From exemption to inclusion: extending the reach of the Equality Act 2010 – with a little help from the Human Rights Act 1998

Nicola Braganza, barrister at Garden Court Chambers, and Emma Norton, solicitor at the charity Centre for Military Justice, consider the recent landmark Employment Tribunal decision of *T v Ministry of Defence*. Applying the Human Rights Act 1998 (HRA), the ET read into s108 of the Equality Act 2010 (EA) (relationships that have ended) additional words which extended its reach to permit disabled ex-service personnel (and those relying on the protected characteristic of age) to bring claims under the EA, when they were previously expressly excluded. The authors are representing T in her discrimination litigation.

Introduction

The ET's decision in *T v Ministry of Defence*[1] on December 13, 2021 changed the law for ex-service women and men subjected to discrimination because of their disability or age. Whilst it is not binding, it provides helpful and persuasive guidance in the approach to be taken on issues of this kind.

Schedule 9 (Work: Exceptions), paragraph 4 (Armed forces) sub paragraph (3) of the EA expressly excludes those subjected to age or disability discrimination from bringing a claim under Part 5 (Work) of the EA. In *T*, the Ministry of Defence (MoD) argued that this primary legislation put an end to T's post-service disability discrimination ET claim; T's claim was bound to be struck out for lack of jurisdiction.

The ET disagreed. It held that the MoD's application and the wording of Schedule 9, paragraph 4 (3) breached T's human rights. The tribunal applied s3 of the HRA and read into s108 of the EA (post-termination discrimination) additional words, so that T was permitted to proceed with her claim. By this route, it transformed an absolute exception to a just and necessary inclusion.

T may now continue with her claim to a full hearing. The MoD has not appealed the decision. And what of the wider implications beyond this case? More generally, the MoD can no longer discriminate against veterans on grounds of disability or age with impunity. Secondly, the decision illustrates how challenges to the EA, considered through the prism of the HRA, can succeed. Finally, the decision provides a compelling reminder as to the need to retain the HRA in its current form. This is particularly since the EU (Withdrawal Agreement) Act 2018 removes the right to seek a reference under the relevant anti-discrimination EU Council Directives to the Court of Justice. Further, it comes at a time when the HRA faces its gravest threat to date by the current government's latest consultation to repeal and replace it.[2]

What is the claim about?

T was an Able Seaman in the Royal Navy from 2014, aged 18, until 2018. After completing her initial training, she became a junior rating. T was given her first assignment in 2015. In 2017 she made two formal complaints through the Navy's Service Complaints process about what she alleged to be sexual harassment, bullying and discrimination. Her claim to the ET concerns the handling of the second of those complaints about her time in service. In 2018 T left the Royal Navy after being medically discharged. She suffers from post traumatic stress disorder, anxiety and depression.

The Service Complaints system

The Armed Forces Service Complaints process is a statutory procedure governed by its own extensive policies and regulations.[3] There are strict deadlines, an admissibility stage and a substantive investigation stage, usually with terms of reference set. An admissibility decision is expected within 14 days and a final decision made by the 'Decision Body' within 24 weeks. A complainant has a right of appeal to an 'Appeal Body' if the appeal is lodged within strict time limits, and

1 https://www.gov.uk/employment-tribunal-decisions/t-v-ministry-of-defence-2201755-slash-2021; December 13, 2021.

2 https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights

3 Armed Forces (Service Complaints) Regulations 2015: https://www.legislation.gov.uk/uksi/2015/1955/made; and Joint Service Publication 831 (Directive & Guidance): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1013136/20210629-JSP831_Part1_v2.0_released_29_June_21-O.pdf; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1017025/JSP831_Part2.pdf

a final right of appeal to the Service Complaints Ombudsman for the Armed Forces. During the life of the complaint, if a service person is concerned that there has been 'undue delay' they may also complain to the Ombudsman about that delay.

Delay

There was significant delay in the handling of T's service complaint. In 2018, after she had been medically discharged, T submitted her first complaint of delay to the Ombudsman. This led to a first formal ruling by the Ombudsman of excessive delay. T re-submitted her service complaint. Further delay ensued. In April 2020 the Ombudsman made a second formal ruling that there had been excessive delay. The MoD determined T's service complaint shortly thereafter, dismissing nearly all of it. In June 2020 T appealed within the strict time limits to the Appeal Body. In November 2021 the Ombudsman ruled, for a third time, that the MoD had excessively delayed in its handling of T's appeal. At the time of writing, over 4 years since she first submitted her complaint, T continues to await the outcome of her appeal.

T's Employment Tribunal claims

T brought claims of sex discrimination, disability discrimination and victimisation against the MoD. Her claims concern the handling and near total dismissal of her service complaint. She relies on s108 of the EA (relationships that have ended) and the discrimination arising after her service. Her disability discrimination claim concerns the MoD's breach of the duty to make reasonable adjustments for her as a disabled person by failing to resolve her complaints promptly and with priority.

