Neutral Citation Number: [2022] EWHC 717 (Admin)

Case No: CO/3592/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 March 2022

Before :

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

- -

Between :

The Queen (on the application of DAMILOLA JOHN OGUNMUYIWA	**Claimant**
- and -	
(1) The Army Board of the Defence Council	
(2) The Secretary of State for Defence	**Defendants**

- -
- -

Mr Pravin Fernando (instructed by **Austen Jones Solicitors**), for the **Claimant**
Mr Simon Murray (instructed by **Government Legal Department**), for the **Second Defendant**

Hearing dates: 19 and 20 May 2021

- -

APPROVED JUDGMENT

Mrs Justice Ellenbogen DBE:

Introduction

1. This is the Claimant's application for judicial review, following the order of Peter Marquand, sitting as a Deputy Judge of the High Court, dated 5 November 2019, by which he granted permission to advance six of the seven pleaded grounds. By the same order, the claim against the First Defendant was stayed, on the basis of the Second Defendant's acknowledgement that he is responsible for the First Defendant. The claim has therefore proceeded against the Second Defendant only.

2. By his claim form, issued on 10 September 2019, the Claimant challenges a decision made on 10 June 2019 ('the Determination'), by the Army Board of the Defence Council, sitting as an appeal body ('the Appeal Body'), in relation to a service complaint, dated 3 June 2015 ('the Service Complaint'), submitted to his Commanding Officer and brought under section 334 of the Armed Forces Act 2006 ('the 2006 Act').

3. At all material times, the Claimant was a private soldier and serving member of the Royal Logistics Corp. By the Service Complaint, he made allegations of mistreatment, bullying and harassment by then Acting Warrant Officer Second Class ('A/WO2') Rennie, said to have occurred whilst the Claimant had been serving as his driver at British Army Training Unit Suffield ('BATUS'), Canada, between April and May 2015. The Claimant was later promoted to the rank of Lance Corporal. He was medically discharged from the Army on 27 December 2018, but for which he would have been expected to serve until 8 January 2024. At the end of his time at BATUS, A/WO2 Rennie reverted to his substantive rank of Staff Sergeant. There is no suggestion that that was in any way connected with the subject matter of the Service Complaint. He was subsequently promoted to WO1.

4. The remedy sought in these proceedings, at section 7 of the claim form, is that: (i) the Determination be quashed in its entirety; (ii) the Service Complaint and the Claimant's appeal be put before a differently constituted appeal body; and (iii) the new appeal body have proper regard to the relevant law and policies/guidance applicable to the Service Complaint. The Claimant contends that, in investigating and determining his appeal, the Appeal Body acted irrationally, unlawfully and without procedural propriety. In particular (and in summary), it is said to have:

    4.1. acted unlawfully and/or irrationally/unreasonably in its application of secondary legislation and associated guidance;

    4.2. irrationally/unreasonably concluded that he had not been bullied;

    4.3. unlawfully and/or irrationally/unreasonably failed to have formed conclusions about facts concerning the Service Complaint;

    4.4. irrationally/unreasonably determined that the Claimant's account in respect of the entirety of the Service Complaint lacked credibility;

    4.5. acted unlawfully and/ or irrationally/unreasonably by failing to have considered matters which were relevant to the Determination; and

4.6. acted in a way which was procedurally unfair and/or irrational/unreasonable in failing to have convened an oral hearing and, specifically, to have heard evidence from the Claimant.

5. Before considering each of those grounds, it is necessary to set out the history of the Service Complaint and related matters.

The Facts

The allegations contained in the Service Complaint

6. WO2 Clark acted as the Claimant's Assisting Officer, on the Claimant's case distilling his original material from eight to two pages[1]. The Service Complaint, as submitted, raised the following six allegations:

6.1. **Allegation 1**: On an unknown date in April 2015, whilst the Claimant had been acting as A/WO2 Rennie's driver, during a live-firing exercise in BATUS, A/WO2 Rennie had shouted at him furiously and then, when the vehicle was stopped, said several words to the Claimant; grabbed him by the collar; and shouted directions at him regarding the following of instructions and route selection. A/WO2 Rennie had then informed a Royal Military Police Corporal and most of '8 Group' that the Claimant was a 'bad driver';

6.2. **Allegation 2:** On 23 May 2015, A/WO2 Rennie had warned the Claimant 'never in [his] life to touch the volume again', after the Claimant had tried to lower the radio volume from its highest setting. A/WO2 Rennie had continued to shout at the Claimant throughout that day. At one-point, whilst standing on the passenger seat looking out of the open vehicle canopy, he had kicked the Claimant;

6.3. **Allegation 3:** On 23 May 2015, A/WO2 Rennie had instructed the Claimant to drive on, despite instructions from Sergeant Hood that he should wait, whilst an obstruction ahead was cleared. When the Claimant failed to drive on, A/WO2 Rennie had approached him and struck him in the face, through the open driver's side window, whilst the Claimant had raised his hand to guard his face. In the process, A/WO2's finger had entered the Claimant's eye, causing it to water;

6.4. **Allegation 4:** On 30 May 2015, after the Claimant had driven through a pot-hole, A/WO2 Rennie, again standing on his seat, had repeatedly kicked him through the back of the seat whilst shouting that the Claimant was a bad driver. When the Claimant had failed to react, A/WO2 Rennie had grabbed him by his helmet strap, pulling him backwards. A/WO2 Rennie had then put his mouth close enough to the Claimant's right ear to touch it and had shouted directly into the Claimant's ear for 30-40 seconds, until the vehicle had come to a stop. The Claimant had then begun to suffer pain in his right ear;

6.5. **Allegation 5:** When the Claimant had expressed his wish to visit the hospital in order to address the pain in his ear, A/WO2 Rennie had, again, grabbed the

[1] A copy of the Claimant's notes is no longer available.

Claimant by his helmet and shouted in his ear, stating that he would not apologise. After calming down, A/WO2 Rennie had asked the Claimant what he would tell the doctor, were he to attend a clinic. He had then apologised for having grabbed the strap of the Claimant's helmet and shouted in his ear, but had informed the Claimant that he could not go to hospital, as they were required to go to EXCON (Exercise Control) the next morning;

6.6. **Allegation 6:** After the Claimant had sought help at the medical centre from Sergeant Matley, who had advised him to see a doctor, A/WO2 Rennie had called Sergeant Matley and told her to inform the Claimant that he should wait until 07.30 the next day to go to the doctor and that A/WO2 Rennie would drive him there. A/WO2 Rennie had then attended the medical centre in person, requesting the vehicle key from the Claimant. The Claimant had been concerned that A/WO2 Rennie had been attempting to prevent him from going to see the doctor.

Referral to the Service Police and the Service Prosecuting Authority

7. The Service Complaint was referred to the Service Police, on 5 June 2015, for investigation, and was stayed pending conclusion of the latter. The Service Police concluded their investigation in November 2015 and referred the matter to the Service Prosecuting Authority ('the SPA'). In a letter to the Claimant dated 12 November 2015, the SPA stated, *'I have very carefully considered all the available evidence in this case, including your witness statements and the effect the incident has had on you. Looking at the case as a whole however, I have reached the conclusion that in respect of the majority of matters there is not a realistic prospect of conviction. This is principally because of the lack of corroborating evidence to support your account but also some of his behaviour, whilst unpleasant, does not amount to a criminal offence. Accordingly, Court Martial proceedings will not be taken against the accused. I know that my decision will be a disappointment to you, but I must emphasise that it does not mean that your account is disbelieved, or that his account is believed. It simply means that there is insufficient evidence to meet the high standard required in criminal cases such as this."*

8. The SPA considered that one issue should be referred to A/WO2 Rennie's Commanding Officer, but did not specify the issue to be referred. HQ BATUS received notification of the SPA's decision on 3 December 2015 and, on 11 February 2016, Minor Administrative Action was taken against A/WO2 Rennie, in the form of a Formal Interview.

Appointment of (a) a Specified Officer and (b) a Harassment Investigation Officer

9. No further action in respect of the Service Complaint was taken until a Specified Officer ('SO') was appointed, in May 2017, eighteen months after the conclusion of the investigation by the Service Police and the decision of the SPA. The SO was Lieutenant Colonel Geary, who made an admissibility decision on 24 May 2017 in respect of the Service Complaint, stating that the complaints raised by the Claimant were just and equitable and disclosed conduct which could amount to harassment and/or bullying. The matter was to be referred to the Army Service Complaints Secretariat who would

appoint a Decision Body ('the DB') to investigate the complaint. On 30 May 2017, Lieutenant Colonel Geary was appointed as the DB. As the Service Complaint raised allegations of bullying and/ or harassment it was necessary for the DB to appoint a trained Harassment Investigation Officer (HIO), requested on 16 June 2017. In the event, it was not until 7 November 2017 that the HIO was appointed, who identified himself as such on 28 November 2017.

The HIO's investigation

10. The HIO investigated each of the allegations set out above and provided a summary report, dated 1 March 2018. The report identified those personnel who had been interviewed and others who had not. The HIO noted that the Claimant had expanded upon the Service Complaint to include allegations of racism, which had been denied by A/WO2 Rennie. As to the allegations set out in the Service Complaint:

    10.1 **Allegation 1:** This had been denied by A/WO2 Rennie. Privates Molai and Tuikoro had witnessed A/WO2 Rennie shouting in people's faces;

    10.2 **Allegation 2:** A/WO2 Rennie had denied ever having kicked the Claimant. Sergeant Matley had stated that A/WO2 Rennie had admitted to kicking the Claimant on the helmet to get his attention. He had also admitted to shouting at the Claimant. He had appeared remorseful about those actions;

    10.3 **Allegation 3:** A/WO2 Rennie had denied striking the Claimant. He had stated that he had been angry and had stormed over to the driver's door, placing his hands on the sill of the vehicle. Sergeant Hood had seen A/WO2 Rennie storm over to the car and had seen his forearms go inside the vehicle, but had not seen any hitting of the Claimant. He had witnessed A/WO2 Rennie shouting and being angry;

    10.4 **Allegation 4:** A/WO2 Rennie's account differed from the Claimant's. He had admitted to pulling the Claimant's helmet. He had made no admission of shouting in the Claimant's ear. He had admitted shouting at him;

    10.5 **Allegation 5:** There was a recording of the conversation, of which the DB was to note the tone and content;

    10.6 **Allegation 6:** A/WO2 Rennie had denied trying to prevent the Claimant from seeing a doctor. Sergeant Viney, Royal Military Police had reported having seen A/WO2 Rennie flustered and in a hurry. He considered that A/WO2 Rennie had been concerned as to the possible consequences for himself, were the Claimant to be seen by someone in a medic role, as opposed to a Combat Medic Observer Mentor, such as Sergeant Matley. Sergeant Viney had reported the Claimant's complaint that his helmet had been grabbed; that he had been shouted at in his ear; and that he could not hear properly. He considered him to have been genuine in his complaint.

The DB's conclusions

11. The DB determined the Service Complaint by decision letter dated 21 May 2018. At paragraphs 7 to 13 of that letter, it stated (with footnotes omitted and emphasis original):

‘7. **HoCs 1-6.** It must be highlighted that the allegations made in HoCs 1-6 were subject to an RMP investigation which took place in 2015. As a result, administrative action was taken against the respondent for the 'helmet pulling' aspect of HoC 4, but it was decided by the Service Prosecuting Authority that there was insufficient evidence for there to be a realistic prospect of prosecution in the other cases. It was also noted that while unpleasant, many of the allegations did not constitute criminal behaviour. The majority of the incidents happened without witnesses (or witnesses only saw part of the incident, e.g. Sgt Hood witnessed shouting but no physical contact regarding HoC 3). As such, it is not possible to determine even ‘on the balance of probabilities' that the events were more likely than not to have occurred exactly as you say they did. I find this element of your SC rejected (noting that administrative action has already been delivered for the one proven aspect).

8. **Racist Behaviour.** I can find no evidence to support your claim that WO2 Rennie used racist language towards you. I note that you believe that this was something that was omitted from your original Annex F when WO2 Clark condensed your notes, but it is a claim which is not corroborated anywhere else. I find this element of your SC rejected.

9. **Bullying and harassment.** Having considered the evidence that has been provided I conclude that on the balance of probabilities the respondent exhibited behaviour towards you that **can be categorised as bullying and harassment - I find this element of your SC upheld.** The relationship between the two of you had clearly broken down and while I do not believe that the respondent intended to bully or harass you, the **impact** of his behaviour (shouting, grabbing your helmet, constant reprimands for poor driving etc) are more likely than not to have resulted in you feeling bullied and harassed.

10. The respondent was clearly under a great deal of pressure; he had significant responsibility for the safe conduct of the ranges and this was his first iteration of the exercise. It was recognised that he was 'initially overwhelmed by the wide ranging responsibilities' and for an acting WO2 for whom this role had been identified as 'the perfect opportunity' this was clearly a stressful time. There are references to a 'clash of personalities' between you and the respondent. Some identify a reason for this being cultural - an 'old school infantry CSM who was robust' vice a 'funny, laid back' young private soldier for whom the situation was probably daunting; while others cite difficulties in communication. There were also significant issues with your standard of driving - not something that you should be blamed for, but nevertheless I can see that this added significantly to the pressure placed on the respondent. You were an inexperienced driver and while you dispute being on a 'risk register', it is a reasonable assumption that as a non-professional driver the vehicle type and the terrain would have presented significant challenges to you. Understandably, this led to 'frustrations (being) high for both parties'; you were a proud soldier who wanted to do your best, but for probably the right reasons (driving on the Prairie was incredibly dangerous), had a boss who appeared to get onto you a lot - as a result your morale went down.

