EMPLOYMENT TRIBUNALS

Claimant: **Mr K Gregory**

Respondent: **Ministry of Defence**

Heard at: **East London Hearing Centre (in public by video)**

On: **16 June 2022**

Before: **Employment Judge Moor**

Representation

Claimant: in person
Respondent: Miss C Hayward, counsel

RESERVED JUDGMENT

The claim of age discrimination is struck out and dismissed as having no reasonable prospect of success. The Tribunal does not have jurisdiction to hear the claim, because it is excluded by paragraph 4(3) Schedule 9 of the Equality Act 2010. In my judgment, it is not possible to interpret that provision, pursuant to section 3 of the Human Rights Act 1998, to allow the claim.

REASONS

1. This preliminary hearing was held remotely. The intention was to hold it by video; however, the Claimant's connection was too poor. I therefore arranged to hear both parties by audio only, although I remained in view via the video platform. Where there was difficulty with connection, I made sure that the words were repeated. I am satisfied that, with those adjustments, each party had a full opportunity to tell me what their claim/response was about.

Issues in this Application

2. This was a preliminary hearing to decide the following issues:

    2.1. Should the Claimant's application to extend time to comply with EJ Feeny's Unless Order of 5 May 2022 be allowed.

2.2. If so, did the Claimant's provision of Further Information on 31 May 2021 materially comply with the Unless Order.

2.3. If so, should the Claim be struck out because the Tribunal has no power (jurisdiction) to hear it?

2.4. If not, should the claim be struck out because it has been brought outside the primary time limit of 3 months and it is not just and equitable to extend time.

3. I decided the first two of those issues in the Claimant's favour at the hearing, and gave reasons for them orally, which I do not repeat here. (In summary, while the Claimant's Further Information is not of the standard of a lawyer, it was sufficient to establish that his claim was about direct age discrimination in relation to his application to join the Army Reserve, which was rejected because he was older at 52 years old than the Army Rules allowed.)

4. This Reserved Judgment with reasons gives my decision on Issue 2.3 and, if necessary, Issue 2.4.

Issues in the Claim

5. The Claimant clarified that he does not bring a claim for unfair dismissal.

6. The claim was presented on 14 November 2021 after a period of Early Conciliation via ACAS from 27 September 2021 to 4 November 2021.

7. The claim is for direct age discrimination, contrary to section 13 of the Equality Act 2010 as read with Part V. The factual complaint is that the Claimant's application in March 2020 to join the Army Reserve (known as the 'TA') was rejected on 30 June 2020 because he had not applied before his 50th birthday. The Claimant was 52 years old when he applied.

8. There is a sub-issue about who is the proper comparator on the facts of this case: the Claimant states that he started training in 1989 but did not complete it; he compares himself to someone who began training before they were 50 but were allowed to complete it beyond the age of 50.

9. In his particulars the Claimant relies on the Human Rights Act 1998 ('HRA') and refers to Articles 3, 8 and 14 of its Schedule 1.

10. I will deal with the jurisdiction issue 2.3 first because, if I find in favour of the Respondent, there will then be no need to consider the limitation issue 2.4.

Legal Principles for Issue 2.3

11. Rule 37 of the Employment Tribunal Rules allows me to strike out a claim if it has no reasonable prospect of success. This is so even in discrimination claims where, on the facts as contended by the Claimant at their highest, the claim has no legal basis. The hurdle for strike-out is a high one. I should take particular care where a party is unrepresented: see the summary of Linden J in Twist DX Ltd v Armes (UKEAT/0030/20/JOJ) at para 43.

Equality Act 2010

12. Part 1 of the Equality Act 2010 ('EQA') describes types of discrimination and identifies protected characteristics including age. Direct age discrimination is to be treated less favourably because of age, see sections 5 and 13 EQA, subject to the defence of justification.

13. Under Part 5 EQA such discrimination is made unlawful in relation to work, including in being discriminated against by not being offered employment, see section 39(1)(c) EQA.

14. The Employment Tribunal does not have power (jurisdiction) to decide any claim of discrimination that fits the descriptions under Part 1. It can decide claims of discrimination under Part 5 EQA, see section 120(1).

