Neutral Citation Number: [2024] EWHC 1932 (Admin)

Case Nos: AC-2023-BHM-000108 & 109

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
Bull Street,
Birmingham

Date: 31st July 2024

Before:

HIS HONOUR JUDGE TINDAL
(Sitting as a Judge of the High Court)

- -

Between:

THE KING (on the application of)

(1) FLIGHT SERGEANT (RET'D)
BARBARA EYTON-HUGHES

(2) WARRANT OFFICER (RET'D)
RUDOLPH PIERRE

Claimants

- and -

THE SECRETARY OF STATE FOR DEFENCE

Defendant

- -

Mr Jonathan Dingle (instructed by **Wace Morgan Solicitors)** for the **Claimants**
Mr Robert Talalay (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 23rd April 2024

Handing down: 31st July 2024

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JUDGMENT

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HHJ TINDAL

Introduction

1. This judicial review case considers the scope of 'redress' under s.340C(2)(b) of the Armed Forces Act 2006 ('AFA') for 'service complaints', which are a statutory form of grievance procedure for non-civilian members of the Armed Forces. Such 'servicepeople' (as I shall respectfully refer to them) can bring claims in the County Court or High Court for personal injury and in the Employment Tribunal for discrimination. However, they cannot bring claims in these venues for breach of contract or unfair/constructive dismissal. This case considers the extent to which they can pursue analogous remedies through service complaints and the extent to which principles of employment and tort law might apply by analogy. It also considers the requirements of procedural fairness in such service complaints.

2. This case concerns two consolidated and factually linked claims brought by two servicepeople who worked together at RAF Honington in Suffolk and have since both left the RAF. I shall refer to Flight Sergeant (Retired) Eaton-Hughes as 'the First Claimant' and Warrant Officer (Retired) Rudolph Pierre as 'the Second Claimant'. I emphasise from the outset that both left after distinguished service for their country and indeed it appears could have had bright futures within the RAF. However, both Claimants contend they were justified in resigning because of the mishandling of service complaints about them by others (dismissed save in minor respects) about which they brought their own service complaints (largely upheld). This case is about the redress offered to each of the Claimants in their successful service complaints. Rather than the compensation they had sought for career losses caused by their early leaving of the RAF, they were each awarded only £3,500.

3. As discussed below, the statutory framework for service complaints is found in Part 14A AFA (including s.340C), the Armed Forces (Services Complaints) Regulations 2015 ('the SC Regs'); the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015 ('the 'SCMP Regs') and the Armed Forces (Services Complaints Ombudsman) Regulations 2015 ('the SCOM Regs'). But sitting on top are internal Ministry of Defence ('MoD') and HM Treasury policies. From a legal perspective, this case involves the relationship between statute and policy. However, there is no challenge here to the lawfulness of the relevant policies. Rather the debate is over their interpretation. This case could potentially affect many others – according to the Ombudsman's latest report, SCOAF publishes its Annual Report 2023 | Service Complaints Ombudsman for the Armed Forces, in 2023 there were 1,225 service complaints (mainly on promotion or pay, but also on bullying, harassment and discrimination) up from 935 in 2022 and 749 in 2021.

4. In short, the Claimants contend that by failing to compensate their 'post-resignation losses', the Defendant acted unlawfully and procedurally unfairly, including by failing to have oral hearings on appeal. By contrast, the Defendant contends that in cases of 'personal injury' and 'stress', financial 'redress' is limited to 'non-quantifiable payments' (akin to common law 'general damages') and excludes 'quantifiable payments' (akin to 'special damages'). The Defendant also submits 'post-resignation' losses are inappropriate if the resignation was not 'reasonable'. It contends the decisions were lawful, oral hearings were unnecessary and the procedures were fair overall (or that any unfairness made no substantial difference).

5. Therefore, in this judgment, I will consider: (i) the factual and procedural background; (ii) the statutory and policy framework and whether the Ombudsman was the correct defendant; (iii) the true scope of permissible 'redress' in service complaints; (iv) whether the Defendant was entitled not to award a 'quantifiable payment' as it was 'not reasonable' for the Claimants to resign (the 'reasonableness' issue') (v) whether it was fair for the Defendant to decide the Claimants' complaints without an oral hearing; and (vi) whether the procedure was otherwise fair; and if not, if a fair procedure been followed, whether the outcome would have been the same. Given the potential importance for other servicepeople and the rarity of reported cases, I have tried to undertake a full analysis and I am very grateful to both Counsel for their assistance including by written submissions after the hearing.

Factual and Procedural Background

6. Whilst the bundle runs to over 1000 pages, much of the 'supplementary bundle'. is not directly relevant to this claim. Indeed, the factual background is largely undisputed. So, my factual summary is drawn from the Claimants' own statements of facts, although I will also quote relevant parts of the decisions and the evidence feeding into them. However, as I am dealing with two Claimants with related facts, this requires some detail, although I will summarise both together chronologically.