11. The situation was further exacerbated by an unhealthy BATUS culture of 'continuing training at all costs', a statement that was re-iterated on daily briefs and only relaxed after a serious accident. This undoubtedly led to undue pressure being placed on the training teams. Shouting appears to have been normalised as an acceptable form of communication, which may well have been justified from the back of a vehicle, but it clearly crept into other aspects of your relationship. At times this might have been

out of frustration (HoC 3 - your actions nearly caused an injury, HoC 4 - you drove into a pot hole) and can be justified to a degree, but the normalisation of this and the manner in which the respondent dealt with some of these situations over stepped what can be considered reasonable. Indeed, he recognised this himself with his admission of helmet pulling and shouting. I also note that some of this behaviour was witnessed by other SNCOs and I think it is a reasonable assumption that others knew of the deterioration in the relationship between you and the respondent. More could, and should, have been done by the chain of command (CoC) in BATUS to identify and resolve the issues that brewed between the two of you.

12. While none of this excuses the behaviour the respondent demonstrated towards you, it places his actions into context. He was under significant pressure, the BATUS culture drove the wrong behaviours, there were cultural and language barriers and your poor driving, in challenging conditions, exacerbated the situation. However, as the senior person in the relationship, the respondent should have handled this situation in a more professional manner and as such must accept a greater share of responsibility.

Requested Redress

13. Your requested redress is outlined below, with my decisions following each:

a. **I want the respondent to be disciplined under military law so he realises his actions are not acceptable.** Having found aspects of your SC upheld, this report will be forwarded to the respondent's CoC for consideration. It should be noted that the respondent has already been the subject of administrative action for one of the events that occurred and there are significant 'contextual' factors that should be taken into consideration - not least the length of time it has taken to reach this point.'

12. The DB went on to apologise, to the Claimant and A/WO2 Rennie, for the significant amount of time taken to reach that point.

The Claimant's appeal from the decision of the DB

13. The Claimant appealed from the decision of the DB, by detailed letter dated 20 July 2018. He raised a number of matters, including an assertion that he had not wanted AO Clark to complete his Annex F (Service Complaint), as she was a friend of A/WO2 Rennie. Consequently, his complaints of race discrimination had been omitted. Under the heading 'Redress sought' he requested that: (i) Heads of Complaint ('HoCs') 1 to 6 be upheld; (ii) it be acknowledged that he had been subjected to bullying, harassment and race discrimination; (iii) an explanation be provided as to why the Service Complaint had taken so long to determine; (iv) there be a three-month extension of the time within which he could seek a review of the SPA's decision not to prosecute A/WO2 Rennie; and (v) that his reasonable legal costs in appealing the DB's decision be awarded by the Appeal Body.

14. On 19 September 2018, the Army SC Sec (Appeals) sent to the Claimant's solicitors, Austen Jones, a redacted copy of the case file, under cover of a letter of the same date. It requested a response to disclosure of the file by 5 October 2018, but stated that, if additional time were required, the Secretariat could be contacted and a revised timeframe considered. Austen Jones requested an extension of time until 19 October

2018, which was granted. On that date, they wrote to the Army SC Sec (Appeals), requesting that:

14.1. the medical records enclosed with the letter taken from the Appellant's DMICP[2] records, between 3 March and 6 August 2015, be included in the case file; and

14.2. Corporal Elizabeth Lawrence, who had treated the Appellant at the Medical Centre at BATUS, on 30 or 31 May 2015 (depending upon the time zone used), be interviewed for a statement as to what she had witnessed, as per her entry in the DMICP records.

15. The entry made in the Claimant's medical records by Corporal Lawrence, dated 31 May 2015 and timed at 05.35 hours read (verbatim):

'Ear pain

patient has attended the MRS this evening c/o pain in his right ear. he stated that earlier on today that his SSM WO2 Rennie shouted in his right ear causing him pain. he also stated that he was told not to come to the medical centre straight away as he would be able to get some analgesia later if he was still c/o pain. apparently he spoke to a sgt medic at the accommodation this evening who stated that she was unable to help as she did not have the right equipment, she then directed him to the MRS.

unable to properly exam patients right ear as he kept moving his head away. spoke to duty doctor about this patient who stated that I should give the patient some analgesia and invite him to return on sick parade tomorrow morning if the symptoms persisted.

the patient stated that he may not be allowed to attend the MRS tomorrow as he has to pick up WO2 Rennie to drive back out onto the training area. I told the patient that if he was unwell then nobody can stop him from attending the MRS. the patient appeared upset and concerned. I asked the patient if he felt as though he was being unfairly treated but he did not answer my question. he just buried his head in his hands. at this point WO2 Rennie came to the MRS to request the vehicle keys from the patient. I instructed the patient to go and get the keys for WO2 Rennie. whilst the patient was gone Mr Rennie informed me that what the patient had said about him yelling in his right ear was true. but he also stated that he felt that the patients' mind was somewhere else whilst they were out driving earlier and because of that they nearly had an RTA. Mr Rennie also stated that within the last week or so that it was the third time that the patient had nearly crashed the vehicle. Mr Rennie feels that the patient may well benefit from talking to an appropriate professional...'

Appointment of the Appeal Body

16. On 22 October 2018, a service complaint brief was presented for consideration by an appeal body. The Appeal Body was appointed on 31 October 2018 and comprised Brigadier Paddy Allison, as the military member, and Mr Andrew Clemes, as the independent member. In its Determination, dated 10 June 2019, the Appeal Body set out the law which it considered to be relevant, which included the 2006 Act (as

[2] Defence Medical Information Capability Programme

amended) and the Equality Act 2010. It considered the Armed Forces (Service Complaints) Regulations 2015 and the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015 to be the applicable secondary legislation. It also had regard to Joint Service Publication (JSP) 831, Redress of Individual Grievances: Service Complaints, dated 22 January 2016; and to JSP 763, The MOD Bullying and Harassment Complaints Procedures, dated 1 July 2013 (as amended).

17. The Appeal Body stated (Determination, paragraph 20(b)) that bullying was not legally defined but was characterised, in Annex A to JSP 763, as being, *"offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure the recipient."* It defined harassment, within the Service Complaint process, to be as defined under either the Protection from Harassment Act 1997, or the Equality Act 2010 (paragraph 20(c)). At paragraph 21, it stated that it had, *'...considered this matter afresh. In doing that we confirm we have read the DB decision and, although we are not bound by it, we understand we may adopt any of the findings as we see fit*." At paragraph 15 of the Determination, the AB had stated*:*

'**DB Determination.** The DB determined the SC on 21 May 2018. He rejected the HoC in their entirety for reasons more particularly set out in paragraph 7 of his Determination, subject to the following caveats: He accepted that the Respondent exhibited behaviour that 'can be categorised as bullying and harassment', finding 'this element of [the Complainant's] SC upheld', on the basis of the impact of the Respondent's behaviour towards the Complainant (e.g. 'shouting, grabbing your helmet, constant reprimands for poor driving etc.) but did not find that the Respondent intended to bully or harass the Complainant. The DB also rejected the Complainant's later accusation of racist behaviour. The DB, mindful of the Complainant's requested redress that the Respondent be 'disciplined under military law so he realises his actions are not acceptable', stated that 'having found aspects of your SC upheld, this report will be sent to the Respondent's CoC [chain-of-command] for consideration. It should be noted that the Respondent has already been the subject of administrative action for one of the events that occurred and there are significant 'contextual' factors that should be taken into consideration — not least the length of time it has taken to reach this point.'

18. The Appeal Body did not consider it necessary to hear oral evidence, on the basis that the written evidence which it had seen (including at its own request) had been sufficient. It stated, at paragraph 25 of the Determination, *'...we wish to make it clear that we broadly agree with and adopt the findings of the DB, which we regard as a reasonable and coherent analysis of the issues in this SC, with certain exceptions (e.g. we partially uphold HoC 4 for reasons more particularly set out below).'*

19. At paragraphs 27(b) to (d) of the Determination, the Appeal Body found (sic):

'b. **Personal Injury Matters Excluded.** We are mindful that the Complainant has indicated that he is suffering from physical injury (e.g. an ear injury) and mental health issues, and a resultant loss of employment and career opportunities, which he alleges occurred as a result of the actions of the Complainant. These injuries and/or losses may, or may not, have been caused and/or exacerbated by the incidents which form the subject of this SC. We are mindful that Regulation 3(1) of the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015 provides that a person may not make a service complaint about a matter within the Schedule to those Regulations

(the Schedule). Paragraph 1(u) of the Schedule provides that a matter is excluded if it 'is or was capable of being the subject of a claim for personal injury against the Ministry of Defence.' Accordingly, we are not able to, nor have we considered, any aspect of this SC which is or could amount to a claim for personal injury. Whilst there is nothing to prevent the Complainant making a SC about alleged bullying which he alleges occurred in connection with any personal injury he may have suffered, pursuant to paragraph 2 of the Schedule, it is our position that the SC process would not be able to consider and determine whether or not the conduct alleged caused or exacerbated any personal injury, and, if so, what quantum would be appropriate.

c. In summary, whilst the matter of personal injury is excluded from forming a valid SC, it is open to the Complainant to consider seeking appropriate recourse for any injuries that he may have suffered as a result of his service through bringing a Common Law claim for compensation against the MOD see DIN 2019DIN06-011: Guidance on Bringing a Common Law Claim for Compensation Against MOD, or approaching the Armed Forces Compensation Scheme (AFCS) see MOD Veterans UK AFCS/WPS Leaflet 1 - Claiming for illness, injury or disease. We are unable to advise on the merits or otherwise of these schemes, nor how the Complainant's medical discharge and, presumably, financial settlement would impact on these schemes. We note the Complainant's solicitor's request that Corporal Elizabeth Lawrence (who treated the Complainant at the BATUS medical centre on 30/31 May 2015) be interviewed in respect of the contents of the medical record entries. We are of the view that this is more pertinent to the alleged personal injury and have not sought this evidence.

d. We note, from correspondence received from the Complainant's solicitors on 16 May 2016, that the Complainant received £6,000 from the AFCS for hearing loss on 5 March 2016. We also note that he was medically discharged from the Army on 27 December 2018.'

20. The Appeal Body also declined to consider the determination of the SPA not to prosecute A/WO2 Rennie, on the basis that it was an excluded matter pursuant to regulation 3(1) of, and paragraphs 1(l) and (n) of Schedule 1 to, the 2015 Regulations. Further, it was the Appeal Body's stated view that the Claimant had had an opportunity to seek a review of the decision not to prosecute and that there was no evidence that he had exercised that right.

21. Under the heading 'General Findings', the Determination stated:

'28. The military member of the AB has considerable knowledge and understanding of the BATUS training environment and the pressures that both the permanent and temporary staff are working under, whilst operating out on the prairie. The environment is harsh, navigation is difficult and the constant requirement to be able to safely drive vehicles cross-country day and night in all weathers is paramount. Observer-Mentor crews lacking in driving and commanding ability are at a disadvantage from the outset, adding further risk to an already high-risk activity. Teamwork and trust are essential. Individuals will often be working at the extremes of their capabilities for long durations and doing this repetitively throughout the training season. Only the most able should be given these responsibilities. Unfortunately, some of the staff selected to oversee the training on the prairie are not entirely suited to these conditions and environments.

Individuals failing to contribute and commit to the task 100% will be found wanting and let the team down.

29. It is within the above context that the Complainant found himself as a driver for the Respondent between April and May 2015. The Respondent was under a considerable degree of pressure given that, at the beginning of the year, he had started a two-year assignment in which he was responsible for range safety, including live-firing exercises, as an A/WO2 (his substantive rank was Staff Sergeant, to which he returned at the end of his assignment).

30. We find that the Complainant found himself driving for the Respondent in this particularly challenging environment. It is clear that the Respondent was frustrated with the Complainant's driving, which he felt was not up to the required standard, and which required a rapid familiarisation with the different vehicles being used on the range area, good ground appreciation and mutual trust in a relatively short time. It is apparent to us that the pair, taking into account the rank disparity and relative inexperience of both Complainant and Respondent, did not have a particularly satisfactory, mutually beneficial, sufficiently trusting and professionally constructive relationship in the circumstances. This is apparent from the transcript of an audio recording from the Complainant and Respondent's BATUS vehicle in which they conversed. We find that whilst this supports our finding that the Respondent was overbearing and overreacted on occasion, it is not supportive of alleged bullying and harassment, even accounting for the acknowledged inappropriate grabbing of the Complainant's helmet. We agree with Sgt Hood, another Observer-Mentor working in BATUS, that 'there was a clash of personalities between the Complainant and Respondent and adopt WO2 Palmer's observation that 'I don't think that they had a good relationship'.

31. We note the Respondent's admissions in SP interview after caution in which he admitted grabbing the Complainant's helmet and shouting at him. We also note that the Respondent gave a statement to the HIO on 12 February 2018, in which he admitted grabbing the Complainant's helmet *'for which I have been disciplined. It was wrong of me. I did shout at him at times but this was justified but as a WO2 I was responsible for Administration, Control and Discipline, and often one cannot walk on eggshells'*. The Respondent confirmed that he had been *'AGAI'd [i.e. received Administrative Action] for my action of grabbing [the Complainant's] helmet'*, apologised to the Complainant, and *believed 'that that was the end of the matter.'* We find that this helmet-grabbing and shouting incident (which is an element of HoC 4) amounts to a wrong for which we apologise, but in so doing find that it has already been fully investigated by the SP, referred to the SPA to consider, and finally dealt with by way of Minor Administrative Action under AGAI 67, which resulted in the Respondent being awarded the sanction of a Formal Interview in February 2016.

32. We find that the Complainant has achieved the outcome and redress he originally sought (i.e. the Complainant requested by way of redress, in his Annex F, that he wanted ·the Respondent *'to be disciplined fully under military law so he realises that his actions are not acceptable'*). This has been done, although we accept that it was not necessarily the outcome or severity of punishment that he desired (neither of which were in his remit to achieve).