The MoD argument that T was excluded from the protection of the EA

The MoD applied to strike out T's claim for disability discrimination relying on the exemption from liability provided to it under Schedule 9 (Work: Exceptions), paragraph 4(3) of the EA which expressly excludes all claims of disability – and age – discrimination in the Armed Forces. T was therefore barred from bringing her claim for disability discrimination as a result of this statutory provision.

What is the exemption?

The Armed Forces has always enjoyed a complete exemption from liability on disability (and age) discrimination claims under Schedule 9, paragraph 4(3) of the EA. When parliament passed the EA, the exemption was said to be justified to preserve combat effectiveness. S108 of the EA protects against post-employment discrimination but only if the complainant would have been protected from discrimination while in employment. In that way the MoD argued that because it enjoyed immunity from a claim of discrimination by serving service personnel on the grounds of disability (and age), the same principle applied to its dealings with T as a veteran.

How does the HRA assist?

S3 of the HRA requires all legislation to be interpreted in a way that is compatible with the European Convention on Human Rights (ECHR) so far as it is possible to do so. T argued that that meant s108 and Schedule 9, paragraph 4(3) must be read in a way to permit her to bring her claim before the ET. Her claims were within the ambit of her rights under Article 6 (right to a fair trial) and Article 8 (right to private life). She argued that veterans were in a different position to serving service personnel. They would not be required to deploy or engage in combat, as they had left service, and so the principle of combat effectiveness could not justify the exemption and the MoD should not be permitted to discriminate against them on the grounds of their disability. Reading the EA through the prism of the HRA, the exemption breached T's human rights and so required to be read in a way which was compatible with the HRA.

In *Ghaidan v Godin-Mendoza* [2004] UKHL 30 per Lord Nicholls, the House of Lords held that the '*interpretative obligation decreed by section 3 is of an unusual and far-reaching character*' [30] which bids the court to '*depart from the unambiguous meaning the legislation would otherwise bear*' and from '*the intention reasonably to be attributed to Parliament in using the language in question*' [32] ... '*a court can modify the meaning, and hence the effect, of primary and secondary legislation*' [33] but '*cannot … adopt a meaning inconsistent with a fundamental feature of legislation*', the adopted meaning being one which '*must be compatible with the underlying thrust of the legislation being construed*'.

Employment Tribunal decision

The ET determined that its decision on this jurisdictional point was final and binding. It rejected the MoD's reliance on the complete, statutory exemption on disability discrimination claims in the armed forces. It observed that '*On the face of the (Equality) Act, accordingly, the armed forces are free to discriminate against disabled ex-servicemen and women*'.

It found this 'surprising' as despite Kenneth Parker J's decision in the *Child Soldiers' case*[4] as to derogation provided by the EU Framework Directive,[5] the purpose of the derogation is to protect the combat effectiveness of the armed forces. In the words of the ET *'there can be no possible link between combat effectiveness of the armed forces and the way that the armed forces is permitted to treat disabled ex-servicemen and women.'* That provided the fatal blow to the MoD's argument.

Referring to *Ghaidan* the ET held that the interpretative obligation in s3 of the HRA permits a tribunal to rewrite '*even a wholly unambiguous legislative provision if the Convention requires it and if doing so does not go against a fundamental feature of the legislation*'. It concluded that where paragraph 4(3) of Schedule 9 is read as not applying to claims brought under s108, that appeared '*to be a legislative oversight rather than cutting across the grain of the existing legislation*'.[6]

The ET considered whether the EA exemption violated T's Article 8 rights read with Article 14 ECHR applying the four-step approach as set out by Lady Black in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59.[7] The tribunal accepted that T's claim '*plainly*' came within the ambit of Article 8 ECHR.[8] By its nature and impact, her claim of discrimination concerned her disability and caused injury to her feelings and distress, which included psychological integrity;[9] and her treatment had affected activities of a professional nature where factors relating to private life have been brought into a work context.

Next, the ET concluded that the alleged discrimination was on grounds of 'other status' as provided for within Article 14. This was whether the discrimination was between disabled ex-servicemen and women, who could not bring discrimination claims, and non-disabled ex-servicemen and women, who could on the basis of their other protected characteristics, so that T as a disabled person had a recognised status under Article 14.[10] Alternatively, the legislation discriminated between ex-servicemen and women and ex-employees of civilian employers on the basis of their status as ex-services personnel. Again, the tribunal accepted that being an ex-serviceman or woman was also capable of amounting to 'other status' under Article 14.[11]

The final and fourth *Stott* question went to justification, on which the ET concluded that it was not possible to see what could be the legitimate aim for the exemption. The purpose of the exemption must be to safeguard the combat effectiveness of the armed forces, and as such could have no relevance once the individual had been discharged.

That meant that s108 taken with paragraph 4(3) of Schedule 9 '*as presently drafted breaches the Claimant's rights under Articles 8 and 14 of the ECHR because it prevents her bringing a disability discrimination claim against the Respondent in respect of matters that have occurred since her discharge*'. S3 of the HRA '*requires it to be interpreted to avoid that result.*' The ET concluded that the EA '*can be so interpreted without offending any fundamental feature of the legislation.*' It even went further and proposed a '*minor amendment*' to the drafting.