7. The First Claimant is now aged 51 and joined the RAF in 1990 aged 18. She worked her way up to Flight Sergeant, the second-most senior non-commissioned officer ('NCO') role. Had she stayed on until 65, it seems clear she would have been promoted to the most senior NCO role - Warrant Officer - and enjoyed better pay and pension than she will now have, after leaving the RAF aged 48 in February 2022. She has since found alternative employment at a lower income as a paralegal.

8. The Second Claimant is now aged 56 and also joined the RAF as a young adult. Since part of his service complaint related to discrimination (as did the First Claimant's), it is relevant to note that the Second Claimant is black. He worked his way up to Warrant Officer and planned to serve until 60. Again, he may well have been promoted even further had he not left the RAF in August 2020 aged 52. Again, he has found alternative employment at a lower income, as a gas fitter.

9. By 2017, both the Claimants were at their final ranks and working at the medical centre at RAF Honington. The First Claimant worked as the Practice Manager under the Second Claimant, who was the RAF Medic Warrant Officer in charge, but in his absence, she 'acted up' as Warrant Officer. (Their respective order as Claimants is the inverse of their ranking only due to my case management order consolidating their claims when granting permission for reasons I explain later).

10. In 2017, the Second Claimant's most recent appraisal (known in the Forces jargon as 'SJAR's) was very positive, suggesting he could be considered for more senior roles in the following couple of years. I do not seem to have a copy of the First Claimant's SJAR from 2017, but I am sure it was equally positive. Both were capable, experienced and highly valued senior NCOs carrying significant responsibility. Indeed, as I have said, both planned to continue working for several years and to try for promotion; before eventually, having dedicated their working lives to the RAF, retiring from it (and possibly from work generally):- the Second Claimant at 60 in 2028 and the First Claimant at 65 in 2038.

11. Unfortunately, the plans and distinguished careers of the Claimants were cut short. In August-September 2018, two more junior members of staff at the medical centre in RAF Honington presented service complaints (the 'SC's) about the Claimants' conduct, alleging 'bullying and harassment'. Under Joint Service Protocol ('JSP') 763, the Armed Forces rightly take such conduct extremely seriously and indeed it can be tragic, as at the Deepcut Barracks two decades ago. There are helpful definitions in JSP 763 of 'harassment' (based on the Equality Act 2010) and 'bullying' (as explained in *R(Ogunmuyiwa) v Army Board* [2022] ACD 96 discussed further below). However, as any employment lawyer knows, people define 'bullying and harassment' in very subjective ways. Regrettably, the complaints against the Claimants were quite trivial. I say immediately that the Claimants were entirely exonerated of bullying and harassment. Whilst they were found to have 'leadership failings', according to a September 2018 'climate assessment' in the medical centre, it appears there was a 'culture problem' within the medical centre to which more senior ranks and investigators should have addressed more promptly. However, inexcusably, the two SC investigations against the Claimants dragged on for three years until finally concluding in August 2021, by when the Second Claimant had resigned and the First Claimant had tendered her resignation. In upholding the Claimants' own service complaints in May and June 2022, the Decision Body ('DB') of Air Cdre Crayford concluded (counter-signed by Wing Cdr Dennis) that the earlier SCs against both had been mishandled and unreasonably delayed. This was upheld on the Claimants' appeals by the Appeal Body ('AB') of Gp Capt Page (unusually a more junior rank), assisted by a lawyer Ms Smith. I refer to them as 'the 'DB' or 'the AB'.

12. From a later investigation by the AB, pending the long-delayed SC investigation against the Claimants from 2018-2021, both explored other deployments:

    a. The Second Claimant stayed at RAF Honington but was experiencing stress and was briefly signed off sick. On his return in September 2019, he asked for 'early termination' from the RAF (which I shall call 'resignation'). Aged over 50, he was entitled to 'resettlement support' (i.e. to transition to civilian life) and from January to March 2020, he moved to Colchester for training in building maintenance and obtained a diploma in gas fitting. He wished to stay on for extra training, but he had used up his resettlement allowance (COVID may have played a part). His early termination interview noted:

        > "[He] is understandably disillusioned with an apparent lack of adherence to proper procedure during the SC process and is now keen to leave the Service having gained new professional qualifications."

        The Second Claimant resigned on 31st August 2020, before the SCs against him had concluded. He then obtained employment as a gas fitter.

    b. The First Claimant stayed on at RAF Honington until May 2019, when she moved to RAF Henlow where she stayed until July 2021, then moving to her last posting in RAF High Wycombe. She was not entitled to quite the same resettlement support but did receive transition training. However, from February 2019 to December 2020, she was signed off sick or placed on light duties ('medically downgraded') with an adjustment disorder. Even after the SCs concluded, she remained downgraded until she resigned in February 2022. Her own 'early termination' interview noted that:

> "We discussed the impact her Service Complaint has had on her and her comment [of] experiencing bullying in a previous role. She is clear and confirmed in her wishes to leave the Service at this time."

