



EMPLOYMENT TRIBUNALS

Claimant Mr S Rafiq
Respondent Ministry of Defence

Heard at: Exeter **On:** 18 January 2022
(remotely by video hearing)
Before:
Employment Judge Goraj

Representation
The claimant: by his mother Ms K Ward (for part of the hearing)
The respondent: Mr S Tibbitts, Counsel

RESERVED JUDGMENT AT A PRELIMINARY HEARING

THE JUDGMENT OF THE TRIBUNAL IS that: -

The Tribunal does not have jurisdiction to entertain the claimant's complaint of race discrimination pursuant to section 120 of the Equality Act 2010 as it was not presented in accordance with the provisions of section 121 (1) of the Equality Act 2010.

REASONS

Conduct of the hearing

1. The hearing was conducted as a remote hearing to which the parties consented. The form of remote hearing was a video conference hearing. A face-to-face hearing was not held because of the Covid pandemic and because it is in the interests of justice and in accordance with the

overriding objective to minimise expenditure on time and costs. The claimant was initially represented at the hearing by his mother Ms Ward, who is a lay representative. Unfortunately, the claimant's mother, who was participating in the hearing from Africa, was unable, despite repeated attempts, to sustain her internet connection to the hearing. In the circumstances, the claimant elected to take over conduct of the hearing and continue the hearing in her absence.

Introduction

2. By a claim form which was presented to the Tribunals on 28 January 2021, the claimant, who was a member of the armed forces (Royal Marines Commando) between August 2010 and 30 October 2018, brought a complaint of race discrimination (direct discrimination, harassment, and victimisation). The claimant describes himself as being of Pakistani and African Caribbean ethnic origins.
3. The claim is disputed by the respondent including on the grounds that the Tribunal does not have jurisdiction to entertain it pursuant to section 120 of the Equality Act 2010 ("the 2010 Act") as the claimant's complaint has been withdrawn for the purposes of section 121 (2) of the 2010 Act and/or it is, in any event, out of time for the purposes of section 123 of the 2010 Act.

Witnesses

4. The Tribunal received a witness statement (unsigned) and heard oral evidence on oath from the claimant. The Tribunal also received a witness statement (unsigned) from the claimant's mother, Ms Ward, which was treated as a written representation as she was unable to sustain her connection to the hearing to give oral evidence.

Documents

5. The Tribunal was provided with an agreed bundle of documents ("the bundle"). The copy exchange of emails between the parties on 26/ 27 February 2020 (at pages 121- 123 of the bundle) were however difficult to read/ incomplete and they were replaced by the further copies provided during the course of the hearing,

The issues

6. The matter was listed for this preliminary hearing at the case management hearing on 6 October 2021 (the order at pages 37 – 42 of the bundle), to determine whether the Tribunal has jurisdiction to entertain the claimant's complaint of race discrimination pursuant to sections 120/ 121 and/or 123 of the 2010 Act.
7. In summary, the respondent contends that :- (a) the jurisdiction of the Employment Tribunals in respect of relevant discrimination claims by

members of the armed forces is subject to the application of section 121 of the 2010 Act as such complaints are regulated by a separate service complaints procedure (which is principally contained in the Armed Forces Act 2006 (“the 2006 Act”), the Armed Forces (Service Complaints) Regulations 2015 (“the 2015 Regulations”) and the respondent’s own policy document (JSP 831) (b) the Tribunal does not have jurisdiction to determine the claimant’s complaint as it is deemed as withdrawn pursuant to sections 121 (1)/ (2) (b)(ii) of the 2010 Act (c) further / alternatively, the claimant’s claim is, in any event, out of time for the purposes of section 123 (2) of the 2010 Act and it is not, in all the circumstances, just and equitable to extend time.

8. In summary, the Tribunal understands the claimant’s case to be that :-
 - (a) his complaint of race discrimination should not be treated as withdrawn for the purposes for section 121 (1)/(2) of the 2010 Act as his appeal against the findings of the Decision Body in respect of his Service Complaint was submitted within the (extended by agreement) permitted time limits for such procedure (b) any refusal to entertain his complaint of race discrimination pursuant to section 121 of the 2010 Act, would also be a breach of his right to a fair trial pursuant to Article 6 of Schedule 1 to the Human Rights Act 1998 (“the 1998 Act”) and /or (c) it would, in any event, be just and equitable pursuant to section 123 of the 2010 Act to extend time to allow him to proceed with his complaint having regard in particular to the fact that any delay in proceeding with his complaint of race discrimination in the Employment Tribunals was due to his mental health and ignorance of Tribunal procedures/ time limits (including as a result of incorrect advice from the respondent that he could not, as a member of the Armed Forces, pursue a complaint in the Employment Tribunals).
9. It was agreed that, for these purposes, the last act of race discrimination complained of by the claimant is (at the latest) 14 February 2018 which is the date of the document entitled “Service Complaint – Racial Harassment, Bullying and Direct Discrimination” which was attached to the claimant’s claim form which was presented on 28 January 2021.