S108(1)(b) of the EA should read*:*

> *A person (A) must not discriminate against another (B) if -*
> *(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and*
> *(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act* ***(or would do were the Act not disapplied by paragraph 4(3) of Schedule 9)****.*

The ET concluded: '*With that minor amendment, the exemption from the prohibition on disability discrimination for those serving in the armed forces remains intact, but the armed forces are not permitted to discriminate against disabled ex-servicemen and women.*'

Implications of the judgment

First, the judgment enables T to proceed with her claim. This also applies to any other claimants who since discharge from service have suffered disability discrimination (or discrimination in relation to their age), whether in the handling of a service complaint or any other matters related to their service.

No longer can the MoD point to Schedule 9 paragraph

4 *Child Soldiers International v the Secretary of State for Defence* [2015] EWHC 2183; see also *Gowland v Ministry of Defence* (2500663/2016); *Smith v Ministry of Defence* (1401295/2019)

5 See Recital 19 and Article 3(4) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

6 The ET also specifically distinguished this case from *Steer v Stormsure Ltd* [2021] IRLR 172 Briefing 994, November 2021, concerning extending the jurisdiction of the tribunal to new categories of interim relief for claimants of discrimination claims.

7 UKSC 59, [2020] AC 51, at [8]

8 It doubted whether it came within Article 6 but made no finding on this.

9 *Costello-Roberts v the United Kingdom* (1993) 19 EHRR 112, *X and Y v the Netherlands* (1985) 8 EHRR 235 and *Glor v Switzerland* 13444/04 [2009] ECHR 2191; see also in *Denisov v Ukraine* (Application No. 76639/11), judgment of 25 September 2018 at [95]–[107]

10 *Glor v Switzerland* ibid at [53]

11 *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311 per Lord Neuberger at [43].

4(3) to try to strike out a claim under section 108 of the EA. It had not been the intention of parliament to include disabled veterans in the blanket exemption and the need to preserve combat effectiveness cannot possibly apply to them.

Women in the Armed Forces

The House of Commons Defence Committee's inquiry on women in the Armed Forces, July 2021revealed the extent of sexual harassment endured by service women in the armed forces. The inquiry found that the MoD is *'failing to help female personnel achieve their full potential'*; that women are under-represented among senior officers; and that 62% of female service personnel and veterans report experiencing bullying, harassment and discrimination. Women are more than twice as likely as men to experience bullying, harassment and discrimination and, in 2021, ten times more likely to have experienced sexual harassment in the last 12 months. Further, nearly 40% of women rated their experience of the complaints process as *'extremely poor'*; and *'a lack of faith in the system contributes to 89% of both male and female personnel in the Regular Forces not making a formal complaint'.*

The Service Complaints system

The Ombudsman's annual reports have also shown that the Service Complaints system is *'not yet efficient, effective and fair'* and finds that female personnel, and those from minority ethnic backgrounds, were over-represented in the Service Complaints system, making up 21% and 15% of complainants compared to their representation in the UK Armed Forces, 12% and 8%. Reflecting these statistics, a very significant proportion of the women who contact the Centre for Military Justice for help, like T, report suffering serious mental health problems as a direct consequence of their experiences while serving, many of which they ascribe to discrimination based on their sex. These women may now bring claims if they are discriminated against in relation to their disabilities post-service.

After they leave the Services, veterans may still need to have considerable contact with the Armed Forces or MoD. For example: they may need to seek reviews of their pension arrangements; they may need to apply to the Armed Forces Compensation Scheme because they have sustained injury, including psychiatric injury, during service; or, as in T's case, they may have a Service Complaint which, because of the serious and endemic delays in the system, remains outstanding and continues long after they have left. If a disabled veteran believes that, post-service, the MoD has discriminated against them on the basis of their disability, or has failed to make reasonable adjustments for them to address any substantial disadvantage they may suffer, they may now be able to bring a claim.

Secondly, this judgment is a rare example of the successful application of s3 of the HRA in seeking to extend the EA. Without that application T's claim would have been struck out; she would have been denied protection from discrimination and access to the tribunal to have her claim adjudicated upon. This judgment may prompt further challenges to exemptions in the EA which give rise to serious questions as to their compatibility with an individual's human rights. Examples may include exemptions relating to potential discrimination claims for acts done on grounds of nationality and ethnic or national origin in certain immigration related decisions.

Finally, this case is a necessary reminder as to why the HRA is so important, particularly post-Brexit. Gone are the days when the ET can make a reference to the Court of Justice as to whether domestic discrimination legislation is compatible with the relevant anti-discrimination EU Directives. Set against the current consultation on replacing the HRA with a British Bill of Rights, T's case further underscores the importance of retaining s3 in its current form for those in need of the protection of the EA and more broadly.