



Neutral Citation Number: [2023] EWHC 3311 (Admin)

Case No: AC-2022-MAN-000251

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

Thursday, 21st December 2023

Before:
FORDHAM J

Between:
THE KING (on the application of

Claimant

MARK MOSS)

- and -

THE SERVICE COMPLAINTS OMBUDSMAN OF
THE ARMED FORCES (No.3)

Defendant

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

Hearing date: 18.12.23
Draft judgment: 20.12.23

Approved Judgment

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

FORDHAM J

FORDHAM J:

Introduction

1. This is a case about a decision which was retaken. It arose from an investigation regarding the substance of a service complaint, pursuant to s.340H(1)(a) of the Armed Forces Act 2006, by the Service Complaints Ombudsman of the Armed Forces (“the Ombudsman”). The Ombudsman provides independent and impartial scrutiny of the handling of service complaints. Service complaints are made by members or former members of the armed forces. The Ombudsman replaced the Service Complaints Commissioner for the Armed Forces in January 2016. The current Ombudsman (Mariette Hughes) was appointed on 18 January 2021. She inherited this case with its long history.
2. This judicial review claim is the third in a series. A first decision (20.7.20) and Investigation Report (IR1) were challenged by Mr Moss, by a judicial review claim in 2020 (reference CO/3914/2020). At an oral hearing on 19 January 2021, HHJ Eyre QC (as he then was) decided that IR1 was arguably flawed in public law terms and granted permission for judicial review. The Ombudsman decided to withdraw IR1 and make a fresh decision. A second decision (22.2.21) and Investigation Report (IR2) followed (see §36 below). These were challenged by Mr Moss, by a second judicial review claim in 2021 (reference CO/1767/2021). On 9 August 2021, HHJ Stephen Davies decided that IR2 was arguably flawed in public law terms and granted permission for judicial review. The Ombudsman defended the claim. Judicial review was granted by HHJ Sycamore on 19 January 2022 (see §§37-39 below). Judge Sycamore’s judgment is [2022] EWHC 92 (Admin). A third decision (18.3.22) and Investigation Report (IR3) were issued (see §§40-44 below). These are challenged in this third judicial review claim. On 21 February 2023, HHJ Stephen Davies decided that IR3 was arguably flawed in public law terms and granted permission for judicial review. The Ombudsman has defended the claim.
3. Ms Palmer, who appears for the Ombudsman, has rightly emphasised that Judge Davies gave permission for judicial review on specific and limited grounds (see §§45-46 below). These delineate the scope of the case. The same was true in the second judicial review claim: see Judge Sycamore’s judgment at §§3, 5 and 7. The Ombudsman’s pleaded Defence observes that a sequence of judges at the Administrative Court in Manchester have now “assisted Mr Moss to identify points that are potentially arguable against the background of a lengthy decision [and] complex history”. That is as it should be. Mr Moss acts in person. The Court, and the Ombudsman, have a responsibility to examine with care whether there is a viable ground of challenge within the scope of his claim. As I do that in this judgment, it is going to be important to describe the “complex history” and “lengthy decision”. Before embarking, here are three notes about the quotations within this judgment: (i) I have edited quotations to standardise the terminology; (ii) any square-bracketed numbering is mine; (iii) except where indicated to the contrary, underlining is my added emphasis.

Colour Sergeant 2009-2011

4. Mr Moss was a regular soldier of the rank Warrant Officer 2 (WO2) until he transferred to the Army Reserve (Non-Regular Permanent Staff) on 1 July 2009. He transferred to a non-commissioned rank known as Colour Sergeant (CSgt or CSjt). A testimonial dated January 2009 had assessed him as exemplary and noted his high standards of behaviour. He was interviewed for an advertised post, working for the Army Recruiting and Training

Division Staff Leadership School. He was appointed and deployed. In March 2010 he collapsed at work and on 26 August 2010 he was placed on leave for medical reasons. He was diagnosed with stress and depression. In February 2011 he was transferred to the 42 Brigade Personnel Recovery Unit. On 12 October 2011 a Medical Board found CSgt Moss unfit for further service and recommended his discharge. CSgt Moss was discharged on medical grounds on 12 May 2012. He then became Ex CSgt Moss. In these proceedings he was content to be referred to as “Mr Moss”. But I will use some of the other designations in telling the story.

Service Complaints

5. By s.334(1) of the 2006 Act, Parliament conferred on a person who is subject to service law, and who thinks themselves “wronged” in any matter relating to their service, the right to make a service complaint. By s.334(1)(b) of the 2016 Act, Parliament has also conferred on a person who has ceased to be subject to service law, who thinks themselves “wronged” in any matter relating to their service which occurred while they were subject to service law, the right to make a service complaint. Pursuant to s.334(4), regulations made by the Defence Council make provision as to the way in which a “superior officer” handles a service complaint. The current regulations are the Armed Forces (Service Complaints) Regulations 2015. Guidance on the procedures to follow, to ensure that service complaints are handled and resolved in accordance with the legislation and using a fair process, is issued by the Ministry of Defence (MoD) in the form of Joint Service Publication 831 (JSP831). It is entitled “Redress of Individual Grievances: Service Complaints”. Issue 2.2 was dated June 2010.
6. If a person who has made a service complaint submits further information which is assessed to include or relate solely to a new matter of complaint, the person should be informed that a separate service complaint should be made: JSP831 §§2.15 and 3.8.
7. The Ombudsman tells me this: that a private law claim in negligence can be brought against the MOD by a member or former member of the armed forces; that this is so whether or not a service complaint has been made and irrespective of its outcome; that no general employment tribunal claim can be brought against the MOD by a member or former member of the armed forces; that a discrimination claim can be brought in the tribunal, but not if a service complaint has been withdrawn.

SC1 and SC2

8. On 28 February 2011, CSgt Moss made two service complaints. One was a medical service complaint (SC1). I have understood its essence to be that CSgt Moss had been wronged by the failure to provide appropriate medical care. The other was a TACOS service complaint (SC2). I have understood its essence to be that CSgt Moss had been wronged by failures relating to the terms of conditions of service (TACOS) by reference to which he had been enlisted and deployed in his July 2009 job. He said he had been required to work on terms different from those on which he had been engaged. Both SC1 and SC2 were referred (JSP831 §1.20) by the Service Complaints Commissioner (Dr Atkins), to be dealt with by a suitable Senior Officer. An Assisting Officer (JSP831 §2.16) was appointed (Captain Bowker).
9. In relation to SC1, a letter was written by Dr Galbraith (30.6.11) concluding that CSgt Moss’s medical care had been poorly coordinated, but that there were no clinical failures.

On 5 January 2012 CSgt Moss wrote a letter making clear that he did not consider SC1 to be closed and maintaining that failure in coordination of medical treatment had caused the loss of his career. He asked that SC1 be taken forward. He also said he was applying for financial compensation for pain and distress and the loss of his career. In relation to SC2, a first-tier decision was written on 3 May 2011, rejecting its substance. At first, the wrong regulations had been applied in dealing with SC2. On 23 May 2011, CSgt Moss exercised his right to have SC2 taken to a ‘higher authority’. The upshot of all of this was that SC1 and SC2 should now have been referred to a higher authority.

The ‘Wider Matters’

10. CSgt Moss’s letter of 23 May 2011 (§9 above) asked for other matters relating to how he had been employed by the Army Recruiting and Training Division Staff Leadership School and the meaning of the job description to be considered. CSgt Moss’s letter dated 5 January 2012 (see §9 above) said that he was applying for financial compensation.
11. It has been emphasised by the Ombudsman that ‘wider matters’ introduced by CSgt Moss needed to be the subject of a separate service complaint (see §6 above). That would mean they did not fall within the scope of SC1 and SC2. It would mean they needed to be, but also that they could be, pursued as separate service complaints. Here is what the Ombudsman has said in OR2 and OR3 about ‘wider matters’, referring to the analysis of the Appeal Body (see §31 below):

The Appeal Body identified confusion over whether a special-to-type investigation into SC1 had been launched (as it should have been). The Appeal Body also highlighted that Mr Moss’s widening of SC1 to include a claim of clinical negligence, and the addition to SC2 of the complaint about Mr Moss’s employment at the Army Recruitment and Training Division Staff Leadership School, should have been treated as new SCs, but were not.

12. The Ombudsman says this means that both (i) Mr Moss’s claim of clinical negligence in his care and (ii) Mr Moss’s claim about employment at the Army Recruitment and Training Division Staff Leadership School were and remained outside SC1 and SC2. That, says the Ombudsman, means that Mr Moss could have advanced both of these claims as fresh service complaints. That in turn means they were not discontinued by Mr Moss in February 2012 (§16 below). Moreover, Mr Moss was told he could issue fresh service complaints (§24 below).
13. Mr Moss says he was not told that he should or could make fresh service complaints to deal with the ‘wider matters’. He also says the Service Complaints Wing, and the Prescribed Officers dealing with SC1 and SC2, did not share with him the suggestion recorded internally that he could ‘redraft’ his service complaints and ‘clarify’ the redress he was seeking. He points to an internal email dated 7 December 2011 which says:

I will be sending you all the paperwork that the Service Complaints Wing received from the Headquarters of 2 Brigade South East (HQ 2 (SE) Bde) by special delivery. Once received, you will see that the legal advice from June suggests that CSgt Moss redrafts his service complaint to detail the matters that he believes remain unresolved and that he also clarifies the redress he is seeking.

The Transfer of SC1 and SC2

14. The cases were transferred horizontally, in November 2011, to 42 Brigade North West Personnel Recovery Unit (42 (NW) Bde PRU). The commanding officer (CO) of that

Unit, and CSgt Moss's commanding officer, was Lieutenant Colonel McCall. He became the Prescribed Officer dealing with the service complaints. On 17 January 2012, Lt Col McCall informed the Service Complaints Wing that he had received the case documents and would arrange to informally interview CSgt Moss, in the course of which he would establish "the start point". The transfer to a new Prescribed Officer, like CSgt Moss's own transfer in February 2011, was linked to CSgt's mental health. As I have explained, the next stage would have been for SC1 and SC2 was to be the transfer to the 'higher authority'. But – as I will now explain – there was a meeting, a letter and an outcome. That outcome was the closure of SC1 and SC2.

The 15 February 2012 Meeting

15. On 15 February 2012, there was a meeting between CSgt Moss and Lt Col McCall. What followed later that day was that CSgt Moss wrote a letter saying that he considered SC1 and SC2 closed. Lt Col McCall then sent an email to the Service Complaints Wing and telephoned Army Legal. I will need to return to points about the nature of the discussion at the meeting (see §§65, 77-85 below).