13. The First Claimant had brought her service complaint in December 2021, three months before she left the RAF. She had summarised her complaint as follows:

> "My Service Complaint relates to the way that the Service Complaints previously made against me have been processed, the way they have been mishandled, fraught with mistake and undue delays. In addition, I have not been supported through the process and ignored when raising my own issues…This process has caused me huge stress, had a significant impact on my mental health, where I was signed off sick with work related stress and has led to a total lack of trust in the complaints system. This has resulted in me to early terminate from the RAF. I feel that the second service complaint was only completed once I raised the issue as the reason for my early termination to my new Line Management at RAF High Wycombe.
>
> I believe the way that I have been treated has caused significant damage to my career and promotion prospects and that my reputation has been tarnished due to the way the complaints have been mishandled and the complete lack of confidentiality applied to my case. I have been discriminated against because I don't have any children. I feel that the principles of fairness have not been applied to these service complaints and the process has breached my rights under Arts. 6 and 8 [ECHR]."

The First Claimant also categorised her complaint as bullying and harassment, maladministration and undue delay. The 'redress' she sought was investigation of various questions, an apology and compensation, though she did not specify what.

14. The Second Claimant brought his own service complaint in January 2022 about 18 months after he left the RAF. He summarised his own complaint as follows:

> "The way that the Service Complaint against me has been handled and the treatment that I have suffered during the process has been beset with delay and unfair treatment towards me and I believe my colour has materially influenced these actions. Policy has not been appropriately applied to my case causing irretrievable damage to my military career infringing my rights under Article 8 [ECHR] to pursue my chosen vocation. I have effectively been ostracised during the complaint process and this has continued throughout the process. I believe that the service complaint was not handled following the principles of fairness as stated in the JSP. Matters got worse when RAF Honnington realised I was going to put in a service complaint against them and they become more hostile."

The Second Claimant categorised his own complaint as racial discrimination, improper and unfair treatment, maladministration, breach of the Data Protection Act, undue delay and bullying and harassment. As 'redress', he sought investigation and answers to various questions and he did specify the compensation he sought:

> "Compensation for premature loss of military career and consolatory compensation for hurt and distress."

15. Both service complaints were allocated to the DB to investigate and decide. In relation to the First Claimant, they sub-divided her complaint into three headings:

a. 'Head of Complaint ('HOC') 1: The First Claimant believed she was wronged by the handling of previous service complaints ('SC's) against her characterised by maladministration, undue delay and a lack of thoroughness.

b. HOC 2: She felt unsupported as a respondent through the previous SCs which she alleged caused significant damage to her career and promotion prospects which eventually led to her 'Early Termination' from the RAF.

c. HOC 3 – Unfair treatment and discrimination in relation to the previous SCs that contravened the Human Rights Act 1998.

The DB re-investigated and spoke to three witnesses as they had found the initial investigation of the SC against the First Claimant had been inadequate and failed to put it in the context of the wider problems at the medical centre in RAF Honington.

16. On 8th June 2022, the DB upheld the First Claimant's first and second HOCs in full and the third in part (not accepting discrimination or breach of human rights):

> 6. [F]ailings in the original investigations and maladministration by the Service, over a 3-year period, had caused ex-FS Eyton-Hughes significant stress and anxiety. As a Respondent in the original complaints, [she] had experienced unwarranted and unnecessary pressure; her mental health had deteriorated significantly such that she struggled to perform her duties at her subsequent posting at RAF Henlow and was signed off sick with work related stress. An unfortunate and unintended consequence was that [she] was medically downgraded for the remainder of her career and this had damaged both her career and promotion prospects.
> 7. The DB found that these failings undermined [her] trust and expectation of fairness in the SC process. The DB recognized that this injustice had severely impacted [her] ability to lead a relatively normal life and this had ultimately led to her leaving the Service to rebuild her mental resilience. It is evident that [she] has experienced a very significant level of obvious distress, worry and anxiety since the complaints were first submitted in 2018. The DB determined that [she] had been wronged by the handling of the previous complaints and that the treatment she had suffered was both unfair and the associated undue delay amounted to maladministration. Therefore, with one exception [i.e. discrimination / human rights], the DB Upheld the Service Complaint**.**
> 8. The DB apologised on behalf of the Defence Council for maladministration and the impact that the original complaints had had on [her] reputation, military career, and her ability to lead a relatively normal life. Finally, the DB emphasized that [she] was completely exonerated from any previous criticism and he hoped that she could now move forward feeling fully vindicated…
> Redress: As the DB determined that the handling of the previous complaints and undue delay amounted to maladministration, the DB directed the award of financial compensation. The DB agreed to request on behalf of the Air Secretary for [Dispute Resolution] approval, and if deemed necessary approval from HM Treasury, to make a consolatory nonquantifiable financial award to Ex-FS Eyton-Hughes for the significant level of obvious distress, worry and anxiety that she had suffered as a result of maladministration."