33. In short, although this amounts to a partial upholding that the Complainant was wronged in relation to his service, we find that this is simply a restatement of a wrong that has been upheld previously, albeit through separate disciplinary and administrative channels.'

22. At paragraphs 34 to 38 of the Determination, the Appeal Body rejected the Claimant's allegation that racist language had been used against him by A/WO2 Rennie, stating that: (a) no such allegation had been made in Annex F of the Service Complaint, which the Claimant had signed; (b) ex-WO2 Clark had stated, in an e-mail dated 3 March 2019, *'with any E&D [i.e. equality & diversity] matters that were ever brought to my attention if a statement was produced it was the facts that were presented to me at the time that would have been documented ... '*; (c) the Claimant had not made any allegations of racist behaviour when providing an account to the Service Police, or in interview with the DB; (d) the Claimant had first raised the issue of racist language in interview with the HIO, on 29 January 2018: *'In this, for example, the Complainant alleged that "on several occasions WO2 Rennie would shout at me, to stop the vehicle and called me a Black Monkey, asked who trained me and that I was a slave. These comments made me feel frightened, I had never been treated this way before.' (sic) The Complainant also alleged that, in the incident he referred to as the 'Ear Damage lncident' which we find to be that outlined in HoC 4, the Respondent "called me a slave and asked who taught me to drive". Again, this was not mentioned at any time between 2015 and 2018'*; and (e) whilst it could not rule out the possibility that racist language might have been used, it was odd that the Claimant had not mentioned it on previous occasions, when given numerous opportunities to do so. The Appeal Body concluded, *'We are not convinced, on balance, by the Complainant's late account. We do not, therefore, make a finding that any racist language was used by the Respondent towards the Complainant.'*

23. The Appeal Body next considered inconsistencies in the Claimant's account; at paragraphs 39 to 43 of the Determination stating:

'39. **Inconsistencies in the Complainant's account.** By way of example, the Complainant made allegations (in his Annex F SC form dated 3 June 2015) that, on 23 May 2015, the Respondent hit him on the face, during which *"his [the Respondent's] finger entered into my left eye and it started watering"*. On 29 January 2018, the Complainant recalled that it was his *own* finger that caused his eye to water: *"I tried to protect myself by raising my hand and the force of his punch pushed my finger into my eye."* Whilst this example of an inconsistency is minor, taken together with the allegations of racist behaviour, we find troubling inaccuracies or embellishment of the Complainant's account at its highest. On balance, these inconsistencies lead us to question the credibility of all the Complainant's evidence.

40. We agree with the SPA's assessment that the Respondent's behaviour was *'unpleasant'* at times, whether subjectively from the perspective of the Complainant or objectively.

41. We agree with the DB to the extent that the Respondent's conduct towards the Complainant fell below the standard to be expected of a WO2, or indeed any Senior Non-Commissioned Officer, even allowing for challenging circumstances

in which the Complainant and Respondent found themselves working together. Unlike the DB, however, we do not find that this behaviour, although unwarranted and regrettable, crossed the bullying threshold, the relevant definition of which we have set out above. Notwithstanding the aforementioned *'helmet grabbing and shouting incident'*, which we accept happened, we are not able to establish, on balance, sufficient findings of *'offensive, intimidating, malicious or insulting behaviour'*, or *'an abuse or misuse of power' to 'undermine, humiliate, denigrate or injure the recipient'*, nor the necessary intent on the part of the Respondent. Together, this means that we cannot uphold the complaint of bullying.

42. Similarly, we are not able to establish, on balance, sufficient findings of unwanted conduct on the part of the Respondent towards the Complainant amounting to either PHA 97 harassment, nor EqA 10 harassment, the relevant definitions of which we have set out above. In relation to EqA 10 harassment, we do not (for reasons set out at paragraphs 36-40 above), find that any unwanted conduct occurred that related to one or more of the 'relevant protected characteristics' under the EqA 10 i.e. *race, ethnic or national origin*.

43. Given that these alleged incidents took place some considerable time ago, and given the change in evidence from the complainant (e.g. racism, assault incident), we find that the Complainant lacks credibility and consistency and, in the absence of any other compelling independent and supporting evidence, we are unable to establish, on balance, the truth of the allegations outlined in HoCs 1-6 inclusive, and (with the exception of the partial upholding of HoC 4) do not uphold the Complainant's SC.'

24. At paragraph 44, the Appeal Body set out its specific findings in relation to each HoC, as follows (verbatim):

24.1. '**HoC 1. Alleged grabbing and shouting incident on an unknown day in April 2015.** We have not been able to find any corroborating evidence to support this allegation, other than that supporting our general findings above. Given our finding that the Complainant lacks credibility, we do not uphold this HoC.

24.2. **HoC 2. 23 May 2015. Alleged radio and kicking incident.** We have not been able to find any corroborating evidence to support this allegation, other than that supporting our general findings above. Given our finding that the Complainant lacks credibility, we do not uphold this HoC.

24.3. **HoC 3. 23 May 2015. Alleged assault to Complainant's head.** We have not been able to find any corroborating evidence to support this allegation, other than noting that Sgt Hood gave two witness statements, one to the SP dated 16 June 2015; the other to the HIO, which is undated but appears from the accompanying emails to have been completed in January 2018, in which he recalls events which could be related to the incident alleged by the Complainant. Sgt Hood in recollecting the incident, albeit on a date in May 2015 that he could not recall, observed the Respondent going to the Complainant's driver-side window and placing his forearms on or through the open window. He also remembered that the Respondent *'looked annoyed'* and *'appeared to be angry, 'shouting'* and *'shouting in an aggressive manner'*. Whilst we find that this is

evidence of the Respondent's unpleasant behaviour, as addressed in our general findings above, it does not extend to a finding of physical assault which is at the heart of this HoC. Given that Sgt Hood did not see the Respondent hit the Complainant, and our findings in relation to the Complainant's credibility, above, we do not uphold this HoC.

24.4. **HoC 4. 30 May 2015. Alleged kicking, helmet grabbing and shouting incident.** We find, for reasons more particularly set out in our general findings above, that the Respondent did grab the Complainant's helmet and shouted at him. We therefore partially uphold this HoC. We are not, however, able to make a finding that the Respondent shouted at the Complainant for the duration and intensity that the Complainant claims i.e. 30-40 seconds. We do not find that the Respondent separately kicked the Complainant through the back of the seat given that we have not been able to find any corroborating evidence to support this allegation, other than that supporting our general findings above. Given our finding that the Complainant lacks credibility, we do not uphold these aspects of the HoC.

24.5. **HoC 5. Alleged denial of hospital visit, and further helmet grabbing incident.** We have not been able to find any corroborating evidence to support this allegation, other than that supporting our general findings above. Given our finding that the Complainant lacks credibility, we do not uphold this HoC.

24.6. **HoC 6. Alleged prevention of medical assessment and treatment.** We have not been able to find any corroborating evidence to support this allegation, other than that supporting our general findings above. Given our finding that the Complainant lacks credibility, we do not uphold this HoC.'

25. The Appeal Body apologised for the *'apparent unconscionable, and therefore undue, delay'* between the conclusion of the minor administrative action taken against A/WO2 Rennie, in February 2016, and the resumption of the Service Complaint, in May 2017. The Determination concluded with information as to the Claimant's rights, respectively, to request an investigation by the Service Complaints Ombudsman for the Armed Forces ('SCOAF') and to make an application for judicial review, recording the limitation period applicable to the latter. The Determination was served on the Claimant under cover of a letter from Army Board Casework, dated 11 June 2019, some four years after he had lodged his Service Complaint. That letter repeated the information provided at the end of the Determination.

The Claimant's claim under the Armed Forces Compensation Scheme

26. In parallel with the Service Complaint process, the Claimant had made a claim under the Armed Forces Compensation Scheme ('AFCS'); a statutory scheme for the compensation of injured service men and women. Under that scheme, on 26 February 2016, he was awarded £6,000, as a one-off payment for hearing loss, awarded in accordance with Table 7, Item 36, Level 13, namely for a *'blast injury to ears or acute acoustic trauma due to impulse noise.*' In the course of the hearing before me, Mr Fernando, for the Claimant, made reference to two further payments, each made under the statutory scheme (respectively, of c. £10,000, in 2018, and of c. £16,500, in February 2021), and said to relate to injuries sustained to the Claimant's mental health

during service. I received no details relating to either such payment and Mr Murray, for the Defendant, told me that he had received no prior information in relation to them.

Pre-action correspondence

27. By pre-action letter dated 16 May 2016, Hilary Meredith Solicitors indicated that the Claimant would be issuing a private law claim for damages for personal injury against the Ministry of Defence. Reference was also made to alleged breaches of the Protection from Harassment Act 1997 and the Equality Act 2010. Whilst extensions to the applicable limitation period were agreed between the panel solicitor acting for the Ministry of Defence and the Claimant's solicitors, the extended limitation period expired without further extension, on 30 May 2019. Time for service of any proceedings issued prior to that date expired on 30 September 2019.

Investigation by the SCOAF

28. On 22 July 2019, the SCOAF wrote to the Army Service Complaints Secretariat to confirm that the Claimant had applied for an investigation into the substance of his Service Complaint and the alleged maladministration in its handling. A draft SCOAF investigation report was sent to the Claimant on 29 September 2020. On 30 October 2020, Ms Nicola Williams (the then SCOAF) wrote to the Claimant stating that she accepted and endorsed the findings and recommendations made in the investigator's final report, which she enclosed. The latter partially upheld the Claimant's application. Its summary findings (drawn from the conclusions set out at paragraphs 279 to 285 of the report) were:

'I have investigated all 16 of the allegations made by Mr Ogunmuyiwa to SCOAF. Having done so, I have a great deal of sympathy towards the circumstances that Mr Ogunmuyiwa evidently found himself working in, whereby he was deployed as the Driver to a Warrant Officer that was not tolerant towards him, despite the working environment being unique and challenging for them both.

Much like both the DB and AB, I partially uphold the application because I found that Mr Ogunmuyiwa was the subject of underlying acts of both verbal and physical bullying perpetrated by WO2 Rennie. This is strongly evidenced within some of the witness accounts.

The time taken to address Mr Ogunmuyiwa's SC was also found to be unacceptable by both the DB and AB, as it took in excess of four years to reach the stage whereby the AB issued their determination.

However I found that many of the specific acts that form the basis of Mr Ogunmuyiwa's application to SCOAF have been difficult to prove. This is due to a lack of corroborative evidence being available to support most of the allegations he made.

In divergence from both the DB and AB, I do not however consider that bullying was only a perception held by Mr Ogunmuyiwa. They both found that the bullying had not been necessarily or consciously targeted towards him despite the perpetrated acts being both verbal and physical. After further consideration of the facts, I find that the evidence

available demonstrates that on the balance of probabilities, WO2 Rennie was aware that his actions and style was overbearing and constituted bullying. The evidence suggests that this was WO2 Rennie's preferred approach to leadership and it remained unchallenged by his Commanding Officer…'

29. Under the heading, 'Redress', the summary to the report stated:

'Mr Ogunmuyiwa requested access to a copy of the apology letter apparently written by WO2 Rennie for his attention and also asked for compensation for his loss of earnings. Additionally, he requested that WO2 SSM Rennie (then WO2) be subjected to a Court Martial. He further suggested that Cpl Scurr (then Pte) should be sanctioned for providing false information to the HIO.

Mr Ogunmuyiwa has been advised that it is outside of the Ombudsman's powers to be able to require the Court Martial or any other administrative sanction be imposed upon any member of Service personnel.

WO2 Rennie has previously accepted that he did commit what amounted to some acts of bullying towards Mr Ogunmuyiwa during a Royal Military Police (RMP) investigation into the potential criminal aspects of the matter. As a result he received the sanction of a 'Formal Interview' for that mis-demeanour. The sanction was not however considered by Mr Ogunmuyiwa to be a satisfactory outcome. I also found that the sanction was disproportionately lenient considering the evidence available.

Nevertheless both the DB and AB consider that Mr Ogunmuyiwa has achieved some of the redress he sought as result of that sanction being imposed.

When considering the fact that WO2 Rennie readily admits that he wrote a letter of apology to Mr Ogunmuyiwa, and that the said letter was subsequently misplaced or lost in transmission, it is therefore appropriate and proportionate for the Army to write to him confirming the letter was lost and offering their apologies for the fact that the letter did exist but was never received by him.

It is noteworthy that the AB has already issued an apology to Mr Ogunmuyiwa for the excessive delay in investigating his SC. I however consider that in excess of four years to reach an AB determination is exceptional and he should therefore be awarded a consolatory payment for the stress and frustration these delays would have caused him.'

30. The investigator made the following recommendations:

'(a) That the Army write to Mr Ogunmuyiwa and make a formal apology for the loss of the 'apology letter' that was admittedly written by WO2 SSM Rennie; no later than 30 December 2020.

(b) That the Army further formally apologise to Mr Ogunmuyiwa for the obstruction that he encountered in trying to seek appropriate medical assistance from a doctor as result of the bullying behaviour displayed towards him by WO2 SSM Rennie.

(c) That Mr Ogunmuyiwa receives a consolatory payment within the moderate band, in recognition of the stress and frustration caused to him as result of the investigation into his SC taking in excess of four years to reach a conclusion.

Confirmation should be provided to SCOAF by 30 December 2020 that the above recommendations have been acted upon.

Organisational Learning

The Army should take steps to audit how identified acts of bullying have been addressed since Mr Ogunmuyiwa's experience in BATUS. This will enable the Service to satisfy itself that progress has been made internally in effectively identifying and tackling bullying behaviour where it arises since the time of this occurrence.'