The 15 February 2012 Letter

16. This was the post-meeting letter from CSgt Moss to Lt Col McCall. Its contents were set out in full in Judge Sycamore's judgment at §10. I set it out here. First, in relation to SC1, the letter said (at §§1-4):

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 the correct procedure was not followed I do not see any merit in carrying out a new investigation that would result in the same conclusion. 3. Therefore from a service complaint point of view I consider it closed. However, I will be pursuing this from a legal stand point 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.

Mr Moss points out that the letter to which he was referring at §4 was the letter dated 5 January 2012 (§§9-10 above) in which he had said that he was applying for financial compensation. Secondly, in relation to SC2, the 15 February 2012 letter said (§5(a)-(d)):

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 [Frimley] Park A+E Dept and subsequent posting un-fit for work.

The Post-Meeting Communications

17. On 7 March 2012, CSgt Moss raised this question:

Would it be possible to find out what action Army Legal intend to take, if any? Or is it completely up to me to issue papers against the MoD. Bearing in mind I have already had a lengthy apology from Defence Medical.

This reflects Mr Moss pursuing the course of action described in §§3-4 of his letter of 15 February 2012 (see §16 above) and the letter of 5 January 2012 (§§9-10 above).

18. On 9 March 2012, the Senior Staff Officer at the Army Recruiting and Training Division Staff Leadership School (Major Bairstow) told CSgt Moss, that:

The SCW [Service Complaints Wing] have advised that, as you state, the 2 Service Complaints are now closed. Therefore any further action would have to be instigated at your own cost having taken appropriate independent legal advice.

19. On 10 March 2012, CSgt Moss emailed Major Bristow:

Sir, [1] Not ranting at you! That just about sums it up or 'stitched up'. Having had an informal interview with the CO 42 Bde PRU he advised me that having spoken to SCW there was nothing else to be gained from the service complaints. [2] This is still not clear. Are SCW saying that if I had not closed the complaints they would have acted on the results? Throughout this whole process there has been no guidance at all with regards the legal consequences. [3] At every hurdle I have been indirectly pressured by individuals to close it because there is nothing else to be gained. I have been spouting on about the Values and Standards of the British Army and doing the 'right thing on a difficult day' and the people who are meant to role model this cannot even grasp the meaning of integrity! [4] So in effect what they are saying is: Despite an admission of medical fault by Dr Galbraith with regards my care and that she conducted an investigation outside of the guidelines they would rather end up in the High Court? Barking! [5] I would like SCW to see this email in full so they can grasp the situation. Due to the errors of Defence Medical every aspect of my life from social, family, work and bedroom to bathroom has been destroyed. Infantry W02 to spare-part. Not impressed. Sir, many thanks, CSgt Moss.

20. There were then emails on 15 and 16 March 2012 between Mr Moss and the Service Complaints Wing. In these emails, as it is put in IR3 §90 (see §43 below), the service complaints process was clearly explained to Mr Moss, including that as his medical complaint had not completed the special-to-type process, it was not a 'Service Complaint' when "it" was "closed". He was advised that it may be prudent for him to contact Lt Col McCall "to seek clarification on the matters discussed during your meeting with him, when you agreed to [close] your complaints." Mr Moss was also told: "If you need advice as to your routes to reconsider this, you will need to take independent legal advice." In April 2012, Mr Moss sent an email to the Staff Support Office at ASLS and was referred to the correspondence with the Service Complaints Wing.

21. On 23 May 2012, after his discharge (12.5.12), Ex CSgt Moss emailed the Service Complaints Commissioner, to explain that he wished SC1 and SC2 to be reopened.

22. On 14 June 2012, the Service Complaints Commissioner wrote to the Service Complaints Wing raising concerns and asking questions. She said this:

My concerns are two-fold. First of all, I asked that the referral under my powers should be to a Senior Officer and it would appear that as a complaint had already been submitted by CSgt Moss my interest in the complaint and my concern for CSgt Moss's health and welfare was ignored/went unanswered. Secondly, it would appear from the letter sent by Mr Moss that he has agreed for his complaint to be closed for the wrong reasons. I am for example confused by his paragraph 1 of his letter of 15 February 2012 regarding his medical complaint...

23. On 8 August 2012, the Service Complaints Commissioner wrote to the Service Complaints Wing again, asking that they advise Ex CSgt Moss. The letter included this (the emphasis here is in the original):

From the correspondence I have received from Mr Moss, it appears that Mr Moss closed his service complaints in order to seek compensation for medical mistreatment Mr Moss informs me that the process of making a service complaint was having a 'severe detrimental effect' on his health and, based on his understanding that he would be unable to gain anything from the SC process (the compensation issue being outside of this process), he reluctantly closed both complaints as per his letter to SCW of 15 May 2012.

The letter also included this:

It appears that Mr Moss closed his Service complaints on a misunderstanding that they could not provide the redress he sought and that closing the Service complaints would not affect his ability to pursue an alternative course of action which would. He was not provided with any information when he tried to find out whether this was in fact wrong advice. He received little support from his Assisting Officer ... who he alleges walked away to deal with his own civilian commitments; He now is very clear that he wishes to re-open both of his Service complaints.

24. The Service Complaints Wing replied advising the Service Complaints Commissioner that the service complaints had been closed and that it was “not empowered to re-open them” but that she “may wish to write to the Prescribed Officer to see if he is prepared to re-open the [service complaints] or suggest to Mr Moss that he may wish to resubmit them”. Major Noke’s June 2015 report (§28 below) described this letter as including that “the advice was to submit a new service complaint”.
25. Made aware of this by a letter from the Service Complaints Commissioner dated 12 September 2012, Mr Moss responded that he had no confidence in the system as it offered no support whatsoever to the person making the complaint. He wrote:

I have now been medically discharged with complex mental health problems so even though I know the process has been flawed I have no idea how to proceed. With regards the medical complaint my solicitors will shortly [be] contacting the MoD informing them of my intention to sue. With regards the work complaint after 24yrs service I know I will never get an honest answer because the process is loaded in favour of those being complained against.

26. What followed next was a period of ill health including hospitalisation. Mr Moss contacted the Service Complaints Commissioner in February 2014. Ms Palmer for the Ombudsman made clear that there is no criticism of Mr Moss for the period of time September 2012 to February 2014.

SC3

27. On 14 May 2014, Ex-CSgt Moss made a further service complaint (SC3). His claim was that “I believe that I have been wronged in the following manner”, identifying three elements (or ‘heads of complaint’) as follows:

[1] During the process and closure of my two Service Complaints in 2011 and 2012 no consideration was given to my state of mind ie. I was and still am suffering with severe mental health illness. [2] I believe in 2011 and 2012 due process in relation to both service complaints [was] not followed in relation to JSP831. [3] The Army through the complaint process outlined above has breached its duty of care to me.

The “outcome or redress” sought in SC3 was:

(i) I would ask that JSP831 be reviewed to ensure that consideration is given to the complainant's health during the complaints process. (ii) I would ask for financial recompense taking into account my personal emotional and physical injury sustained as a result of this process.

28. Between May 2014 and May 2018, SC3 was dealt with by the Service Complaints Wing. The Prescribed Officer (Major Noke) wrote a 17-page investigation report (29.6.15). Major Noke's investigations included a note of a telephone interview (30.1.15) with, and a written statement from, Lt Col (Retd) McCall.

The Deciding Body

29. The consideration of SC3 went to the Deciding Body (Lt Col Shirras) whose decision was in two stages. First, a decision (28.9.16) which upheld all three elements of SC3 (§27[1]-[3] above). These were the findings, corresponding to the elements:

[1] The investigation report shows that due consideration was not given to your health during the processing and closure of your Service Complaints, from February 2011 when you submitted them until February 2012 when you agreed to close them. There was sufficient information available to those responsible for your complaint to make them aware of your health condition, and the effect this might have had on your judgement and your wellbeing. I find this element of your Service Complaint upheld.

[2] The evidence contained in the investigation report supports the contention that the handling of the process of your Service Complaint was not in accordance with JSP831. It does appear that the management of your complaint in 2011 regarding your Terms and Conditions of Service did follow JSP831 to a certain extent, however there were still unreasonable delays in the process. I find this element of your Service Complaint upheld.

[3] Having upheld the first two elements of your Service Complaint it is reasonable to further conclude that the Army did in fact fail to discharge its management and pastoral responsibilities towards you. The investigation report shows that the care and management you received once you had been placed on sick leave was inadequate and was not in accordance with the Army's regulations. Shortcomings in this regard served to exacerbate the impact of the complaints process on your health and well-being. I find this element of your Service Complaint upheld.

30. The second stage was a decision (31.7.17) as to what redress was appropriate. That decision posed the question "whether, as a result of the management of your previous Service Complaints, you had suffered any injury and what redress might be appropriate". Lt Col Shirras recorded these conclusions:

5. Having reviewed your medical record I have drawn the following conclusions: (a) At the time of your medical discharge from the Army you were suffering from a number of significant and complex medical problems. (b) The medical care provided for you was appropriate. (c) Given the nature of the conditions 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. (d) There is no evidence in the medical record that the Service Complaint process 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 your raising the Service Complaint process is a concern for you, nor did any medical practitioner identify a change in your condition which was then so attributed. 6. My conclusion is that 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.

Lt Col Shirras added: "In respect of the wrongs I have previously upheld, I apologise on behalf of the Army. I also apologise on behalf of the Army for the time it has taken to staff this complaint."

The Appeal Body

31. Ex CSgt Moss appealed (2.8.17), and the case went to the Appeal Body (Brigadier Cartwright and Ms Dodgson). They issued a determination (11.5.18) in which (i) they overturned the findings of Lt Col Shirras upholding the elements of SC3 and (ii) they maintained the refusal of redress. On the first element, the Appeal Body referred in detail to Lt Col (Retd) McCall's evidence to Major Noke about what had been said at the meeting (15.2.12). The Appeal Body's reasoning, corresponding to elements [1], [2] and [3] of SC3 (§27[1]-[3] above) included these passages:

[1] ... We find that it would have been wise to ensure the Complainant [Ex CSgt Moss] had access to an Assisting Officer (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 [Lt Col McCall] 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 CO 42 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.

[2] ... We found that there were several breaches of the procedures established in JSP831 when both SCs were processed. The AO appointed was not an appropriate choice and seems to have assisted the Complainant relatively little, although we accept that this was not his fault... The Complainant's widening of SC1 to include a claim that there had been clinical negligence that had caused or contributed to his medical discharge should have been treated as a new SC, but was not... [A]lthough 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 Complainant'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.

[3] ... As we have not upheld [the] other heads of complaint, we do not find he has been wronged in this regard.