17. Having sought such approval (as I shall explain below), on 20th July 2022, Air Cdre Crayford wrote again to the First Claimant to reiterate his apology and to confirm the decision on redress – which was a non-quantifiable payment of £3,000:

> "2. The purpose of redress is to recognise the impact of the injustice caused by maladministration has had on the complainant. The Service Complaints Ombudsman for the Armed Forces (SCOAF) Financial Remedy Guidelines1, which was sent to you highlights that a nonquantifiable financial award may be recommended where the Complainant is found to have suffered obvious distress or injury to feelings; lost an opportunity or benefit; or where no specific action can be taken to fully remedy the wrong. The guidelines also contain a 'redress scale' for consolatory payments to ensure a consistent and transparent approach is taken by the Services when implementing a non-quantifiable consolatory payment recommendation.
>
> **Award**
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> 3. Taking into account the SCOAF Financial Remedy Guidelines and the circumstances of this SC, I consider that the level of redress to be at the top of the redress scale. Therefore, I concluded that an award of **£3,000** would be appropriate redress for the wrongs I found you suffered in the handling of the previous complaints.
>
> **Summary of reasons…**
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> 4. When making my decision, I carefully considered the nature of the wrongs you were subjected to and the evidence about the impact they have had on you. I am only empowered to award redress for the elements of your SC that were upheld. It is therefore only those elements and the impact resulting from them, as opposed to the impact of the totality of the alleged course of conduct, that I have considered.
>
> 5. In relation to your SC, specifically, I found that the principles of fairness were not followed. I found the investigator had failed to interview key witnesses in the Chain of Command and this had resulted in unbalanced, incomplete and ultimately biased investigations. I found significant evidence of maladministration and undue delay and you were undoubtedly wronged by the poor handling of the original complaints. I also found that you had not been fully supported as a Respondent in the original complaints and that you had experienced unfair treatment.
>
> 6. [T]he injustice, over a considerable period, had caused you significant stress and anxiety and that your mental health had deteriorated significantly such that you struggled to perform your duties at a subsequent posting. Unfortunately, an unintended consequence of the deterioration in your health was that you were medically downgraded for the remainder of your career, which had implications on your career and promotion prospects."

18. For the Second Claimant, the DB sub-divided his SC into two headings (and conducted an overlapping investigation with that for the First Claimant's SC):

    a. HOC 1: The Second Claimant believed he had been wronged by the handling of previous SCs against him. He believed those SCs were not handled following the Principles of Fairness laid down in Policy. He alleged the treatment he suffered was due to racial discrimination including unfair treatment and was beset with delay.

    b. HOC 2: The Second Claimant alleged Policy was not appropriately applied causing irretrievable damage to his military career infringing his rights under Article 8 [ECHR].

19. On 19th May 2022, the DB upheld both HOCs of the Second Claimant in part, but not the allegations of discrimination or breach of human rights. The DB said:

> "6. It is evident that Ex-WO Pierre has experienced a very significant level of obvious distress, worry and anxiety since the complaints were first submitted in 2018 and the allegations, which were compounded by undue delay in the complaints process had impacted him massively. The DB accepted that Ex-WO Pierre had been wronged by the handling of the previous complaints; the treatment Ex-WO Pierre had suffered was unfair and the associated undue delay amounted to maladministration.
>
> However, the DB found no evidence that the failings occurred because of Ex-WO Pierre's race. Rather they appear to be attributable to incompetence, lack of training and resource. Therefore, the DB partially upheld the Service Complaint.
>
> 7. The DB apologized, on behalf of the Defence Council, for the maladministration and the impact that the original complaints had had on Ex-WO Pierre's reputation, military career and his ability to lead a relatively normal life. Finally, the DB emphasized that Ex-WO Pierre was completely exonerated from any previous criticism and he hoped that Ex-WO Pierre could now move forward feeling fully vindicated.
>
> Redress: As the DB determined that the undue delay amounted to maladministration, the DB directed the award of financial compensation. The DB agreed to request on behalf of the Air Secretary for DRes approval, and if deemed necessary approval from HM Treasury, to make a consolatory non-quantifiable financial award to Ex-WO Pierre for the significant level of obvious distress, worry and anxiety that he had suffered as a result of maladministration."

20. Likewise, on 20th July 2022, the DB wrote to the Second Claimant in similar terms to the letter to the First Claimant the same day, also awarding £3,000:

> "In relation to your SC..I found the principles of fairness were not followed. The investigator had failed to interview key witnesses and therefore I considered the investigation to be unbalanced, biased and incomplete. I also found exceptionally poor complaint handling and significant and unnecessary delays although I found no evidence that the failings occurred due to racial discrimination. However, I determined that the injustice had severely impacted your ability to lead a relatively normal life and ultimately this had led to you leaving the Service believing your reputation had been besmirched and your value as a Warrant Officer irrevocably undermined."

