarded in discrimination claims but not on the basis of ordinary common law principles. The equivalence issue in **P** related to the different treatment of claims under the EqA rather than the different treatment of EqA and personal injury claims.

(83) The purpose of a personal injury action is the recovery of damages for an injury to physical or mental health. In contrast to a discrimination claim, a personal injury claim is dependent on proof of injury. Damages solely for distress or hurt feelings are not available in a personal injury action. The remedy in a personal injury action is an award of damages. In a discrimination claim, remedies are available which are not available in personal injury claims, including recommendations and compensation for injury to feelings. Although both personal injury claims and discrimination claims are generally tortious claims and although personal injury damages may be awarded in discrimination claims, the award of personal injury damages in a discrimination claim is not subject to the same requirements as in a personal injury claim.

(84) I accepted the Respondent's submissions on this issue. I did not consider that the degree of similarity necessary to a finding of equivalence was established as between personal injury claims and claims for discrimination in the employment tribunal.

(85) For the above reasons, the specific requirement in s121 to bring a service complaint before bringing a complaint to the employment tribunal does not fall to be amended or disapplied in accordance with the principles of effectiveness or equivalence.

(86) The Claimants further relied on the obligation to construe legislation in accordance with the ECHR. They relied in particular on Article 14 of the ECHR and alleged discrimination on grounds of their engagement in the military in relation to the enjoyment of their rights under Articles 6 and 8 on the basis that persons in civilian employment did not have to go through a statutory process before bringing a race discrimination claim to the tribunal. The impact of Article 14, it was submitted, is that there should not be a difference in treatment between those engaged in the military and those outside the military in "analogous" situations in relation to Article 6 and Article 8 rights save where a

difference in treatment is justified: **R (Carson) v Secretary of State for Work and Pensions** [2006] 1 AC 173 as cited in **AL (Serbia) v Secretary of State for the Home Department** [2008] 1 WLR 1434. The jurisdictional bar in s121 only applied in armed forces cases and there was no justification for it. The Respondent's justification argument, that there was a clear distinction between working pursuant to a contract of employment and under a CoC, did not get off the ground. In support of their argument that being a member of the military could amount to a "status", the Claimants relied in particular on **Engel and others v Netherlands** (1979-80) 1 EHRR 706 and **Buchen v Republique Tcheque** Appn 3541/97, judgment 26 November 2002.

(87) In relation to this submission, I reminded myself that it is not open to the tribunal to make a declaration of incompatibility. The Claimants' submission was, in effect, a wholesale challenge to the statutory regime for determining discrimination complaints brought by members of the Armed Forces. If correct, it would involve the disapplication of s121 in its entirety and the practical removal of the SC process as a precondition to bringing a claim in matters potentially falling within the ambit of the EqA. This would remove the primary purpose of enabling the military authorities to consider and determine a complaint before it is brought to the employment tribunal. Whilst I acknowledge that the statutory regime may contravene Article 6 in some respects and that members of the armed forces face a jurisdictional hurdle which does not apply to others in similar situations, the employment tribunal does not have the power to change the key principles and the scope of the legislation.

(88) Further, in relation to the Claimants' directly effective rights, in **Molaudi** there was consideration of the impact of Article 7 of the Race Directive and Article 189 of the (then) EC Treaty. It was concluded that the requirement to bring a service complaint before bringing proceedings in the employment tribunal did not infringe rights under the Race Directive. Subject to the issue addressed below, namely whether or not s121 prevents a complaint being brought to the tribunal in respect of a service complaint ruled inadmissible in the SC process on grounds that are not purely procedural, this part of the judgment in **Molaudi** remains at least persuasive if not technically binding on the employment tribunal. There is no material distinction between rights under the Race Directive and rights under the Framework Directive in this context. For these reasons also, I concluded that the requirement to bring a service complaint as a pre-condition to bringing a complaint to the employment tribunal about the same matter did not infringe the Claimants' directly effective EU law rights.

(89) In relation to the First Claimant's complaint about his lack of career progression and the failure to progress his career, the wording of s121(1)(b) is clear. It is a pre-condition to the pursuit of a claim before the employment tribunal that the service complaint should not have been withdrawn. The First Claimant's service complaint was withdrawn. This is a procedural requirement which does not contravene any principle of EU law.

<u>Complaints ruled inadmissible</u>

(90) In relation to the complaints which were ruled inadmissible in the SC process, the Claimants submitted that in order to satisfy the requirements of s121(1), it was sufficient that a service complaint had been made. A claimant did not have to have made a service complaint which was "valid", in the sense that it had been ruled to be admissible within the SC process.