The Ombudsman

32. By s.340H(1)(a) of the 2006 Act, Parliament empowered the Ombudsman to investigate a service complaint which has been finally determined. The Ombudsman describes this as a "substance" (or merits) investigation. By s.340H(1)(b), there is power to investigate an allegation of "maladministration" (including delay) in the handling of a service complaint which has been finally determined. This is a "maladministration" investigation. It was pursuant to these powers that the Ombudsman was acting in producing the decisions which were accompanied by IR1, IR2 and IR3 (see §2 above). The functions of the Ombudsman are identified at s.340H(6) of the 2006 Act. In a substance investigation the Ombudsman's function is to decide whether the service complaint is well-founded and, if so, consider what if any redress is appropriate. In a maladministration investigation the Ombudsman's function is to decide whether the allegation of maladministration is well-founded and, if so, whether the maladministration or undue delay has or could have resulted in injustice, going on to consider redress. Redress is the subject of an Ombudsman recommendation. It can be action-based (eg.

apology, reinstatement) or consolatory payment. The Ombudsman cannot recommend a consolatory payment for negligence.

Maladministration

33. Mr Moss made allegations of substance and maladministration. The outcome of the maladministration investigation was that the Ombudsman found: (1) maladministration in the undue delay in the handling of SC3, which on occasion he has been unfairly blamed for, including in the Appeal Body's determination; (2) maladministration in the consideration by the Deciding Body and the Appeal Body of the medical records; (3) maladministration by the Appeal Body's failure to identify a psychiatrist's letter (5.1.12); (4) all of which identified failures caused Mr Moss injustice in relation to the anxiety they caused him. Findings (2) and (3) were new to IR2. The Ombudsman made recommendations that the Service (ie. Army): (a) write to Mr Moss acknowledging the failings identified; (b) make a financial consolatory payment in respect of the injustice caused due to the failings; (c) make an additional moderate financial consolatory payment in respect of the injustice caused due to the Decision Body and Appeal Body failing to properly consider the medical evidence and a failure by the Appeal Body to identify the psychiatrist's letter. The issues with which Judge Sycamore was concerned, and the issues with which I am concerned, relate not to the maladministration aspect of the case, but to the substance.

Substance

34. On 2 December 2019, the Ombudsman wrote to Mr Moss to set out this understanding of Mr Moss's substance complaint:

The Service did not fulfil its duty of care towards you concerning your deteriorating mental health during the SC process, which resulted in you being unable to process information to act in your own best interest.

This description was recorded within IR1, IR2 and IR3. There was a further complaint about the Service missing evidence or not giving it appropriate weight, but the Ombudsman treated that as an aspect of maladministration.

35. The Ombudsman has explained that the same letter (2.12.19) told Mr Moss in broader terms that the Ombudsman would be looking to see whether the Army's investigation of SC3 was reasonable, whether the correct process was followed, and whether the decision reached was "fair proportionate and justified, based on the evidence available".

Investigation Report 2 (IR2)

36. As I have explained, there was first an original decision (20.7.20) and investigation report (IR1), but these were withdrawn and replaced (see §2 above) and have not featured in these proceedings. The findings and conclusions as to the substance in IR2 (22.2.21) have featured. Ms Palmer emphasises that there were passages within the main body of IR2 under a heading "findings". Under a heading "Conclusion" there was then a discussion within a sub-heading "substance. This contained seven paragraphs (IR2 §§78-84). In his judgment (at §14), Judge Sycamore had set out four of these (§§79-82), which he subsequently quashed. Here are all seven (IR2 §§78-84, including the quashed §§79-82):

78. Mr Moss complained that the Service did not fulfil its duty of care towards him concerning his deteriorating mental health during the SSC process, which resulted in him not being able to process information to act in his own best interest.

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.

83. I have identified failings in the handling of Mr Moss's original SC's, including the complaints being considered twice at level I, there being delay and Mr Moss being unfairly threatened with the closure of his complaint if he failed to make contact, even though there is no evidence of him receiving any communication in the meantime. In addition, his medical complaint was not considered in accordance with the special-to-type process and the Assisting Officer he was assigned was not an appropriate choice. These points were identified by the AB in their determination.

84. For the reasons set out in this report, I do not consider Mr Moss is SSC to be well-founded, so have not made any recommendations for redress.

Judge Sycamore

37. Judge Sycamore held that the Ombudsman's conclusions on substance in IR2 (§§78-84) did not discharge the applicable public law duties. He concluded (judgment at §21) that the Ombudsman had "erred" in her "approach" to certain matters and that he should quash this "part of the decision".

38. These were Judge Sycamore's reasons (at §§17-19):

17. In considering the information which was available to the Ombudsman I have concluded that insufficient regard was given to a combination of factors. I consider that the Ombudsman failed to sufficiently engage with the question of the extent of Lt Col McCall's knowledge of the condition and history of Mr Moss's mental health, the absence of an Assisting Officer to assist him against the background of the caveats expressed by Mr Moss 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 Mr Moss resulting in a breach of duty of care by the Army.

18. The Ombudsman should have considered the extent to which Lt Col McCall should have explored with Mr Moss whether he wished to pursue his further complaints as separate SCs and

the need for assistance from the Assisting Officer given the position with regard to Mr Moss's mental health and the importance of the matters to him.

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

39. Judge Sycamore's order was that (i) the claim succeeded for the reasons set out in the judgment; (ii) the Ombudsman's decision (22.2.21) was quashed "in respect of IR2 §§79-82 only"; and (iii) the Ombudsman "shall remake the decision in respect of that decision by 21 March 2022". He refused permission to appeal and the case was not pursued in the Court of Appeal.

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40. The Ombudsman reconsidered the case and issued the new decision (22.2.21) and IR3. This is the "lengthy decision" (see §3 above). The paragraphs under the heading "findings" from the main body of IR2 were repeated. Under the heading "conclusion" and the sub-heading "substance" the passage of seven paragraphs (IR2 §§78-84: see §36 above) were replaced with thirteen paragraphs (IR3 §§78-95). However, the old IR2 §§78 and 83-84 (see §36 above) were repeated verbatim as IR3 §§78 and 94-95. The quashed four paragraphs in IR2 §§79-82 were replaced with IR3 §§79-93 (see §§41-44 below). I asked whether the reconsideration and new reasons were the work of the same individual who was the decision-maker and had written the quashed paragraphs in IR2. Ms Palmer was unable to tell me. As she pointed out, Judge Sycamore had not required reconsideration by a different decision-maker (see §39 above). I asked about the fact that Judge Sycamore did not quash IR2 §84 (see §36 above). I accept from Ms Palmer, given that the Ombudsman was being ordered to reconsider the decision, that this must have been reconsidered, albeit that it was in the event maintained verbatim.
41. On the topic of Lt Col McCall having been "aware of Mr Moss's condition" (§94[i]), this was a conclusion recorded at IR3 §87 (see §42 below), based on features of the evidence set out at IR3 §§79-82, which was information "obtained" by Lt Col McCall prior to the meeting (7.2.12) (IR3 §83). Also within IR3 §§79-82 was an observation about the absence of evidence demonstrating that Mr Moss had "lacked capacity or was unable to process information or make decisions at this time" (IR3 §81). So, here are IR3 §§79-82, concerning information relating to health:

79. Paragraphs 79-82 of the report dated 22 February 2021 were quashed at Judicial Review as set out in the judgment dated 19 January 2022, which concluded that SCOAF had given insufficient regard to a combination of factors. SCOAF was ordered to remake the decision in relation to this part of this report. The following paragraphs reflect SCOAF's consideration of the factors identified.

80. Based on the available evidence, the PRU had been providing Mr Moss with welfare support since 5 May 2011. It was recorded in the WISMIS record, which the PRU were updating, that Mr Moss was being seen by a psychiatrist and that he was struggling with anxiety due to his situation. The CO ASLS had shared with PRU his ongoing concern about Mr Moss's physical and mental health and Mr Moss was being seen by a Personal Recovery Officer (PRO) who reported on Mr Moss's case at PRU health committees. I understand that, as the CO of the PRU, Lt Col McCall would have attended PRU health committee meetings, or been aware of the content of meetings. Based on the available evidence, I am therefore satisfied that as the CO of the PRU

that was providing Mr Moss with welfare support, Lt Col McCall was aware of Mr Moss's condition, including his mental health.

81. Lt Col McCall was appointed CO for all issues pertaining to Mr Moss's SC on 2 December 2011. Mr Moss had attended his medical board and been recommended for discharge by that time, and that information had been shared with the PRU. It was noted in the WISMIS record that work was being undertaken to place Mr Moss on courses to prepare him for transition out of the Service, but that due to his mental health, this could not be done at that time. However, I note that Mr Moss corresponded actively in relation to his SCs, and was receiving regular welfare support and communication from both his Unit and the PRU. Although it is acknowledged that his mental health was poor, I have not seen evidence to demonstrate that he lacked capacity or was unable to process information or make decisions at this time.

82. The SC file was sent to Lt Col McCall, which he received on return from Christmas leave in January 2012. There is evidence of Lt Col McCall corresponding with the SCW to confirm what matters he was considering and of him speaking with Mr Moss's PRO, before arranging the interview with Mr Moss. I have also seen [fn. Letter from Dr Galbraith to Lt Col McCall dated 8 February 2012] that Lt Col McCall spoke with Dr Galbraith and was provided with details of her consideration of Mr Moss's medical complaint.

42. The passage at IR3 §§83-87 is where the Ombudsman deals with the meeting (7.2.12) itself:

83. Having obtained that information, on 7 February 2012 the interview between Lt Col McCall and Mr Moss was arranged: just over a week before it was due to take place. The meeting between Lt Col McCall and Mr Moss was arranged so that the next steps in Mr Moss's SCs could be discussed. Mr Moss had indicated in previous correspondence that he wished to progress his SCs and I therefore find that it was appropriate for the meeting to be held, although Mr Moss should have had an Assisting Officer with him. I acknowledge that Mr Moss was suffering stress and poor mental health, but am satisfied this did not mean he was unable to make decisions for himself or in his best interests. I have seen no evidence of Mr Moss requesting support for the interview although the failings around the provision of an Assisting Officer to Mr Moss are recognised in this report.

84. There is no record of the interview between Lt Col McCall and Mr Moss, which has also been identified as a failing. However, I note that in his interview with the IO, Lt Col McCall said that the caveats expressed by Mr Moss in the withdrawal letter were not discussed during the meeting. Lt Col McCall, says that he explained the SC process to Mr Moss, who given that information, indicated that he would withdraw his complaints. However, it appears that Lt Col McCall advised Mr Moss that his decision to close the complaints should be put in writing, which Mr Moss did that same day. Lt Col McCall notified the SCW of Mr Moss's decision and the SCs were closed.

