



# EMPLOYMENT TRIBUNALS

**Claimant:** MR P UKPAI

**Respondent:** MINISTRY OF DEFENCE

**Heard at:** Watford ET sitting in Amersham **On:** 25,26,27,28, & 29 November 2019

**Before:** Employment Judge Skehan  
Ms Bhatt  
Ms Hamill

**Appearances**  
**For the Claimant:** In person  
**For the Respondent:** Mr Burns, Counsel

## JUDGMENT

1. The claimant's claim for unlawful detriment contrary to S47B of the Employment Rights Act 1996, direct discrimination on the grounds of race and victimisation contrary to the Equality Act 2010 are unsuccessful and dismissed.

## REASONS

1. The claimant requested these reasons in writing at the conclusion of the hearing. At the relevant time the claimant was a Major in the Army reserves and had held this post since 01/10/2013. He was the Officer Commanding (OC) of the 94 Signal Squadron, 39 Signal Regiment. By claim form received at the Employment Tribunal on 27/12/2017 the

claimant claimed unlawful detriment contrary to section 47B Employment Rights Act 1996 (ERA), victimisation contrary to section 27 of the Equality Act 2010 (EqA), direct discrimination contrary to section 13 of the Equality Act. The protected characteristic is race and the claimant describes himself as a black British person of African descent. The claim was defended, and the respondent lodged their response form on 13/03/2018.

2. There was a preliminary hearing held on 05/07/2018 where Employment Judge Hawsworth identified the issues with the parties. We revisited these issues at the outset of the hearing. The employment tribunal explained to the parties that the list of issues was a list of questions that the employment tribunal would determine within our judgement. It was important at the outset to ensure that the list of issues was agreed and complete. The issues in this case was set out and agreed as set out in Appendix 1 to this judgment.

### **The Facts**

3. We heard from the claimant on his own behalf and Brig Robertson, Lt Col Connolly, Col Cooper and Captain Bath on behalf of the respondent. All witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined.
4. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.
5. Prior to the issues giving rise to this litigation no disciplinary or capability issues were raised with the claimant by the respondent. The claimant's performance appraisals to which we were referred show that he was held in high regard by Lt Col Bruce and Col Cooper who praises the claimant's

sound judgement. The claimant's performance appraisals reflect his progress through the respondent's ranks. The claimant was at the relevant time in command of the 94 Signal Squadron, part of the 39 Signal Regiment from 01/10/2015.

6. The claimant had issues with his second-in-command Capt Saunders. We note the email dated 27/02/2017 contained within the bundle and conclude that any issues between the claimant and Capt Saunders were at least significantly contributed to by Capt Saunders.
7. By way of background to the issues between the claimant and the respondent, on 01/11/2016 the claimant made a complaint to the Investigatory Powers Tribunal (IPT). The claimant told us that that he did not keep a copy of his claim to the IPT. His complaint referred to the British Army generally and members of his squadron in particular, including Capt Saunders. The claimant first raised concerns with the respondent directly on 09/11/2016 by way of an email to Captain Bath. The email states:

I am writing to inform you that I believe that I am the subject of a covert investigation emanating from a complaint from a person I knew very briefly in 2013. I have not been provided with any transparent or accountable opportunity to defend myself or even made aware of any allegations against me. However, in other aspects of my life, I believe the following steps have been taken

- Contacts have been recruited to act as Covert Human Intelligence Sources within the meaning of [the legislation] and on some occasions meetings I have had at the homes of people have been recorded.
- There has also been an attempt to enter my property under the ruse of selling flowers and I would be grateful for any legal or welfare support available.

- From my part, I have submitted a complaint last week to the IPT alleging that my Human Rights under article 6 & 8 have been violated

I will be grateful for any help or guidance that you can point me to within the military system.

8. The respondent considered this to be an external matter as the claimant stated he had submitted a complaint to the IPT. The claimant was encouraged to report any concerns to the authorities if he had not done so already by Capt Bath. No further action was taken by the respondent. From the claimant's documentation it appears that the IPT rejected the claimant's complaints on 16/05/2017. The claimant did not inform the respondent of the outcome of his IPT complaint prior to the issue of this claim.
9. On 05/09/2017 the claimant arranged for a meeting with Brig Robertson. Prior to this meeting the claimant sent a text message to Brig Robertson stating '.... I just have a simple point to make for the benefit of all..'.
10. The claimant accepted during the hearing that the notes written up by Brig Robertson following their discussion as contained within the bundle were reasonably accurate, with the exception of the reference to suspension dealt with below. Brig Robertson's notes the claimant's concerns as:
  - the Facebook exchange with a named solicitor suggesting that the claimant feared he was under surveillance from a state body. He assumed this was the army, possibly the SIB and made reference to this being unlawful under the [legislation] hence his pursuit of the case with the ECHR.
  - Brig Robertson asked the claimant to consider the means, motive and opportunity for such surveillance to be conducted – particularly the motive. The claimant did not know what the motive might be but felt the outcome was to undermine him in the eyes of the squadron, the Gp and also to some extent his outside interests .....