31. Within the body of the report, the investigator addressed four heads of complaint which the Claimant had made regarding WO2 Clark's appointment as, and approach to the role of, AO. He found:

'(85) In summary, it is important to note that none of the witnesses interviewed, made any comments that corroborate Mr Ogunmuyiwa's assertion that he called into question the appointment of WO2 Clark as his AO, either at the specific time that she was appointed or at any time prior to his interview with the HIO on 29 January 2018.

(86) He states that he personally wanted to appoint SSgt Palmer as his AO at the time of having his SC documented. However there is no evidence available to support the insinuation that he verbalised that wish to Lt Col Steve Nevin or that SSgt Palmer was contacted by himself or anyone else to request his assistance as an AO. Further, whilst SSgt Palmer does provide a supporting statement to the investigation there is no mention of any request being made to him to act as Mr Ogunmuyiwa's AO.

(87) Conversely, Mr Ogunmuyiwa personally signed the SC Annex 'F', created on 3 June 2015, by WO2 Clark. This indicates that at the time it was created, he was most likely to have read it through and that as result he was satisfied with the content. That is because I believe that it is reasonable to assume that had he not been satisfied with the content, then he would have exercised his option, not to sign it until it was amended (an option that he recalls he did exercise later in the investigation when he was allegedly asked to sign a false interview record).

(88) Additionally, it is unfortunately not now possible to establish whether Mr Ogunmuyiwa did or did not, furnish WO2 Clark with 8 pages of notes as he maintains. That is because the existence of the notes cannot be confirmed as WO2 Clark has exercised her right not to assist the investigation. Nevertheless, even if it is accepted on the balance of probabilities that he did provide the notes, it is now impossible to establish what information was recorded in the notes that was in difference to what was detailed in his Annex 'F'.

(89) Further I find that there are various examples provided of occasions when efforts were made by both the HIO and the ASCS to contact WO2 Clark. Unhelpfully however, she exercised her right to refuse to assist the investigation once contacted. Importantly though, it cannot be refuted that such contact did take place.

(90) Finally, WO2 Clark made it perfectly clear to the ASCS that she did not want to assist the investigation and that is documented in an email received from her. It is therefore the case that she refused to provide a statement that would assist the investigation.

(91) I am therefore unable to establish or determine that on the balance of probabilities, Mr Ogunmuyiwa was 'forced' to accept WO2 Clark as his AO, or that all of his allegations that were apparently documented in eight pages of notes, were not condensed and included in the SC Annex 'F' that he signed and submitted.

(92) Neither can I uphold the allegation that the Army falsely stated that WO2 Clark did not want to give a statement as there is clear evidence to support the fact that she exercised her right not to assist the investigation. Numerous attempts were also made to contact her before she was traced by the Army.

(93) I do not therefore uphold any of these four Heads of Complaint (HoC).'

32. The investigator also addressed the Claimant's assertion (amongst others) that A/WO2 Rennie had deliberately driven past the medical centre, against the Claimant's wishes, knowing that the Claimant wanted to seek medical assistance. He found:

'…

(276) I therefore consider that by implication and actions, SSM WO2 Rennie did stop Mr Ogunmuyiwa from going to the medical centre for treatment immediately.

(276) I therefore uphold the element of this HoC related to WO2 SSM Rennie stopping him from visiting the medical centre as requested.

(277) I do not however find that the audio recording alone proves WO2 SSM Rennie bullied, humiliated or harassed Mr Ogunmuyiwa based upon an analysis of the content of that audio recording. Nevertheless there exists ample evidence that surrounds this sequence of events to confirm WO2 SSM Rennie did bully and harass Mr Ogunmuyiwa more generally both verbally and physically.

(278) I therefore uphold the allegation of Mr Ogunmuyiwa being denied his wish to visit the medical centre. I do not uphold the allegation that the audio recording directly proves that WO2 Rennie bullied and harassed Mr Ogunmuyiwa, but I do find that he was both verbally and physically bullied and harassed by WO2 Rennie.'

33. On 3 November 2020, Lieutenant Colonel J S Carter, of the Army Service Complaints Secretariat, wrote to the Claimant to apologise, in accordance with the SCOAF's recommendations. He said:

'In relation to the findings and recommendations of the Service Complaints Ombudsman for the Armed Forces (SCOAF) investigation report dated 30 Oct 20, I am writing to acknowledge and apologise for the fact that the apology letter written to you by WO2 Rennie was lost in transit. Whilst I cannot explain what happened to this letter, I hope that you find some solace in the fact that WO2 Rennie recognised that his behaviour was unacceptable and therefore, apologised for it.

I would also like to offer an apology on behalf of the Army for any obstruction you encountered whilst attempting to seek medical assistance following the inappropriate behaviour displayed by WO2 Rennie; it is completely unacceptable that any attempt was made to deny you any form of medical attention.

The fact that your Service complaint took over 4 years to conclude is unacceptable and I note that the SCOAF has recommended that a consolatory payment is to be made in recognition of the stress and frustration you experienced during this time; I will write to you separately on this matter.

May I take this opportunity to wish you all the best for the future.'

34. On 31 March 2021, the Claimant was paid the gross sum of £1,000.00 (£705.76 net), by HM Forces, as a consolatory payment for the delay identified in the SCOAF report.

The legal framework relating to the Service Complaint

35. There is no dispute between the parties as to the legal framework within which the Service Complaint fell to be considered.

36. The 2006 Act affords those who are subject to service law and who consider themselves to have been wronged in any matter relating to their service a statutory right to make a service complaint. At the date of the Service Complaint, such a complaint was brought pursuant to section 334 of the 2006 Act (since repealed - see Part 14A, section 340A). Section 334 provided:

'(1) If-

(a) a person subject to service law thinks himself wronged in any matter relating to his service, or

(b) a person who has ceased to be subject to service law thinks himself wronged in any such matter which occurred while he was so subject, he may make a complaint about the matter under this section (a "service complaint").

(2) But a person may not make a Service complaint about a matter of a description specified in regulations made by the Secretary of State.

(3) The Defence Council must by regulations make provision with respect to the procedure for making and dealing with service complaints.'

37. The Armed Forces (Service Complaints and Financial Assistance) Act 2015 (Transitional and Savings Provisions) Regulations 2015 ('the Transitional Regulations') make provision for the processing of service complaints which had been made before 1 January 2016 and had not concluded by that date.

38. JSP 831, Part 1: Directive, Version 1.1 (effective at the relevant time) is described in its foreword[3], as being *'the authoritative policy and guidance for all MOD Service*

[3] written by the then Chief of Defence Personnel, Lt Gen Andrew Gregory CB

personnel when making, responding to, advising on, investigating and deciding service complaints'. At Annex E, it sets out the scenarios covered by the Transitional Regulations and what is to happen to complaints made to a commanding officer which will transfer to be considered under The Armed Forces (Service Complaints) Regulations 2015 and the 2015 Regulations. For a service complaint on which no decision at all has been taken, the comments provide (emphasis original):

'The process is to start at the beginning with the specified officer's admissibility decision. The specified officer is to treat the complaint as though raised under the new system, but is to apply the schedule of excluded matters from the old process as it would be unfair to apply the new. The Ombudsman must therefore apply the same exclusions from the old system, if the complainant seeks a review of the admissibility decision. **Serials 4-9 are "Part 3" complaints in the terms set out in the Transitional Regulations. The rules under that Part provide for adjustments to time limits, independence and excluded matters to be applied in these cases, as they were provided for under the old system, to ensure that complainants are not disadvantaged from the move to a new system.**'

Accordingly, the excluded matters applicable to the Service Complaint were those set out in The Armed Forces (Redress of Individual Grievances) Regulations 2007 ('the 2007 Regulations') and not those set out in the 2015 Regulations.

39. Pursuant to regulation 3(1) of, read with paragraph 1(u) of the Schedule to, the 2015 Regulations, a person cannot make a service complaint which *'is or was capable of being the subject of a claim for personal injury against the Ministry of Defence'*. That is not amongst the exclusions for which the 2007 Regulations had provided. Paragraph 2 of the Schedule to the 2015 Regulations provides: *'Nothing in paragraph 1 shall prevent a person making a service complaint about anything referred to in regulation 5(2) which he or she alleges has occurred in connection with a matter specified in paragraph 1.'* Regulation 5(2) encompasses an allegation that the complainant has been the subject of (materially, for current purposes) discrimination, harassment or bullying.

40. The Armed Forces (Service Complaints) Regulations 2015 were made under section 334(3) of the 2006 Act. Regulation 4 stipulates that a service complaint is made by a complainant making a statement of complaint, in writing, to the SO. Under regulation 6(1), the service complaint may not be made after three months beginning with the relevant day, defined by regulation 6(2) to mean the day on which the matter about which the person wishes to complain occurred, or (if it occurred over a period of time) the last day on which it occurred. Regulations 4(2) and (3) set out the matters which must be included within a service complaint. Regulation 5(1) stipulates that the SO must determine whether the service complaint is admissible in accordance with section 340(B) of the 2006 Act. If the SO decides that any part, or all, of the complaint is admissible, he must so notify the complainant in writing and refer the relevant parts of the complaint to the Defence Council.

41. By regulations 9 and 10:

'9

(1) After they receive a referral of a service complaint from the specified officer the Defence Council must decide whether the complaint is to be dealt with –

(a) by a person or panel of persons appointed by the Council; or

(b) by the Council themselves

(2) The person or panel of persons appointed to deal with the service complaint or (in a paragraph (1)(b) case) the Defence Council must

(a) decide whether the complaint is well-founded; and

(b) if the decision is that the complaint is well-founded

(i) decide what redress (if any), within the authority of the person or persons on the panel or (in a paragraph (1)(b) case) the Defence Council, would be appropriate; and

(ii) grant any such redress.

(3) The person or panel of persons appointed to deal with the service complaint or (in a paragraph (1)(b) case) the Defence Council must notify the complainant in writing of a decision made under paragraph (2)(a) or (b), giving reasons for the decision.

(4) If a decision under paragraph (2)(a) or (b) is made by a person or panel of persons appointed under paragraph (1)(a), that person or panel of persons must inform the complainant of the right of appeal under regulation 10(1).

…';

'10

(1) Where a decision under regulation 9(2)(a) or (b) is made by a person or panel of persons appointed under regulation 9(1)(a), the complainant has a right to appeal to the Defence Council against that decision.

(2) An appeal under paragraph (1) must be brought by the complainant in writing to the Defence Council.

(3) The appeal must be dated and state those aspects of the decision under regulation 9(2)(a) or (b) which the complainant disagrees with and his or her reasons for disagreeing.

(4) If the complainant brings an appeal after the end of the period stated in regulation 11(1) the appeal must state the reason why it was not brought within that period.'

42. Pursuant to regulation 13:

'(1) Where the Defence Council decide, or following a review the Ombudsman decides, that the appeal can be proceeded with, the Defence Council must decide whether the appeal is to be determined –

(a) by a person or panel of persons appointed by the Council; or

(b) by the Council themselves.

(2) The person or panel of persons appointed to consider the appeal or (in a paragraph (1)(b) case) the Defence Council must —

(a) determine whether the complaint is well-founded; and

(b) if the determination is that the complaint is well-founded –

(i) determine what redress (if any), within the authority of the person or persons on the panel, or (in a paragraph (1)(b) case) the Defence Council, would be appropriate; and

(ii) grant any such redress.

(3) The person or panel of persons appointed to consider the appeal or, as the case may be, the Defence Council, must notify the complainant in writing of a determination under paragraph (2)(a) or (b), giving reasons for the determination and informing the complainant of the complainant's right to apply to the Ombudsman to conduct an investigation under section 340H(1) in relation to the service complaint.'

43. Pursuant to regulation 14:

'(1) For the purposes of making a decision under regulation 9(2)(a) or (b), or a determination under regulation 13(2)(a) or (b), the person or panel of persons or, as the case may be, the Defence Council may request the complainant, or such other person as they consider appropriate, to supply information or produce documents.

(2) ln respect of a request under paragraph (1), the person or panel of persons or, as the case may be, the Defence Council may impose any such time limit for the supply of the information or production of other documents, as they consider reasonable in the circumstances.

(3) Should the information or documents requested under paragraph (1) not be supplied or produced within the time limit under paragraph (2), the person or panel of persons or, as the case may be, the Defence Council may proceed to reach a decision or a determination based on the information or documents available.

…'

44. At all material times, the following directive and guidance applied:

44.1. JSP 831 – Redress of Individual Grievances: Service Complaints Version 1.1: Part 1: Directive and Part 2 Guidance (22 January 2016); and

44.2. JSP 763 – The MOD bullying and harassment complaints procedures (1 July 2013).

JSP 831

45. The preface to JSP 831 stated:

> **'How to use this JSP**
>
> 1. JSP 831 is intended as a guide for all MoD Service and civilian personnel on the application of policy for Service complaints. It is designed to be used by Service personnel when making a complaint and by all those responsible for handling and managing such complaints. This JSP contains the policy and direction on service complaints and guidance on the processes involved and best practice to apply.
>
> 2. The JSP is structured in two parts:
>
> a. Part 1- Directive, which provides the direction that must be followed in accordance with Statute, or Policy mandated by Defence or on Defence by Central Government.
>
> b. Part 2 - Guidance, which provides the guidance and best practice that will assist the user to comply with the Directive(s) detailed in Part 1.'

46. At Annex G to JSP 831, principles of fairness were set out, applicable to all those involved in the handling of service complaints. Principle 2(d) required the complaint handler to ensure that investigations were prompt, thorough and established the facts. Principle 3(b) required that a complainant, and any other party involved, be allowed to explain his or her position through appropriate means, before a decision was made.