85. Based on the available evidence, I have seen nothing to suggest that Mr Moss was not clear and coherent in the meeting. Mr Moss has said that, having spoken to SCW, Lt Col McCall advised him there was nothing further to be gained from the SCs, which is why he decided to close them. As there is no note of the meeting, I cannot say what exactly was discussed. It would have been inappropriate for Lt Col McCall to simply accept Mr Moss's verbal closure of the SCs in the meeting. However, this did not happen: Lt Col McCall requested that Mr Moss put his decision in writing. Although Mr Moss sent the letter later the same day, as set out in this report, the letter was clear and logical. Mr Moss explained that one reason for the closure was that he would be pursuing the matters raised in his complaint by alternative (legal) means.

86. Whilst I do not dispute Mr Moss's account of how poor his mental state was, he was entitled to withdraw his complaints, and it would not have been appropriate for Lt Col McCall to have acted any differently and to have required Mr Moss to continue pursuing his SCs. Nor do I consider that the presence of an Assisting Officer would likely have made a material difference in this respect. An Assisting Officer's role would not have included advising Mr Moss on the relative merits of pursuing legal proceedings, but would have been to assist him with the complaints process. Based on the available evidence, it seems unlikely that an Assisting Officer

would have encouraged Mr Moss to persevere with the complaint process, in light of Mr Moss's stated mental health condition, instead of considering legal proceedings.

87. For the reasons set out in this report, I am satisfied that Lt Col McCall was aware of Mr Moss's condition. I consider that his actions at the interview in which Mr Moss decided to close his complaint were appropriate and in keeping with the relevant guidance. It appears Mr Moss made an informed decision to close his complaints, knowing that the avenue of pursuing legal proceedings remained open to him.

43. On the topic of what happened after meeting: the "correspondence", the meeting and what was "addressed shortly afterwards" (§93[ii][iii]), the position was described as follows at IR3 §§88-92:

88. However, I find that the Service missed the opportunity to acknowledge Mr Moss's letter closing his complaints and to note in writing the consequences of that, given his request for compensation and the caveats mentioned in his closure letter. Also, in the weeks following, Mr Moss's correspondence (see below) indicated that further clarity was required.

89. I note that Mr Moss contacted the Staff Support Officer at ASLS on 7 March 2012 and asked what action Army Legal intended to take and was told that as the SCs were closed "[...] any further action would have to be instigated at your own cost having taken appropriate independent legal advice." Mr Moss asked that the email exchange be shared with the SCW, which was done.

90. In emails between Mr Moss and the SCW (15-16 March 2012) the SC process was clearly explained to Mr Moss, including that as his medical complaint had not completed the special-to-type process, it was not a 'Service Complaint' when it was closed. He was advised that it may be prudent for him to contact Lt Col McCall "to seek clarification on the matters discussed during your meeting with him, when you agreed to closed [sic] your complaints." Mr Moss was also told: "If you need advice as to your routes to reconsider this, you will need to take independent legal advice."

91. I note that Mr Moss again asked what was happening with his compensation claim in an email to the Staff Support Office at ASLS in April 2012, who referred Mr Moss back to the above correspondence with the SCW. Mr Moss then contacted the SCC [Service Complaints Commissioner] (correspondence between May and September 2012) and was told that his complaints could not be reopened by the SCW. It appears that Mr Moss was advised to contact the PO (Lt Col McCall) to see if he would reopen the complaints; or to submit new, separate SCs. However, in his response to the SCC, Mr Moss said he had no confidence in the system and I have seen no evidence of Mr Moss either approaching Lt Col McCall following the closure of his SCs, or submitting new SCs as advised.

92. All of these matters, however, happened after Mr Moss closed his complaints and therefore have no bearing on Lt Col McCall's handling of Mr Moss's request. Based on the available evidence, I am satisfied that Lt Col McCall was aware of Mr Moss's condition and handled Mr Moss's wish to close the complaints appropriately. I have identified failings around the provision of an Assisting Officer to Mr Moss, which are recognised in this report. On receipt of Mr Moss's letter explaining his wish to close his complaints, which included the caveats and wish to claim financial compensation, I find that it would have been good practice for the Service to have acknowledged this and explained to Mr Moss that, by closing his complaints, he would not be able to claim financial compensation as redress for those complaints. However, these explanations were subsequently provided to Mr Moss on several occasions in the months following his decision to close his complaints and which he said he understood.

44. Then, at the end of the new section on substance, the Ombudsman gives this summary of conclusions (at IR3 §93[i]-[iv]):

93. In summary, reviewing the points made in [Judge Sycamore's] judgment dated 19 January 2022: [i] I am satisfied that Lt Col McCall was aware of Mr Moss's condition and that adequate consideration was given to Mr Moss's mental health. [ii] I cannot say precisely what was

discussed at the meeting closing the SCs and the extent to which options were explored. However, in his closure letter, Mr Moss referred to his to open SCs and his reasons for closing them. In correspondence following this, it was clear that his SCs were closed and that he would need to speak to the PO or raise new SCs if he had any concerns. I acknowledge Mr Moss was frustrated by this, but the process was explained, and Mr Moss indicated that he understood what he was being told. [iii] I have identified missed opportunities in the way the Service processed Mr Moss's letter closing his complaints. However, I am satisfied that this was adequately addressed shortly afterwards, with clear explanation to Mr Moss that all issues were closed, no further action was being taken, and he would need to seek independent legal advice and/or speak to his PO. I note that in September 2012 he indicated that he had no desire to do so as he had lost faith in the process. [iv] For these reasons and having not identified a breach in the duty of care by the Service in the handling of the original SCs, I have not made any recommendation for redress. Whilst acknowledging Mr Moss's strength of feeling on the matter and that this was a particularly difficult time for him, on balance, I do not consider that the Service acted inappropriately during the closure of his SCs in 2012.

Permission for Judicial Review

45. When Judge Davies granted permission for judicial review (21.2.23) he identified the parameters within which he was doing so. He said this:

5. In its remade decision the Ombudsman ... clearly considered the absence of an Assisting Officer (AO) to assist [Mr Moss] against the background of the caveats expressed by Mr Moss in his letter of 15 February 2012. The finding (at IR3 §86) is that the presence of an AO would likely have made no material difference, on the basis that the AO's role was to assist him with the complaints process and not the relative merits of pursuing legal proceedings, so that it is unlikely that the AO would have encouraged Mr Moss to persevere with the complaint process in the light of his mental health condition. However, this finding (at least arguably) fails to consider whether advice from the AO would have extended to advice about the consequences of formally closing the existing SCs without pursuing his further complaints as separate SCs.

6. What the Ombudsman (at least arguably) conspicuously failed to consider in my judgment is the key point about whether or not [Lt Col McCall or the Army] ought to have advised Mr Moss, in the knowledge of his mental health condition and the caveats expressed in his letter of 15 February 2012, that if he closed his existing SCs without pursuing his further complaints as separate SCs then: (a) he would lose the right to do so for good; and (b) he ought to consider seeking assistance from an AO and/or seeking legal advice and – in any event - carefully considering the implications of this before formally closing his existing SCs.

7. What the Ombudsman (at least arguably) needed to consider is whether or not this advice should have been given at any point before the existing SCs were accepted as formally closed. The Ombudsman (at least arguably) needs to consider this in the context of what someone in the position of Lt Col McCall ought to have advised, either at the meeting itself, or in a letter to Mr Moss sent after the meeting, whether before he sent his letter of 15 February 2012, or upon receipt of that letter and before the letter was accepted as an unqualified and irrevocable closure of his existing SCs.

8. This is in the context that the evidence appears to be that Lt Col McCall (seemingly) did not give this advice at the meeting, or see the need to write a letter after the meeting, or see the need to read and consider – and act upon as reasonably required – the letter of confirmation from Mr Moss which Lt Col McCall had expressly asked him to send having reflected on the position post meeting. It is at least arguable that the Ombudsman has fallen into error by making the finding at SC3 §87 (that Lt Col McCall's actions at the interview were appropriate and in keeping with relevant guidance and that Mr Moss made an informed decision to close his complaints knowing that the avenue of pursuing legal proceedings was open to him) without giving consideration to whether Lt Col McCall ought to have given specific advice of the kind identified in paragraphs 5 and 6 above, whether at the meeting or in a subsequent letter before or after receipt of the letter of 15 February 2012. Although the Ombudsman has gone on (at IR3 §§88 to 91) to consider and – at least in one respect – to make adverse findings against the Army as regards what happened

subsequently, this is considered (at IR3 §92) to be irrelevant on the basis that it happened after the complaints were closed. This approach at least arguably ignores the key point that Mr Moss's case is that had he been given appropriate advice before the SCs were formally closed he would not have done or, at least not without submitting further SCs.

9. Because of the Ombudsman's (arguable) failure to consider the key points identified in paragraphs 5, 6 and 7 above it has also (at least arguably) failed to go on, as it was required to do by HHJ Sycamore, to consider the consequences of a finding of breach in this respect, given Mr Moss's case that, in the absence of a breach of duty by the Army, he would have pursued further SCs during 2012.

10. In short, the Ombudsman ought (at least arguably) to have considered whether it was [necessary] for Lt Col McCall, in the light of what he knew and should have known, to advise Mr Moss simply to go away and think about things before formally closing his existing SCs, with the consequences that entailed, and – if not – whether giving further advice along the lines identified above would, on balance, have resulted in Mr Moss acting differently and, in particular, pursuing the further complaints as SCs and – if so – whether that ought to be the subject of financial redress.

46. From Judge Davies's reasoning, I extract the following as key topics: (1) Did the Ombudsman understate the role which the Assisting Officer could have played? (2) Did the Ombudsman fail to consider whether Mr Moss should have been advised, before formal closure: (a) that this would mean losing rights for good; and (b) that he ought to consider these implications and consider assistance from an Assisting Officer or legal advice? (3) Does the Ombudsman's reliance on post-meeting communications satisfactorily answer the question of what Mr Moss would have done, had he been appropriately advised? I will analyse the arguments in the case by reference to these topics, in the light of Judge Davies' reasoning.

The 'Processing Information' Shortcut

47. Ms Palmer submits that this claim must fail because of the Ombudsman's undisturbed findings of Mr Moss's ability to process information and act in his own interest. This argument runs as follows. (1) The sole issue of substance was framed by the Ombudsman (see §34 above) as whether there was non-fulfilment of a duty of care "which resulted" in Mr Moss "being unable to process information to act in [his] own best interest". This result was part and parcel of a composite question. The description has not been quashed by Judge Sycamore; nor is any challenge to it within the scope of Judge Davies' grant of permission for judicial review. (2) IR2 had contained the following "findings" in the main body of the document, and these are duly replicated in the main body of IR3 at §§43 and 47:

[B]ased on the available evidence, while it is not disputed that Mr Moss's mental health had deteriorated during the course of the service complaints, I have seen nothing to support his allegation that he was unable to process information to act in his own best interest... [B]ased on the available evidence, 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...