THE FACTS

10. The claimant was a member of the Armed Forces (Royal Marines Commando) between August 2010 and 30 October 2018. The claimant was entitled, as a member of the Armed Forces, to pursue a Service Complaint pursuant to the respondent’s policy JSP 831 which embodied and consolidated the provisions of the 2006 Act and 2015 Regulations.
11. The 2015 Regulations / JSP set out the framework and procedural requirements for how a Service Complaint is made and determined including the rights of appeal / review which ultimately fall under the jurisdiction of an independent body, the Service Complaints Ombudsman for the Armed Forces (“SCO”). Decisions of SCO are

binding (Regulation 7 (3) of the 2015 Regulations) subject to a right of judicial review. An extract from JSP 381 relating to the role of the SCO and recourse to Employment Tribunals (including guidance relating to relevant time limits for pursuing a claim) is at pages 135 – 136 of the bundle.

12. On 15 February 2018, the claimant submitted a Service Complaint of “Racial Harassment, Bullying and Direct Race Discrimination, 14 February 2018” to his Commanding Officer utilising the prescribed form (Annexe F) contained in JSP 831. This completed form is at pages 43 – 57 of the bundle. The claimant complained, in all material terms, about the matters which he seeks to pursue in this Tribunal.
13. By a letter dated 20 March 2018 (pages 58-59 of the bundle), the claimant’s Commanding officer advised the claimant that all aspects of the complaint, save for one which related to an alleged wrong suffered by another individual, were deemed admissible and that a Decision Body would be appointed to determine his Service Complaint. The claimant was further advised where further information regarding the Service Complaint process contained in JSP 831 could be found on the defence intranet/ internet. The claimant was also encouraged to utilise the support and guidance of his assisting officer. The claimant had access to support from Assisting officers during the process.
14. The claimant was medically discharged from the armed services on 30 October 2018 at which time the claimant’s Service Complaint was still outstanding.
15. The claimant’s Service Complaint was subject to a formal investigation and the evidence collated as part of that process was formally considered by the Decision Body appointed by the Defence Council in accordance with the laid down procedure. By a letter dated 14 November 2019, which is at pages 107-118 of the bundle, Lt Col A Alderson RM who had been appointed as the Decision Body by the Defence Council, dismissed, with reasons, the claimant’s Service Complaint. At the conclusion of the letter the claimant was informed of his right to appeal the decision in accordance with JSP 831. The claimant was advised that any appeal, by virtue of which the matter would be considered afresh, must be brought within 10 working days beginning on the day on which the claimant received the decision letter. The claimant was however, also advised that if the claimant required an extension of time, he should contact Lt Col Anderson who could grant an extension of a further 6 weeks. The letter further stated that it was the respondent’s policy to consider complaints resolved and closed if no response was received within the six-week time limit.
16. The respondent accepted for the purposes of this hearing, that the outcome letter of the Decision Body, which were sent to the claimant by post, did not appear to have been received by the claimant at that time and that a copy was sent to the claimant by WO2 Beilby by email on 14

January 2020 (the exchange of emails between the claimant and WO2 Beilby dated 14 January 2020 at pages 119 – 120 of the bundle). WO2 Beilby told the claimant to send his address if he wanted a hard copy of the letter. In the claimant's email in reply, also dated 14 January 2020, he confirmed receipt of the email attaching the finding of the Decision Body and asked WO2 Beilby to pass onto Lt Col Alderson his request for the six week extension to make a decision on what he intended to do. The claimant did not request a hard copy of the decision letter or provide details of his address.

17. The Tribunal has not been provided with a copy of any further correspondence between the parties until the subsequent exchange of emails between the claimant and WO2 Beilby on 26/27 February 2020 (pages 121 – 123 of the bundle as replaced/ supplemented by the copy emails provided during the course of the hearing) in which the claimant acknowledged receipt of the Decision Body's outcome letter and asked WO2 Beilby to confirm with Lt Col Alderson how long he had to submit an appeal. WO2 Beilby confirmed in response by email dated 27 February 2020 that having looked at the guidance in JSP 831, if the claimant wished to make an appeal or go to SCO, he had six weeks in which to do so from the date of the receipt of the Decision Body letter and that such time period could be extended if considered appropriate to so. WO2 Beilby subsequently confirmed on 27 February 2020, in response to a further query from the claimant, that the six weeks had started from the "Monday just gone" (24 February 2020).
18. On 6 April 2020, the claimant submitted a Service Complaint appeal against the findings of the Decision Body (page 128 – 130 of the bundle). The appeal made no reference to the exchange of correspondence between the claimant and WO2 Beilby regarding the extension of time for the submission of the claimant's appeal.
19. By letter dated 17 April 2020 (pages 131 – 132 of the bundle), which was sent by email, the Navy Service Complaints Secretary advised the claimant that he had determined that the claimant's appeal application did not constitute a valid appeal as it did not comply with the statutory requirements under the 2015 Regulations including in part, because it had not been submitted within 6 weeks of the date upon which the claimant had received the Decision Body's decision. The Complaints Secretary explained at paragraph 4 of the letter that he was aware from the exchange of emails between the claimant and Mr Beilby that the claimant had not received the Decision Body's letter of 14 November 2019 which was possibly because the claimant had changed address. The Complaints Secretary stated that he could see from the correspondence that, following contact from the claimant, Mr Beilby had emailed a copy of the Decision Body decision to the claimant on 14 January 2020, which had been acknowledged by the claimant that day and that, in such circumstances, he had therefore calculated the statutory 6 week appeal period from 14 January 2020 which gave a deadline of 24 February 2020. The Complaints Secretary further stated