- a device on the claimant's car as evidenced by observers being around whenever he drove anywhere especially the ARC;
  - email information influencing comments from others who should not have seen original emails.
  - Coincidence of comments, e.g. I made a light-hearted exchange with him relating verb and noun confusion with invite/invitation. The claimant received an email using 'invitation' correctly and feared this has been informed by earlier emails.
  - On a private trip to Strasbourg the claimant's mobile wouldn't roam;
  - email and/or Facebook exchanges disappearing from his PC/phone.
  - The claimant assumed it was the army conducting the surveillance as other agencies were busy with CT activity etc.
  - the claimant stated that he knew how to run agents and that there were a number of classic signs that he was the subject of an operation – presumably to gather information to be used to undermine him.
  - The claimant expressed some irritation (the only time he did so) as what the claimant considered to be the ineptitude of the surveillance. It was all too easy for him to detect it.
11. The note is said to be a summary of the discussion as Brig Robertson could not recall all of the examples given. We find it likely that the claimant referred to additional examples that Robertson did not recall and/or record. We consider it likely that he referred to the previous examples brought to the attention of Captain Bath and set out above in addition his claims set out in the ET1 at paragraph 5 of his statement of claim being:
- 11.1 with respect to the suspected use of legal covert technical means authorised by [the legislation] to illegally alter data on social media accounts including my Facebook account, I shared..... Images of an interaction which I had recently on 02/09/2017 with a social media contact who was also a solicitor..... I have been informed

that some of the Facebook posts [the solicitor] had published on to my Facebook newsfeed had been orchestrated by Lt Col Caroline Whittle. .... I had previously submitted a complaint to the SRA on 22/03/2017 stating that [the solicitor's] conduct breached the solicitor code of practice.

12. Brig Robertson's note also records that he explained to the claimant.... That he had to act on what the claimant had told him. He explained that he was concerned that whatever the facts of the case were, the claimant was not in a position to successfully command the squadron. Brig Robertson informed the claimant that he would call the CO at the earliest opportunity so that he could take appropriate action and that Brig Robertson's assessment of the action was that the CO would be likely to suspend the claimant without prejudice while an investigation was conducted. Brig Robertson records that the claimant's said that while he was not seeking a suspension he would understand if some such measure was imposed. Brig Robertson noted that there were a number of areas of the claimant did not wish to go into. Throughout their discussion the claimant remained entirely calm and, within the constraints of his concerns, coherent and rational. They parted at approximately 20:20 on somber but good terms. The claimant denies that there was any discussion about suspension during this initial conversation. In viewing this evidence, the tribunal note the text correspondence between the men following this discussion. In particular Brig Robertson said 'I have briefed him [the CO, Lt Col Connolly] on the situation and he's clearly very concerned for you and will take action, probably as we discussed. .... The tribunal considers on the balance of probability that possible suspension was discussed with the claimant as set out by Brig Robertson.
13. Prior to this discussion the claimant held Brig Robertson in high regard. Brig Robertson considered himself a mentor to the claimant in the broader sense of the word. There was no previous ill feeling or animosity between the men.

14. Brig Robertson, on realising that the claimant had a genuine belief, listened carefully to his complaint. Brig Robertson told us that it was a very serious matter, whether the claimant was right or entertaining completely erroneous beliefs. Brig Robertson told us that he could not see how in the current circumstances, the claimant could successfully command of the squadron. If nothing else, he suspected a number of those within the squadron of being guilty of spying on him. Brig Robertson said that he explained to the claimant that he may need to step back from his mobile his concerns were investigated. Brig Robertson did not consider this to be a punitive measure but simply to ensure the operational capability of the squadron in the situation that now existed. Brig Robertson saw the situation as a squadron of OC's position was untenable until the issues he has raised were resolved. Either he was indeed under state surveillance (in which case the reason for this surveillance was likely to be material to his ability to command the squadron) or else he was mistaken in beliefs that he clearly held very strongly. The latter would raise concerns about his health and well-being and would cause the chain of command to consider the appropriateness of the claimant continuing to occupy the post he held.
15. Brig Robertson discussed this matter with Lt Col Connolly. He discussed two possibilities being either the claimant suspicions were true or else he was mistaken. In any event the matter would need to be looked into and Brig Robertson left it to Col Connolly to take forward.- Brig Robertson was not part of the chain of command.
16. Brig Robertson considered Lt Col Connolly to be a very sensible and measured man and noted that within his civilian career he was a senior academic psychologist. Following his discussion with the claimant, Brig Robertson had also requested internally that the claimant not be allowed access to the weapons in the armoury.
17. Lt Col Connolly was new in his post, having taken it up some 5 days previously on 01/09/2017. On receiving a call from Brig Robertson on 5 September as set out above, Col Connolly spoke to Captain Keenan and

Collins, Captain Mell and Captain Bath in relation to the allegations. He was surprised to hear that the allegations made by the claimant were not new and there were existing issues between the claimant and the second-in-command. The claimant had accused Capt Saunders of being a 'CHIS', a covert human intelligence source or spy in more everyday language. Lt Col Connolly considered on the information available to him and the fact that none of the officers to whom he had spoken appears to have seen any rational or objective basis for the allegations the claimant was making that the claimant was behaving irrationally.