47. The following were the relevant aspects of Part 2 of JSP 831 (emphasis original):

47.1. Chapter 1:

47.1.1. (at paragraph 36) 'Where the SO [specified officer] has decided, or been informed by the Ombudsman, that your service complaint is admissible, the SO must refer your service complaint to the single Service secretariat. The secretariat will appoint a decision body with authority to consider and decide your service complaint and to grant any appropriate redress...';

47.1.2. (at paragraph 41) 'The **decision body** (DB) appointed by the single Service secretariat to decide your service complaint must decide whether, on the balance of probabilities, it is well founded, and, if it is, what **redress** (if any) is appropriate, and grant any such redress. The decision body can also ask someone to investigate your service complaint on its behalf, but it will be the decision body that has to reach the final decision on your complaint.';

47.1.3. (at paragraph 43) 'If in your service complaint form you have made allegations of bullying, harassment or discrimination, the DB will follow the process set out in JSP 763 The MoD Bullying and Harassment Complaints Procedures. This includes guidance

on the appointment of a **Harassment Investigation Officer** (HIO) and their role…';

47.1.4. (at paragraph 52) 'Once the decision body has notified you of its decision on your service complaint, you have the right to an appeal (unless your service complaint was decided by a Service Board or by the **Defence Council** itself). Should you wish to appeal, you must do so within six weeks of the date that you received notification of the decision.';

47.1.5. (at paragraph 54) 'You must submit your appeal in writing to the single Service secretariat that was referred to in the decision letter, and set out what it is about the decision that you disagree with and why. If you submit your appeal outside the six week time limit, you must state the reasons why you were not able to appeal within the time limit.';

47.1.6. (at paragraph 55) 'Setting out what you are dissatisfied with and why can help the appeal body to focus its investigation. As the appeal body considers the entirety of the complaint afresh, you need to know that the appeal body can reach a different decision entirely about whether your service complaint is well founded and about any redress that might be appropriate.'; and

47.1.7. (at paragraph 65) 'The appeal body (AB) appointed by the single Service secretariat to determine your service complaint must decide whether, on the balance of probabilities, it is well founded, and, if it is, what redress (if any) is appropriate, and grant any such redress. The appeal body can also ask someone to investigate your service complaint on its behalf, but it will be the appeal body that has to reach the final decision on your complaint.'

47.2. Chapter 4, paragraph 10: *'It is MOD policy that 90% of service complaints should be completed within 24 weeks. This timeline starts from the date that the complainant receives notification from the SO that a complaint is admissible…'*;

47.3. Chapter 5, relating to the appeal body:

47.3.1. (at paragraph 22) 'ln determining the appeal, you must establish whether the complaint is well founded. The standard of proof to be applied when determining the appeal is set out in Chapter 1 paragraph 18 of Part 1 of this JSP.';

47.3.2. (at paragraph 23) 'ln their appeal, the complainant must set out what they disagree with about the decision made by the decision body on their complaint and why. Whilst this would identify those matters about the decision stage that the complainant is concerned about, your role is to consider the entirety of the complaint afresh. This may result in your findings and

determination, and any redress, being different from those of the decision body.';

47.3.3. (at paragraphs 29 to 31):

'29. There is no obligation to hold an oral hearing in any case. A complainant may request an oral hearing but the final decision lies with the appeal body.

30. The complexity of the complaint and its potential wider implications may be considerations to be included in coming to a decision on whether to hold an oral hearing. Similarly, an oral hearing may involve no more than asking the complainant to state the complaint in person, but might involve others concerned. Straightforward cases involving no substantial conflicts of evidence on any material issue or difficult points of law may be less likely to require an oral hearing.

31. If an oral hearing is held, the complainant should always attend and may be accompanied by an AO and at the discretion of the appeal body, by a legal or other representative. A member of the single Service complaints secretariat, other administrative staff and a verbatim recorder may also be present.'

JSP 763

48. The introduction to JSP 763 provided:

'**SCOPE**

1.1. Service complaints and civilian grievance procedures are the framework for dealing with complaints from MOD Service or civilian personnel relating to their service or employment. For Service personnel, JSP 831 sets out MOD policy concerning Service complaints seeking redress of individual grievance under sections 334 to 339 of the Armed Forces Act 2006 (AFA 06)... If the complaint is related to bullying or harassment, Armed Forces and civilian personnel are to use JSP 763. For the purpose of this document, Service complaints are also referred to as 'formal complaints'. The procedures set out in this publication supplement that framework but cover only complaints of bullying and harassment by MOD Service or civilian personnel against other MOD Service or civilian personnel…

1.2. In practice, Complainants usually offer their own description of bullying and harassment. However for the purpose of making a formal complaint, working definitions of bullying and harassment can be found at Annex A.'

49. In relation to bullying, Annex A of JSP 763 stated (so far as material):

‘17. There are many definitions of what constitutes bullying but no legal definition. ln general it may be characterised as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure the recipient.

18. Bullying is not always a case of pulling rank. It can also take place between peers, and occasionally personnel are bullied by those junior to them.

19. Bullying can often be hard to recognise; it is not necessarily conducted face to face and may be insidious (the recent rise in bullying by mobile phone text message is a good example of this). The recipient may think it is normal behaviour for the organisation; they may be anxious that others will be weak or disloyal if they do not put up with it; or they may worry that if they report it, they will not be believed and may be victimised.

20. Though most people will agree on extreme cases of bullying, behaviour that is considered bullying by one person may be viewed as, for example, 'firm management' or 'robust leadership' by another. Such perceptions should, however, be treated sceptically and strongly discouraged, in case they are being used as a pretext or euphemism for bullying.

…’

The Legal Principles Arising In The Claim for Judicial Review

50. Here again, the parties are in broad agreement as to the statutory and common law principles engaged by this claim, summarised below. The issue between them is the correct application of those principles to the facts of this case.

51. Section 31(2A) of the Senior Courts Act 1981, as amended (‘the 1981 Act’), provides, so far as material:

‘(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred….’

52. Section 31(6) of the 1981 Act provides:

‘Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant

(a) leave for the making of an application or

(b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.'

53. In *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, an appeal from the Divisional Court's conclusion that the Government's policy in favour of the development of a third runway at London Heathrow airport had been produced lawfully, the Court of Appeal held, at paragraphs 267 to 273:

'267. It has long been established that, in a claim for judicial review, the court has a discretion whether to grant any remedy even if a ground of challenge succeeds on its substance. It was established by Purchas L.J. in *Simplex GE (Holdings) Ltd. v Secretary of State for the Environment* [1988] 3 P.L.R. 25 (at paragraph 42) that it is not necessary for the claimant to show that a public authority would – or even probably would – have come to a different conclusion. What has to be excluded is only the contrary contention, namely that the Minister "necessarily" would still have made the same decision. The *Simplex* test, as it has become known, therefore requires that, before a court may exercise its discretion to refuse relief, it must be satisfied that the outcome would inevitably have been the same even if the public law error identified by the court had not occurred.

268. The *Simplex* test has been modified by the amendments made to section 31 of the Senior Courts Act by section 84 of the Criminal Justice and Courts Act 2015. The new provisions apply to all claims for judicial review filed since 13 April 2015. They do not apply to applications for statutory review.

269. On the question of relief, section 31 of the Senior Courts Act provides:

"(2A)… The High Court –

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements of subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

270. The meaning of "conduct" for this purpose is defined by a new subsection (8), which provides:

"(8) In this section "the conduct complained of", in relation to an application for judicial review, means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief."

271. Similar provisions have been introduced into section 31 on the question whether permission to bring a claim for judicial review (still referred to in the statute as "leave") should be granted: …

272. The new statutory test modifies the *Simplex* test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of "exceptional public interest". Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely "highly likely". And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been "substantially different" for the claimant.

273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales L.J., as he then was, in *R. (on the application of Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin); [2018] 1 All E.R. 142, at paragraph 89).'

54. It is convenient, at this stage, to record that, in granting the relief sought in *Plan B Earth*, the Court of Appeal held, at paragraphs 276 and 277:

'276. We are unable to accept the suggestion that the terms of section 31(2A) are satisfied in this case. We find it impossible to conclude that it is "highly likely" that the ANPS would not have been "substantially different" if the Secretary of State had gone about his task in accordance with law. In particular, in our view, it was a basic defect in the decision-making process that the Secretary of State expressly decided not to take into account the Paris Agreement at all. That was a fundamentally wrong turn in the whole process.

277. Furthermore, and in any event, this is one of those cases in which it would be right for this court to grant a remedy on grounds of "exceptional public interest". The nature and degree of that public interest hardly needs to be set out here. The legal issues are of the highest importance. The infrastructure project under consideration is one of the largest. Both the development itself and its effects will last well into the second half of this century. The issue of climate change is a matter of profound national and international importance of great concern to the public – and, indeed, to the Government of the United Kingdom and many other national governments, as is demonstrated by their commitment to the Paris Agreement.'

55. Emphasising that the Claimant does not rely upon section 31(2B) of the 1981 Act, the Second Defendant contends the context in which *Plan B Earth* was decided to have been significant and of a very different character from that which is under consideration in this case. Nonetheless, it does not demur from the principles set out at paragraphs 267 to 273.

56. In *Clayton v The Army Board of the Defence Council and Secretary of State for Defence* [2014] EWHC 1651 (Admin), Nicol J held, at paragraphs 20 to 24:

'20. As I have already noted, the Panel considered whether to hold an oral hearing by reference to the principles in *Anderson*[4]. In 1990 when this case was decided, members of the Armed Forces who alleged discrimination did not have access to Employment Tribunals (or Industrial Tribunals as they then were) – see what was then Race Relations Act 1976 s.75 (8) and (9). Their only recourse was to make a service complaint which would then be considered by the Army Board. Anderson complained of race discrimination. His service complaint had been dismissed and in his application for judicial review he challenged the procedure which the Panel had adopted including not holding an oral hearing. At p.187 Taylor LJ (with whom Morland J. agreed) said,

> "The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute, are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing: see *Local Government Board v. Arlidge* [1915] A.C. 120, 132-133; *Reg. v. Race Relations Board, Ex parte Selvarajan* [1975] 1 W.L.R. 1686, 1694B-D and *Reg. v. Immigration Appeal Tribunal, Ex parte Jones (Ross)* [1988] 1 W.L.R. 477, 481B-G. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made. It will also depend upon whether there are substantial issues of fact which cannot be satisfactorily resolved on the available written evidence. This does not mean that whenever there is a conflict of evidence in the statements taken, an oral hearing must be held to resolve it. Sometimes such a conflict can be resolved merely by the inherent unlikelihood of one version or the other. Sometimes the conflict is not central to the issue for determination and would not justify an oral hearing. Even when such a

[4] This was a reference to *R v Army Board ex parte Anderson* [1992] QB 169.

> hearing is necessary, it may only require one or two witnesses to be called and cross-examined."

21. Taking her cue from the comment of Foskett J. when he granted permission to the Claimant to apply for judicial review, Ms Edington for the Claimant submitted that 24 years later this principle deserved reconsideration. However, I was not entirely clear from her submissions in what ways she submitted it needed updating.

22. The passage which I have quoted comes within a section of the Court's judgment in which it observed (also at p.187) that,

> "The Army Board as the forum of last resort, dealing with an individual's fundamental statutory rights, must by its procedures achieve a high standard of fairness. I would list the principles as follows" and the passage which I have quoted was then one of those principles. It is not entirely clear whether the Court was intending to limit its enunciated principles to cases where the Army Board was only dealing with fundamental statutory rights. If that was so, then I would agree that the common law has moved on. Mr Milford, for the Defendant, did not suggest otherwise and, indeed, it is notable that the Panel did not refuse to hold an oral hearing because this Claimant's complaint did not deal with fundamental statutory rights. This is not to say that the subject matter of the complaint is irrelevant to the question of whether fairness requires an oral hearing."

23. That apart, the statement in *Anderson* as to when the common law principles of fairness require an oral hearing has stood the test of time. Thus, for instance, in *R (Smith) v Parole Board (No.2)* [2004] 1 WLR 421 at [37] Kennedy LJ said that an oral hearing should be ordered where there is a disputed issue of fact which is central to the board's assessment and which cannot fairly be resolved without hearing oral evidence. The same approach was adopted by the Court of Appeal in *R (Thompson) v the Law Society* [2004] 1 WLR 2522 at [45] – [52].

24. Mr Milford noted that at [47] in *Thompson* Clarke LJ said that he could not think of a situation in which a solicitor could complain of the Law Society's failure to hold an oral hearing if he did not ask for one. Mr Milford recognised that the Court was there concerned with a solicitor claimant. However, the Claimant in the present case was well familiar with the procedure and the MOD manual on Redress of Grievances said in Appendix K that an oral hearing might be held on the application of the complainant. The Claimant in this case had not asked for one. Ms Edington observed that the standard form for making a service complaint does not alert the complainant to the need to ask for an oral hearing and the Claimant's omission to do so should not be held against him. I regard this as a barren part of the argument. Despite the Claimant not asking for an oral hearing, the Panel considered whether fairness required one. If they erred in law in answering that question, I would not have thought it right to deprive the Claimant of a remedy because he himself had not raised the matter.'

The Grounds of Review

57. Against the above background, the Claimant advances his six grounds of review, each of which is resisted by the Second Defendant, whose case, in broad summary, is that, in substance, each ground constitutes an impermissible and unwarranted attack on the merits of the Appeal Body's decision and that, in any event, the claim should be dismissed by reason of delay and because no purpose would be served by granting the relief sought.

58. In reaching my conclusions on each issue, I have had regard to the agreed bundle of documents, together with an additional document produced on day one of the hearing; the witness statement of Mr Clive Preston, Deputy Secretary for Army Board Casework within the Service Complaints Secretariat, on which the Second Defendant relies; and the detailed written and oral submissions made by Mr Fernando, on behalf of the Claimant, and Mr Murray, on behalf of the Second Defendant. I begin by considering the substantive merit in each ground of appeal, before turning to the issues of delay and relief.