that the claimant's appeal had not however, been received until 6 April 2020 which was a further 6 weeks beyond the statutory deadline and that it did not offer any explanation as to why the claimant could not meet the deadline notwithstanding that the claimant was advised of the relevant deadline for the appeal in the letter dated 14 November 2019. The Complaints Secretary concluded his letter by advising the claimant of his right to request the SCO to undertake an independent review of his decision not to accept the claimant's appeal application including that the claimant must make such request within 4 weeks from the date that the claimant received his letter. The Complaints Secretary included a link to the SCO website for further information.

Application to SCO

20. The claimant made an application to the SCO to review the appeal admissibility decision. The Tribunal has not been provided with a copy of the claimant's application to SCO. The Tribunal has however been provided with a copy of the SCO's decision letter dated 21 July 2020 (pages 133 – 134 of the bundle) in which the SCO informed the claimant that she had decided not to investigate the matter further. In summary, the reasons given for the SCO's decision were as follows :- (a) the claimant's application had not been submitted until 22 June 2020 notwithstanding that the Navy Service Complaints Secretary had informed the claimant in the letter rejecting the claimant's appeal that the claimant had, in accordance with the 2015 Regulations, 4 week's from the date of that letter in which to apply to the SCO for a review of the admissibility decision (b) the claimant had however, submitted his application over six weeks out of time and (c) the SCO did not believe that the claimant had provided just and equitable grounds to accept his application out of time. The SCO stated that she had considered the claimant's explanation that he had been unable to download the application form. This was not however accepted by the SCO as she stated that following initial contact by the claimant and advice from the SCO enquiries team on 20 May 2020, the claimant had been provided with a copy of the relevant application form on 3 June 2020 which was not however submitted until 22 June 2020. The claimant was advised that the SCO's decision was final and could not be appealed. The SCO further advised the claimant that if he wished to pursue the matter further, he might be able to pursue an application for judicial review through the civil courts and advised him in general terms of the associated time limits.
21. The claimant obtained employment as a security guard working shifts with effect from 29 September 2019 and has worked in such position since such date.
22. The claimant's ACAS Early Conciliation Certificate records that the claimant's EC notification was received by ACAS on 22 January 2021

and the claimant's EC certificate was issued (by email) on 26 January 2021 (page 2 of the bundle).

23. The claimant presented his claim form to the Employment Tribunals on 28 January 2021 (pages 3- 14 of the bundle) to which he attached a document entitled, "Service Complaint – Racial Harassment, Bullying and Direct Race Discrimination, 14 February 2018 (pages 15 – 24 of the bundle) which is in all material terms the same as the document submitted as the claimant's Service Complaint on 15 February 2018 (pages 43- 57 of the bundle).
24. The claimant stated at paragraph 15 of his claim form that the previous 6 months had been an incredibly busy period for him and his family because of work and family commitments. The claimant also stated that whilst he had had every intention of submitting his application to the Employment Tribunals over the Christmas period, he had been unable to do so because of family matters involving legal issues relating to contact with a child which had required him to incur legal expenses and meant that he was unable to pay for any legal help with regard to the Tribunal proceedings (page 14 of the bundle). The claimant further stated that it had been a very emotional and busy time, that things had been getting the better of him lately and that he would be seeking counselling through his employer.
25. The claimant has given a number of reasons, in addition to the matters referred to at paragraph 24 above, for the delay in bringing his Tribunal proceedings including in particular :- (a) ignorance of relevant Tribunal procedures and time limits (b) that he was advised by WO2 Beilby that he had to pursue his claim via the Service Complaints procedure and could not pursue a complaint to the Employment Tribunals and (c) because of his mental health.
26. In addition, the claimant's mother stated in her written representations that in the light of the advice from the claimant's superior that he could not bring a claim in the Employment Tribunals she believed this to be the case until she became aware of such right in January 2021 when she came across a video of an ex- army man talking about bringing a claim for race discrimination. The claimant's mother further contended that at that time she undertook further research and as a result of which she understood that a member of the armed forces had 6 months in which to bring such a claim.
27. The Tribunal has considered the factual basis for such reasons as addressed below.
28. The Tribunal has considered first the claimant's contention that he had been told by WO2 Beilby that he had to pursue his complaint of race discrimination as a Service Complaint pursuant to JSP 831 and that he could not pursue a claim via the Employment Tribunals. The claimant

was unable to provide particulars of such alleged discussion other than that such a discussion had taken place around the time that he had left the service and that WO2 Beilby had advised him that he had to go through the process contained in JSP831.