18. Lt Col Connolly contacted his commanding officer, Col Cooper. Lt Col Connolly informed Col Cooper that his initial assessment of the claimant's complaint was that the claimant was being irrational. Both men agreed that the best approach would be for the claimant to seek medical help and in the meantime take a step back from any activities. Lt Col Connolly stated that his primary concern was for the claimant health and welfare at this point. He noted that should the claimant be experiencing delusions he would genuinely believe them to be real. Lt Col Connolly wanted the claimant to seek professional medical advice about his thoughts. Lt Col Connolly considered there is no difference to a physical condition and where a physical illness appears to be exasperated by serving in the Army reserve Lt Col Connolly would advise the individual to take a step back and obtain medical advice.
19. Lt Col Connolly enquired internally whether he could compel the claimant to seek medical advice. He was told that because the claimant was a reserve officer he could not order him to seek medical advice from an army medical service or indeed civilian doctors. The situation would have been different had he been a regular officer. This position is disputed by the claimant. During the course of the hearing we were referred to various policy documents. We note that the respondent produced a document entitled 'Army Reserve Unit Commands Part One Chapter 3 Section 4' that reflects its position stating that a reservist is to be advised to consult their own GP..... This document also notes under the heading 'failure to cooperate', should a reservist not consent to an approach to their GP, or if



there are reasonable grounds for doubting the authenticity of a medical certificate, the case is to be dealt with as an administrative or disciplinary matter in accordance with existing procedures for such cases.

20. While there may be conflicting evidence in other policies referred to by the claimant, we conclude on the basis of Lt Col Connolly's evidence together with the existence of the guidelines highlighted above that it was Lt Col Connolly's genuine belief at the time that the claimant could not be compelled to seek medical advice and that the only way to deal with a failure to cooperate would be through administrative or disciplinary procedures.
21. Lt Col Connolly spoke to the claimant on 07/09/2017. Lt Col Connolly told the claimant that he considered the claimant was being irrational in his claims. The claimant was due to deploy on an annual camp which would involve an extended period of exposure to the Army and Lt Col Connolly believed that this would not be beneficial to the claimant's welfare or mental well-being. The claimant was asked to self refer himself to his GP. Lt Col Connolly put this in writing by way of email to the claimant dated 07/09/2017. This also records that the claimant was given an option to elect to see a military GP should he prefer to do so.
22. The claimant sent a long response to this email at page 72 to 74 of the bundle. The claimant strenuously objected to any correlation between his concerns and his mental health which he considered had the potential to discredit him as a witness before his concerns have been properly adjudicated upon or the outcome of the IPT matter or ECHR were published.
23. Lt Col Connolly made repeated attempts to arrange a face-to-face meeting with the claimant. These were on:
  - 23.1 7<sup>th</sup> of September by email;
  - 23.2 11 of September by email;
  - 23.3 11<sup>th</sup> of September by text;

- 23.4 26 September by email;
- 23.5 4 October page 178 by email; and
- 23.6 6 October page 177 by email.
24. Throughout this time the claimant refused to meet his commanding officer Lt Col Connelly to discuss his concerns. The claimant stressed his concerns that only a transparent legal process could determine whether his concerns were unfounded. The claimant also objected to the correlation between his concerns about serious violations of his privacy and human rights and his mental health, that has the potential to discredit him as a witness.
25. On 18/09/2017 Lt Col Connolly discussed this matter with Col Cooper. He had been unable to meet with the claimant. Lt Col Connelly had concerns about the claimant's ability to effectively lead and manage his command. These concerns arose directly from the accusations the claimant had made against individuals within his chain of command which created a conflict of interest and potentially made the claimant's position as OC untenable. Col Connelly has continuing concerns for the claimant welfare. He plans to suspend the claimant from his command and instigate an investigation to consider there was a requirement for his removal from his appointment for reasons of unsuitability. This action would not remove the claimant entirely from the Army reserves.
26. Although Lt Col Connolly informed us that he was told the military doctor Dr Greenland attempted to contact the claimant directly, we found on the balance of probability, on the basis that it was denied by the claimant and there was no documentary evidence to support the alleged contact, that Dr Greenland did not attempt to contact the claimant.
27. As the claimant refused to meet Lt Col Connolly, Lt Col Connolly's options for dealing with the matter were limited. He considered that the situation of the claimant is refusing to meet with him as requested could not continue. He was the claimant's commanding officer, yet the claimant refused to

engage with him. Lt Col Connolly sent a letter dated 4 October 2017 that stated:

As a result of the ongoing complaints and investigation you have submitted to the IPT in which you cite both the British Army in general and member(9) of 94 Signal Squadron in particular as actors within the complaint, I have reached the conclusion that your position as Ofc commanding 94 Signal Squadron has become untenable and there now exists a breakdown in cohesion and operational effectiveness of 94 Signal Squadron and attendant lack of confidence in you by myself as your Commanding Officer. This has come about as a result of your demonstrated inability to effectively command individuals within your Squadron whom you have cited within your complaint .

Your suspension will be reviewed on a monthly basis beginning from the date of this letter or in the event of any significant change of circumstances and I would encourage you to keep me fully apprised of the progress of your complaint to the IPT at all stages. During your suspension you are not to visit any military establishment attend any military social functions.....