Ground 1 (application of the incorrect regulations)

59. The Second Defendant acknowledges that the Appeal Body did not have regard to the Transitional Regulations and ought to have done so. The issue between the parties is whether that failing had a material effect on its approach and, by extension, on the outcome of the Claimant's appeal.

The Claimant's submissions

60. The Claimant contends that the relevant error led to the Appeal Body's failure to consider, adequately or at all, evidence which directly supported the veracity of the Claimant's account. That is because it concluded that it could not consider matters within the Service Complaint which were, or were capable of being, the subject of a claim for personal injury against the Ministry of Defence, as being excluded under regulation 3(1) of, and paragraph 1(u) of the Schedule to, the 2015 Regulations, but which were not excluded by the 2007 Regulations. By virtue of the Transitional Regulations, it was the exclusions under the latter which were of relevance to the Service Complaint.

61. Applying the 2015 Regulations, the Appeal Body considered that it was unable to look into the facts giving rise to the Claimant's hearing loss, or mental health issues, yet the Service Complaint was the only process by which a determination of those facts could and ought to have been made. In any event, the focus of any claim for personal injury, or of the AFCS, was different and the former might be settled without any admission of liability by the relevant defendant. Proper engagement with the facts which the Appeal Body did not address would have led to the obtaining of further evidence from Corporal Lawrence and to a proper analysis of the contemporaneous medical record which she had prepared. It would have led the Appeal Body to recognise that the date of hearing loss which had been acknowledged by the AFCS coincided with the date on which A/WO2 Rennie had shouted at the Claimant, with the overwhelming inference that the latter had caused him to sustain such loss. Such considerations (including as to the duration and intensity of A/WO2's shouting) would have had a material bearing on the bullying allegations and would have been likely to have resulted in positive findings of fact against A/WO2 Rennie. Thus, the Claimant would have received an apology of a different nature and A/WO2 Rennie's chain of command would have been informed

of the serious nature of his conduct, which would have been likely to have had a material impact on its consequences for him. It might also have resulted in a finding that the Claimant ought to be compensated, in accordance with the principles in *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102, CA. The principle set out at paragraph 273 of *Plan B Earth* was of particular importance here.

The Second Defendant's submissions

62. The Second Defendant's position is that the Claimant had expressly disavowed any claim for personal injury as part of his Service Complaint; as he had acknowledged at paragraph 72 of his statement of facts and grounds, *'At no time did the Claimant assert that these were matters for determination within his SC.'* Thus, in fact, there had been nothing of that nature to exclude and the Appeal Body's erroneous application of the exclusions in the 2015 Regulations had had no material consequence for the decision-making process, such that ground 1 was moot. The Appeal Body had made clear that it would consider the underlying allegations of bullying, and had in fact done so, setting out its conclusions at paragraph 27(c) of the Determination. Those allegations had been upheld, partially, in connection with HoC4 (at paragraph 44(c) of the same document). It was clear from that finding, and from paragraph 27(b) of the Determination, that the exclusion applied had been limited to any injuries or losses caused, not to the alleged act of shouting said to have given rise to such matters. Furthermore, paragraphs 41 and 42 of Mr Preston's witness statement were to be borne in mind:

'41. … even under the 2007 Regulations, although a prohibition on such claims was not explicit, the service complaint system was inapposite for the resolution of personal injury type claims. This is because, as explained in paragraph 27b and c of the Appeal Body decision, the Service Complaints process is ill-equipped to make the complex assessments of causation and damages that personal injury claims require. This was the case even, and arguably particularly, under the 2007 Regulations as it was then envisaged that Service Complaints would be resolved through the normal chain of command. Instead a specialist compensation scheme has been established to resolve such claims, the AFCS as detailed in paragraphs 21 -22 above.

42. Moreover, it was not appropriate to consider personal injury claims even if the 2007 Regulations schedule of exclusions had been properly applied, as no personal injury claim was intimated in the initial service complaint. This is because, aside from the schedule of excluded claims, the complaint was to be treated as made under the 2015 Regulations. Under those regulations, a valid complaint must be considered and ruled admissible by a Specified Officer in order to be considered by the Decision Body and Appeal Body. This was particularly the case as the Claimant had already, at the time the AB made its determination, been offered and availed himself of more appropriate alternative routes to obtain compensation for the same personal injury - a claim through the AFCS, and a threatened claim in the civil courts (as noted in paragraphs 23 -24 above, and paragraph 27c - d of the decision).'

63. In any event, it was clear from the evidence of Mr Preston (at paragraphs 50 to 53, to which I shall return later in this judgment) that it was highly likely that any reconsideration of such matters at this stage would result in the same conclusion and, accordingly, section 31(2A) of the 1981 Act was engaged.

Discussion and conclusions

64. The Appeal Body failed to apply the Transitional Regulations and, accordingly, erred in its conclusion that matters within the Service Complaint which were, or were capable of being, the subject of a claim for personal injury against the Ministry of Defence were excluded. I reject the Second Defendant's contention that the 2007 Regulations implicitly led to the same conclusion, or would have inclined the Appeal Body so to conclude, had it considered and applied them. In any event, there is a material distinction between an explicit exclusion and any implication (should that arise) that consideration of the same matters is inapposite, but is not precluded by law. The Appeal Body clearly considered the exclusion to be of relevance; otherwise, it would not have made reference to it in the Determination. The issue is whether its error was material, in the sense that it did make, or could have made, any difference to the outcome of the Claimant's appeal.

65. Paragraphs 27(b) and (c) of the Determination contain two conclusions which are problematic: (a) *'Whilst there is nothing to prevent the Complainant making a SC about alleged bullying which he alleges occurred in connection with any personal injury he may have suffered, pursuant to paragraph 2 of the Schedule, it is our position that the SC process would not be able to consider and determine whether or not the conduct alleged caused or exacerbated any personal injury,..'*; and (b) *'We note the Complainant's solicitor's request that Corporal Elizabeth Lawrence (who treated the Complainant at the BATUS medical centre on 30/31 May 2015) be interviewed in respect of the contents of the medical record entries. We are of the view that this is more pertinent to the alleged personal injury and have not sought this evidence.'* Whilst Mr Murray is right to observe that a claim for personal injury had formed no part of the Service Complaint, that did not mean that the existence of any injury and/or the observations of the treating medic were irrelevant to the issues which did fall within that complaint. For example, as Mr Murray accepted in the course of discussion (of ground 5), as a matter of principle the duration and extent of any shouting might afford evidence of bullying per se, or of more serious bullying. Equally, the nature and extent of any injury caused (whether physical or mental) would be of relevance to the characterisation and gravity of the conduct in question and could assist in corroborating the Claimant's account of events, where disputed. It might also shed some light on the Claimant's general credibility. Yet, at paragraph 44(d) of the Determination, when addressing HoC 4, the Appeal Body stated that it was, *'...not able to make a finding that the Respondent shouted at the Complainant for the duration and intensity that the Complainant claims i.e. 30-40 seconds.'*

66. In my judgment, the Appeal Body erroneously put from its mind matters which went to the cause and extent of any personal injury, considering them to be incapable of consideration under the service complaint process and/or more pertinent to personal injury proceedings and/or a claim under the AFCS. It formed such a view as a product of its erroneous belief that matters within the Service Complaint which were, or were capable of being, the subject of a claim for personal injury against the Ministry of Defence were excluded. It follows that I do not accept Mr Murray's submission that there is a stark distinction to be drawn between the alleged acts of bullying and harassment and any personal injury thereby caused; conclusions as to the latter might well have informed those as to the former.

67. Given the considerable overlap between all grounds of review, I shall turn to the consequences of the Appeal Body's error, having considered all other grounds.

Ground 2 (irrational/unreasonable conclusion that the Claimant had not been bullied)

The Claimant's submissions

68. Mr Fernando submits that the Appeal Body applied an unduly restrictive definition of bullying, requiring, as it did, an intention on the part of the alleged perpetrator, rather than focusing on the effect upon the alleged victim. In so doing, the Appeal Body purported to apply the definition set out in Annex A to JSP 763, but did not have regard to the fact that Annex A indicates that there are many definitions of bullying, or focus on the wider text at paragraphs 18 to 20 of that annex. On any reasonable view, Mr Fernando contends, the Claimant was bullied by A/WO2 Rennie, as the Appeal Body's own findings serve to indicate. The circumscribed definition applied led to an irrational or unreasonable conclusion to the contrary. The DB had concluded that the Claimant had been bullied, as did the SCOAF, but the Appeal Body made different findings. Had a broader definition been applied, different findings of fact would have been made and the Claimant would have received an apology of a different character. A/WO2 Rennie's chain of command would have been informed accordingly.

69. In the alternative, Mr Fernando submitted, if the proper interpretation of Annex A to JSP 763, is that it requires intention to be established, *'the document itself is challenged'* by the Claimant.

The Second Defendant's submissions

70. Mr Murray's short point is that it was not for the Appeal Body to define bullying for itself. It could not be criticised for adopting the definition set out in Annex A to JSP 763. The fact that it referred to a particular part of the relevant passage does not mean that it did not have regard to the passage as a whole. In truth, the Claimant's challenge, whilst disguised as a point of law, is to the facts found. It cannot be said that the Appeal Body's conclusions were unreasonable, in the public law sense, or irrational. The alternative challenge to the definition of bullying set out in Annex A to JSP 763, had not been raised prior to the hearing and could not now be raised.

Discussion and conclusions

71. Paragraph 43 of Chapter 1 of the guidance provided by Part 2 of JSP 831, stated that the DB would follow the process set out in JSP 763, where the service complaint contained allegations of bullying, harassment or discrimination; a matter reiterated in paragraph 1.1 of the introduction to JSP 763 itself, which 'Armed Forces and civilian personnel' were to use. Paragraph 1.2 of that introduction made clear that the definitions of bullying and harassment in Annex A were 'working definitions', having noted that, *'In practice, Complainants usually offer their own description of bullying and harassment'*. Paragraph 17 of Annex A stated that there was no legal definition of bullying, going on to preface the working definition given with the words, *'In general it may be characterised as…'* The examples of bullying given at paragraphs 19 and, in particular, 20 of Annex A indicate that perception and intention (whether of the recipient or the alleged bully) are not necessarily conclusive. In my judgment, JSP 763

does not, on its face, require the adoption of a restrictive, single definition of bullying which requires intention on the part of the putative bully, or which is to be treated as though enshrined in statute. Had the AB had all relevant aspects of JSP 763 in mind, it would not have concentrated exclusively on the working definition (being one of 'many') to which it referred at paragraph 20(b), and cross-referred at paragraph 41, of the Determination, including the need for intent, set out at paragraph 17 of Annex A to JSP 763 (see paragraph 41 of the Determination). To have done so, in the context even of its limited findings in relation to HoCs 3 and 4, meant that it did not focus on the Claimant's perception, or the legitimacy of A/WO2 Rennie's perception of the justification for his actions. Such a narrow reading of Annex A, rendered the AB's decision-making process flawed. That process informed its ultimate conclusion, which was, I am satisfied, unreasonable in the public law sense, as a result.

Ground 3 (unlawful and/or irrational/unreasonable failure to have formed conclusions about facts concerning the Service Complaint)

The Claimant's submissions

72. Mr Fernando submits that the Appeal Body acted irrationally and/or unreasonably in failing to have made findings of fact, notwithstanding its ability to consider matters afresh and the fact that it was not bound by the DB's decision. It conflated its task with that of the SPA, yet the latter had been concerned with whether there was a realistic prospect of conviction, adopting the criminal standard of proof. The absence of witnesses to material events might have been relevant in that context, but could not and should not have been determinative in circumstances in which the civil standard of proof applied. In any event, there had been multiple witnesses who could have supported the Claimant's account of certain incidents and/or provided evidence of A/WO2 Rennie's propensity to act in the manner alleged. The DB's failure to have made findings of fact, adopted by the Appeal Body, was irrational/unreasonable.

The Second Defendant's submissions

73. Mr Murray submits that the DB itself applied the correct standard of proof to all HoCs and its reasoning was then adopted by the Appeal Body. As is clear from paragraphs 21, 22 and 25 of the Determination, the Appeal Body considered the matter entirely afresh, concluding that it was in broad agreement with the DB, the findings of which it considered to represent *'a reasonable and coherent analysis of the issues'*. The DB had been entitled to take account of the findings of the Service Police; were the position otherwise it would not have been necessary to stay the Service Complaint pending the outcome of the criminal investigation. At paragraph 7 of its decision, the DB had concluded that the absence of witnesses to the majority of the alleged incidents meant that it was not possible to determine whether they had occurred, even on the balance of probabilities. Accordingly, the Appeal Body had made no error in reaching its conclusion, which had fallen well within the ambit of its discretion, and should be accorded the respect customarily due to decision-makers acting within their field of expertise.

Discussion and conclusions

74. The Appeal Body did make findings of fact; see, for example, paragraphs 30; 31; and 34 to 43 of the Determination. It also stated its broad agreement with, and adoption of, those of the DB (Determination, paragraph 25). There is nothing intrinsically unreasonable or irrational about the adoption of findings made by a decision body, but, before adopting those findings, the Appeal Body had to be satisfied of one of two matters: (a) that its own analysis of the available evidence, properly conducted, led to the same conclusions, or (b) that the DB's findings were themselves the product of appropriate analysis, on which it could not improve.