- 29.** After giving the matter careful consideration, the Tribunal is not satisfied that the claimant was, on the balance of probabilities, informed by WO2 Beilby that he could not bring a complaint of race discrimination in the Employment Tribunals. When reaching this conclusion, the Tribunal has taken into account that it has not received any evidence from WO2 Beilby. The Tribunal has also taken into account however, that the claimant was unable to give any specific details of the alleged discussion/ was uncertain when it was alleged to have taken place, that it is not referred to in the claimant's explanation at paragraph 15 of his claim form for the delay in bringing his Tribunal complaint and that such contention is inconsistent with the other available evidence. It is apparent from the other available evidence that :- (a) WO 2 Beilby was aware of and consulted the provisions of JSP 831 (paragraph 17 above) (b) the claimant accepts that WO2 Beilby drew such provisions to his attention and (c) the extract from JSP 831 dealing with such matters (at pages 135 – 136 of the bundle) clearly states that claims may be brought to an Employment Tribunal under the 2010 Act and contains guidance concerning the relevant time limits and associated criteria.
- 30.** Further, the Tribunal is satisfied that the claimant was, or in any event should reasonably have been aware, of the ability to bring a complaint of race discrimination claim in the Employment Tribunals and of the relevant time limits for issuing such proceedings. When reaching this conclusion, the Tribunal has taken into account that the claimant had accessed/ was repeatedly made aware of JSP 831 from the time of the submission of his Service Complaint onwards (paragraphs 12 -13 and 15 above) and the associated guidance concerning such matters contained therein. The Tribunal has further taken into account that the claimant refers to the provisions of the 2010 Act in his Service Complaint (pages 50 – 57 of the bundle). Moreover, the Tribunal has noted that although the claimant's mother contended in her written representations that she was unaware of the claimant's right to bring a complaint of race discrimination in the Employment Tribunals until January 2021, the claimant says at paragraph 15 of his claim form that he had intended to commence proceedings over the Christmas period but was unable to do so because of the family issues identified by him (page 14 of the bundle).
- 31.** Further, the Tribunal is not satisfied on the evidence that the claimant's mental health prevented or delayed him from pursuing a complaint of unlawful discrimination to the Employment Tribunals. When reaching this conclusion, the Tribunal has taken into account in particular, that :- (a) the claimant was able to submit a Service Complaint on 15 February 2018 (page 57 of the bundle) and participate in the subsequent fact finding investigation on 18 July 2018 (page 60 of the bundle) (b) that the claimant undertook alternative employment in security working shift work

from September 2019 (paragraph 21 above) (c) there is no reference to any health issues in the claimant's correspondence with WO2 Beilby in January or February 2020 and (d) the claimant was able to submit an appeal in April 2020 (paragraph 18 above) and a subsequent application for a review to the SCO in June 2020 (paragraph 20 above) and (e) that there is no suggestion in the subsequent letter from the SCO dated 21 July 2020 rejecting the claimant's application for review, that the claimant had raised any health issues as a reason for the delay in submitting his application. Further, the claimant has not submitted any medical evidence in support of his contention that he was unable to pursue his complaint in the Employment Tribunals at an earlier date because of his mental health.

32. THE LAW

33. The Tribunal has had regard in particular to the following statutory provisions and legal authorities:-

Article 6 of Schedule 1 to the 1998 Act.

Sections, 9 , 13, 26, 27, 39, 120, 121 and 123 of the 2010 Act,

The 2006 Act (Part 14a – redress of service complaints sections 340A - 340 O).

The 2015 Regulations (and in particular Regulations 7,10-12).

Molaudi v MOD (UKEAT/0463/10/JOJ) and Molaudi v MOD [2012] EWCA Civ 576 CA.

Robertson v Bexley Community Centre [2003] IRLR 434CA

Edomobi v La Retraite RC Girls School EAT/0180/16)

Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021]EWCA Civ 23. CA.

34. The Tribunal has reminded itself in particular of the following: -

The Jurisdiction of Employment Tribunals in cases involving the Armed Forces

(1) The jurisdiction of Employment Tribunals in respect of permitted discrimination claims (including race discrimination) relating to matters arising during service in the Armed Forces is regulated by sections 120 and 121 of the 2010 Act.

(2) Employment Tribunals only have the power to determine such complaints where two requirements are met namely :- (a) a Service Complaint has been made about the matter complained of and (b) the Service Complaint has not been withdrawn (section 121 (1) (a) and (b) of the 2010 Act).

(3) Section 121 (2) of the 2010 Act sets out the circumstances in which a Service Complaint is deemed to be withdrawn. In

summary, where a Service Complaint has been dealt with by a relevant person/ Decision Body it is to be treated as withdrawn if the period permitted for the bringing of an appeal against such decision has expired and either :- (a) the complainant does not apply to the SCO for a review of the decision not to allow an appeal brought out of time to proceed or (b) the complainant does apply for such a review and the SCO decides that the an appeal cannot be proceeded with.