28. Lt Col Connolly said that no time did he consider that the claimant had made a 'protected disclosure' or that the claimant was a whistleblower. Lt Col Connolly considered that it was the consequence of what he had said not the fact he had made the allegation per se that caused him to act in a way it ended up in the claimant's suspension. The fact that he had made the allegations and whether he was right or wrong in the was neither here nor there: Lt Col Connolly believed that the demonstrated grounds for concern about the claimant's mental health and well-being and it was also clear that in expressing the concerns about fellow soldiers within his command that he did, he could no longer maintain his position as OC of these people
29. Lt Col Connolly also sent an email to the claimant dated 04/10/2017. This states:

You have stated that you will not meet with me until I write to you and set out the reasons I am concerned for your health and welfare.

To reiterate, in a phone conversation with you on 07/09/2017 I informed you that I was concerned for your welfare and, in particular, your mental health. This concern was based on the conversation I had with Brig Robertson on the evening of 5 September, the conversation I had with you on 5 September and the subsequent conversation I then had with the welfare officer, Capt Bath that evening and a further conversation with Capt Bath and the previous Ops Major, Major Budding, on 6 September. In particular, on the evening of 7 September, I heard details of your claim that members of your Squadron were spying on you from Brig Robertson. They were corroborated as long-standing claims by you against members of your Squadron from Capt Bath and Major Budding. Given that the personnel you are currently working with in the army are the centre of many of your claims, and that you were about to spend 2 weeks with the army on ACT from 9 September, I judged that this would potentially be very stressful for you. Thus, I asked you to take some time away and self refer yourself to a GP with regard to your mental health as, in my judgement, and on the balance of probabilities, I did not believe that your claim against your fellow soldiers to be rational.

I hope that this makes clear my thinking in this matter and that you decide you can now meet face-to-face as I have requested

30. The claimant made his first service complaint relating to his suspension on 25/09/2017. It states inter-alia 'I believe my race as a black British person of African descent has been a factor in making my OC treat me in such a grossly contemptuous manner...' The claimant addresses race discrimination within only one paragraph of his 106 paragraph statement by stating at paragraph 11 that he recorded his belief within the service complaint that he considered his race as a black British officer had influenced Col Connolly's actions and no caucasian colleague had been treated in a similar way.

31. On 17/10/2017 the claimant's complaints to the Service Complaint Ombudsman is forwarded to Col Cooper as the person chosen by the respondent to handle the matter. Col Cooper did not consider that he had had previous input into the matter, yet Lt Col Connolly's referred to previous decisions being 'agreed by' Col Cooper. This raises questions as to whether Col Cooper was an appropriate person to deal with the matter under the respondent's policy but is irrelevant to the issues which we have to determine. On 31/10/2017 Col Cooper suggests that the claimant's service redress complaint should not be made formal but should be resolved by mediation. Several alleged procedural failures were identified by the claimant in Col Cooper's handling of the matter. It was confirmed by Capt Bath that the service complaint was a formal complaint rather than an informal complaint. Col Cooper's decision to treat the claimant's complaint as 'informal' appears to be an error on his part. It is common ground between the parties that the claimant could not be forced to participate within a mediation. It appears on the basis of the available evidence that Col Cooper's conclusion that the claimant's complaint was inadmissible due to mediation being a preferable route was irregular under the respondent's procedures. However, we have carefully considered captain Col Cooper's reasoning for his actions. Col Cooper explained his motivation in detail to the tribunal and this is set out within his letter dated 31/10/2017. The respondent has shown on the balance of probability that the reasons for Col Cooper's actions are those as set out within his letter and his genuine held view that mediation would offer a far more rapid route to resolving the claimant's concerns. Within this letter colonel Col Cooper states that [the claimant's] conclusion over the reason behind the advice to self-refer to a GP is entirely understandable. Col Cooper explained to the tribunal that he sympathised with any individual being told to examine their mental health in circumstances where they considered such concerns were unwarranted. Col Cooper believed that this was a sensitive matter which would be dealt with much more effectively by way of mediation than formal process. Col Cooper also explained that his actions in no way sought to prevent the claimant from bringing his concerns as the claimant

could proceed with his formal complaint in the event that mediation failed, which the claimant did in any event.

32. AGAI 67 means the Army General And Administrative Instruction Volume 2 Chapter 67 'Administrative Action'. In simple terms this provides a set of management tools to those in a chain of command to deal with situations that require management, such as capability concerns, but do not require the application of the disciplinary process. Lt Col Connolly concluded that he would take appropriate action to address the concerns he had for the claimant's welfare and his likely unsuitability to command 94 Signal Squadron, but he was not taking any disciplinary action against him. The respondent has shown on the balance of probability that no disciplinary action was taken against the claimant however it is noted that sanctions akin to disciplinary sanctions may result from the capability concerns raised by the respondent.
33. Lt Col Connolly states that the conditions of the suspension and the limitations imposed by the suspension including not entering military establishments and attending military social functions were within the AGAI 67 procedures and in no way specific to the claimant. They apply to all suspended personnel.
34. Lt Col Connolly believed that the claimant's relationship with the second-in-command had broken down, as had the relationship between the claimant second-in-command, captain Saunders, with her staff. However the difference between both individuals was that the claimant refused to engage with Lt Col Connolly whereas Capt Saunders sought to engage with her commanding officer and voluntarily addressed legitimate concerns relating to her behaviour.
35. Lt Col Connolly wrote to the claimant on 10/11/2017 launching the AGAI process. This letter stated:

Having attempted to arrange an interview with you personally and via my Adjutant on numerous occasions, you have not responded to the request and have not offered any alternatives which would be more suitable. This

lack of engagement leaves me no choice but to progress with the administrative action that I have initiated.