75. At paragraph 7 of its decision, the DB had found, *'The majority of the incidents happened without witnesses (or witnesses only saw part of the incident, e.g. Sgt Hood witnessed shouting but no physical contact regarding HoC 3). As such, it is not possible to determine even 'on the balance of probabilities' that the events were more likely than not to have occurred exactly as you say they did…'* The second of those sentences is a non-sequitur. It appears to conclude that, in the absence of independent, fully corroborative evidence, the Claimant's allegations could not be established to the civil standard of proof. As a matter of principle, that is not so. Where two individuals give conflicting accounts of one or more incidents which are not witnessed (in whole or in part) by a third party, it is commonplace for tribunals to make findings of fact based upon their assessment of the credibility of each account, usually having regard to oral evidence and any available evidence consistent and inconsistent with the accounts respectively given. Furthermore, there is no need for an 'all or nothing' approach; an individual's account of one event may be accepted as credible, whilst his account of another may be rejected.

76. In adopting as 'reasonable and coherent' the DB's analysis of the Claimant's service complaint (Determination, paragraph 25), the Appeal Body adopted its flawed conclusion that, in the absence of full corroborative evidence, it was not possible to accept the Claimant's account of any of the HoCs, on the balance of probabilities. In the absence of oral evidence from the parties on the basis of which credibility could be tested and assessed, the Appeal Body's own analysis suffered from the same shortcoming (subject to my conclusions in relation to ground 4, below). Its adverse credibility finding was applied across the board and resulted in a conclusion that, absent independent corroborative evidence of any matter in dispute, the Claimant's account of each HoC ought to be rejected (Determination, paragraph 43). The fact that the Claimant had given a credible account of certain incidents, and the relevance of the evidence gathered by the HIO from third parties which might be thought to be consistent with his account (summarised at sub-paragraphs 10.1; 10.2; and 10.6, above) was not addressed. In such circumstances, I am satisfied that the Appeal Body's adoption of findings by the DB which had been the product of a flawed approach, compounded by its own flawed approach to its analysis of the material before it, was unreasonable and/or irrational. The Appeal Body reached its conclusions on the basis of its impermissible, irrational view that, where disputed, the Claimant's account required independent corroboration in order to be established; a position compounded by its approach to his credibility and the relevance of the adverse findings made in that respect.

Ground 4 (irrational/unreasonable approach to credibility)

The Claimant's submissions

77. Mr Fernando submits that the Appeal Body's rationale in relation to the Claimant's credibility was irrational/unreasonable. The Claimant disputed the Appeal Body's findings as to his allegation of race discrimination but, in any event, its rejection of his account was not born of those findings, which were said, together with a minor inconsistency in relation to HoC3, to have formed the tipping point (Determination, paragraph 39). Such an approach was irrational and/or unreasonable.

The Second Defendant's submissions

78. Mr Murray submits that the Claimant here mounts a straightforward and impermissible challenge to the Appeal Body's findings of 'troubling inaccuracies or embellishment' (Determination, paragraph 44). It had not been unreasonable, in the public law sense, for the Appeal Body to have concluded that the Claimant was prone to changing his story, and so lacked credibility, on the basis of a minor inconsistency, taken together with the late and unsupported accusations of racism raised in the independent investigation into harassment. The Claimant 'veers towards' asking the Court to take the substitutionary approach forbidden by *R (Plan B Earth)*.

Discussion and conclusions

79. The Appeal Body made findings in relation to the Claimant's complaint of race discrimination, which were supported by the evidence to which it referred at paragraphs 35 to 38 of the Determination. It cannot be said that those findings were themselves irrational or unreasonable and I do not understand the Claimant to suggest otherwise; his case is that the Appeal Body acted unreasonably/irrationally in making the wider adverse credibility findings which it made in reliance upon them and upon the expressly minor inconsistency, and which defeated those HoCs which were not upheld (in whole or in part).

80. I have already considered the difficulties with the Appeal Body's approach to credibility when addressing ground 3, above. Whilst it was perfectly proper for the Appeal Body to have informed its findings by reference to the Claimant's credibility, that exercise had to be undertaken in a reasonable and rational way. In failing to have had any, or any adequate, regard to: (1) the fact that the DB had made findings on the basis of its flawed assumption that the allegations could not be established to the civil standard in the absence of witnesses; (2) the evidence available from third parties in connection with the HoCs and A/WO2 Rennie's propensity to behave as alleged; and (3) the fact that it had considered certain parts of the Claimant's account to have been credible, against all of which the minor nature of the inconsistency which it had identified and its view of the Claimant's subsequent complaint of racism fell to be balanced, the Appeal Body's approach was unreasonable and irrational. That is not to stray into 'the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review'; it is to recognise the basic defect in the approach which the Appeal Body took to its decision-making process. Furthermore, if the Claimant's credibility was considered to be of such significance, the need for oral evidence ought to have been considered in that light (see ground 6, below).

Ground 5 (unlawful and/ or irrational/unreasonable failure to have considered relevant documentary evidence)

The Claimant's submissions

81. Mr Fernando submits that the error here lay in the Appeal Body's failure to have considered the evidence of Corporal Lawrence, together with the corroborative accounts provided to the HIO by other army personnel (being Privates Molai and Tuikoro; and Sergeants Matley; Hood and Viney). In short, it is said that:

    81.1. the Appeal Body first stated that it was not able to consider, nor had it considered, any aspect of the Service Complaint which could amount to a claim for personal injury (Determination, paragraph 27(b)), before making a single reference to Corporal Lawrence, noting that she had treated the Claimant at the BATUS medical centre and would not be asked to give further evidence because the latter would be *'more pertinent to the alleged personal injury'* (Determination, paragraph 27(c)). Thus, it was unclear how Corporal Lawrence's evidence regarding A/WO2 Rennie's shouting in the Claimant's ear had been considered and any consideration could not have been reasonable or rational; and

    81.2. the accounts of the other army personnel supported the Claimant's allegations against A/WO2 Rennie and evidenced a propensity for him to act in the manner alleged, yet neither the DB nor the Appeal Body had referred to the collective effect of those accounts.

The Second Defendant's submissions

82. It is the Second Defendant's position that this ground represents an impermissible challenge to the merit in the AB's factual findings, contrary to *R (Baci Bedfordshire Ltd) v The Environment Agency and An'r* [2019] EWCA Civ 1962 [91], and that, in any event, the material on which it is based had been included in the bundle with which the DB and the Appeal Body had been provided, and considered by them. As was apparent from paragraph 27(c) of the Determination, the Appeal Body had considered whether it was appropriate to seek evidence from Corporal Lawrence and had not acted unreasonably or irrationally in concluding that, having regard to the written record which she had made, there was nothing to suggest that she could provide further material of relevance. Whilst it was 'conceivable' that the duration and extent of any shouting would have evidenced bullying, or more serious bullying, the Appeal Body reasonably had concluded that any further conjecture would not have provided adequate corroboration for the Claimant's account. The Claimant's solicitors had asked only that Corporal Lawrence be interviewed for a statement as to the events which she had witnessed and, in any event, her existing evidence accorded with the Appeal Body's findings (Determination, paragraph 44(d)), that A/WO2 Rennie had shouted at the Claimant and grabbed his helmet.

Discussion and conclusions

83. At paragraph 27(b) of the Determination, the Appeal Body stated, 'We note the Complainant's solicitor's request that Corporal Elizabeth Lawrence (who treated the Complainant at the BATUS medical centre on 30/31 May 2015) be interviewed in

respect of the contents of the medical record entries. We are of the view that this is more pertinent to the alleged personal injury and have not sought this evidence.' Having regard to the entry which she had made in the Claimant's medical records, that was to ignore the potential relevance of Corporal Lawrence's account to: (1) the duration and intensity of A/WO2 Rennie's shouting (HoC 4), as to which, at paragraph 44 of the Determination, it stated that it was unable to make findings; and, potentially, (2) the alleged denial of a hospital visit/prevention of medical assessment and treatment (HoCs 5 and 6), as to which it stated that it had been unable to find any corroborating evidence. Furthermore, Corporal Lawrence's evidence might have been of relevance to the Claimant's credibility generally. If and to the extent that Corporal Lawrence's evidence was taken into account, that does not appear from the Determination. Consistency with the Appeal Body's findings at paragraph 44(d) does not, without more, indicate that it was taken into account, or to what effect. The over-lawyerly interpretation of the Claimant's solicitors' request that Corporal Lawrence be interviewed does not avail the Second Defendant, not least as, in the course of the requested interview, further and more detailed information might have been elicited.

84. Similarly, in particular where the Claimant's credibility had assumed such a significance for the Appeal Body, the accounts of other army personnel were of relevance and yet their collective effect was not referred to in the course of the Appeal Body's stated reasons. The reference to the HIO report, in connection with the Claimant's allegations of racist behaviour (Determination, paragraph 37) does not establish that the evidence was taken into account appropriately, or for the relevant purpose. When making its specific findings as to each of the HoCs, at paragraph 44 of the Determination, only Sergeant Hood's evidence was referred to, in connection with HoC3.

85. The mere fact that the material was available for consideration in the DB's or Appeal Body's bundle affords no answer. The relevant question is whether, and, if so, to what effect, it was considered and informed the Appeal Body's conclusions. That is simply not apparent from the Determination, in which the Appeal Body had made the generic statement, at paragraph 6, that, *'We considered all the evidence giving it such weight as we considered appropriate and not only the evidence expressly referred to in this determination. We gave no weight to evidence that we considered was not relevant to this SC.'* Accordingly, and in light of the Appeal Body's conclusion that it had been unable to find any corroborating evidence for any of the HoCs (to the extent in dispute) it may fairly be concluded that the Appeal Body's conclusions either did not take account of the material in question, or gave no weight to it, for reasons which it did not explain. That was an unreasonable and irrational approach and it is that approach, rather than the Appeal Body's assessment of the evidence, per se, to which the Claimant's challenge relates.

Ground 6 (procedurally unfairness and/or irrational/unreasonable failure in failing to have convened an oral hearing and, specifically, to have heard evidence from the Claimant)

The Claimant's submissions

86. Acknowledging that the Appeal Body had a discretion as to whether to receive oral evidence, Mr Fernando submits that the circumstances of this case required its receipt, in the interests of natural justice and fairness. That was because (1) the Claimant had alleged that AO Clark had not included allegations of race discrimination within Annex

F to the service complaint and was a friend of A/WO2 Rennie; (2) the AB had discounted the entirety of the Claimant's complaint on the basis of his lack of credibility, including by reference to the minor inconsistency in his position which it had identified; (3) there were relevant accounts by other army personnel in relation to the alleged incidents, or to A/WO2 Rennie's propensity to act in the manner alleged; and (4) the effect of the matters the subject of the Claimant's allegations had been severe and enduring, such that a proper determination of the Service Complaint was very important to him. That such hearings were not unusual before an appeal body was apparent from the Ministry of Defence's reply to the Claimant's solicitors' request for information as to the number held between 2015 and 2020, which had estimated that number to be 187 (albeit that the proportion of all hearings convened which that figure represented had not been requested or specified).

The Second Defendant's submissions

87. Mr Murray submits that neither the 2015 Regulations nor JSP 831 required that the Appeal Body convene an oral hearing; a matter for its discretion. It had addressed the issue at paragraph 23 of the Determination. There had been no fresh evidence which had not already been presented to the DB and, on the documents, it had not been open to the Appeal Body to differ from the latter's view of the Claimant's credibility, for the reasons given. In any event, oral hearings were very rarely convened (in Mr Preston's words, at paragraph 45 of his witness statement, *'extremely exceptional'*). In all the circumstances, it was clear, from *Clayton* [20] to [28], that there had been no requirement for an oral hearing.

Discussion and conclusions

88. There is no dispute that the Appeal Body was not mandated, whether by the regulations or either JSP, to receive oral evidence; the issue was a matter for its discretion. But that discretion had to be exercised in an appropriate way. As *Clayton* makes clear at paragraph 20, citing *Anderson,* whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made. Such a hearing will not be necessary if there is an inherent unlikelihood of one version of events, or where the conflict of evidence is not central to the issue for determination. That is echoed by paragraph 30 of JSP 831: *'Straightforward cases involving no substantial conflicts of evidence on any material issue or difficult points of law may be less likely to require an oral hearing.'* The corollary of that position was set out in *R (Smith) v Parole Board (No.2)* (cited at paragraph 23 of *Clayton*), in which Kennedy LJ stated that an oral hearing should be ordered where there is a disputed issue of fact which is central to the board's assessment and which cannot fairly be resolved without hearing oral evidence. Ultimately, the question is whether the hearing of oral evidence was required in order to achieve the degree of fairness appropriate to the Appeal Body's task and irrespective of whether such a hearing had been requested.

89. In this case, in which the Appeal Body did not conclude that the Claimant's account of events was inherently unlikely; some of the Claimant's allegations were upheld; the Claimant's credibility assumed a central consideration where his factual allegations were in dispute; the Appeal Body considered there to be 'no corroborating evidence' of such matters; and the Claimant and other army personnel were able to give relevant evidence, fairness required that the Appeal Body be willing to receive oral evidence

from (at least) the Claimant; Corporal Lawrence; Privates Molai and Tuikoro; and Sergeants Matley; Hood; and Viney, to the extent then available. (I note that WO2 Clark subsequently exercised her right not to assist the SCOAF investigation. Ideally, she, too, would have been asked to give evidence to the Appeal Body, in so far as the lateness of the Claimant's complaint of race discrimination was deemed to be a relevant consideration.) It is right to observe that the quality of all oral evidence may well have been adversely affected by the passage of time. Nevertheless, it ought to have been sought, consistent with the principles set out in *Clayton* and the cases to which it refers. In my judgment, the procedure adopted by the Appeal Body in all the circumstances was unfair and its approach unreasonable/irrational. For the sake of completeness, that is so irrespective of how rarely oral hearings are convened in practice (which says nothing of how frequently they ought to be convened, and, in any event, the figures provided by the Ministry of Defence would suggest the term 'extremely exceptional' to be inapt).

Consequences of the Appeal Body's errors and disposal

90. Having upheld all grounds of review, the question arises as to the consequences of the fundamental errors made by the Appeal Body and the proper disposal of this claim.