15. Section 83(3) EQA, within Part 5, provides:

    This Part applies to service in the armed forces as it applies to employment by a private person; and for that purpose – (a) references to terms of employment, or to a contract of employment, are to be read as including references to terms of service.

16. Section 83(11) EQA provides: 'Schedule 9 (exceptions) has effect'.

17. Schedule 9 para 4(3) provides:

    This Part of the Act [i.e. Part 5], so far as relating to age … does not apply to service in the armed forces…

18. Thus, Sch 9 Para 4(3) EQA means that service in the armed forces is excluded from provisions that would otherwise make age discrimination unlawful, including age discrimination in the rules about joining the armed forces.

19. The exception in Sch 9 para 4(3) EQA derives from Article 3(4) of the Council Directive 2000/78/EC on equal treatment in employment (the 'Framework Directive'). It provides that

    Member States may provide that the Directive, in so far as it relates to discrimination on the grounds of … age, shall not apply to the armed forces.

20. This derogation was explained in Recital 19 to the Framework Directive as follows:

    Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning … age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.

21. The exclusion of age discrimination claims in the armed forces was tested in R (Child Soldiers International) v Secretary of State for Defence [2016] 1 WLR 1062 ('Child Soldiers'). The Claimant charity brought a claim for judicial review to challenge the lawfulness of the Army Terms of Service Regulations

2007 and in particular the terms on which recruits between the ages of 16 and 18 could leave service. It argued they were incompatible with the EQA and the Framework Directive.

22. The main complaint in Child Soldiers was that the terms of the regulations meant that soldiers recruited at age 16 would have to serve 6 years before qualifying for a transfer to the reserve, whereas those recruited at age 18 would have to serve 4 years before so qualifying. (The case was not, as the Claimant argued before me, about banning children from serving in the armed forces.)

23. Kenneth Parker J decided that the meaning of Article 3(4) of the Directive was plain: it gave an unqualified and unrestricted power to Member States not to apply the Directive to the armed forces. He refused to assess whether Art 3(4) was 'justified' in the sense of asking whether it was proportionately justified by reference to any objective (paragraphs 9 and 10 on p1065). He decided that the exception set out in Sch 9 para 4(3) EQA '*extends in terms to all units of the armed forces … and to all functions of the armed forces*' (paragraphs 44, 45, p1074). This decision survives Brexit because it is 'retained law' under the terms of the European Union (Withdrawal Act) 2018.

24. In Child Soldiers there was no challenge to Sch 9 para 4(3) EQA on human rights grounds.

Human Rights Act 1998 ('HRA') and the European Convention on Human Rights ('ECHR')

25. Section 3 of the HRA provides at present (it is soon to be repealed):

Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—
(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; …

26. The articles of the ECHR, set out in Schedule 1 to the HRA 1998, relied on by the Claimant provide:

Article 3 Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 8 Right to respect for private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 14 Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or ***other status****.* (my emphasis)

27. I cannot declare the EQA incompatible with the HRA, because I am a Tribunal not a court, see section 4 HRA.

28. As to the (current) extent of the interpretative obligation under section 3 HRA, I set out the opinions of the Supreme Court justices in Ghaidan v Godin-Mendoza [2004] 2 AC 557:

Lord Nicholls:

26. Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights "so far as it is possible to do so". This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention. ...

27. Unfortunately, in making this provision for the interpretation of legislation, section 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The difficulty lies in the word 'possible'. Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships' House, are still cautiously feeling their way forward as experience in the application of section 3 gradually accumulates.

28. One tenable interpretation of the word 'possible' would be that section 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the Convention-compliant meaning is to prevail. Words should be given the meaning which best accords with the Convention rights.

29. This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed. It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according

to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. The decision of your Lordships' House in R v A (No 2) [2002] 1 AC 45 is an instance of this. The House read words into section 41 of the Youth Justice and Criminal Evidence Act 1999 so as to make that section compliant with an accused's right to a fair trial under article 6. The House did so even though the statutory language was not ambiguous.