(91) The difficulty for the Claimants is that the EAT held in **Molaudi** that a "service complaint" is a service complaint accepted as valid by the prescribed officer in the SC process. This was the definition of a service complaint applied also by the EAT in **Duncan.** Subject to the application of EU law, **Molaudi** is binding on the tribunal unless it can be distinguished.

(92) In relation to their complaints that were found to be inadmissible, the Claimants repeated their submission that the statutory wording considered in **Molaudi** was entirely different from the wording in s121 and that **Molaudi** was distinguishable on that basis. Further, in **Molaudi,** the service complaints were rejected as inadmissible because they were out of time, which was a matter of procedure: in contrast, the Claimants' claims were rejected as inadmissible on a point of substance, namely whether the discriminatory acts complained of "relate[d] to the service" of the Claimants. The question of whether a complaint, ruled inadmissible on a point of substance going to the nature of the complaint rather than on a point of procedure, was a "valid" service complaint for the purposes of s121, was not considered in either **Molaudi** or **Duncan**.

(93) The Respondent responded again that there was no material change in the statutory language. Further, a complaint ruled inadmissible on one basis should not be treated differently from a complaint ruled inadmissible on another basis.

(94) The changes in the statutory language relied on by the Claimants were, I concluded, only changes of substance insofar as they referred to "the matter" as explained above. Those changes did not impact on the meaning of the words "service complaint".

(95) S340B(5) of the AFA lists the grounds on which a service complaint is not admissible. The list includes expressly or by reference both procedural grounds (such as limitation) and substantive grounds (that a complaint does not relate to the complainant's service). On an ordinary domestic law interpretation of s340B(5) and s121, there is no basis for concluding that the two different types of grounds for ruling that a complaint is inadmissible will lead to different consequences under s121. While the decision made on substantive grounds involves some preliminary assessment of the substance of the complaint, both types of ruling are made within the SC process and preclude a determination on the merits under that process. On an ordinary reading of s121, no distinction could be drawn between different types of complaints found to be inadmissible.

(96) As a matter of ordinary domestic law statutory construction, therefore, the Claimants' complaints that were ruled inadmissible are not "valid" service complaints. **Molaudi** is not distinguishable from the Claimants' cases on either of the grounds contended for by the Claimants. The complaints are barred by

the jurisdictional hurdle in s121(1)(a) unless EU law requires the amendment or disapplication of that jurisdictional hurdle as a matter of statutory interpretation.

(97) The Respondent conceded that **Molaudi** was not binding in the current cases from an EU law perspective and that EU law arguments could be advanced by the Claimants. Charter rights and rights under the ECHR were not advanced before the EAT in **Molaudi.** The Respondent nevertheless submitted that **Molaudi** was persuasive in relation to EU law because the EAT in **Molaudi** did address Article 7 of the Race Directive and the EU law principle of effective remedy, holding that the availability of judicial review as a means of challenging an admissibility decision by the military authorities meant that claimants had an effective remedy for breach of their directly effective rights.

(98) Since **Molaudi** was decided, the Supreme Court has given judgment in both **P** and **Benkharbouche**. In **P**, where the claimant was potentially precluded by the domestic law principle of judicial immunity from pursuing complaints of unlawful discrimination against a police disciplinary panel, the Supreme Court held that judicial immunity could not have the effect of barring her complaints to an employment tribunal that her treatment was discriminatory and contravened the Framework Directive.

(99) The Supreme Court (Lord Reed [30]) noted that the right not to be discriminated against under Article 21 of the Charter is a fundamental right in EU law. Where individuals' rights under the Directive have been infringed, they are entitled to an effective remedy. In **P**, the relevant legislation, s42(1) of the EqA, was interpreted so as to apply to discrimination in the exercise of disciplinary functions by misconduct panels, whose decisions would otherwise have been incapable of challenge by reason of the principle of judicial immunity.

(100) In **Benkharbouche** also, in circumstances where a claimant would otherwise have been unable to pursue a discrimination complaint, the Supreme Court held that the Charter could be relied on, pursuant to the principle of effectiveness, as a means of evading the effect of domestic laws that conflicted with Article 47 Charter rights.

(101) The Respondent sought to distinguish **P** and **Benkharbouche** from the Claimants' cases on the basis that, in **P** and **Benkharbouche**, there was an absolute bar to the claimants presenting their cases if the jurisdictional hurdle was not disapplied. In the current cases, in contrast, it was open to the Claimants to challenge the decision of the military authorities that some of their complaints were ruled inadmissible in the SC process by way of judicial review. The availability of judicial review, the Respondent submitted, means that there is no such absolute bar. Further, in **P**, it was the body making the decision which was alleged to have discriminated. In the current case, the Claimants do not suggest that the SO or SCO discriminated against them.

(102) In relation to the second of these arguments, I do not consider that the distinction is material. The key question is whether a claimant is able to bring a complaint in respect of his or her directly effective EU law rights and the nature of the alleged discriminator is immaterial.