21. Therefore, by the end of July 2022, the DB had upheld both Claimants' service complaints (except on discrimination or breach of human rights which neither appealed or have pursued either in the Employment Tribunal or at Court). The DB had given each Claimant unequivocal 'exoneration' and apology; and granted both redress of £3,000, reflecting the impact of the maladministration etc they had found:

    a. The First Claimant's health had been affected with the 'unintended consequence was that [she] was medically downgraded for the remainder of her career and this had damaged both her career and promotion prospects'. That was reflected in the £3,000 non-quantifiable payment, albeit bearing in mind the First Claimant had not sought longer-term losses in her SC.

b. The Second Claimant 'had left the Service believing his reputation had been besmirched and his value as a Warrant Officer irrevocably undermined'. However, the DB had not found that the Second Claimant's career *had in fact* been damaged in that way (contrary to their more explicit finding with the First Claimant: which is why I chose her as such in granting permission and consolidating the two cases). Nevertheless, the DB still awarded the Second Claimant the same financial redress as the First Claimant of £3,000.

22. The DB's decisions are not challenged before me, save implicitly on the size of the £3,000 award, which is less than the £3,500 award of the AB which is challenged. Indeed, the DB's decisions are relied on in that challenge by both Claimants. The DB appears to have genuinely tried to acknowledge the impact of the previous failings on both Claimants, to apologise for that and to exonerate them. Whilst the DB did not accept the Second Claimant's claim for 'compensation for premature loss of military career', they had accepted that he resigned because he believed that. So, the DB awarded him a 'consolatory compensation for hurt and distress' of £3,000. The First Claimant received the same having just asked for 'compensation' without articulating any claim in her SC for redress of career-long losses.

23. Whilst the Claimants accepted the DB's conclusions on their service complaints themselves, they each appealed the DB's £3,000 awards. Their solicitor (the same representing each Claimant as indeed he still does) sent a notice of appeal on 9th August 2022 for the First Claimant (which was similar for the Second Claimant):

> "We act for Flight Sergeant (Ret'd) Barbara Eyton-Hughes in respect of her Service Complaint (SC). We refer to: (1) the findings of fact substantially upholding the grounds of our client's SC set out in the Decision Letter dated 8th June 2022 and sent by email on that date to our client (which findings are expressly not appealed); and (2) the financial award (redress) consequent upon those findings set out in the Decision Letter dated 20th July 2022 again sent directly to our client by email by which our client was awarded just the sum of £3,000 (together with an apology): it is this financial award of £3,000 that is now…appealed by our client.
>
> **The June Decision**
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> The DB in reaching their decision on 8th June 2022 made many findings of fact. Air Commodore Malcolm Crayford quite properly and correctly, and frankly indisputably, reported that the DB found… that: "….I found that the principles of fairness were not followed. I found the investigator had failed to interview key witnesses in the Chain of Command and this had resulted in unbalanced, incomplete, and ultimately biased investigations. I found significant evidence of maladministration and undue delay and you were undoubtedly wronged by the poor handling of the original complaints. I also found that you had not been fully supported as a Respondent in the original complaints and that you had experienced unfair treatment."
>
> **The July Decision**
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> In considering the basis for the redress set out in the decision made on 20th July 2022, Air Commodore Crayford, again quite properly and correctly, and just as indisputably, stated: "6. I found that the injustice, over a considerable period, had caused you significant stress and anxiety and that your mental health had

significantly deteriorated such that you struggled to perform your duties at a subsequent posting. Unfortunately, an unintended consequence of the deterioration in your health was that you were medically downgraded for the remainder of your career, which had implications on your career and promotion prospects."

They continued in paragraph 7 of that letter to apologise on behalf of the Defence Council and the Royal Air Force, and noted the impact on our client's reputation, military career, and ability to lead a normal life. They regretted the significant level of obvious distress. They concluded that our client had been completely exonerated from any previous criticism.

And yet the financial award was just £3,000.

The grounds of the appeal

The level of the financial award made in the letter of 20th July 2022 is perverse, irrational, and not one that any reasonable tribunal properly directing itself to the findings it had made and the consequences of those findings, could have reached. In particular the Financial Award does not reflect, adequately or to any meaningful degree the findings made and so elegantly summarised by Air Commodore Crayford and in particular that our client lost: * her career – our client, who was born on 28th March 1973 and is now aged 48, quite reasonably intended to serve until age 60: she potentially could have been extended annually until age 65 - instead she is now a civilian working as a paralegal and earning but a fraction of her earnings as a senior NCO; * her reputation * her mental health * potential promotion – our client will need to see a career forecast to quantify this in detail but it is likely that our client would have been promoted at least one more step; * the collateral benefits of RAF service – our client would have enjoyed these until at least age 60 including those relating to housing, mess life, medical care, dental care, gymnasia, sport, travel, and education credits which are well known; and * pension payments – our client would have earned a greater and higher level of pension, and tax free lump sum payments from a longer career as will be well known within the Service.