30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. ***Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear****. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question.* ***Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation****. ... (my emphasis)*

31. ... once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

32. ...Section 3 ... ***is also apt to require a court to read in words which change the meaning of the enacted legislation,*** *so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation. (my emphasis)*

33. ***Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation****. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant.* ***The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must****, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry,* ***"go with the grain of the legislation".*** *Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation. (my emphasis)*

Lord Steyn:

50. Having had the opportunity to reconsider the matter in some depth, I am not disposed to try to formulate precise rules about where section 3 may not be used. Like the proverbial elephant such a case ought generally to be easily

*identifiable. What is necessary, however, is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional cours**e. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights.** (my emphasis)*

29. From this authority I draw the following propositions:

    29.1. where an Article of the ECHR as enshrined in the HRA is engaged; and where I consider the Act of Parliament is inconsistent with it, I must make a distinction between those cases where I can interpret the legislation consistently with the HRA, and those cases where I can do nothing, because I cannot make a declaration of incompatibility.

    29.2. the interpretive power is not confined only to where the words of the statute are ambiguous.

    29.3. the interpretive power can mean that I read words into the statute that change its meaning (known as 'reading down').

30. The distinction is not always an easy one to draw. I must consider whether the interpretation sought goes with the 'grain of the legislation'. Nor should I adopt an interpretation inconsistent with 'a fundamental feature' of the legislation. Any new interpretation must be compatible with the underlying 'thrust' of the legislation. These phrases, drawn from Ghaidan, should assist me in deciding which side of the line this case falls but they are not precise rules, nor in the form of a rigid test.

31. Mr Gregory relies on the decision of EJ Stout in T v Ministry of Defence (2201755/2021) decided in London Central Employment Tribunal. The decision is not binding on me, but if it relates to the same argument, it is appropriate that I consider its reasoning.

32. In T part of the claim was for disability discrimination in the handling of the T's service complaints (about alleged sexual harassment). These service complaints had been raised after she had left the armed forces. One issue was whether the claim should be struck out because it was excluded by Sch 9 para 4(3) (which also excludes disability) and section 108 EQA, which otherwise allowed claims for discrimination which '*arises out of and is closely connected to a relationship which used to exist between them'*.

33. The Respondent made the same argument in T as before me: the exclusion in Sch 9 derives from the permitted derogation in the Framework Directive which is unqualified and absolute.

34. EJ Stout decided that it was surprising that the derogation extended to ex-service personnel. This is because Recital 19 showed the derogation concerned combat effectiveness.

35. EJ Stout next considered whether it would be permissible to interpret the EQA compatibly with the HRA (if, as currently drafted, it were to breach the HRA) or whether that would be to go against the grain of the legislation. She decided that it would not be going against the grain of the legislation to revise the EQA '*so as to provide that the exemption enjoyed by the armed forces in*

relation to disability discrimination does not apply to claims brought by ex-servicemen and women by virtue of s 108 ...' She decided this would not alter a fundamental feature of the legislation. She could not see a reason why the armed forces should be permitted to discriminate against disabled ex-servicemen and women, stating '*the overwhelming impression is that no consideration was given to the interaction between paragraph 4(3) of Schedule 9 and s 108(1)(b) when it was enacted*. She considered such an interpretation '*would remedy what appears to be a legislative oversight rather than cutting across the grain of the existing legislation*'.

36. EJ Stout distinguished Steer v Stormsure Ltd [2021] IRLR 172 as follows:

where the remedying of the discrimination between claimants in whistleblowing cases and claimants in discrimination claims would have required extending the jurisdiction of Employment Tribunals in respect of interim relief to a new category of claims and effectively amalgamating unfair dismissal law with discrimination law, when Parliament has always dealt separately with those rights and in separate statutes. Cavanagh J in that case viewed that as quintessentially a legislative issue for Parliament. It is quite different to the possibility arising in this case of making a very modest adjustment to the scope of the exemption for the armed forces for disability discrimination to ensure that it does not apply to discrimination against a small category of claimants where there is nothing to suggest that the exemption was ever intended to apply to those claimants in any event.