The Claimant's submissions

91. It is the Claimant's position that the Determination should be quashed and the matter remitted to a differently constituted appeal body. That, Mr Fernando submits, could result in a different determination of the facts and, hence, outcome: the nature of the findings made could be more extensive; any associated apology ordered could relate to wider matters and be more fulsome; there is the availability of a financial award and the consequences for A/WO2 Rennie could be more severe and would be shared with his chain of command, potentially with a recommendation that further action be taken against him. Contrary to the Second Defendant's submission, there would be no double jeopardy, were further redress to be ordered and it was to be noted that the SCOAF had considered the sanction which he had received to have been disproportionately lenient. The availability of other avenues, such as a claim for personal injury, breach of statutory duty or under the AFCS (and any decision not to pursue any of them) afforded no bar to that approach and each had a focus different from the service complaints process.

92. As to delay, the claim had been lodged at the end of, but within, three months, during which the consideration of legal aid had been a material factor (albeit not one previously communicated to the Second Defendant); permission to apply for judicial review had not been refused on the basis of delay; it ill-behoved the Second Defendant, in the context of its own delay in handling the Service Complaint, to complain of the time taken; any hardship to A/WO2 Rennie fell to be weighed against that to the Claimant and could not be said to derive from any part of the three months which had elapsed since the Determination; and, accordingly, the court should not refuse to grant the relief sought on the basis of delay.

The Second Defendant's submissions

93. Relying extensively upon the witness statement of Mr Preston, the Second Defendant submits that, irrespective of any errors made by the Appeal Body, it is highly likely that

the outcome for the Claimant would not have been substantially different, if the conduct complained of had not occurred.

94. Paragraphs 46 to 53 of Mr Preston's statement are set out in full below:

'Outcome if reconsidered

46. It is highly likely the outcome would be the same if the redress sought by the Claimant (i.e. for the decision to be quashed and for the Service Complaint to be remitted to a differently constituted Appeal Body for reconsideration) were to be granted.

47. The Claimant sought as redress from the AB that his original Service Complaint be upheld, that it be acknowledged that he was subjected to bullying, harassment, and race discrimination, that an explanation be provided for delay, that the time for review of the SPA decision be extended, and he be awarded his legal costs (paragraph 6 of the decision).

48. Even were the Claimant's grounds set out in his claim form made out, it would have been open to the AB to come to the same conclusion, and the it is highly likely it would have done so, as:-

a. Ground One - for the reasons set out in paragraphs 40 - 42 above, even were the 2007 Regulations applied the AB would not have considered it appropriate to consider the personal injury elements of the claim. In any case, redress for personal injury was in fact by the Claimant's own admission not requested as part of his Service Complaint;

b. Ground Two - even were the Court to deem it inappropriate to have required evidence of intent to find there was bullying, the AB also found A/WO2 Rennie's conduct did not satisfy other aspects of the definition in JSP 763, as it was open to it to do;

c. Ground Three and Four - the AB was entitled to reach the conclusions it did on the Claimant's credibility and the facts on the balance of probabilities, for the reasons given above at paragraphs 36 - 44;

d. Ground Five - the evidence referred to at ground three (i) - (v) was included in the HIO report, which was considered by the AB. It is highly likely a new AB would draw similar conclusions from the conflicting evidence identified in the HIO report. The AB found that it was true that A/WO2 Rennie had shouted in the Claimant's ear in respect of head of claim 4, and this was indeed admitted by him during the SPA investigation. The entry in the Claimant's medical records bears peripheral relevance at best to the other heads of claim. It is highly unlikely further evidence from Corporal Lawrence to this effect would have impacted on the conclusions of the AB.

e. Ground Six - the Claimant was given ample opportunity to adduce further evidence in response to the disclosed Appeal File, including an extension of time to respond, and indeed availed himself of this opportunity by providing

copies of his medical records. It is therefore highly likely holding an oral hearing would have not made any difference to the AB decision.

49. Further, the AB did provide an explanation for the delay (paragraph 11 of the decision), and would not-be able to offer any redress in respect of the SPA decision as it was an excluded matter (paragraph 27e of the decision), and there is no provision for an award of legal costs as the Service Complaints process is envisaged as a no-lawyer jurisdiction. It is therefore highly likely that there would be no different outcome in respect of these requested forms of redress.

50. Moreover, it is highly likely an AB on a fresh consideration of the appeal from the decision of DB would award the same redress, i.e. an apology. A summary of the approach to redress is as follows: A person or panel appointed by, or on behalf of, the Defence Council is to decide on the balance of probabilities whether the service complaint is well-founded, i.e. whether the complainant was wronged in a matter relating to his service. If it is determined that the complainant was wronged, it is necessary to determine what redress within the authority of the person or panel is appropriate, if any, and to grant it accordingly. Redress could be non-financial restitution, a financial award or a combination of the two. The guiding principle is to put the complainant in the position they would have been had the wrong never occurred. However, if it is considered inappropriate or the decision-maker is unable to do this, they can award any redress they see fit (provided that it is within their authority to do so). This can include issuing an apology on behalf of the Army or inviting the chain of command to consider the initiation of disciplinary or administrative action against anyone involved in the Service Complaint or voicing criticism of individuals or organisations they consider culpable within the Service Complaint.

51. In this case, the AB does not have the power to grant the Claimant the redress which he sought in the initial Service Complaint (that A/WO2 Rennie be prosecuted etc.). Indeed JSP 837 makes it clear that directing prosecution of other personnel is not a kind of redress any level of the chain of command, Decision Body, Appeal Body, or Defence Council can make, but in such circumstances the Service Complaint should continue to be investigated so that any other redress within their remit can be considered.

52. Secondly, there was no indication on either the evidence that was before the original AB, nor in the evidence the Claimant alleges Corporal Lawrence would have been able to provide, that would tend towards a finding on the balance of probabilities of either statutory harassment or racial discrimination, or to indicate that there was deliberate bullying behaviour. The appropriate redress for an incident of this type would have been an apology on the respondent's behalf by the Appeal Body, which was duly given.

53. Finally, for the reasons given above in paragraph 20, even had the AB not relied on a definition of bullying requiring intention, A/WO2 Rennie had already received an administrative sanction under AGAI 67 at the appropriate level in accordance with the Tri-Service Guidance covering conduct amounting to bullying, harassment, or discrimination where there is no element of intention.'

95. Mr Murray submits that there is no evidence of any likelihood of a further apology, given the apology already received.

96. Further, and in reliance upon section 31(6) of the 1981 Act, Mr Murray submits that the Claimant has unduly delayed the bringing of his claim, which should incline me to exercise my discretion not to grant the relief sought. The Appeal Body had informed him of the need for any application for judicial review to be made promptly. Section 31(6) does not call for a consideration of the marginal difference which has been made by any period of undue delay; the question is whether the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person, or would be detrimental to good administration. Here, there is the potential for double jeopardy for A/WO2 Rennie.

Discussion and conclusions

Delay

97. The short answer to this contention is that, in particular in the context of the time taken by the Second Defendant to resolve the Service Complaint and the multi-faceted challenge to it, there has been no undue delay by the Claimant. In any event, and for the same reason, I am not satisfied that it would be detrimental to good administration to grant the relief sought. I am also not satisfied that to do so would be likely to cause substantial hardship to, or substantially prejudice the rights of, A/WO2 Rennie. First, there is no hardship or prejudice which might result which would not have resulted from an application brought at an earlier stage and I reject the Second Defendant's submission that that is not a relevant consideration; the purpose of section 31(6) of the 1981 Act is to confer a discretion where undue delay has led to the issues identified. If, in the absence of delay, those same issues would have arisen, that is material to the exercise of that discretion. Secondly, if and to the extent that the flawed approach adopted by the Appeal Body has, to date, resulted in an unduly lenient sanction for A/WO2 Rennie, the way forward is a matter to be considered following the outcome which results from a rational and reasonable process from which the Appeal Body's errors are absent. The double jeopardy submission lacks merit; in many, if not all, applications for judicial review of an appeal body's determination, the substantive hearing and outcome of the application will post-date any sanction imposed as a result of that determination and yet that is no bar to remission of the underlying complaint for fresh consideration. The exposure of the alleged perpetrator to (greater) sanction is a product of the nature of a claim for judicial review and the available remedies, should it succeed, and here again, any delay is of no causative potency. In any event, any substantial hardship and prejudice to A/WO2 Rennie is, in my judgment, significantly outweighed by the hardship and prejudice which would result to the Claimant were he to be denied the relief which he seeks.

Likelihood of a substantially different outcome

98. In my judgment, Mr Preston's evidence is inadequate to its purpose, for the following reasons. Fundamentally, it takes as its premise that the evidence which the Appeal Body considered was sufficient for the proper performance of its task and that the Appeal Body's conclusions as to the Claimant's credibility were legitimate and would not have differed were further evidence to have been considered. Thus, Mr Preston assumes that which the Appeal Body did not seek to establish, namely that there was no other

evidence from which assistance could be gleaned (whether oral or documentary). For the reasons which I have set out earlier in this judgment, it cannot be assumed that, had all available evidence been considered appropriately, the Appeal Body's conclusions as to the Claimant's credibility and the particular HoCs, and its associated recommendations, are highly likely not to have been substantially different. In any event, freed of its unduly restrictive approach to the definition of bullying, the Appeal Body might have come to a different conclusion (as the SCOAF did, also finding that the sanction imposed on A/WO2 Rennie was disproportionately lenient, considering the evidence available), potentially including a finding that intentional bullying on the part of A/WO2 Rennie had been established. Had one or more further allegations been upheld, the nature and content of any apology received might well have differed, as might the Appeal Body's actions (of the nature to which Mr Preston refers in the final sentence of paragraph 50 of his statement) and the level of sanction. I note Mr Preston's observation, at paragraph 20 of his witness statement, that the normal starting point when determining the appropriate sanction for non-intentional bullying is censure. As to that, first, the starting point is not necessarily the end point. Secondly, that is to presuppose that any bullying is found to have been non-intentional. Thirdly, the appropriate sanction can only be determined once all the facts have been found, in accordance with due process.

Relief

99. In all the circumstances, the requirements of section 31(2A) of the 1981 Act are not satisfied and it is appropriate to consider the relief which ought to follow from my earlier conclusions on each ground of review which the Claimant has been permitted to advance. Mr Murray rightly acknowledged that, in the event that I made the findings which I have made, it would be appropriate to quash the Determination. As it cannot be said that, without the errors which I have found, there is only one conclusion which the Appeal Body could have reached (see section 31(5A) of the 1981 Act), it is appropriate that the matter be remitted for fresh consideration, at the earliest opportunity, by a differently constituted appeal body, which should approach its task informed by this judgment.

Costs

The adjourned hearing

100. The hearing of this claim had originally been listed to be heard on 16 and 17 February 2021. Supported by the witness statement of Mr Ian Valentine, solicitor, on 11 February 2021 the Second Defendant made an application to adjourn that hearing, and for its associated costs to be paid on the indemnity basis, by reason of the Claimant's non-compliance with the Court's earlier directions and the prejudice thereby caused. The Second Defendant seeks summary assessment of its costs, in the sum of £2,944. The Claimant does not resist the payment of costs, in principle, but submits that they should be payable on the standard basis and that, in any event, the sum properly incurred is £1,175. In short, it is said that the correspondence in which the Second Defendant's solicitors engaged; the time taken to draft the application notice and supporting evidence; the extent of the advice sought from counsel; and the time taken to draft the schedule of costs were excessive.

101. The Second Defendant submits that: (1) the application was complicated by the Claimant's stance in response to it and his cross-application for relief from sanctions, reflected in the time taken to put the application together and the volume of correspondence necessitated; (2) the need for counsel's advice in the form sought was generated by the late provision of the hearing bundle and its effect upon the preparation required for the hearing; (3) the time taken to prepare the costs schedule (one hour) was reasonable and proportionate in that context; and (4) the rates charged by all lawyers were reasonable, such that, viewed in the round, the total sum sought is proportionate.

102. In my judgment, there is nothing which takes the Claimant's conduct out of the norm, so as to justify an award of costs on the indemnity basis. I am satisfied that the costs incurred in drafting the application notice and supporting evidence were proportionate, having regard to the matters giving rise to the application and cross-application. Given the nature and compass of the issues engaged, I am satisfied that it is appropriate to reduce the costs payable in relation to correspondence and counsel's advice to, respectively, £350 and £1,000. Preparation of the costs schedule ought to have been straightforward and I reduce the sum payable in that connection to £85. Accordingly, I assess the costs payable by the Claimant to the Second Defendant, on the standard basis, in the total sum of £2,365, to be offset against the costs payable by the Second Defendant to the Claimant (see below).

The claim

103. The parties are agreed that costs should follow the event, to be assessed on the standard basis, if not agreed. Whilst it is agreed, in principle, that a reasonable sum on account of costs should be paid by the Second Defendant, in accordance with CPR 44.2(8), the parties are not agreed on the appropriate sum — the Claimant seeks a payment of £30,000 and the Second Defendant seeks directions permitting it to file and serve a schedule/informal bill of costs and written submissions by both parties. I consider that course to be unnecessary; the sum sought by the Claimant is realistic and reasonable in all the circumstances and I, therefore, order payment on account in that sum.

Permission to appeal

104. In the usual way, a draft of this judgment was sent to counsel prior to hand down. Counsel jointly sought directions which made provision for any application to this court for permission to appeal, under CPR 52.3(2)(a), and any written submissions in reply, to be deferred and for the application to be determined on the papers. For that purpose only, and having regard to the procedure summarised in *McDonald v Rose* [2019] EWCA Civ 4 [21], I formally adjourn the decision hearing and extend time for the filing of an appellant's notice. The timetable is set out in the orders made in connection with this judgment.