- (4) The 2015 Regulations (Regulation 11) state that the period allowed for bringing an appeal against the findings of a Decision Body is 6 weeks beginning with the day on which the complainant received notification of the decision (unless the Defence Council considered it just and equitable to allow the appeal to proceed). The 2015 Regulations (Regulation 12) further state that SCO must not consider an application for a review against a refusal to allow an appeal to proceed which is made after 4 weeks beginning with the day the complainant received notification of such refusal unless the SCO considers it just and equitable to allow the complainant to apply after that period.
- (5) The guidance contained in the judgments of the Employment Appeal Tribunal/ the Court of Appeal, in the case of **Molaudi** including that the Employment Tribunal is not the place to challenge decisions of service authorities, including in respect of time limits, and further that the proper way of challenging such decisions is by way of judicial review.

Section 123 of the 2010 Act

- (6) In circumstances where a valid Service Complaint has been made which is not “withdrawn” any complaint has to be presented to the Employment Tribunals within 6 months starting with the date of the act to which the proceedings relate or such further period as the Tribunal thinks just and equitable. When deciding whether to exercise such discretion, the Tribunal should have regard to all relevant factors in the case including the length and reasons for any delay and any prejudice caused to the respondent by such delay.

The 1998 Act

- (7) Article 6 of Schedule 1 to the 1998 Act entitles all persons to a fair and public hearing within a reasonable period of time by an independent and impartial Tribunal established by law. Employment Tribunals are required to interpret and give effect to domestic legislation in a way that is compatible with Convention Rights in so far as it is possible to do so

CLOSING SUBMISSIONS

35. The Tribunal has had regard to the written submissions and oral submissions of the parties (including to the legal authorities relied upon by the respondent as referred to above).

The submissions of the parties

36. In summary, the claimant appears to contend that the Tribunal has jurisdiction to entertain his complaint of race discrimination as he submitted a valid Service Complaint which should not be treated as withdrawn as he submitted a valid appeal (within the time period permitted by WO2 Beilby) and further that any refusal to allow him to proceed with his claim would be a breach of his right to a fair trial pursuant to Article 6 of Schedule 1 to the 1998 Act.
37. The claimant further contends that for the purposes of section 123 of the 2010 Act it would be just and equitable for the Tribunal to extend time to allow him to proceed with his claim in the light of the mental health and family difficulties experienced by him, his lack of knowledge of Tribunal procedures/ time limits and limited prejudice to the respondent as it had undertaken an investigation of the matter for the purposes of the Service Complaint.
38. In summary, the respondent contends that the Tribunal does not have jurisdiction to entertain the claimant's complaint of race discrimination as members of the Armed Forces, including the claimant, are only entitled to pursue such claims in the circumstances identified in sections 120 and 121 of the 2010 Act. This requires the claimant to have made a valid Service Complaint which has not been withdrawn (section 121 (1) of the 2010 Act). In this case however, although the claimant submitted a valid Service Complaint, he did not appeal against the Decision Body's decision within the time limit laid down in the 2015 Regulations for bringing such appeal. Further, his application for a review of the decision not to allow him to proceed with an appeal was rejected by the SCO (Section 121 (2)(a) and (b) (ii) of the 2010 Act).
39. Further, if for any reason the Tribunal has jurisdiction to entertain the claimant's complaint of race discrimination pursuant to sections 120 and 121 of the 2010 Act, the claimant's claim was not presented within the time limited permitted by section 123 of the 2010 Act for such claims (6 months from the date of the last act complained of) and it is not just and equitable in the circumstances of the case to extend time to allow such claims to proceed. The Tribunal was asked to have regard in particular to the inordinate delay in bringing the claim, which was presented by the claimant nearly 2.5 years out of time which

included a period of over 6 months after the conclusion of the SCO process and notwithstanding that the substance of the claim was essentially the same as the original Service Complaint. The Tribunal was further asked to take into account that the claimant had assistance from his mother and access to relevant policies and procedures and further the significant prejudice which would be caused to the respondent if it was required to defend the claimant's claims which concerned events which had occurred over 4 years ago.

THE CONCLUSIONS OF THE TRIBUNAL

Does the Tribunal have jurisdiction to entertain the complaint of race discrimination pursuant to sections 120 and 121 of the 2010 Act.

40. The Tribunal has considered first whether it has jurisdiction to entertain the claimant's complaint of race discrimination pursuant to sections 120 and 121 of the 2010 Act. As the claimant was a member of the armed forces at the relevant time, he has to satisfy the requirements of section 121 (1) of the 2010 Act in order to be permitted to bring a complaint of race discrimination pursuant to the "gateway" provision of section 120 of the 2010 Act.
41. The Tribunal is satisfied that the claimant has complied with the requirement of section 121 (1) (a) of the 2010 Act namely, that on 15 February 2018 the claimant submitted a Service Complaint in respect of the matters of race discrimination which he now seeks to pursue in this Tribunal (paragraph 12 above). Further, the Service Complaint was accepted (save in respect of one aspect which is not relevant to these proceedings) as a Valid Service Complaint by the respondent by letter dated 20 March 2018 (paragraph 13 above).
42. After giving the matter careful consideration, the Tribunal is however satisfied that the claimant's Service Complaint was subsequently "withdrawn" for the purposes of section 121 (1) (b) and 121 (2) of the 2010 Act prior to the submission of the claimant's complaint of race discrimination and that the Tribunal therefore does not have jurisdiction to consider his claim.
43. When reaching this conclusion, the Tribunal has taken into account the following matters: -
 - (1) The claimant's Service Complaint was considered and dismissed by a Decision Body (in accordance with Regulation 9 of the 2015 Regulations) by a letter dated 14 November 2019 (paragraph 15 above). The claimant was advised in that letter that any appeal must be brought within 10 working days beginning on the day on which the claimant received the decision letter save that the Decision Officer could if required grant an extension of time of a further 6 weeks.