As per AGAI Vol 2 Ch67 AEL 90 – Jul17, having offered me no other option I have decided that there are sufficient grounds to conduct an investigation to determine whether you have demonstrated inefficiency imposed and an inability to effectively command members of your squadron, leading to a breakdown in operational effectiveness.

Due to the lack of confidence I have in your ability to command the squadron at this time you will continue to be suspended under the provisions set out in Ref A .....

36. In considering the entirety of the evidence available to the tribunal the tribunal concludes that this process was lodged by Lt Col Connolly for the reasons set out within the letter. The claimant had a refused to respond to requests from meeting Lt Col Connolly which left Lt Col Connolly with no option but to launch the process.

### **The Law and Deliberations**

37. The relevant provisions of the ERA and the EqA were not contentious between the parties. We refer to the main statutory provisions below within our deliberations. We note the extensive case law to which we were referred as set out within the parties' written submissions. We have considered those submissions, alongside the oral submissions very carefully and referred to the most relevant case law below within our deliberations.

#### Jurisdiction for whistleblowing complaint

38. We had the benefit of detailed written submissions from both parties. The relevant provisions of the ERA are as follows

*191.— Crown employment.*

*(1) Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers.*

*(2) This section applies to—*

*(a) Parts I to III,*

- (aa) Part IVA,
- (b) Part V, apart from section 45.

192.— *Armed forces.*

(1) Section 191—

(a) *applies to service as a member of the naval, military or air forces of the Crown but subject to the following provisions of this section, and*

(b) *applies to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996.*

(2) *The provisions of this Act which have effect by virtue of section 191 in relation to service as a member of the naval, military or air forces of the Crown are—*

(a) Part I,

(aa) *in [Part V, sections 43M, 45A, 47C and 47D, and sections 48 and 49] so far as relating to [those sections]*

39. Section 192 (2) sets out the provisions of the ERA which have effect in relation to service as a member of the reserve forces being sections 43M (jury service) 45A (working time cases) 47C (leave for family and domestic reasons) and 47D (tax credits). The list does not include section 47B (protected disclosures). The respondent submitted that the absence of an express entitlement to the protection of section 47B to the armed forces meant that Parliament had expressly considered this matter and chose to exclude this protection to members of the armed forces and the reserve forces. The claimant submitted that there was no express exclusion of section 47B and an omission of the particular section from the list could not be read as Parliament deliberately intending to exclude that entitlement. Therefore the section must be interpreted in a manner compatible with Articles 6 and 10 of European Convention on Human Rights (ECHR), and in accordance with EU principles of Effectiveness and Equivalence as set out by Employment Judge McNeill QC in the recent case of Mr Zulu & Others v Ministry of Defence, 17 May 2019.

40. We considered this argument carefully and concluded that the absence of S47B from the list was not a matter of chance but confirmation that Parliament had expressly considered and chosen to allow specific rights arising within the ERA to members of the armed and reserve forces but expressly chose not to extend the provisions of section 47B.



41. We have considered the claimant's arguments relating to article 10.

Article 10 is not an absolute right. It reads as follows:

*"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

42. Article 10 expressly contemplates the restriction of the right to freedom of expression prescribed within domestic law. As can be seen from Article 10(2) the exercise of the right can be lawfully restricted in the interests of, inter alia, national security. It cannot be said that the exclusion of protection from a soldier in the MOD is contrary to convention rights because the right itself is qualified to include such a restriction. There is no directly effective EU right for a soldier to claim whistleblowing because it is contemplated that such restrictions can be made. In the circumstances we consider that Article 6, the right to a fair and public hearing, does not assist the claimant as the claimant does not have the initial protection under the provisions of section 47B ERA. There can be no right to a fair and public hearing in respect of a non-existent statutory protection.

43. We note the decision of EJ McNeil QC in Mr Zulu v MOD 2205687 and 2205688 2018 dated 8/5/2019 (a preliminary hearing dealing with jurisdictional issues) is a decision of the Employment Tribunal and is not binding upon us. The case is not concerned with whistleblowing. Mr Zulu's claim was a claim of race discrimination (which soldiers are protected against). The preliminary question in Mr Zulu v MOD was the proper interpretation of the jurisdictional requirements in section 120 and 121 of the EqA (which requires soldier to bring internal service redress

complaints before bringing employment tribunal proceedings). The question was whether section 121 should be deemed to be satisfied where a service redress complaint had been made but which had been ruled inadmissible by the MOD prescribed officer? The judge decided that such internal rulings would not prevent section 121 being satisfied save where they were made on limitation or procedural grounds consistent with EU law. This conclusion was reached without requiring “*either amendment or disapplication of any part of section 121.*” (see paragraph 117). The case does not establish that UK legislation can be ignored or interpreted to mean the opposite of what is intended by the legislature. The correct principles are stated by EJ McNeil QC in paragraph 57 and 87 of the reasons

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

...