Judge Sycamore did not quash these passages in IR2. Judge Davies did not identify any challenge to them – repeated in IR3 – as within the scope of permission for judicial review. They can not successfully be impugned. (3) The substance of these passages is then reflected in the conclusion passage within IR3 at §§81 and 83. They are a clear and adverse finding of Mr Moss's ability to process information and act in his own interest. That is a complete answer to the issue of substance as framed. It is the end of the case.

48. I cannot accept this argument. It would rob Judge Sycamore’s decision and remittal of logic or utility. It would mean that passages being left intact were and remained an inevitable answer to the case. It would also have meant the conclusions in the retaken decision (SC3) could have been very short indeed. The answer, in my judgment, is this. The allegation as encapsulated by the Ombudsman had (i) an alleged default (non-fulfilment of a duty of care) and (ii) an alleged consequence (inability to process information to act in best interest). I do not accept that an adverse answer to (ii) was the end of the complaint. The complaint could have succeeded on non-fulfilment of a duty of care. It could have succeeded with an adverse consequence, short of inability to process information to act in best interest. This is consistent with the following: the Ombudsman’s reasoning; the structure and content of the summary (IR3 §93); the broader terms of the explanation in the same letter of 2 December 2019 (see §35 above); and the Ombudsman’s broader description of ascertaining whether there was a breach in the duty of care and inappropriate action during the closure of SC1 and SC2 (IR3 §93[iv]). There is no shortcut. The question is whether the Ombudsman’s reasoning can withstand public law scrutiny.

The Temporal Jurisdictional Line

49. Ms Palmer submits that there is a jurisdictional line in the sand. It is drawn at the moment in time when the letter of 15 February 2012 was received by Lt Col McCall. It serves to exclude the Ombudsman from having any power to consider the appropriateness of any actions taken by Lt Col McCall or the Service Complaints Wing after that moment in time. The argument runs as follows: (1) SC1 and SC2 were service complaints which were closed. That closure was at the moment of receipt of the letter of 15 February 2012. This is because there was no “prescribed process” for any follow-up. There was solely a discretion to “re-open” SC1 and SC2. SC3 was parasitic on the treatment of SC1 and SC2. It follows that the only issues which the Ombudsman could consider as part of the complaint were those up to the moment of receipt of the letter. (2) The complaint to the Ombudsman was in any event confined to the period “during the SC process” (see §34 above). This matches SC3 itself which referred to the position “during the process and closure” and “the complaint process” (see §27 above). So, the Ombudsman’s jurisdiction is in any event temporally restricted by the scope of the complaint to her. (3) The events after the letter of 15 February 2012 are relevant only insofar as they illuminate the events prior to that, and the materiality of any shortcoming. But the appropriateness or inappropriateness of whatever Lt Col McCall and the Service Complaints Wing did or did not do after receipt of the letter of 15 February 2012 is legally irrelevant as being outside scope. This is supported by the reasoning of Judge Sycamore, who focused on Lt Col McCall. It is a complete answer to the concerns raised by Judge Davies about what was done and not done on and after receipt of the letter.
50. I cannot accept this line of argument. Nor, for that matter, do I think such a line is being drawn in the Ombudsman’s reasoning in SC3. The Ombudsman’s jurisdiction is, in my judgment, limited by the complaint to her, and by SC3, to which the complaint relates. SC3 is about the process and closure of SC1 and SC2. But the phrase “during the SC process” is sufficiently broad to include what was done, or not done, when the withdrawal letter was received. It can extend to the act of “closing” service complaints and what is done at that stage. I was shown no source which prescribes the moment of receipt of a letter as a moment of closure. What if the letter is ambiguous, equivocal, contingent or caveated? What if a letter ‘reserves’ a right? I can see no reason why the letter writer

could not be asked to provide further clarity or give further thought. I see no reason why the letter writer could not be given information relevant to something said in the letter. I see no reason why the letter writer could not be given the opportunity to have a discussion with the Assisting Officer. I see no reason why the letter could not be permitted to be withdrawn.

51. This case is all about the circumstances. Mr Moss's letter referred explicitly to mental health. It referred to an alternative avenue for redress. It referred to Mr Moss maintaining the substance of the service complaints. It was caveated. The caveats were said by Lt Col McCall to be new points, not raised or discussed at the meeting. That makes them all the more significant. I do not accept that, if Lt Col McCall – on receipt of a letter – had said 'I want you to have a discussion with your Assisting Officer' or 'I want to give you this piece of important information', that would have been action in the discretion to reopen SC1 and SC2. I think it would have been action in 'not closing' SC1 and SC2. The Ombudsman's reasoned decision does not explore the point. There may or may not have been a non-fulfilment of a duty of care. But the question whether there was or was not is not, in my judgment, beyond the Ombudsman's jurisdictional reach. The fact that there is no prescribed process for dealing with a letter of withdrawal is no answer. Indeed, it assumes that, were there such a process, this would then come within scope. I cannot accept that a complaint about non-fulfilment of a duty of care would be barred, insofar as it relates to what is done on receipt of such a letter. I accept that SC1 and SC2 were subsequently treated as closed, at some stage after receipt by the Service Complaints Wing. But whether – on receiving the letter given the circumstances and its contents – there was a non-fulfilment by Lt Col McCall or the Service Complaints Wing of a duty of care is not, in my judgment, a question outside the scope of the complaint as framed.
52. I accept that Judge Sycamore's reasons focused on Lt Col McCall. But those reasons did not, as Ms Palmer at one point argued, draw a temporal line at the receipt of the letter. Judge Sycamore included (judgment §17: see §38 above) what Lt Col McCall did and did not do on and after receipt of the caveated letter of 15 February 2012. And he quashed paragraphs in IR2 which have now been replaced with new paragraphs discussing what was done and not done after receipt of the letter. That includes the Service Complaints Wing. It includes the "good practice" and "missed opportunities" (IR3 §§92, 93[iii]). Mr Moss has challenged those findings and they fall within the scope of Judge Davies' grant of permission. In my judgment, the Ombudsman was right and rightly addressed the position on receipt of the letter and in closing the complaints on their merits.

The 'Duty of Care' Points

53. Ms Palmer makes a series of submissions about restrictions in the meaning of non-fulfilment of a "duty of care" for the purposes of the scope of Mr Moss's complaint to the Ombudsman (see §34 above). She accepts that "duty of care" is not here being used in the sense of an actionable duty of care in tort law. Initially, she submitted to me that 'duty of care' was restricted to breach of a statutory duty, arguing that the only statutory duty on the Service was to permit a service complaint to be made under the statutory entitlement (see §5 above). She subsequently accepted that 'duty of care' could extend to any 'legal duty', arguing that there are no legal duties but only "guidance" (JSP831). She argued that, even if a "breach" of JSP831 could be non-fulfilment of a 'duty of care', the only relevant requirements were to appoint an Assisting Officer (which happened in this case) and to appoint an appropriate Assisting Officer (which did not: IR3 §94). There was no "breach" of JSP831 in the actions of Lt Col McCall or the Service Complaints

Wing. Finally, Ms Palmer submitted that non-fulfilment of “duty of care” would need to be “something specific”, and the points being made by Mr Moss would be of general application: for example, being accompanied by an Assisting Officer; or being given advice as to consequences. For any or all of these reasons, she said there could be no non-fulfilment of a ‘duty of care’ in the present case.

54. I cannot accept these submissions. They are further examples of points which do not have any support in the Ombudsman’s own reasoned decision. Nothing in IR3 says that “duty of care” is restricted in these ways. If the Ombudsman had found that Lt Col McCall had acted incompatibly – rather than finding that he acted “in keeping with” (IR3 §87) – the guidance in JSP831, that could have been a non-fulfilment of a ‘duty of care’. If the Ombudsman had found that it was necessary in the circumstances to ensure that Mr Moss had a discussion with an Assisting Officer, or necessary to ensure that he received and considered information as to consequences, that too could have been a non-fulfilment of a duty of care. I agree with Mr Moss. In my judgment, ‘duty of care’ has a broader sense in the complaint to the ombudsman, just as it did in the third element of SC3 (see §27[3] above) which the Deciding Body upheld (see §29[3] above). The point of ‘substance’ which the Ombudsman had to address was whether ‘duty of care’, in a broad and non-technical sense, had been fulfilled or not. This was in a context where the first and second ‘elements’ of SC3 were relied on in SC3 to demonstrate breach of ‘duty of care’ (see §27[1] and [2] above). Both the Deciding Body (see §29(3) above) and the Appeal Body (see §31(3) above) treated the first two heads as relevant to deciding the third. This fits with the broader description in the letter of 2 December 2019 (see §35 above). It fits with what the Ombudsman considered. In my judgment, Ms Palmer’s submissions about restrictions in ‘duty of care’ would shrink the scope, purpose and utility of Mr Moss’s complaint. I would accept that non-fulfilment of a ‘duty of care’ can connote “something specific”. But the points being made in the present case are not about what needs to be done in every case. They are about what should have been done in this case. Non-fulfilment of a duty of care, approached straightforwardly, would include the failure to take a protective step which Lt Col McCall or the Service Complaints Wing needed in the circumstances to take, in the light of Mr Moss’s known mental health condition. If there was such a failure, the question of appropriate redress would be informed by considerations of prejudice and materiality. That, as I read it, was the Ombudsman’s approach. It stands or falls by whether it involved a public law error.

The ‘Wider Matters’ Point

55. Ms Palmer submitted that the case is all and only about the ‘wider matters’ (see §§10-11 above). She argued, at one point, that only the ‘wider matters’ involved something to be gained by Mr Moss. She said that Mr Moss’s claim for judicial review is about the ‘wider matters’. In consequence, the closure of SC1 and SC2 was nothing to the point. The ‘wider matters’ were never included within SC1 and SC2, as the Appeal Board found, which means they were never closed. They could always have been pursued as fresh service complaints. I cannot accept this submission. Judge Davies made very clear when articulating the scope of judicial review (§45 above) that part of the claim is about “the further SCs” and “the further complaints”, but part of the claim is about “closing his existing SCs, with the consequences that entailed”. Furthermore, I was shown nothing which demonstrates that there was nothing to be gained for Mr Moss by SC1 and SC2. In fact, the Ombudsman’s written submissions repeatedly recorded that the Ombudsman was taking no position on the merits of SC1 and SC2. I was shown nothing which

demonstrated that Mr Moss's judicial review claim was confined in the way suggested. As to Mr Moss being made aware that he could simply have advanced fresh service complaints advancing the points that mattered to him, so that closure was or would be no bar, Ms Palmer accepted that there is nothing in the Ombudsman's reasoned decision which makes such a finding. And I was shown no material demonstrating it to have been the case.