- (2) Regulations 10 and 11 of the 2015 Regulations give a complainant a right of appeal against the findings of a Decision Body where the appeal is brought within 6 weeks beginning with the day on which the complainant received notification of the decision or if later, if the Defence Council considers it just and equitable to allow the appeal to proceed.
- (3) It was accepted for the purposes of the claimant's Service Complaint appeal (and for the purposes of this hearing), that the findings of the Decision Body were not received by the claimant until 14 January 2020 (paragraph 16 above) which was therefore the relevant date for the purposes of bringing any appeal.
- (4) The claimant did not however submit an appeal until 6 April 2020 which was outside the 6-week time period permitted by Regulation 11 (1) (a) of the 2015 Regulations. The claimant did not refer in his appeal document (or it appears in his subsequent application for review to the SCO) to any agreement by WO2 Beilby to extend the time limit for appeal beyond that provided for in the 2015 Regulations. The claimant's appeal/ review of the rejection of his appeal was subsequently rejected by the Navy Service Complaints Secretary and the SCO as set out below.
- (5) The Navy Service Complaints Secretary notified the claimant by letter dated 17 April 2020 that he had determined that the claimant's appeal application did not constitute a valid appeal as it did not comply with the requirements of the 2015 Regulations including in part as it had not (taking the relevant date of receipt as 14 January 2020) been received within the relevant 6 week deadline and the claimant's appeal offered no explanation for the delay (paragraph 19 above and page 132 of the bundle). The claimant was advised of his right to request the SCO to undertake a review of the decision and was advised that any application must be made within 4 week's of the date he received the letter.
- (6) The claimant's subsequent application for a review of the decision to reject his appeal was rejected by the SCO. The claimant's application for review was submitted by him to the SCO on 22 June 2020. The SCO declined by the decision letter dated 21 July 2020 to investigate the matter further on the grounds that the application had been submitted outside the 4 week time period permitted by the 2015 Regulations and that the claimant had not provided just and equitable grounds to accept his application out of time (paragraph 20 above). Such rejection was in accordance with Regulation 7 (2) of the 2015 Regulations which provides that SCO must not consider any such application for review which is made after four week's

beginning with day that the complainant received notification of the decision unless the SCO considered it just and equitable to allow the complainant to apply after that period.

44. The Tribunal is therefore satisfied, in the light of the above, that the claimant's Service Complaint was therefore deemed to be withdrawn in accordance with section 121 (2) (b) of the 2010 Act prior to the presentation of his complaint of race discrimination on 28 January 2021.
45. When reaching the above conclusions the Tribunal considered whether the exchange of correspondence between the claimant and WO2 Beilby in January – February 2020, culminating in the email from WO2 Beilby dated 27 February 2020, confirming in response to the claimant's request for clarification, that the 6 week extension for the submission of the appeal had begun to run from 24 February 2020 (paragraphs 16 and 17 above) together with the claimant's subsequent submission of the appeal within such period (on 6 April 2020) (paragraph 18 above) changes the position. As part of such consideration the Tribunal considered whether this meant that the period allowed for the bringing of an appeal had not expired for the purposes of section 121 (2) (a) of the 2010 Act and whether the appeal could not consequently be considered to have been withdrawn for the purposes of section 121 (1) (b) of the 2010 Act.
46. The Tribunal has taken into account that the relevant provisions of section 121 (2) of the 2010 Act state that :-
- “(2) Where the complaint is dealt with by a person or panel appointed by the Defence Council by virtue of section 340C(1)(a) of the 2006 Act, it is to be treated for the purposes of subsection (1) (b) as withdrawn if :-
- (a) the period allowed in accordance with the service complaints regulations for bringing an appeal against the person's or panel's decision has expired and
 - (b) either:-
 - (i) the complainant does not apply to the Service Complaints Ombudsman for a review by virtue of section 340D (6) of the 2006 Act (review of decision that the appeal brought out of time cannot proceed) or
 - (ii) the complaint does apply for such a review and the Ombudsman decides that an appeal against the person's or panel's decision cannot be proceeded with”.
47. The Tribunal has also taken into account the provisions of 9 – 12 of the 2015 Regulations including in particular: -