Further, in reaching the decision in respect of the Financial Award, the Decision Maker irrationally and wrongfully failed to call for or to obtain or to consider: * any evidence of immediate financial loss * any evidence of potential lost promotion / career forecast * any evidence of lost pension and lump sum * any evidence of psychological or psychiatric injury – in particular by obtaining a suitable medical report or by agreeing with our client that one should be obtained * any evidence of lost collateral benefits * any evidence of actual relocation / resettlement costs * any evidence of actual retraining / education costs all of which were likely to be obvious consequences of the findings of the effects on our client set out in June Letter or summarised in paragraph six of the July Letter.

Yet further, in reaching the decision in respect of the Financial Award, the Decision Maker irrationally and wrongfully failed to * call for or to obtain any evidence from our client in respect of the effects on her – both the quantifiable losses and the unquantifiable losses – what lawyers call the special and general damages * interview our client to directly establish her position * call for or to obtain any submissions from our client in respect of: (1) the basis of the Financial

> Award (2) appropriate level of Financial Award (3) the method of calculation of the Financial Award; or (4) the evidence needed to assess the Financial Award
>
> **Proposal for resolution**
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> Our client can set out her losses in Schedule if you indicate that this would be helpful. Preliminary calculations by experienced counsel suggest that these will exceed £175,000 and may be as high as £300,000 having regard to potential promotion and pension loss. These are not final figures and much work will need to be done to calculate the sums involved. These numbers are intended to be indicative.
>
> They demonstrate, however, that sum of £3,000 awarded fails utterly to reflect the impact on our client. We and our client are happy and committed to engage in any form of ADR or mediation to resolve this matter. We suggest that it may be appropriate for a way ahead to be agreed to obtain the necessary evidence and then refer the matter back for a collaborative process leading to an appropriate Financial Award being made which reflects the findings made."

The Second Claimant's appeal was in similar terms as adjusted to his case – the potential size of his claim was said to be in excess of £150,000 and as high as £275,000 (presumably given he was a little older and intended to serve until 60). Whilst it is not entirely clear, I accept both appeals requested an oral hearing to give evidence about their losses and to explain their reasons for resigning from the RAF.

24. Whilst one of the grounds of appeal was that the DB had 'failed to call for and consider evidence' of loss, neither Claimant had actually asked the DB to do that in their service complaints. In particular, the First Claimant had simply asked for 'compensation', which the DB awarded. So, it was difficult to criticise the DB's decision on that ground. It is part of the Defendant's overall submissions that the Claimants' appeals were fundamentally misconceived in that the DB (and AB) could not have made such awards in principle anyway. (I consider that issue below, but as I will explain, that was not the basis on which the AB refused such an award, although the Defendant's own submissions raise the question of principle).

25. In any event, unlike the typical appeal in a Court context, the appeal of a service complaint from a DB to an AB was *at that time* a 'rehearing' rather than a 'review', as the DB explained to the Claimants in its decision letters in May and June 2022:

> "If you disagree with the DB's decision you have the right to appeal and escalate your complaint to an Appeal Body….If you appeal, the Appeal Body is not bound, restricted or confided by my decision and will consider the whole of your Service Complaint again, including **any parts that have been upheld and any redress that I have recommended**. The Appeal Body may not reach the same decisions as the DB." (original bold)

26. It follows that by those grounds of appeal, the Claimants were clearly asking the AB to substitute for the DB's award of £3,000 compensation for their alleged long-term losses. Therefore, this claim fairly and squarely raises the important question whether DBs and ABs in principle can make such larger 'career-long' awards. That wider question of the scope of permissible 'redress' for service complaints and the requirements of procedural fairness in doing so potentially affects other cases. Those were two of the three reasons why I granted permission to claim judicial review and invited the parties to address those

issues. (I will come back to the third reason when discussing the basis of my decision to grant permission).

27. There appears to have been a delay until the start of the AB's re-investigation in November 2022. Both Claimants were interviewed, which was turned into appeal statements. Although her appeal was limited to redress, as it was a rehearing, the First Claimant mainly expanded on the merits of her SC, although she did say:

> "This whole process has been extremely stressful and I was crying all the time at the slightest thing. The way I have been treated has significantly damaged my career and promotion prospects. Before the SCs I was competitive for promotion but in the 3 yr period of the SCs, I was not competitive at all for promotion. As soon as the SCs were finalised I became competitive again. Although I had expected to serve the next 14 or 15 yrs. in the RAF, for the sake of my mental health I felt that I had no choice but to Early Terminate (ET) from the RAF and I submitted by application for ET in July 2021. The SCs still had not reached a conclusion but I felt I had no choice if I was to get an improvement in my mental health. I was just under so much pressure and I felt that as it had gone on for so long, everyone thought I must be guilty."