The 'Mistaken Consequence' Point

56. Ms Palmer accepts that in March 2012 the Service Complaints Wing promptly told Major Bairstow that Mr Moss's course of asking the Service to engage with the question of redress was closed, in light of closure of SC1 and SC2 (see §18 above). She submits that the Service Complaints Wing was, however, mistaken about that consequence. She says this course was open and could have been pursued. I cannot see how this point assists. The Service Complaints Wing's understanding is clear. It was made clear after SC1 and SC2 were withdrawn and closed. Mr Moss wanted to pursue the course. He was awaiting a response to his letter. This was described in his letter (15.2.12) at §§3-4. He was closing SC1 to pursue that course instead. He spelled that out. He was not told that, if he closed SC1, he would be closing that door too. He was not told that he could reopen the door with a new service complaint because SC1 never included redress. What he was told was, having closed SC1 he had closed the door to the course he wanted to pursue. That was itself "closed". That is part of his complaint.

Supervisory Review

57. Ms Palmer submits as follows. The Ombudsman has a wide latitude for judgment and discretion. There are wide discretionary powers as to appropriate investigations (s.340I of the 2006 Act). The Ombudsman has institutional advantages, specialist knowledge and experience. The Ombudsman is the primary decision-maker. There is no right of appeal to the High Court. The Court's judicial review jurisdiction is a supervisory secondary function. There is broad latitude afforded to the Ombudsman as to the standards to be adopted in reviewing a service complaint and in carrying out investigations (cf. Miller v Health Service Commissioner [2018] EWCA Civ 144 at §§67-72). The question of relevance, and weight, is for the primary judgment of the Ombudsman, subject to reasonableness review. The Ombudsman's reasons are to be read 'benevolently' and 'as a whole'. Public law unreasonableness is a high threshold. Any public law error must be material to the outcome. I accept all these submissions.

The Reasonableness Defence

58. All of which brings me to the heart of the case. Ms Palmer's further submissions in defence of the claim were, in essence as I saw it, as follows:
59. The Ombudsman has reached reasonable conclusions, for legally adequate reasons, with a reasonable judgment as to relevance and weight. The Ombudsman has recognised that the steps taken by Lt Col McCall were 'not optimal' and 'criticisms' were appropriately made, for which 'an apology was required'. It was a "failing" (IR3 §84) not to have a written record of the meeting (15.2.21). Mr Moss "should have had an Assisting Officer with him" (IR3 §83) and so there were "failings" around the provision of an Assisting Officer (§92), who was in any event "not an appropriate choice" (§94). The Ombudsman has also recognised that it would have been "good practice" for the Service, recognising

that Mr Moss's letter (15.2.12) contained caveats and recorded the wish to claim financial compensation, to have explained that "by closing his complaints, he would not be able to claim financial compensation as redress for those complaints" (§92). This is characterised as a "missed ... opportunity" not to respond (§88) and there were "missed opportunities" in the way the letter was processed (§93[iii]). But there is no act of non-fulfilment of a duty of care. The actions were appropriate: holding a meeting; allowing Mr Moss to communicate his decision to withdraw his complaints; asking for him to go away and put it in writing; receiving the letter; closing SC1 and SC2.

60. The Ombudsman has recognised that Mr Moss made a clear and rational decision to close SC1 and SC2. He was not lacking in capacity, unable to process information or unable to make decisions (§81). Mr Moss was able to make decisions for himself and in his best interests (§83). He was entitled to withdraw his complaints (§86). His letter (15.2.12) was "clear and logical" (§85). It gave as one reason that Mr Moss would be pursuing the matters by alternative (legal) means (§85). It also records that Mr Moss was focusing on his mental health and the implications of the ongoing process. The Ombudsman has reasonably found that there was no inappropriate action or non-fulfilment of any 'duty of care' in accepting that decision.
61. The Ombudsman has reasonably – indeed correctly – concluded that there was no breach of any legal duty or any duty of care (§93[iv]). There was no legal duty to advise Mr Moss as to the consequences of his action. There was no legal duty to advise him that any redress, if SC1 and SC2 were withdrawn, would need to be by legal process. There was no legal duty to ensure an Assisting Officer. JSP831, which in any event is guidance, did not require any of these steps to be taken.
62. The Ombudsman has also made a reasonable finding, on the balance of probabilities, that Mr Moss would still have closed his complaints, even had there been an Assisting Officer and even had the advice described by Judge Davies been given by Lt Col McCall or the Service. The "presence" of an Assisting Officer, assisting Mr Moss "with the complaints process", would not have included advice on the relative merits of legal proceedings and is unlikely to have encouraged perseverance with the complaints instead of legal proceedings (§86). That is a clear and reasonable finding that an Assisting Officer would have made no difference to the withdrawal of SC1 and SC2. The Ombudsman has also made a reasonable finding, on the balance of probabilities, that advice from Lt Col McCall or the Service about consequences of withdrawing SC1 and SC2 is unlikely to have made a difference to his actions. This finding is properly based on the evidence of what happened next, in the post-meeting communications (see §§17-26 above). Mr Moss was told in March 2021 that he could contact Lt Col McCall or seek independent legal advice (IR3 §§90, 93[iii]), and was told in May 2012 that he could ask Lt Col McCall to reopen SC1 and SC2 or could submit new "separate SCs" (§§91, 93[i]), but Mr Moss did neither of these. The Ombudsman has reasonably found that the missed opportunities were "adequately addressed shortly afterwards" (§93[iii]) and the explanations which could or should have been given earlier were "subsequently provided" on "several occasions", when Mr Moss "said he understood" (§§92, 93[i]). The closure of SC1 and SC2 did not prevent Mr Moss from raising new service complaints about matters that he had not previously complained of; nor to seek legal redress through the Court system for the wrongs he believed he had suffered. It was always open to Mr Moss to submit a new and 'wider' service complaint, including about a claim that there had been clinical negligence and about employment at the Leadership School, since his 'wider matters'

(raised in May 2011) had never been brought within the process (§12 above). It was always open to Mr Moss to pursue a civil damages claim (see §7 above), when the MoD indicated after closure of SC1 and SC2 that it would not consider a claim for compensation. He did not do so.

63. In the light of this, and the other points, there was no public law error, still less any material public law error. Judicial review should be refused.

No Assisting Officer

64. That is the argument. But I cannot accept it. I have concluded that IR3 cannot withstand scrutiny by way of reasonableness review. I start with the absence of an Assisting Officer, in the circumstances of the meeting of 15 February 2012 and what emerged from it. The Ombudsman has reached multiple conclusions about the “appropriateness” of Lt Col McCall’s actions. The Ombudsman says it was “appropriate” for the meeting to be held (§83). The Ombudsman says the actions of Lt Col McCall at the meeting were “appropriate and in keeping with the relevant guidance” (§87). The Ombudsman says it “would not have been appropriate for Lt Col McCall to have acted any differently” (§86). The Ombudsman says that “adequate consideration” was given to Mr Moss’s mental health (§93[i]). The Ombudsman says there was no inappropriate action in receiving the letter. Yet the Ombudsman has also found that at the meeting Mr Moss “should have had an Assisting Officer with him” (§83). He did not. Moreover, there should have been arrangements so that what was said to Mr Moss was recorded in writing. There were none. I have not been able to find a reasonable basis in the reasons for the repeated references to appropriate action, and the complete absence of any reference to any inappropriate action. Here are my reasons:
65. This was set up as a meeting with Mr Moss in which Lt Col McCall was going to explain “process”. Lt Col McCall says he did indeed explain the service complaints process (IR3 §84). Lt Col McCall told Major Noke that it was a meeting convened so that Lt Col McCall could tell CSgt Moss “how the investigation would proceed”, in the course of which he “explained the process (the JSP Process)”. So, pausing there, this was a meeting at which the Prescribed Officer – and CSgt Moss’s Commanding Officer – was giving explanations, about process. The very function of an Assisting Officer is that they have “duties” to provide “assistance” to the person making the service complaint (JSP831 §2.16). It is the Commanding Officer who appoints Assisting Officers to cases (JSP831 Annex I §1d). It is the Prescribed Officer who has the function of reminding Assisting Officers of their duties, including at appropriate times during the process (Annex I §2). The Assisting Officer has a key role in helping to achieve a fair resolution of the complaint (Annex I §4) including ensuring that the complainant understands what the process requires of them (Annex I §4a). The Assisting Officer is appointed to help with procedural matters throughout the process (Annex G §2c). Yet Lt Col McCall – a Commanding Officer and the Prescribed Officer for SC1 and SC2 – was convening a meeting, to have a discussion about process, without an Assisting Officer present. It was to be a discussion of the JSP Process. Ironically, it is the JSP Process which emphasises the duties of the Prescribed Officer and importance of the Assisting Officer. But the meeting and the discussion went ahead without an Assisting Officer.
66. Mr Moss was having serious mental health difficulties. This was known to Lt Col McCall. The Ombudsman emphasises that there is no evidence of lack of capacity or inability to process information and make decisions. But the Assisting Officer is not like

a ‘litigation friend’ for those lacking capacity or unable to process information or make decisions. The Assisting Officer is a supporting safeguard. This safeguard must surely be especially important where the complainant has a vulnerability or may be a vulnerable person. So, the presence of an Assisting Officer was a relevant protection: “Mr Moss should have had an Assisting Officer” (§83). So, there were “failings around the provision of an Assisting Officer to Mr Moss” (§92). In fact, Mr Moss had written (1.6.11) to the Commanding Officer at the Staff Leadership School (Col Davies) – from whom the cases had subsequently been transferred to Lt Col McCall – referring to advice from his psychiatrist that the process was detrimental to his current state of mind and so requesting that questions “be addressed through my Assisting Officer”.

