Neutral Citation Number: [2022] EWHC 92 (Admin)

Case No: CO/1767/2021

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Civil Justice Centre
Bridge Street, Manchester M60 9DJ

Date: 19 January 2022

Before:

HIS HONOUR PHILLIP SYCAMORE CBE

(Sitting as a Deputy High Court Judge)

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Between:

MARK R MOSS	**Claimant**
- and -	
THE SERVICE COMPLAINTS OMBUDSMAN FOR THE ARMED FORCES	**Defendant**

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The Claimant appeared in person
Ms Claire Palmer (instructed by the Government Legal Department) for the Defendant

Hearing date: 14 December 2021

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JUDGMENT

HIS HONOUR JUDGE SYCAMORE :

1 This is an application for judicial review brought by Mark R Moss ("the Claimant") against the Service Complaints Ombudsman for the Armed Forces ("the Defendant") by which the Claimant seeks to challenge the re-considered decision of the Defendant dated 22 February 2021 ("the decision"). The decision relates to a service complaint made by the Claimant on 14 May 2014 and was consequent upon an order granting permission made by His Honour Judge Eyre QC (as he then was), sitting as a Judge of the High Court on 19 January 2021 by which he granted permission in a judicial review claim brought by the Claimant (CO/3914/2020) in relation to the Defendant's earlier decision of 20 July 2020. Permission had earlier been refused on the papers by His Honour Judge Pearce, sitting as a Judge of the High Court, on 9 December 2020.

2 Following the order of 19 January 2021, the Defendant withdrew her original decision of 20 July 2020 and issued the re-considered decision on 22 February 2021.

3 Permission for judicial review of the decision was granted on 9 August 2021 by His Honour Judge Stephen Davies, sitting as a Judge of the High Court, on specific and limited grounds which are set out at paragraphs 8 to 11 of his order:

"8. In my judgment what this part of the decision at least arguably fails to address or engage with is whether or not in relation to the medical SC and the TACOS SC, the combination of Lt Col McCall's knowledge of the claimant's mental condition, coupled with the caveats expressed, namely that:

(a) in relation to the medical SC he would be pursuing this from a legal standpoint (it appears he had already written in similar terms on 5 January 2012 in relation to this widened complaint);

(b) *in relation to the TACOS SC he was: (i) withdrawing this "reluctantly and due to my health"; (ii) he was maintaining the widened complaints (in respect of which he had not been advised to issue a new SC); and (iii) one cause of his current state of health was the widened complaints, meant that no sufficient consideration had been given to his mental health at this juncture and the Army breached its duty of care. This is on the basis that Lt Col McCall ought at the very least to have asked him to confirm whether he wished to pursue these widened complaints as separate SCs (as ought to have been done earlier) and to have the benefit of assistance from the AO when making a decision, given his mental condition and the importance of these matters. This was clearly a matter which concerned the Service Complaints Commissioner when she wrote to the Service Complaints Wing on 14 June 2012.*

9. In my judgment the decision is at least arguably open to challenge on public law grounds (irrationality and /or failing to make a decision on all of the key issues raised) in failing to address or engage with these particular key points. In my judgment the case as advanced in the grounds under heading (1) is sufficiently widely expressed to encompass this ground.

10. If so, then the conclusions at paragraph 79 to 82 of the second decision are at least arguably undermined as regards the decision in relation to the specific complaints made in the 2014 SC as identified above in relation to breach. In such circumstances it appears to follow that the defendant would at least arguably have needed to consider the question of recommendation of compensation on the basis of the claimant's case that, had the defendant not breached its duty, he could and would have pursued further SCs in 2012 in respect of his complaints

in relation to the "legal" elements of the medical SC and the widened complaints in relation to the TACOS SC.

11. I therefore grant permission to bring this judicial review in relation to the matters identified in paragraphs 8 to 10 of these reasons."

4 The extent of the Claimant's challenge is helpfully summarised at paragraph 1 of the order of His Honour Judge Stephen Davies of 9 August 2021:

"The claimant seeks permission to challenge by judicial review the defendant's reconsidered decision dated 22 February 2021 (the second decision). In summary (see paragraph 28) the claimant contends that: (a) the defendant went too far in giving weight to matters when determining that the Army did not breach its duty to him; (b) used evidence in error; (c) used evidence which was irrelevant; (d) failed to address his 2014 service complaint as regards the issue of sickness absence management failure; (e) and (f) failed to engage with the claimant appropriately at the pre-action stage."

5 The Claimant appeared in person and restricted his submissions to those relevant to the grounds upon which permission was granted. The Defendant was represented by Claire Palmer of counsel. Both parties had submitted skeleton arguments which I had read prior to the oral hearing. I am grateful to them both for their helpful submissions.