(103) The Respondent's first ground for seeking to distinguish the Claimants' cases from **P** and **Benkharbouche** requires some closer scrutiny. The key question here is whether the jurisdictional hurdle in s121 contravenes the principle of effective remedy in respect of the Claimants' alleged breaches of their directly effective rights because it prevents them from pursuing their discrimination complaints ruled inadmissible in the SC process. The determination of whether or not there is an effective remedy does not depend on whether there is an "absolute bar" to the Claimants' claims but must be determined in accordance with the approach set out by the Supreme Court in the **Unison** case. There is a material difference for these purposes between the exclusion of a complaint because it is made outside a limitation period, which is an exclusion based upon a procedural requirement which does not contravene the EU law principles of effectiveness and equivalence, and the exclusion of substantive complaints of discrimination, which can only be resurrected following a successful application for judicial review of the decision to exclude.

(104) In the **Unison** case, the Court referred both to the long-established principle of EU law that procedural requirements for domestic actions must not be "liable to render practically impossible or excessively difficult" the exercise of rights conferred by EU law and to the principle of effective judicial protection. It was stated (Lord Reed with whom the other Justices agreed [108]-[109]) that "the burden lies on the state to establish the proportionality of restrictions where…they are liable to jeopardise the aims pursued by EU Directives". In relation to rights under the ECHR which correspond to relevant Charter rights, the protection of rights must be "practical and effective" and not just "theoretical and illusory" and the "impact of restrictions must be considered in the real world".

(105) The Respondent submitted, in seeking to distinguish the **Unison** cases, that the issue of effectiveness is not whether in the Claimants' specific cases and due to a "plainly wrong" decision by the SCO the Claimants are effectively prevented from exercising their EU rights but whether s121 has a "tendency" to exclude such claims. In contrast to the **Unison** case, there were no statistical data or hypothetical scenarios illustrating how s121 operated in practice and no evidence that decisions of the SO or SCO were often "plainly wrong". The Respondent relied on the specific and detailed nature of the SC process and on complainants' rights under that process, including a right of challenge, comparing that process favourably with the process applying when a claim is brought to the employment tribunal.

(106) The Supreme Court in the **Unison** case was, I accept, considering the fees regime itself rather than claims brought by individual claimants. Nevertheless, the Supreme Court's findings as to the approach to effectiveness and the principle of effective remedy apply just as much to cases brought by individuals to enforce their directly effective rights. It is no answer to a case brought by an individual claimant to enforce a directly effective right that, in general, the SC process works well to protect complainants' directly effective rights even if it failed to do so in their particular case.

(107) Applying the principle of effective remedy as explained in the **Unison** case to the Claimants' cases, the protection of the Claimants' rights in respect of their complaints of discrimination ruled inadmissible depends on whether the availability of judicial review is compliant with the **Unison** analysis. Looking at the impact of having to pursue an application for judicial review "in the real world", is the availability of judicial review a "practical and effective" rather than just a "theoretical and illusory" protection?

(108) As Silber J pointed out in **Molaudi**, legal aid may be available for judicial review where it is not available for employment tribunal claims and the process can be a speedy one.

(109) On the other hand, judicial review of a decision on admissibility involves a complainant in delay and potential cost. Legal aid is not always available and many individuals will be in the position of these Claimants who would find it difficult to meet the costs of a judicial review application. If a decision on admissibility is inconsistent with well-established principles of equality law, it is burdensome for a complainant to have to go through the process of a judicial review application before having their case determined.

(110) Further, there are other significant hurdles which a claimant may encounter if the only means of redress in relation to an erroneous admissibility decision is by way of judicial review. A complaint which could not be brought to the employment tribunal, because it had been ruled inadmissible, might be well out of time if presented after a successful judicial review and a possible reconsideration of the decision under the SC process. An extension of time, while possible under the provisions for "just and equitable" grounds for extension in the EqA, would not be guaranteed. Having discrimination complaints dealt with promptly is part of the policy behind the short limitation periods applying in the employment tribunal and the delay necessarily entailed in challenging a decision by way of judicial review runs counter to this policy.

(111) In **Michalak**, in the context of a domestic law interpretation issue, the Supreme Court contrasted the consideration of a race discrimination complaint by an employment tribunal, where there is an "open-ended" enquiry into the discrimination issue, with a judicial review application where the issue is normally whether the alleged discriminator acted within the range of reasonable responses. This was consistent with what the ECHR said about judicial review, in a very different context, in **Tsfayo v United Kingdom** (2009) 48 EHHR 18.