67. In the light of these features, I have not been able to understand the reasonable basis for a conclusion that the meeting – without an Assisting Officer present – was “appropriate”, and why would it not have been “appropriate ... to have acted any differently” (§86). I cannot see how the answer can be that an Assisting Officer had been appointed; or that the only duty was to appoint an appropriate Assisting Officer. What is the point and purpose of the safeguard, if duties of care stop there? I cannot see how the answer can be that Lt Col McCall was acting purely passively. He was not.
68. Next, there is this. The meeting took on an important dimension. Lt Col McCall’s description is that, as a result of what he said to Mr Moss, Mr Moss now indicated that he would withdraw his complaints (§84). So, this was not Lt Col McCall receiving information from Mr Moss about a decision which Mr Moss had made. Mr Moss’s withdrawal was responsive to what Lt Col McCall was saying. This was a significant turn of events. It involved a vulnerable person. It was responsive to a Prescribed Officer and Commanding Officer. And there was nothing ever in writing, or intended to be in writing, from Lt Col McCall. There was “no note of the meeting” (§85). The advice or explanation given by Lt Col McCall was verbal only, with no other person present. And this, notwithstanding that Lt Col McCall was alive – on the day – to the significance of important things being put in writing. After all, he insisted that Mr Moss’s withdrawal be put in writing. Lt Col McCall recognised, and insisted, that Mr Moss should go away and put it in writing. But he did not insist that an Assisting Officer should be brought in, even when this important new development had taken place. He did not say ‘time out: you are now telling me you want to withdraw these service complaints, so we must involve your Assisting Officer’. I have not been enabled to see a reasonable basis why the absence of such a step was not inappropriate. This, in a situation where there were known mental health concerns. These were reinforced by the contents of the letter which followed later that day. In that letter, Mr Moss was describing withdrawal, but he was also clearly maintaining his position on the substance of various matters which he had raised.
69. I have not been enabled by the Ombudsman’s reasons to understand the reasonable basis for concluding that the Assisting Officer could only have made a difference by “advising” Mr Moss “on the relative merits of pursuing legal proceedings” (§86). The Assisting Officer could surely have assisted and supported, to ensure that proper time was taken for reflection, and that the consequences were fully understood. Surely the Assisting Officer would, most obviously, want clarity about what Mr Moss had been told about the process. The Assisting Officer would surely want to be clear that something important was being given up. The Assisting Officer would have been a party to Mr Moss’s thinking, which in the event found its way into his letter (15.2.12), in which the substance of his complaints was maintained. On the question of mental health impacts of the service

complaints process, the Assisting Officer's duty extends to help with accessing welfare support (Annex I §4e) and could have given assistance about the mental health implications of litigation in the civil courts. Why, from a mental health perspective, would an Assisting Officer not encourage the service complaint route above the civil courts? Being made aware of Mr Moss's belief that he had a route via Army Legal, to pursue SC1 from a legal stand point (the idea in the letter at §§3-4), the Assisting Officer could have assisted with that too. It was a point about processes. This was linked to Mr Moss's letter of 5 January 2012 (see §§9-10 above), written just a month earlier. An obvious point to make would have been to find out whether the MOD would consider redress. They could ask – as Major Bairstow did – and they could await a response. This is more than advising on relative legal merits or encouraging perseverance. It is about ensuring clarity, information, an understanding of consequences, and time for fully informed reflection. And it is about things which Lt Col McCall had not done. There was a deficit which an Assisting Officer could repair.

70. In my judgment, this has not been reasonably addressed by the Ombudsman. The Ombudsman has materially understated the role played by the Assisting Officer. I have not been enabled to understand on what reasonable basis, with legally adequate reasons which grapple with the obviously relevant features of the evidence, the Ombudsman can sustain the conclusions that it was “appropriate for the meeting to be held” that the actions of Lt Col McCall at the interview were “appropriate and in keeping with the relevant guidance” (§87), and that it “would not have been appropriate for Lt Col McCall to have acted any differently” (§86). Nor have I been able to understand on what reasonable basis, with legally adequate reasons which grapple with the obviously relevant features of the evidence and JSP831, the Ombudsman can sustain the conclusion that an Assisting Officer is unlikely to have made a material difference (IR3 §86). I have not been able to understand the reasonable basis for the conclusion that this would not fall within non-fulfilment of a ‘duty of care’, in the broad sense.

Limits of the Advice

71. As I have explained, Lt Col McCall was intending to give Mr Moss an explanation of the “process”. Lt Col McCall – on his own description – was giving advice about the process, which led to Mr Moss communicating a wish to withdraw SC1 and SC2. But there was no advice then about the consequences of that course of action. As I have emphasised, there was no recognition, even then, that no Assisting Officer had not been involved to protect Mr Moss's interests. And when Lt Col McCall asked for the withdrawal to be put into writing – so that it would be evidenced as unequivocal – what was promptly received was a letter which: (a) maintained the essence of his complaints; (b) maintained the wish to seek positive redress; (c) referred to the intention to engage with the MoD about redress; and (d) emphasised mental health vulnerabilities and impacts.
72. I have not found within SC3 an explanation which addresses why it was not straightforwardly incumbent on Lt Col McCall to ensure that Mr Moss was clear about the consequences and thought them through clearly. Especially when the letter (see §16 above) made clear that Mr Moss maintained the substance of what he had raised regarding SC1 (§3) and SC2 (§5(b)-(d)). The service complaints SC1 and SC2 were being closed, and so were never adjudicated upon on their merits. They were closed with Mr Moss contemporaneously making clear that he maintained his complaints and wished to claim financial redress. The point is linked to the absence of an Assisting Officer. If Lt Col McCall was going to proceed, knowing that his explanation of the process had

precipitated a decision to withdraw service complaints – and without any Assisting Officer to help Mr Moss – why did he not give advice as to the consequences?

73. If the Service were going to proceed to shut down service complaints, by reason of a letter – riddled with caveats which made clear that Mr Moss maintained the essence of complaints, maintained the wish to seek positive redress, referred to the intention to engage with the Army Legal Services about redress, and referred to a serious mental health condition – why was it not straightforwardly incumbent on the Service to ensure an explanation of the consequences? It appears that the Service Complaints Wing would have known that engagement with the Army Legal Services was itself going to be closed off as a course of action for Mr Moss, if and as a consequence of closing SC1 and SC2. That, after all, was what they told Major Bairstow soon afterwards (9.3.12) when Mr Moss followed up on this idea (see §17 above). Lt Col McCall’s evidence to Colonel Noke (January 2015) was that Army Legal Services for their part had been “shocked” after CSgt Moss decided to close the service complaints “so quickly”. Anyone looking at the letter could see the mental health vulnerabilities referenced, the clear maintaining of the substance of the service complaints, and the reference to intending to pursue SC1 with Army Legal Services. The Service Complaints Commissioner also found the terms of the letter concerning and problematic, as she told the Service Complaints Wing (14.6.12) (see §22 above). The Ombudsman’s language is “good practice” and “missed opportunity”. The Ombudsman’s reasons have not enabled me to understand on what reasonable basis this is not a straightforward finding of default. I have not been able to understand the reasonable basis for the conclusion that this would not fall within non-fulfilment of a ‘duty of care’, in the broad sense.

Reliance on what happened afterwards

74. The Ombudsman has placed strong reliance on explanations that were given after closure of SC1 and SC2 and Mr Moss’s actions in the face of those explanations. I agree with the concerns foreshadowed by Judge Davies. These are explanations ‘after the event’. They provided alongside Mr Moss being told that SC1 and SC2 were now closed, and that the course of action of engaging with the MoD over redress was also closed. In fact, Mr Moss was promptly making clear by his communications – having been told that his idea of redress through consideration by the MoD was closed – that he wished SC1 and SC2 to proceed. That supports the suggestion that – advised differently by Lt Col McCall or by the Service – Mr Moss would not simply have withdrawn them. Although Mr Moss was given various suggestions which he did not take up, they were all in the context where he was told, and repeatedly told, that SC1 and SC2 were “now closed”. He was, very clearly, now in a different position. He explained, in a contemporaneous email, that he felt ‘stitched-up’. He eventually explained – six months on – that he had now lost all confidence in the process. There was no point pursuing the position with Army Legal, given what he had been told (9.3.12). He was repeatedly being told the consequences of the actions he had taken, namely that SC1 and SC2 were “closed”. Ms Palmer has been unable to point to any finding that references in communications to making new service complaints (see §24 above) were explained as allowing matters which he had already previously raised: the ‘wider matters’ (§§10-11 above). Insofar as it was appreciated internally that these had not in fact been closed because they ought to have been included in new service complaints (see §6 above) I have seen nothing to show this was promptly made known to Mr Moss. I have not been able to see the reasonable basis for treating Mr Moss’s later actions as demonstrating what would have happened with the protection of

an Assisting Officer – whose role has been understated in the Ombudsman’s reasoning – or with a clear explanation of consequences. It follows, on the basis of what I have discussed so far, that the claim for judicial review must succeed. But in my judgment the problems, in relation to all these points, runs deeper than this. To explain why, I need to examine a point emphasised by both parties. It is about what really happened at the meeting. Before turning to that, I will address some points about utility.

Utility

75. Where can all of this go? It secures a lawful decision. It could lead to a clear finding upholding the complaint on the basis that Mr Moss was wronged. The pleaded Defence suggested that Mr Moss has achieved this – on the substance complaint – but when I examined this with Ms Palmer the outcome was that she withdrew this characterisation of IR3. It could lead to the Ombudsman finding that there was a breach of a duty of care, as the Deciding Body found in September 2016 (§29 above) before being overturned by the Appeal Body in May 2018 (§31 above). It could lead to a response which considers detriment in terms of a loss of SC1, SC2 and the ‘wider matters’ being determined on their merits. All of these are just as important now as they were when Judge Sycamore granted judicial review.

A Conspicuous Further Feature

76. I will now need to turn to the further feature of this case. At IR3 §85 (see §81 below) the Ombudsman records what Mr Moss says he was advised by Lt Col McCall at the meeting on 15 February 2012. This point has featured in both parties’ skeleton arguments. I think it has implications which call for consideration. I raised these implications with both parties at the hearing. I have explained that at the meeting on 15 February 2012 Lt Col McCall was not the passive recipient of a communicated decision from Mr Moss about withdrawing the service complaints. Rather, Lt Col McCall had said something to Mr Moss, to cause Mr Moss’s reference to withdrawal as a responsive decision. Let us start with Lt Col McCall himself.
77. The Ombudsman also recorded (IR3 §84), Lt Col McCall’s description of advice and consequence:

Lt Col McCall says that he explained the SC process to Mr Moss who, given that information, indicated that he would withdraw the complaints.

78. The Ombudsman’s pleaded Defence refers to “findings”:

There are no contemporaneous records of the 15 February meeting, a point noted in [IR3]. However, [IR3] sets out findings in relation to the meeting noting that there was no evidence that the Claimant was struggling to process information. There was a discussion around the service complaints process, which the Claimant said he understood and had this been explained earlier, it was unlikely the matter would have gone on as long as it did (IR3 §§43-44).

79. Here is what IR3 §§43-44 actually say:

43. There is no record of the interview Mr Moss had with the CO in February 2012 (another failing in the process), so assessment can only be made based on the accounts that Mr Moss and the CO have since given. 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. However, based on the available evidence, while it is not disputed that Mr Moss’s

mental health had deteriorated during the course of the SCs, I have seen nothing to support his allegation that he was unable to process information to act in his own best interest.

44. The CO's account of the meeting he had with Mr Moss, when he said he was closing his SCs, provides no evidence to suggest that Mr Moss was struggling to process information or was acting 'abnormally'. The CO says that there was a discussion around the SC process, which Mr Moss said he understood and that had this been explained to him sooner, it was unlikely the matter would have gone on as long as it had.