6 A helpful summary of the lengthy and complex history of the matter is contained in the order of His Honour Judge Pearce of 9 December 2020 at paragraphs 7 to 12, which I adopt and reproduce below:

"7. The Claimant was a regular soldier until he transferred to the Army Reserve on 1 July 2009. On 28 February 2011, he submitted two

complaints, known as Service Complaints (a Service Complaint is frequently abbreviated to "SC"), the first in respect of matters relating to his medical condition, the second relating to his terms and conditions of service. In February 2012, he withdrew the complaints. He was discharged from the army three months later.

8. In May 2014, the Claimant asked the army to reopen the Service Complaints on the basis that his medical condition, specifically relating to his mental health, in 2012 was such that the complaints should not have been closed. This was treated as a further SC. His allegations about the manner in which the Service Complaints was dealt with was upheld by the Army Decision Body ("DB") on 28 September 2016, but in a subsequent decision of 31 July 2017, the DB declined to make a financial award. The decision letter referred to the Claimant's medical record and stated

"Given the nature of the condition from which you were suffering it would be quite understandable that the additional strain of dealing with a Service Complaint would have caused you distress." However, it went on, "there is no evidence in the medical record that the Service Complaint was specifically identified as a cause for a medical problem, or a contributory factor in exacerbating your existing conditions. There is no mention in the records of your meetings with medical practitioners of you raising the Service Complaint process as a concern for you, nor did any medical practitioner identify a change in your condition, which was then so attributed." The DB goes on to conclude "It is not possible to identify what if any medical impact the Service Complaint process might have had on you, especially given the already serious nature of your medical

problems at the time, and certainly not to quantify any impact as would be required for me to justify a financial award."

9. The Claimant appealed that determination. The Appeal Body ("AB"), in a determination dated 11 May 2018, found that there had been procedural deficits in the handling of the previous Service Complaints. In respect of the Claimant's medical history it referred to a medical report dated 20 June 2011, which was summarised as stating that "his care had been poorly co-ordinated administratively but did not find any clinical failures." *At paragraph 37 of the report it is stated* "We found no evidence that the SC process was a specific cause or contributory factor to the [Claimant's] medical problems, including any evidence in the medical records that such a cause or contributory factor had been raised by him or identified by the medical practitioners he had consulted."

10. The determination concluded, "Although we accept that there were breaches of procedure, we do not see that the procedural failings caused a detriment, as the ultimate outcome was not materially different to what would have happened had the correct procedures been followed. We found no evidence that the SC process was a specific cause or contributory factor to the [Claimant's] medical problems, including any evidence in the medical records that such a cause or contributory factor had been raised by him or identified by the medical practitioners he had consulted. Thus, we do not uphold this element of the SC". *The AB concluded that the Claimant had not been wronged and did not grant redress.*

11. The Claimant's complaint to the Defendant was summarised at paragraph 21 of the determination as involving maters of substance. The Defendant summarised its findings in the report of 20 July 2020 as follows:

"My investigation, as set out in this report, has identified:

Substance

- That on balance, the investigations that the Service concluded into Mr Moss' SC that he had been wronged due to no consideration being given to his state of mind during the process and closure of his previous SCs were reasonable and appropriate.
- That whilst his SCs were not handled in accordance with JSP 83, which was a failing, there is no evidence that this caused him to be wronged or that the service breached its duty of care to him through the SC process.
- I do not consider Mr Moss' SC to be well-founded and have therefore not made any recommendations for redress.

Maladministration

- That there was undue delay in the handling of Mr Moss's SC, which on occasion he has been unfairly blamed for, including in the Appeal Body's determination."

12. *The Defendant's determination, at paragraph 69, specifically quotes from medical records there identified. It is not necessary to repeat them here. That paragraph does not however mention what appears to be a potentially relevant letter dated 5 January (the date is cut off, but 2012 is written in) from a Dr Barker, which states amongst other things*, "The main concern for him today was that he struggles and gets a little anxious

when he is (passage cut off) deal with his service complaint and I have advised him to discuss this with his commanding (passage cut off) to see if there is an option for some help with this."

7 I add that his testimonial of 13 June 2009 assesses him as exemplary and notes his high standards of behaviour.

8 It is appropriate to look to the nature of the 2014 Service Complaint ("the SC") made by the Claimant and dated 14 May 2014 in which the Claimant indicated that he believed he had been wronged in the following manner:

"1. During the process and closure of my two Service Complaints in 2011 and 2012 no consideration was given to my state of mind i.e. I was and still am suffering with severe mental illnesses.