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

44. We also carefully considered the case of Gilham v Ministry of Justice v Protect [2019] 1 W.L.R. 5905 the Supreme Court found that although judicial office holders were not employees or workers for purposes of the ERA 1996, whistleblowing protection should be extended to them under

Article 10 and 14 of the Human Rights Act. However crucially, at paragraph 35 appears the following

*'35. The courts will always, of course, recognise that sometimes difficult choices have to be made between the rights of the individual and the needs of society and that they may have to defer to the considered opinion of the elected decision-maker: see R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326, 381. But the second problem is that in this case there is no evidence at all that either the executive or Parliament addressed their minds to the exclusion of the judiciary from the protection of Part IVA. While there is evidence of consideration given to whether certain excluded groups should be included (such as police officers), there is no evidence that the position of judges has ever been considered. There is no "considered opinion" to which to defer.'*

45. Members of the Armed Forces are in a different position to judges in that the express provisions of section 192 indicate that parliament has given express and specific consideration as to whether the armed forces should be protected or not under section 47B, whereas the ERA is silent about judicial office holders. Extending protection to judicial office holders is not "against the grain" of the ERA but extending it to the armed forces would be. In considering the entirety of the submissions made by the parties we conclude that the employment tribunal does not have jurisdiction to consider a complaint of protected disclosure detriment by a member of the reserve forces have protected interest disclosure complaints are not included within the list of complaints set out in section 192 which a member of the reserve forces can bring.
46. In the event that we are wrong in relation to the jurisdiction, as requested by the respondent, we have considered the claimant's whistleblowing claims as pleaded.

Did the claimant make a protected disclosure on 05/09/2017 in his meeting with Brig Robertson. Was the information disclosed to Brig Robertson something which in the claimant's reasonable belief tended to show that :

- a criminal offence had been committed
- a person has failed was failing or likely to fail to comply with any legal obligation

47. The claimant clearly believed that a criminal offence had been committed. The Claimant complained he was subject to unlawful covert surveillance or

spying and/ the respondent and/or members of the chain of command had failed to comply with their legal obligations in relation to that covert surveillance. The question raised by the respondent is whether the claimant had a 'reasonable belief'. The respondent say that the claimant's belief was an irrational belief and as such cannot be a 'reasonable belief'. The respondent's witnesses accept that the claimant held a genuine belief that he was being spied on. We were not referred to in any case law in relation to this distinction but note that the legislation covers those who hold a mistaken belief. We consider that the claimant's concerns may be reasonably classed as very unlikely and perhaps very likely to be mistaken. We also note that the 'reasonable belief' is that of the claimant's belief rather than the respondent's. In the circumstances we conclude that it was the claimant's reasonable belief that the information he disclosed tended to show a failure on the respondent's part to comply with the legislation surrounding covert surveillance as he had alleged.

Did the claimant reasonably believe that the disclosure was made in the public interest?

48. The claimant provided very little information in relation to his belief that the disclosure was made in the public interest. The claimant's evidence amounts to a text message sent to Brig Robertson prior to their initial conversation and 05/09/2017 stating, '.... I just have a simple point to make for the benefit of all'. We note within the claimant's submissions that he refers to four bullet points in support of the public interest point including that the concern he raises applied not only to him but everyone serving in defence and subject to military law and discipline. The remaining two bullet points relate to secret approaches to civilian and surveillance being shared with colleagues and subordinates which were not raised during the course of the evidence and we discount these matters for this reason.
49. In considering this matter as a whole, although there is little express reference by the claimant to the public interest within his complaints, and the detail of his complaints, although unclear, appear to emanate from the

claimant's personal life, we conclude that the allegations of unlawful spying by the respondent are so serious with such wide-ranging implications that the disclosure of unlawful spying on the part of the MoD must, by the intrinsically serious nature of the allegation alongside the claimant's evidence, be in the public interest.

It was accepted by the respondent that the disclosure made to Brig Robertson was made to the claimant's employer.

If protected disclosures are proven, was the claimant, on the grounds of any protected disclosure, subject to detriment by the employer or another worker as alleged (set out above)

50. The legislation requires that the act or deliberate failure to act of the employer must be done 'on the ground that' the worker in question has made a protected disclosure. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer so to act and the test is not satisfied by the simple application of a 'but for' test. The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not *materially influence* (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.
51. The respondent accepts that it took the three actions said to be a detriment being (1) excluding the claimant on 07/09/2017 from training, (2) formally suspending the claimant on 04/10/2017 and (3) launching the AGAI process on 10/11/2017. We have looked very carefully at the respondent's witnesses' mental processes. It is clear that 'but for' the claimant's complaint none of these steps would have been taken by the respondent. The case law is clear that the 'but for' test is not the correct test. We have looked at whether or not these actions were taken 'on the grounds of' the protected disclosure.
52. We note that the respondent's witnesses did not at the time consider that the claimant could be classed as 'a whistleblower' or that he had made a protected disclosure. The claimant did not at the time refer to himself as a

whistleblower or claim that he had made a protected disclosure. This was a consideration that did not appear to be to be within anyone's mind at the time. The claimant, at the time while he did not request the initial suspension, recognised the respondent's position. The employment tribunal consider that a distinction exists between the fact that the claimant made a disclosure tending to show that the legislation was being breached, or in more everyday terms that he was being subject to unlawful spying and the consequences of the claimant's disclosure being that as set out by Lt Col Connolly above.