28. As he had been in his initial service complaint, the Second Claimant was more explicit than the First Claimant on the linkage between the SCs against him and his decision to leave the RAF, including how it led him not to take up promotion, which was in turn directly relevant to the level of redress that he was seeking on the appeal:

> "In addition to the entire SCs being extremely detrimental to my health, it has caused irretrievable damage to my military career and forced me to prematurely leave the RAF. I had been successful in applying to be WO Head of RAF Medical Services…. This was at the start of the SCs ….The SWO couldn't keep quiet about it….There was no way I could take it up…with all the breaches of confidentiality and as I was receiving calls from across the RAF within my trade; I had to clear my name…..My position had now become untenable and I had no one I could go and see for support….I couldn't go to HR because they were part of it and with all the stress and pressure I was under, my health was suffering. The only support I could get was from seeing doctors from another unit….When I returned to work the stress and anxiety returned and I felt I could not go on anymore. Within a month of coming back from sick leave, I [sought Early Termination ('ET')] in Sept 19…[B]efore the SC and Climate Assessment, I had not considered leaving the RAF and I had planned to stay as long as I could. However, with how the SC was being handled and the way I was being treated I couldn't go on any longer and I felt I had no choice but to leave for the good of my mental health and wellbeing…."

29. In addition to obtaining the details about each Claimant's 'resettlement' and the circumstances of their 'early termination' which I have discussed, the AB's investigator obtained some additional information about the welfare support the First Claimant had in each of her subsequent postings. In relation to both Claimants, the AB's investigator Sq Ldr Pollock obtained their appraisals ('SJAR's), which are prepared without sight of any pending service complaint, to ensure promotion is unaffected (unless of course the service complaint is upheld):

a. The First Claimant's SJAR's for the periods to May 2019, November 2020 and July 2021 had a 'A-' grade meaning she was performing above expected standards and her promotion recommendations were 'high'. Indeed, she had 'acted up' as Warrant Officer when the Second Claimant was absent. Whilst the Second Claimant had conducted her 2018-2019 SJAR, after she moved from RAF Honington, an officer at RAF Henlow in her 2019-2020 SJAR also supported her promotion. The same officer said in her 2020-21 SJAR:

> "In my experience she has shown…she is ahead of her peers. Her performance has been indicative of a person...ready for the next rank."

b. The Second Claimant's SJARs were similarly positive – indeed as noted he had been offered promotion in 2018 but turned it down due to the service complaints to 'clear his name'. Again, his 2017-2018, 2018-2019 and 2019-2020 SJARs were all positive and all supported his promotion, indeed his average grades in the period improved from a 'B+' to 'A-'. Moreover, each of his SJARs supported his candidacy for promotion, albeit by the last he was on the cusp of retiring from the RAF. Notably, whilst the Second Claimant has been working as a gas fitter using those qualification, his last appraisal, referring to his impending employability in civilian life, said:

> "An eminently experienced WO, he would undoubtedly be suitable for executive managerial appointments, strategic planning and development projects within any high tempo environment."

30. Moreover, the AB investigator Sq Ldr Pollock also obtained further information about both Claimants' potential careers within the RAF had they stayed - from the 'Career Manager' ('CM') Sgt Davis. On 5th January 2023, Sq Ldr Pollock asked:

> "I have been appointed as the Harassment Investigation Officer (HIO) to investigate the appeal to Ex WO Pierre…and Ex FS Eyton-Hughes…Service Complaint (SC)…Their SC centres around their allegation that a previous SC (Sep 2018), in which they were both named as Respondents forced them to subsequently leave the RAF in 2020 and 2022 respectively. What I am trying to ascertain is: a. What were the career prospects of WO Pierre and FS Eyton-Hughes prior to the initial SC in Sep 18 ? b. What discussions, if any, did they have with CM about their careers and the impact the SC was having on them ? c. The dates they… submitted their application for ET and any comments made. d. From a CM perspective what were their future prospects had they remained in the RAF ?"

Whilst Sq Ldr Pollock referred to a discussion, it seems this did not occur as Sgt Davis promptly sent an email by return the very same day on which Sq Ldr Pollock asked only one brief question of clarification, suggesting there was no need for a discussion. In his first email that day, Sgt Davis explained:

> "I only started in post in August 2020, so I never had any direct contact with WO Pierre. I have looked back through his records. His last recorded SJAR he was given OPG of A-. On his [early termination] application he…felt he had not been supported by the RAF while he was the subject of a service complaint. I see no evidence that his service was restricted, he could have been employed in any RAF Medic OR9 post and executive employment would have been possible subject to successful interview with job holder.