37. EJ Stout went on to decide T's Article 8 and Article 14 rights had been engaged.

38. I will consider the matter in the same order as did EJ Stout: whether it would be permissible to interpret the EQA compatibly with the HRA (if, as currently drafted, it was to breach the HRA) or whether that would be inconsistent with a fundamental feature of the legislation or to go against its grain.

Submissions

39. I refer to Miss Hayward's written submissions. In essence she relies on the words of the statute and Child Soldiers. She submits I am bound by that case to conclude that the exclusion (of the right to claim age discrimination in connection with the armed forces) is unqualified and absolute and therefore the Tribunal has no power to hear the claim, it has no reasonable prospects of success, and should be struck out.

40. She argues that T is not binding upon me. In any event, it concerned very different facts: alleged discrimination in the handling of an ex-servicewoman's complaint. The reason for the decision not to apply Sch 9 para 4(3) in T was because she was an ex-servicewoman and the exclusion could not have anything to do with combat effectiveness, the rationale for derogation in the Framework Directive. She submits this claim is very different: here the Claimant wanted to join the armed forces and combat effectiveness was therefore relevant. In her submission it would be to read against the grain of the legislation to ignore the very wide derogation allowed by Member States and decided upon by Parliament. She argues those legislatures had decided the armed forces were the best judges of how to achieve combat

effectiveness. In her submission the point was not simply confined to combat effectiveness, but to ensure that the Respondent was entitled to decide its own policies on who it does and doesn't accept on age and disability grounds. Even if I was of the view that some 50+ year olds were likely to be fit enough for combat, or as fit as 48 year olds, this was irrelevant: Parliament had left decisions on those matters entirely to the armed forces.

41. The Claimant argues that his case was very like T and I could ignore the exclusions in EQA for similar reasons. Such a blanket ban breached his human rights. It could not be justified given that many people over 50 were fit and able; and given that those starting their training before 50 could complete it after that age. Child Soldiers was understandable, he argues, as being about ensuring children did not serve.

Decision

42. On the face of it the Tribunal's power to hear this claim is excluded by Sch 9 Para 4(3) EQA.

43. The Claimant's case depends upon me interpreting the EQA otherwise. In other words, reading words into Sch 9 Para 4(3) along the lines: '*except for the purposes of joining the army reserve in relation to age'*. This narrow interpretation is all he needs to pursue his case. (I did not understand him to be arguing that the exclusion should be ignored so far as age is concerned for all applications to join the armed forces.) He says I should do so in order that it the EQA is compatible with the Human Rights Act.

44. For this first question I assume the Claimant's human rights are engaged and the exclusion is inconsistent with them. Even if this were so, I must ask whether it would be permissible to interpret the EQA compatibly with the HRA. This requires me to apply the propositions I have set out above and grapple with the question whether such an interpretation would be permissible under section 3.

45. I remind myself that in this interpretive exercise, I can depart from the unambiguous meaning of the legislation.

46. Child Soldiers decided that the exception in Sch 9 para 4(3) covers the whole of the armed forces. The case was decided without reference to the Human Rights Act arguments I must consider. Rather the court was testing whether part of the Army Rules were caught by the EQA exception and whether it should first be objectively justified. It seems to me, therefore, while accepting the meaning of the exclusion as decided in Child Soldiers section 3 HRA still allows me, if it is correct to do so, to decide an interpretation under section 3 that alters its meaning.

47. Although EJ Stout's decision is a model of clarity, I am not bound to follow it. More importantly, I agree with Miss Hayward, that the reasons for her decision do not apply to this case. She was able to depart from the clear wording of the EQA because the interpretation sought was not against the grain of the legislation. This is because combat effectiveness, the rationale in Recital 19 for the derogation in Article of the Framework Directive that allowed the Sch 9 para 4(3) exception, was not undermined by allowing claims concerning the handling of ex-service personnel's service complaints.

The reasoning in that claim, therefore, does not assist the Claimant here, who wanted to join the army reserve. It cannot be said that combat effectiveness is irrelevant to the army reserve, a group of people who exist to support the regular army in the country's defence.