53. Lt Col Connolly said that the fact that the claimant had made the allegations and whether he was right or wrong was neither here nor there. If the claimant's concerns were correct, and he was being spied upon by the respondent, there were clearly serious issues that would need to be uncovered that would most likely have an effect on his ability to lead within his position. In the more likely event that the claimant's concerns were a mistaken to the extent they were irrational as Lt Col Connolly believed, that demonstrated grounds for concern about the claimant's mental health. The claimant's expressed concerns about fellow soldiers within his command spying upon him as he did, meant that a practical consequence was that he could no longer maintain his position as OC of these people. We conclude that the respondent has demonstrated that Lt Col Connolly excluded the claimant on 07/09/2017 from training for these reasons. The respondent has demonstrated that Lt Col Connolly formally suspended the claimant on 04/10/2017 as the claimant had refused, for reasons considered justified by the claimant, to meet him face to face and Lt Col Connolly considered the formal suspension the only way to address the matter. The respondent has demonstrated that it launched the AGAI process on 10/11/2017 as it held the genuine belief that it was the proper way to deal with the scenario where the claimant had refused to seek medical advice from his GP relating to his mental health as requested by the respondent and refused to cooperate with the respondent.
54. The evidence that we have heard from the respondent, shows on the balance of probability, that while the claimant's allegation of breach of the

legislation and unlawful acts on the part of the respondent and the individuals led to the alleged detriment, the fact that the claimant made a protected disclosure i.e. that he complained of a criminal offence or that any person was likely to fail to comply with a legal obligation played no material part or a part that can be reasonably classified as trivial in the respondent's decision to take the above steps said to constitute detriment. It cannot, in our view, be said that the steps as set out above were taken 'on the grounds of' the protected disclosure. We therefore conclude that the claimant was not subject to any unlawful detriment as he has alleged for making a protected disclosure.

Victimisation contrary to section 27 of the EqA

Has the claimant carried out a protected act? The claimant relies upon the following:

- his service complaints dated 25/09/2017. The respondent accepts that this was a protected act but reserves position in respect of good faith.
- his updated service complaints sent to the Service Complaints Ombudsman on 17/10/2017;
- his written indication on 09/11/2017 that he intended to be submitted service complaints through the Army Service Complaints Secretariat.

55. We note that these documents either state or repeat that the claimant considers the treatment that he has received from the respondent to be linked to his protected characteristic of race and in particular that he is a British black person. The respondent submits that the service complaint was not made honestly because of the withholding of information relating to the IPT tribunal determination. It is correct that the claimant chose not to disclose the IPT determination to the respondent during the course of the service complaint. The subject matter of the service complaint is the respondent's treatment of the claimant following his initial discussions with Brig Robertson and within this context he raises the potential issue of race

discrimination. We do not consider that the withholding of the IPT decision has any bearing on the discrimination complaint. We can find no evidence to support any submission that the complaints relating to the EqA as contained within the above three claimant complains were not made honestly or in good faith. We conclude that the above three matters constitute protected disclosures as defined within the legislation.

Has the respondent subjected the claimant to any of the below detriments and if so, was this because the claimant did a protected act or acts and/or because the respondent believed the claimant had done, or might do a protected act or acts?

Formally suspending the claimant from duty in an email dated 04/10/2017. This allegation was withdrawn at the conclusion of the claimant's closing submissions.

56. During the course of the claimant's submissions he clarified that this allegation relating to victimisation was withdrawn as it was accepted that Lt Col Connolly who made the decision, was not aware that the claimant had made any allegation that could be classified as a protected act.

Launching a disciplinary investigation under AGAI 67 procedures into 'inefficiencies in his command' on 10/11/2017

57. We note that there was no disciplinary investigation launched but a capability process was commenced by the respondent. We refer to and repeat our above findings in relation to the reasons why the respondent launched the AGAI 67 procedures into 'inefficiencies in the claimant's command' on 10/11/2017. The respondent has shown on the balance of probability that its reasons for taking this step were those set out above and unconnected to the claimant's protected act.

Direct discrimination on the grounds of race contrary to section 13 of the EqA

Has the respondent subjected the claimant to the following treatment:

- formally suspending him from duty in an email dated 04/10/2017;



- launching a disciplinary investigation under the AGAI 67 procedures into 'inefficiencies in his command' on 10/11/2017.

Has the respondent treated the claimant as alleged less favourably than it treated or would have treated a comparator and/or hypothetical comparator? The claimant relies upon the following comparators:

Captain Dawn Saunders

Warrant Officer First-Class removed from an appointment as RSM 39 Signals Regiment between January and April 2017; and

Major Orr

If so was this because of the claimant's race and/or because of the protected characteristic of race more generally

58. When considering direct discrimination, we must look at the issue of a correct comparator. there must be no material difference between the circumstances" of the claimant and the comparator (section 23(1) EqA, or in other words. the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class." In the circumstances we conclude that the material circumstances of any comparator in the circumstances must be that the comparator:
- 58.1 holds a genuine but unlikely belief, similar to that held by claimant.
- 58.2 The respondent holds a genuine belief that the comparator's concerns are unlikely to the extent that the belief is irrational and holds genuine concerns for the comparator's mental health
- 58.3 any comparator refused (for whatever reason) to meet or speak face-to-face with their officer in command.
59. For these reasons, we conclude that the comparators suggested by the claimant are not appropriate comparators. In particular captain Saunders, although her relationship had broken down with others in her command,

did not hold an unlikely belief. Further she chose to engage with her line of command to address legitimate areas of concern relating to her performance. The other comparators similarly are inappropriate as their circumstances are materially different to those of the claimant.