2. I believe in 2011 and 2012 due process in relation to both service complaints were not followed in relation to JSP 831.

3. The Army through the complaint process outlined above has breached its duty of care to me."

9 I next turn to the determination of the Appeal Body ('AB") of 11 May 2018. At paragraphs 31 to 33 the AB found that the Claimant had sought to widen the scope of the SCs but had not been advised, as required, that he should submit them as separate SCs:

"31. … Paras 2.15 and 3.8 of JSP 831 dealt with additional matters of complaint. Complainants were encouraged to supply as much evidence about their complaint as the could, but if in doing so they raised additional matters that were not in their original SCs they should be advised to submit a separate SC. This was not mentioned by the CO."

At paragraph 34 it was noted that the Claimant had withdrawn his SC's following a meeting on 15 February 2012 with his new CO, Lt Colonel McCall. At paragraph 23 the AB recorded as follows:

"The next step was the Complainant's interview with CO 42 PRU and withdrawal of the SCs. We find that it would have been wise to ensure the Complainant had access to an AO before the meeting, and ideally that his AO accompanied him. We note, however, that the Complainant appeared well able to deal with questions at their meeting and confirmed that the CO had not put him under pressure to withdraw the SCs. Indeed, when he had expressed a wish to do so, the CO told him to put it in writing, thus allowing the Complainant an opportunity to change his mind or seek advice. In that letter, the Complainant was able to articulate his reasons for not wishing to proceed and they are entirely sound, based on his state of knowledge at the time. Therefore, we do not find that the Complainant was wronged by the actions of CO42 PRU and that the decision to withdraw SC1 and SC2 was made freely by the Complainant for what were entirely logical and valid reasons. Accordingly, we do not uphold this element of the SC."

10 There is no contemporaneous record of the meeting. The content of the letter from the Claimant of 15 February 2012 is as follows:

"1. With regard to my service complaint (medical). As you are aware I have received a reply from the Army Medical Directorate which was inconsistent with my wishes as it seems it was dealt with as a favour not as a Service Complaint. To that end it also contained a number of errors which I asked to be addressed. This again has not been forthcoming and a copy of the letter from Dr Galbraith is held on file.

2. As we discussed, even though it would seem that correct procedure was not followed do not see any merit in carrying on a new investigation that would result in the same conclusions.

3. Therefore from a service complaint point of view I consider it closed. However I will be pursuing this from a legal standpoint in that the unmitigated failure by the Defence Medical Services to provide accurate and timely care has significantly contributed to my current state of health.

4. A letter to the above has been forwarded to Army Legal and I await their response.

5. With regards to my service complaint (terms/conditions) I now consider this closed with the following caveats:

a. I do this reluctantly due to my health and the effect my health is having on my family

b. It still remains my position that the post was incorrectly interviewed for i.e. a full and true description of the role was not available.

c. The NRPS 05 regulations were totally unsuitable for this post.

d. My current state of health has three causes; source(combat), medical negligence and the work I undertook over and above my original understanding of the role as discussed at the employment interview which has played a significant part in my current state of health i.e. I collapsed in the classroom at Pirbright teaching a regular army course resulting in two visits to Firmly Park A+E Dept and subsequent posting unfit for work."

11 Lt Colonel McCall made a written statement in the course of the Service Complaint process. He described his meeting with the Claimant, recalling that the Claimant informed him of his wish to withdraw the complaint and

close the investigation. He explained that the Claimant was never put under any pressure to reach his decision nor did he *"make me aware of any mental health issues preventing him from making an informed or rational evaluation of the situation at the time."* There is no reference to the letter from Dr Barker of 5 January 2012 (see paragraph 6 supra) or to the absence of an Assisting Officer. In a separate document described as *"Record of Interview in Respect of Service Complaint Submitted by Ex CSjt Moss*" it is noted that Lt Colonel (Retired) McCall *"... informed Army Legal Services, to state Ex CSjt Moss was closing the SCs, he recalls them being shocked that Ex CSjt Moss had decided to close them so quickly."* In closing his written statement Lt Colonel McCall said this, *"I respond to the request by Lt Col Heap to comment on the evidence supplied to me on this occasion but wish to make it clear that unless legally summoned will not respond to matters in this case in the future."*

12 The decision which is the subject of these proceedings was a new decision, following the permission hearing on 19 January 2021. The Defendant found that there was further maladministration and recommended that an additional financial consolatory payment be made to the Claimant. The Claimant informed the court that that part of the decision has been complied with and he has received a payment. The substance finding in the original report of 20 July 2020 was also reconsidered by the Defendant in the February 2021 decision. That finding was as follows:

"... I am satisfied that the service treated Mr Moss appropriately concerning his deteriorating mental health during the SC process, and that on balance, Mr Moss was able to process information and act accordingly at the time. I also find that it would not have been appropriate to have treated Mr Moss's decision to close his SCs any

differently simply because of the knowledge of his mental health deterioration."