(112) In both **P** and **Michalak**, the Supreme Court confirmed the primacy of the employment tribunal as the specialist forum for determining work-related discrimination complaints. The employment tribunal can determine whether or not there was discrimination both as a matter of domestic law and contrary to a claimant's directly effective EU law rights and may award a range of remedies. The Supreme Court in **P** has confirmed that employment tribunals fulfil the requirements of effectiveness.

(113) It is not in question that judicial review is in theory available to challenge the decision of a SO or SCO on admissibility and that such a challenge is available where a complainant's complaint is about the contravention of a

directly effective EU law right. However, taking into account the practicalities and hurdles in the real world of having to apply for judicial review before a claim is brought to the employment tribunal, including cost, delay and the generally burdensome nature of having to pursue judicial review as the only available route to an effective remedy, I concluded that the bar in s121 to bringing a claim in respect of a directly effective right ruled inadmissible in the SC process is contrary to the EU law principle of effective remedy. That conclusion is supported by the Supreme Court's description of the role of the employment tribunal in **P** and **Michalak.**

(114) In the event of a limitation on the right to an effective remedy, as I have found, the issue of justification falls to be considered: was that limitation a proportionate means of achieving the legitimate aims pursued by the legislation? The legitimate aims of the service complaints process relied on by the Respondent are (1) to enable the Armed Forces to determine service complaints first and before they are scrutinised by an employment tribunal and (2) to maintain command control and discipline in the armed forces. In relation to proportionality, the Respondent relies on the clear distinction between working pursuant to a contract of employment and under a CoC. It contrasts the powers required to maintain operational effectiveness with the ordinary relationship of employer and employee and notes that the service complaints process is geared to dealing with "wrongs" far wider than just discrimination complaints.

(115) Such arguments may have force in a general sense but do not explain why it is proportionate to bar complaints to the employment tribunal in respect of fundamental, directly effective non-discrimination rights, brought in time and in accordance with the procedural rules under the SC process. The imposition of a requirement that a complaint cannot be adjudicated upon unless it is ruled admissible in the SC process is more than a mere procedural requirement. It involves a preliminary determination, which may preclude the bringing of a justiciable complaint of race discrimination, properly made by way of a service complaint under the SC process, which would fall squarely within s120 of the EqA but for the finding on inadmissibility.

(116) While the opportunity for the military authorities to determine service complaints before they are brought to an employment tribunal is a legitimate aim, the Respondent does not explain why is it proportionate that it should act as gatekeeper, making determinations which have the effect of preventing scrutiny and determination of complaints in respect of directly effective rights properly brought in accordance with the procedural requirements under the SC process. The Respondent has not demonstrated why such a provision is reasonably necessary.

(117) For all the above reasons, I have concluded that s121 should be interpreted in accordance with EU law so as to permit claims in respect of directly effective EU law rights to be brought in the employment tribunal where a service complaint has been brought about the matter, save where claims in respect of such rights have been held inadmissible in the SC process on limitation or other procedural grounds consistent with EU law on effectiveness.

Such an interpretation does not require either the amendment or disapplication of any part of s121.

(118) It does entail a clarification or narrowing of the decision of the EAT in **Molaudi** that a "service complaint" is a "valid" complaint which has been ruled admissible in the SC process. However, the arguments advanced in the current cases in respect of Charter and ECHR rights were not before the EAT in **Molaudi** and, to that extent, **Molaudi** was *per incuriam.* **Molaudi** must now be read subject to more recent Supreme Court authority. For the same reasons, the decision in **Molaudi** that judicial review constituted an effective remedy where a service complaint was ruled inadmissible, is not binding on the tribunal on the facts of the current cases and, where the grounds for the ruling on admissibility were substantive and not procedural, I do not follow it.

(119) For the above reasons, the Claimants' complaints referred to above as "the Nazi flag" complaints, which were ruled inadmissible in the SC process, fall within the employment tribunal's jurisdiction.

(120) Although lengthy argument was presented by the Claimants on the impact of rights under the ECHR and Article 14 in particular, I accepted the Respondent's submission that such arguments duplicated the Claimants' arguments in relation to their rights under the Directive and the Charter and added nothing of substance to the analysis. In the light of my decision above, I do not address these arguments further.

(121) In relation to equivalence, findings made above in relation to the general requirement to bring a service complaint apply here also. The comparison relied on by the Claimants between a discrimination complaint and a claim for personal injury is not made out on the grounds that the two claims are not sufficiently similar.

Conclusions

(122) For all the reasons set out, I determined that the only complaints falling outside the jurisdiction of the tribunal because of the operation of s121 are the First and Second Claimants' victimisation complaints, the First Claimant's complaint about an incident occurring in 2009 and the First Claimant's complaint about a lack of career progression.

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Employment Judge McNeill QC

Dated: 8 May 2019

Sent to the parties on:

13 May 2019

For the Tribunal