- (1) The requirements of the Defence Council to provide a decision on a service complaint in writing together with notification of the associated rights of appeal (Regulations 9 (3) – (5)).
 - (2) That any appeal against such complaint must be brought “ within six weeks beginning with the day on which the complainant received notification under regulation 9 (3) of that decision” or “ if the appeal is brought after the end of such period but the “Defence Council consider it is just and equitable to allow the appeal to be proceeded with” (Regulation 11 (1) of the 2015 Regulations)
 - (3) That any application for a review of the Defence Council’s decision not to proceed with an appeal cannot be considered by the SCO where it is “made after four weeks beginning with the date that the complainant received notification of the decision under regulation 11 (2) unless the Ombudsman considers it just and equitable to allow the complainant to apply after that period” (Regulation 12 (2) of the 2015 Regulations. Further such decision is binding on the complainant and the Defence Council.
48. After giving the matter careful consideration, the Tribunal is satisfied that the confirmation by WO2 Beilby in the email dated 27 February 2020 that the 6 week extension for the claimant’s appeal ran from 24 February 2020 (and the subsequent submission of an appeal by the claimant on 6 April 2020) does not assist the claimant for the purposes of his Tribunal complaint pursuant to section 120 or 121 of the 2010 Act.
49. When reaching such conclusion, the Tribunal has taken into account that the period of appeal against the Decision Body’s decision, as permitted by Regulation 11 (1) of the Regulations ie 6 weeks, had expired when the claimant submitted his appeal on 6 April 2020 as it is agreed that the claimant had received written notification of the decision of the Decision Body on 14 January 2020. Further, the Naval Complaints Secretary did not consider it just and equitable to allow the appeal to proceed. The claimant’s appeal against the Decision Body’s decision therefore falls within section 121 (2) (a) of the 2010 Act.
50. Moreover, the claimant’s Service Complaint also falls within the provisions of section 121 (2) (b) (ii) of the 2010 Act as the SCO subsequently determined that the claimant’s (out of time) application for a review of the decision not to allow him to proceed with his appeal could not proceed.
51. In all the circumstances, the Tribunal is satisfied, having given careful consideration to all of the above, that the claimant’s Service Complaint was withdrawn by 21 July 2020 (with the outcome of the decision of the

SCO) for the purposes of section 121 (1) of the 2010 Act and that the Tribunal does not have jurisdiction to entertain his complaint of race discrimination. Any complaint that the claimant had regarding the application of the time limits for appeal against the Decision Body's decision (including in the light of his correspondence with WO2 Beilby) should have been pursued by him as part of the Service Complaints procedure / the SCO application for review/ by way of judicial review and the Tribunal does not have jurisdiction to intervene in such matters.

The position with regard to section 123 of the 2010 Act

52. Strictly, without prejudice its finding that it does not have jurisdiction to entertain the claimant's complaint pursuant to sections 120 and 121 of the 2010 Act, the Tribunal has, in case such finding is incorrect, gone on to consider whether the Tribunal would, in any event, have had jurisdiction to determine the claimant's complaint of race discrimination pursuant to section 123 of the 2010 Act. When considering such matter the Tribunal has had regard to the law and submissions of the parties referred to above.
53. It is accepted that the claimant's complaint of race discrimination was not presented within the period of 6 months starting with the last act complained of pursuant to section 123 (2) (a) of the 2010 Act as :- (a) the last act complained of occurred no later than 14 February 2018 (the date of the Service Complaint) and (b) the claimant's complaint of race discrimination was not presented to the Tribunals until 28 January 2021.
54. The Tribunal has therefore gone on to consideration whether the complaint was however presented within such further period as the Tribunal thinks just and equitable for the purposes of section 123 (2) (b) of the 2010 Act. For such purposes the Tribunal has had regard in particular to the length of the delay, the reasons for the delay and the question of prejudice.
55. As far as the length of the delay is concerned the "last act" complained of for such purposes was 14 February 2018 and the original 6month period in which to bring a Tribunal claim therefore expired on 13 August 2018. The claim is therefore nearly 2 ½ years out of time.
56. When considering the reasons for the delay, the Tribunal has taken into account that the claimant was required to pursue his claim first as a Service Complaint which he did duly did. The Tribunal has also taken into account that it took from 15 February 2018 to 14 November 2019 for the Decision Body to investigate and determine the claimant's complaint, that the claimant did not receive the written decision until 14 January 2020 and further that the appeal and subsequent SCO process was not completed until 21 July 2020. The Tribunal has also

taken into account that the claimant experienced mental health issues from time to time during the period together with the domestic issues in December 2020 referred to in paragraph 15 of the claimant's claim form. The Tribunal has also had regard to the claimant's contentions regarding his ignorance of the relevant procedures and time limits.