13 The Defendant did consider the letter of 5 January 2012 in conducting the reconsideration and concluded that on balance those additional comments would not change the original decision that no consideration was given to his state of mind.

14 The relevant paragraphs in the conclusion to the re-considered decision, as identified by HHJ Stephen Davies when granting permission, are at paragraphs 79 to 82:

"79. As set out in this report, I have seen the entries in Mr Moss's medical records but am not persuaded that this shows on the balance of probabilities that there was a failure in duty of care during the consideration of the original SCs or that Mr Moss was unable to process information to act in his own best interest.

80. In reconsidering Mr Moss's complaint I have identified further maladministration in the Service's handling of his SCs set out in paragraphs 71 to 74 of this report. In light of this, I have reviewed the evidence afresh in relation to Mr Moss's complaint as set out in paragraph 78 above. In doing so, I am satisfied that all the available evidence has now been considered, in particular Mr Moss's medical records, including the Barker-Burki letter, which is understood to be dated 5 January 2012. I have reflected on the passage of the Barker-Burki letter set out at paragraph 73 of this report to determine whether it affects the conclusion reached on the substance of Mr Moss's SC.

81. However, on balance, I do not believe that these additional comments from Dr Barker change our decision as set out in this report. Mr Moss saw Dr Barker on 3 January 2012 and on 5 January 2012. Mr Moss wrote to his CO but made no mention of struggling and getting anxious when

dealing with the SCs. Nor did Mr Moss ask whether there was an option for being given any help with the process.

82. There is clear evidence that Mr Moss's mental health deteriorated during the processing of his 2011 and 2012 SCs. However, his complaint that no consideration was given to his state of mind is not well-founded based on the available evidence as set out above, particularly in paragraphs 42 to 48 of this report."

15 At paragraph 42 the Defendant found that Lt Colonel McCall should have been aware of the Claimant's mental health:

"…. I would have expected the CO taking on Mr Moss's SCs to be aware of this information …."

And at paragraph 43 that the Claimant's Assisting Officer was not present at the meeting on 15 February 2012 to support him and that this was a failure:

"…. It is clear that Mr Moss attended this interview without the support of an Assisting Officer and the failings around the provision of an Assisting Officer are recognised in this report …."

The Defendant continues paragraph 43 by indicating that she had seen nothing to support the Claimant's allegation that he was unable to process information to act in his own best interest, whilst acknowledging that it was not disputed that the Claimant's mental health had deteriorated during the course of the SCs.

16 In reaching my conclusion I have reminded myself of the relevant legal principles, in particular the need for the court to respect and recognise the experience and expertise of the decision maker and to give sufficient deference. (see for example Ross v Secretary of State for Transport [2020]

EWHC 226 (Admin) 2020, Dove J) and the broad discretion available to an ombudsman (see for example Miller &Another v The Health Service Commissioner for England [2018] EWCA Civ 144, Sir Ernest Ryder).

17 In considering the information which was available to the Defendant I have concluded that insufficient regard was given to a combination of factors. I consider that the Defendant failed to sufficiently engage with the question of the extent of Lt Colonel McCall's knowledge of the condition and history of the Claimant's mental health, the absence of an AO to assist him against the background of the caveats expressed by the Claimant in his letter of 15 February 2012 and whether as a consequence there had been a failure to give adequate consideration to the mental health of the Claimant resulting in a breach of duty of care by the Army.

18 The Defendant should have considered the extent to which Lt Colonel McCall should have explored with the Claimant whether he wished to pursue his further complaints as separate SCs and the need for assistance from the AO given the position with regard to the Claimant's mental health and the importance of the matters to him.

19 Accordingly the findings by the Defendant at paragraphs 79 to 82 of the decision of 22 February 2021 fall into question and the Defendant will need to reconsider her findings and also the question as to whether it is appropriate to recommend compensation given the Claimant's case that, in the absence of a breach of duty by the Army, he would have pursued further SCs during 2012.

20 I have reminded myself of the narrow basis upon which permission was granted and have restricted my findings to those heads of the claim. There is no wider claim or further ground of challenge in relation to the findings in the re-issued decision of 22 February 2012.

21 In light of these findings, I hold that the Defendant erred in her approach to the matters in respect of which permission was granted and accordingly I quash that part of the decision of 22 February 2012 and the matter will be remitted to the Defendant to re-consider and to make a new decision.

22 I will hear representations from the parties in relation to consequential matters, including costs.