48. The interpretation the Claimant seeks is to remove the exclusion to allow him to claim age discrimination in the way the army affords opportunities to join the army reserve. The rationale for the exclusion allowed in the Framework Directive is most definitely engaged here: combat effectiveness. In saying so, I am not deciding that people over 50 are likely to be less combat effective: that is not the relevant question. It is that, as Member States were allowed to do by the Directive, Parliament has decided that question be left to the armed forces to decide. Child Soldiers means that the exclusion did not have to be objectively justified before being lawful.

49. In my judgment, the derogation at Article 3(4) is a fundamental feature of the Directive and the EQA. It is explained by Recital 19. Part of the democratic process within the Europe Union involved a consideration of how far to allow the armed forces in each state to discriminate on grounds of age. The Member States did not require but allowed a very wide derogation in that respect. Service in the armed forces was seen as qualitatively different to other occupations because of the need of each country to safeguard its combat effectiveness. Recital 19 clearly allows each Member State to decide to exclude discrimination claims about disability and age in relation to their armed forces. There has been no 'oversight' here as EJ Stout considered in respect of ex-service matters: the Claimant's case comes squarely within the derogation.

50. I have in mind that arguments in relation to combat effectiveness by the Ministry of Defence historically (and wrongly) were used to justify rules excluding pregnant women and gay people from the armed forces. Such rules were found in the courts to have been unlawful. Nor do I consider that the Employment Tribunal would be ill-equipped to consider the evidence on whether the age rules in this case could be objectively justified by reference to combat effectiveness. This jurisdiction looks at the widest possible range of occupations some highly specialist, others involved in saving lives, pursuing criminals, fighting fires. Tribunals undertake such assessments in relation to those occupations and are accustomed to assessing such evidence. Combat effectiveness is not some kind of mystery ingredient: it can and should be defined by references to skills and attributes. For all of these reasons I have given the matter a great deal of thought. But despite that history and the Tribunal's expertise, the Framework Directive allowed Parliament to exclude age discrimination in the armed forces: this was a significant derogation.

51. If I were only to consider the 'grain of the legislation' or its 'thrust' then my thinking might well have led in a different direction, given the whole purpose of the EQA is to make unlawful discrimination in occupations. But to do so would be to disregard this very particular exclusion, doubtless carefully negotiated and expressed in a specific Recital by Member States when agreeing the Framework Directive on equal treatment. The derogation goes against the grain of the Directive, obviously, but it is nevertheless a fundamental feature of it. The Supreme Court justices in Ghadain used a

number of different phrases to describe for the interpretive approach. Those phrases are not themselves rigid rules but are designed to guide judges a steer in our interpretive power. In this case I have found the 'fundamental feature' phrase most useful. Is the exception in Sch 9 para 4(3) EQA a fundamental feature of the EQA? I have concluded that it is because:

51.1. it derives directly from the Framework Directive derogation;

51.2. the derogation allowed Parliament to permit the armed forces to make its own rules on entry (even if they amounted to age discrimination);

51.3. the rationale behind the derogation, safeguarding combat effectiveness, is relevant in this case because it concerns an application to join the army reserve.

52. I am also satisfied, for these reasons, that the strong presumption in favour of an interpretation consistent with Convention rights (referred to by Lord Steyn in Ghaidan) has been rebutted.

53. The claim therefore does not have any prospect of success because it is excluded by paragraph 4(3) of Schedule 9 of the Equality Act 2010. I therefore strike it out and it is dismissed.

54. I do not therefore need to decide whether the Claimant's human rights were engaged by this case. I heard very little argument on this from either party. Article 3 was plainly not engaged and would have failed: the Claimant's complaint comes nowhere near torture or degrading treatment. The argument that the facts of the claim come within the ambit of Article 8 for the purposes of an argument that Article 14 was breached would have been more difficult to determine. It is not every case that the rejection of employment or an occupation comes within the ambit of Article 8 (private life). I would likely have had to hear more evidence from the Claimant about how the rejection of his application to be in the TA impacted on his private life and argument from the Respondent with reference to the relevant ECHR case law before I could have determined this question.

55. I do not need to decide the limitation issue.

Employment Judge Moor
Dated: 24 June 2022