57. The Tribunal has however balanced against such matters that the claimant's Service Complaint did not preclude the claimant from presenting a claim to the Tribunals whilst his Service Complaint was progressing (section 121 (5) of the 2010 Act) as explained in paragraph 16 of JSP 831 (page 135 of the bundle) and that the relevant facts were known to the claimant by 14 February 2018. The Tribunal has also taken into account for such purposes, that it has rejected the claimant's evidence that he was advised by WO2 Beilby that he could not bring a complaint to the Tribunals (paragraph 29 above). The Tribunal has further taken into account that it was satisfied on the facts that the claimant knew or ought reasonably have known, in the light of the provisions of JSP 831 to which he was repeatedly referred and had access to (paragraphs 30 above) together with his own awareness and knowledge of the provisions of the 2010 Act (as referred to in his Service Complaint – paragraph 12 above) about the relevant procedure and time limits for bringing a race discrimination complaint in the Employment Tribunals. The Tribunal has still further taken into account that it is not satisfied, having regard in particular to the absence of any medical evidence to the contrary and that the claimant has undertaken alternative employment since September 2019, that any mental health issues on the part of the claimant prevented/ delayed his claim to the Tribunals (paragraph 31 above). Moreover, the Tribunal is not satisfied that the events described in paragraph 15 of the claimant's claim form prevented him from bringing at that time a claim which had been formulated since February 2018.
58. The Tribunal has also had regard to the prejudice which would be suffered by the parties of extending or refusing to extend time. The Tribunal appreciates that if it refuses to extend time the claimant would not be allowed to pursue his complaint of race discrimination further. The Tribunal has also taken into account however that if the Tribunal extended the time limit the respondent would be required to defend allegations which occurred at least four years ago and which are unlikely to be determined by a Tribunal hearing for at least another 12 – 18 months.
59. Having weighed all of the above, the Tribunal is not satisfied that it would be just and equitable to allow the claimant to proceed with his claim of race discrimination. When reaching this conclusion, the Tribunal is satisfied that the claimant has failed to give an adequate explanation for the reasons for the delay and that the factors identified at paragraph 57 significantly outweigh those identified at paragraph 56 above. The Tribunal is further satisfied that there is likely to be significant prejudice caused to the respondent if it was required to

adduce oral evidence relating to contentious factual events which were alleged to have occurred more than 4 years ago and which would take a further 12 – 18 months to come to trial. Further these are matters which the claimant could, if he had pursued his appeal against the Decision Body in the Service complaint proceedings / application for review to the SCO in a timely manner within their rules, had determined in 2020.

Article 6 of Schedule 1 to the 1998 Act

60. Finally, the Tribunal has considered whether, as alleged by the claimant, the refusal to allow him to proceed with his complaint of race discrimination would be a breach of his right to a fair trial pursuant to Article 6 of Schedule 1 to the 1998 Act.
61. The claimant has not properly particularised this claim. The Tribunal however understands that the claimant's case is that sections 120, 121 and 123 of the 2010 Act should be construed in accordance with the claimant's Convention rights and that, in particular in the light of the confirmation by WO2 Beilby in February 2020 that the claimant had 6 weeks from 24 February 2020 in which to appeal against the Decision Body (which he duly did) he has been denied a fair trial by reason of the unfair application of section 121 (2) of the 2010 Act which section / section 123 of the 2010 Act, should be construed in accordance with the provisions of the 1998 Act to allow him to pursue his complaint of race discrimination. The respondent denies any such interpretation / breach.
62. As stated previously above, the Tribunal accepts that the statutory provisions have to be construed in accordance with the claimant's Conventions rights as enshrined in the 1998 Act.
63. Having given the matter carefully consideration the Tribunal is not satisfied that there has been any breach of Article 6 of Schedule 1 of the 1998 Act in this case.
64. When reaching this conclusion, the Tribunal has taken into account in particular, that it is satisfied that the claimant was afforded an opportunity to access a fair and public hearing within a reasonable period of time in respect of his complaint of race discrimination by an independent and impartial tribunal established by law. In this case the claimant had potential access to three independent and impartial tribunals namely: - (a) the Service Complaints process which involved consideration of his Service Complaint by a Decision Body, a fresh right of appeal and further right of review of refusal to consider an appeal by the SCO (b) recourse to judicial review in respect of the outcome of the decision by the SCO and (c) an Employment Tribunal.

65. The prescribed time limits in respect of the Service Complaints procedure and the Employment Tribunal proceedings were capable of extension on “just and equitable grounds” as referred to previously above.
66. Further, as far as the Employment Tribunals were concerned, the claimant would have been entitled to pursue a complaint of race discrimination to the Tribunals if he had brought such claim in the Employment Tribunal within 6 months of the last act of discrimination complained of (or such further period as the Tribunal considered just and equitable) pursuant to sections 121(5) and 123 (2) of the 2010 Act (as explained in paragraphs 16- 18 of JSP 831) provided that his complaint was brought before his Service Complaint was deemed to have been withdrawn for the purposes of section 121 (1)(b) / 121 (2) of the 2010 Act.
67. As indicated previously above, the Tribunal is satisfied that the claimant was, or should reasonably have been aware of such matters, by reason of his awareness of JSP 831 and the Equality Act 2010. Further, the claimant could have raised any concerns regarding the effect of his discussions with WO2 Beilby on the operation of the time limits for appeal as part of the Service Complaint / SCO procedures.
68. In all the circumstances, the Tribunal is satisfied that there has been no breach of the claimant’s Human Rights as enshrined in Article 6 of Schedule 1 to the 1998 Act in respect of the Tribunal’s interpretation of sections 120,121 or 123 of the Equality Act 2010.

Employment Judge Goraj
Date: 14 February 2022

Judgment sent to parties: 17 February 2022

FOR THE TRIBUNAL OFFICE