60. The respondent formally suspended the claimant from duty by email dated 04/10/2017 and the AGAI process was commenced as alleged. We have looked at this allegation carefully and also examined the nature and manner of suspension and in particular preventing the claimant from continuing military service at another appointment and banning the claimant from military premises or attending military functions. We refer to our findings above relating to the circumstances and the reasons leading up to the claimant's formal suspension on 04/10/2017 and the commencement of the AGAI process by Lt Col Connolly. Lt Col Connolly has shown that he genuinely did not believe the claimant's spying complaints to be rational and had a genuine (not fabricated) concerns in respect of the claimant's mental health at that time. The claimant refused to address the respondent's concerns in respect of his mental health by referring himself to his GP as requested. The claimant refused to meet with Lt Col Connolly face to face. These matters are all set out within the respondent's correspondence of the time. We conclude that Lt Col Connolly would treat any comparator, whose circumstances were not materially different to the claimant in a similar fashion.
61. We note the burden of proof in discrimination claims. The burden of proof provisions in the EqA are set out in section 136(2) and (3) and states: "(2) If there are facts from which the court [or tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision." This is effectively a 2 stage approach: Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent. Stage 2: is the respondent's explanation sufficient to show that it did not discriminate? When examining the entirety of the evidence, the claimant has not shown a prima facie case. Even if we give

the claimant the benefit of the doubt and move to the second stage of the test, we consider that the respondent has shown a non-discriminatory reason for the conduct as set out above.

62. We note that the claimant has included within his submission that the suspension amounts to a segregation contrary to section 13(5) of the EqA. The evidence provided by the respondent that a ban on attending military functions as part of the normal suspension process was not queried by the claimant during the course of the hearing. We conclude that the direction within the suspension letter banning the claimant from attending social functions during the currency of the suspension is a generic instruction provided to any person upon suspension and can in no way contravene the provisions of section 13 (5).
63. For the reasons set out above the claimant's claims are unsuccessful and dismissed. I apologise to the parties for the delay in forwarding these written reasons.

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Employment Judge Skehan

Date: .....10.01.20.....

Sent to the parties on: .....10.01.20....  
.....

For the Tribunals Office

## Appendix 1

### Whistleblowing/protected disclosure

1. Does the employment tribunal have jurisdiction to consider the claimant's complaint of protected disclosure detriment under the ERA or is his claim excluded by section 192 of the ERA.
2. If the tribunal has jurisdiction, did the claimant make a protected disclosure?
3. What that the claimant say on 05/09/2017 in a meeting with Brig Robertson?
4. Was information disclosed which in the claimant's reasonable belief tends to show one of the following:
  - 4.1 a criminal offence has been committed or was being committed or is likely to be committed; and/or
  - 4.2 a person had failed, was failing or is likely to fail to comply with any legal obligation to which they were subject.
5. If so, did the claimant reasonably believe that the disclosure was made in the public interest?
6. Was any qualifying disclosure a protected disclosure within the meaning of section 43C (1)(a) by virtue of being made to the claimant's employer?
7. If protected disclosures are proven, was the claimant, on the grounds of any protected disclosure, subject to detriment by the employer or another worker in that:
  - 7.1 on 07/09/2017 he was excluded from training;
  - 7.2 on 04/10/2017 he was formally suspended from duty;
  - 7.3 on 10/11/2017 an investigation was launched under the AGAI 67 procedure into 'inefficiencies in the claimant's command'.

8. It is accepted by the respondent that the employment tribunal has jurisdiction to consider the claimant's complaint under the EqA.

Victimisation contrary to section 27 of the EqA

9. Has the claimant carried out a protected act? The claimant relies upon the following:

9.1 his service complaints dated 25/09/2017. The respondent accepts that this was a protected act but reserve position in respect of good faith.

9.2 his updated service complaints sent to the Service Complaints Ombudsman on 17/10/2017;

9.3 his written indication on 09/11/2017 that he intended to be submitted service complaints through the Army Service Complaints Secretariat.

10. If there was a protected act or acts has the respondent subjected the claimant to any of the following detriments:

10.1 formally suspending the claimant from duty in an email dated 04/10/2017. This allegation was withdrawn at the conclusion of the claimant's closing submissions.

10.2 Launching a disciplinary investigation under AGAI 67 procedures into 'inefficiencies in his command' on 10/11/2017

11. if so, was this because the claimant did a protected act or acts and/or because the respondent believed the claimant had done, or might do a protected act or acts?

Direct discrimination on the grounds of race contrary to section 13 of the EqA

12. Has the respondent subjected the claimant to the following treatment:

12.1 formally suspending him from duty in an email dated 04/10/2017;

12.2 launching a disciplinary investigation under the AGAI 67 procedures into 'inefficiencies in his command' on 10/11/2017.

13. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated a comparator and/or hypothetical comparator? The claimant relies upon the following comparators:
  - 13.1 Captain Dawn Saunders
  - 13.2 Warrant Officer First-Class removed from an appointment as RSM 39 Signals Regiment between January and April 2017; and
  - 13.3 Major Orr
14. If so was this because of the claimant's race and/or because of the protected characteristic of race more generally.