What IR3 §44 records is what the CO (Lt Col McCall) had said about the meeting. That is what the Appeal Body focused solely on (see §31 above). But IR3 §43 recognises that an assessment is possible, considering the accounts given by both those who were present.

80. This is from the statement which Lt Col McCall gave to Major Noke in 2015:

Moss was invited to my office at Fulwood Barracks in order that I could inform him of my assignment as PO and how the investigation would proceed. During this informal interview Moss told me that, had the procedure been explained to him in such a clear, precise and common sense manner earlier then he would not have proceeded with the complaint in the first instance...

But then there is this is from Major Noke's note of his telephone interview with Lt Col McCall (30.1.15):

During the interview Lt Col (Retd) McCall asked Ex CSgt Moss what he wanted from the SCs (the desired outcome). Ex CSgt Moss stated that he did not know. Lt Col (Retd) McCall stated he subsequently explained the process (the JSP Process). Lt Col (Retd) McCall recalls Ex CSgt Moss stated that if someone had explained this to him in a way he understood it would have made sense. Lt Col (Retd) McCall also recalls Ex Sgt Moss stated that he wished he had known this before and it was unlikely it would have gone this far, 'if common sense had been applied we would not be here today'.

'Nothing Further to be Gained'

81. More has been said about what was said within the discussion. And it is this further evidence which provides the conspicuous further feature of the case. The Ombudsman records (IR3 §85) Mr Moss's description of Lt Col McCall's advice, and its consequence:

Mr Moss has said that, having spoken to SCW, Lt Col McCall advised him there was nothing further to be gained from the SCs, which is why he decided to close them.

82. The Ombudsman has referred to an "assessment" being "made", as an assessment "based on the accounts that Mr Moss and the CO have since given" (see §79 above). That assessment could have been undertaken in the new reasons. But I am not able to find the "assessment". What the Ombudsman does in the new reasons is to record the two descriptions. However, the Ombudsman's pleaded Defence Mr Moss's description and the fact that it is relevant and apt for consideration. The Defence includes this:

The Ombudsman's conclusion is that in the meeting of 15 February 2012, Lt Col McCall explained the service complaints process to the Claimant who, given that information, indicated he would withdraw his complaints. The Claimant's own account in the 15 February letter confirms that he was advised that there was nothing further to be gained from the service complaints, and that he was content to withdraw the complaints. He was invited by Lt Col McCall to set out that decision in writing, which enabled him an opportunity to reflect and to not be pressured to do so in the meeting itself. On 15 February 2012, Mr Moss sent a clear and logical letter and explained that he would be pursuing the matters by alternative (legal) means.

Like the Ombudsman’s pleaded Defence, Ms Palmer’s skeleton argument also recognises that the point is relevant and apt for consideration. She too embraces Mr Moss’s description. She also gives a reason for doing so, by reference to the letter which he wrote the same day. The skeleton argument says this:

[T]here was a discussion that there was nothing further to be gained from the SC process and that having had that explained, the Claimant indicated that he would withdraw the complaints. The Withdrawal Letter is consistent with this, see §2.

83. We can pause there. Mr Moss’s description – recognised in the Ombudsman’s reasons and embraced in the Ombudsman’s pleaded Defence and skeleton argument – is consistent with (a) a discussion about “process” (see §§77-80 above); (b) a discussion whose focus was outcome (see §80 above); and (c) as the Ombudsman’s skeleton argument recognises, Mr Moss’s description in his letter the same day (§2) (see §16 above). The context is, moreover, as Lt Col McCall told Major Noke in January 2015 (see §28 above) is that Lt Col McCall “did not want to take on the SCs” in the first place; that this was “an interview to close the 2 x SC”; and that the decision to close the complaint was made after Mr Moss was “armed with TACOS and Medical “evidence”. There is also the letter of 8 August 2012 (see §23 above) which explains that Mr Moss was giving up service complaints, whose pursuit was detrimental to his mental health, “based on his understanding that he would be unable to gain anything from the SC process”, because “the compensation issue [was] outside of this process”.
84. Two further points can be made. First, I can see no reason identified, anywhere, of why a mere “explanation” of the SC “process” would cause Mr Moss to decide to withdraw SC1 and SC2. What was it supposed to have been, about the “clear, precise and common sense” explanation of “the procedure” that could have, or could have been understood to have, caused Mr Moss to say ‘now that I understand this process, I am going to withdraw my service complaints’. Nothing in the papers that I have found begins to explain that. On the other hand, advice about “outcome” – that said “there was nothing further to be gained” – makes good sense as a point about process which could lead to reconsideration and withdrawal.
85. Secondly, there is the evidential value of Mr Moss’s email on 10 March 2012. It was written within a month of the meeting. It was written in the course of Mr Moss seeking to pursue the very action (“from a legal stand point”) described in §§3-4 of the letter of 15.2.12. It is a communication from Mr Moss, a person described by the Ombudsman as writing in a “clear and logical” way (§85); and someone able to “process information” (§81). That email clearly tells Major Bairstow that, at Mr Moss’s meeting with his Commanding Officer Lt Col McCall:

he advised me that having spoken to SCW there was nothing else to be gained from the service complaints.

Implications

86. I have gone into this in some detail, because I think it is significant. The implications – if Lt Col McCall was going to be advising a vulnerable person that there was “nothing to be gained” from pursuit of service complaints – sounds like a textbook illustration of the significance of the safeguard of an Assisting Officer, recording explanations in writing and identifying consequences. I have been unable to understand how it could be part of the legitimate role of a Prescribed Officer dealing with the service complaints to advise

a complainant that there is “nothing to be gained” from pursuit of a service complaint. Ms Palmer accepted that such advice could be inappropriate, but only if it were “untrue”. I am in no position to say that there was nothing to be gained from the resolution of SC1 and SC2. There is also the issue about whether the ‘wider matters’ were understood by Lt Col McCall – and more to the point understood by Mr Moss – to be within SC1 and SC2. I am in no position to say that there was nothing to be gained from resolution of the ‘wider matters’. Mr Moss, in his skeleton argument, clearly submitted that Lt Col McCall had “no legal right” to offer this “advice” that there was “nothing to be gained” from SC1 and SC2. I have not been able to see how this would not, of itself, be inappropriate action by a Prescribed Officer and Commanding Officer.

87. The Ombudsman at one point says (IR3 §85): “I cannot say what exactly was discussed”. This, says the Ombudsman, is because “there is no note of the meeting”. That, however, is one of the shortcomings in the process. Another is the absence of the Assisting Officer, in front of whom any advice would have been given, and who would have been a party to what was said. But it is not necessary to reconstruct a transcript. It is only necessary to consider Mr Moss’s description that he was advised “there was nothing to be gained”. The Ombudsman elsewhere says (IR3 §43) that, absent a record of the meeting, assessment can only be made on the basis of the accounts that Mr Moss and Lt Col McCall have given. That is right. But I have been able to find no such assessment, within the original and repeated findings, nor in the new reasoning.
88. Viewed against this feature of the case, I can return to what is said later in IR3. The Ombudsman focuses on whether, in the light of Mr Moss’s poor mental state, Mr Moss was “entitled to withdraw his complaints” and whether it was “appropriate” for Lt Col McCall to have “acted any differently” by taking action (IR3 §86), as a description of action to have “required Mr Moss to continue pursuing his SCs” (§86). In the same way, the Ombudsman asks whether, being “aware of Mr Moss’s condition”, Lt Col McCall “handled ... appropriately” what is described as “Mr Moss’s wish to close the complaints” (§92). The problem is that all of this focuses on what was happening when Mr Moss was communicating his decision to close the complaints. It treats Lt Col McCall as the passive recipient of information about a decision to withdraw. It overlooks the prior point in the sequence of events, when Lt Col McCall was giving the advice to Mr Moss which produced this consequence. It completely overlooks the significance of Mr Moss’s description, and the various points which support it.
89. There are, in my judgment, three consequences, so far as concern the issues identified by Judge Davies in granting permission for judicial review. The first is that this point feeds into the issue about understating the role of the Assisting Officer. The very presence of the Assisting Officer could have prevented or inhibited inappropriate advice. The Assisting Officer could have spotted if advice were given about there being “nothing else to be gained” from pursuit of the service complaints. The second is this. Not only did Lt Col McCall fail to give advice as to the consequences for Mr Moss of giving up SC1 and SC2, in fact – on this evidence – he was telling Mr Moss that SC1 and SC2 lacked utility. This brings into even sharper focus what the Ombudsman calls “best practice” and “missed opportunity”. The third is that this is part of the context for Mr Moss’s later actions. He had been advised by Lt Col McCall that there was nothing to be gained from SC1 and SC2. Nothing in the post-meeting communications giving information to Mr Moss could operate as the explanation and advice which Mr Moss ought to have been given at the time of withdrawing SC1 and SC2. Only a retraction and clarification that

there was something to be gained from the pursuit of SC1 and SC2 could do that. Even then, it would have come after the closure of those service complaints alongside Mr Moss being told that it was too late.

90. This feature of the case therefore reinforces my conclusion that no reasonable basis has been given for the conclusions about understating the position of an Assisting Officer, the absence of clear and fair advice as to consequences, and the reliance placed on subsequent communications. All of those are the topics within the proper scope of the grant of permission for judicial review (see §46 above). There was a full and fair opportunity to address the feature of the case which appeared in the new reasons, the pleaded Defence and both skeleton arguments. It could not be right, in my judgment, to exclude consideration of this conspicuous point. The point is relevant and apt for consideration. It reinforces the conclusions at which I have arrived.

Conclusion

91. These are judicial review proceedings, not an appeal from the Ombudsman. I have a secondary supervisory function. I accept that this is a difficult case with a complex background extending over a period of years, scrutinised by a series of pairs of judicial eyes, in which different points have arisen over time (including the conspicuous further feature in this judgment). I accept that the Ombudsman was dealing conscientiously with a difficult case. That was in the light of a remittal which had surgically removed certain paragraphs from IR2. But, in my judgment, the concerns identified by Judge Davies in granting permission for judicial review and – within the scope and substance of those concerns – the IR3 paragraphs which have replaced the IR2 paragraphs quashed by Judge Sycamore cannot withstand scrutiny. The claim succeeds, in the circumstances and for the reasons I have described. Having dealt with typos on a truncated timetable to ensure speedy communication and avoid a prolonged embargoed judgment, all consequential matters can await the new term and be dealt with in early 2024. I will first receive written submissions and decide whether any further hearing is needed. I will then describe, in a short sequel judgment, what I decided about the appropriate remedy to grant and any question of costs or permission to appeal.