> FS Eyton-Hughes last three SJARs she received an OPG of A- with a High [promotion recommendation]. On the 2021 [Promotion Selection Board] she finished 6 on the [Merit Order List] and 5 were released to the PSB. It's entirely possible that had she remained in the service she may have been promoted on the 2022 PSB. In her [early termination] application…she felt she had been disadvantaged by her ongoing SC and was disillusioned with service life. She had just started in post as [Flight Sergeant on Medical Policy] so although I tried to retain her in service, there were no assignment options for her at that time. When she reached [Future Availability Date] she would have been employable in any [Flight Sergeant] post."

Whilst Sgt Davis clarified in response to Sq Ldr Pollock's only question that the First Claimant had not been competitive for promotion in 2018, 2019 and 2020, as Gp Capt Page explained in a statement for this claim, Sgt Davis' answer on the 2021 Promotion Service Board meant that the First Claimant would not just have been competitive, she would have been the next to be released to a guaranteed vacancy. This is why it was entirely possible she would have been promoted in 2022.

31. The additional information (including Sq Ldr Pollock's questions to Sgt Davis and his responses) was provided to both Claimants by Sq Ldr Pollock in letters summarising the investigations in January 2023. Both Claimants responded, again mainly focusing on the merits of their SCs and the comments of officers they had criticised in their SCs. On 2nd February 2023, the First Claimant specifically noted the positive scores in her SJARs and did not contradict her positive prospects for promotion. With an extension granted, a week or so later, the Second Claimant responded but not to the evidence relevant to his career prospects.

32. The AB (as noted, consisting of Gp Capt Page assisted by a civilian lawyer Ms Smith) did not conduct oral hearings as requested, but made the decisions under challenge on 28th February 2023, having earlier met in the absence of the Claimants. The AB re-iterated the point in the DB's decision letter that it this was a rehearing:

> "[W]e are not bound by the findings of the DB and have independently and objectively formed our own view on all aspects of your SC. However, to avoid unnecessary repetition and duplication, where we agree with the findings and reasons provided by the DB, we will adopt them by reference."

The AB did indeed agree with the DB in that it upheld the Claimants' complaints of maladministration and undue delay and also did not upheld their complaints of discrimination and breach of human rights. (The AB reconsidered those even though they were not appealed, but there is no challenge to their decisions about either of those, which would have had an alternative remedy in the Employment Tribunal or Court in any event). However, crucially, the AB did reach different (and challenged) conclusions on the impact on the Claimants' careers of the SCs against them than the DB did. That difference between the DB and AB is key to this claim.

33. For the First Claimant, the challenged reasoning of the AB relates to its different conclusion on her second head of complaint alleging damage to her career and on the linked analysis by the DB of the issue of redress:

> "13…[It] is not clear from the DB's [decision letter] whether the DB upheld your allegation that this has caused significant damage to your career and promotion prospects which eventually led to you early terminating from the RAF.

Nevertheless, the AB noted the DB's subsequent comment at para 6 of the Record of Case Hearing which states "*An unfortunate and unintended consequence was that Ex-FS Eyton-Hughes was medically downgraded for the remainder of her career and this had damaged both her career and promotion prospects*". The DB further states at para 6 of the Confirmation of Financial Award letter dated 20 Jul 22 that "*I found that the injustice, over a considerable period, had caused you significant stress and anxiety and that your mental health had significantly deteriorated such that you struggled to perform your duties at a subsequent posting. Unfortunately, an unintended consequence of the deterioration in your health was that you were medically downgraded for the remainder of your career, which had implications on your career and promotion prospects*".

15. Moving onto the next part of this HoC (that the lack of support caused significant damage to your career and promotion prospects which eventually led to you early terminating from the RAF),your medical records highlight that the situation had caused you a great deal of stress throughout which, at times, required you to take time off work. Your Early Termination paperwork also shows your reasons for wanting to leave the RAF early were "*Dissatisfaction with Overall Career/Promotion Prospects, Bullying, that [you] had a service complaint against [you] for nearly 3 years that has seriously affected [your] health and [you] believed that due to this you have been overlooked for promotion*".

16. The evidence obtained….demonstrates that you continued to be well thought of by your Chain(s) of Command. This is supported by your last 3 SJARs which clearly identify continuing high performance and solid 'High' recommendations for promotion. In addition, the current Career Manager, having assessed these reports states "*FS Eyton-Hughes last three SJARs she received an OPG of A- with a High prom rec. On the 2021 PSB she finished 6 on the MOL, and 5 were released to the PSB. It's entirely possible that had she remained in the Service she may have been promoted on the 2022 PSB*…W*hen she reached FAD she would have been employable in any FS post*". It appears, therefore, on the balance of probabilities, that neither your on-going medical condition, nor the ongoing SCs had caused 'significant damage to your career and promotion prospects'. Further, the outcome of these SCs was that only one HoC was upheld in the [first SC against you] and 2 within the [second] the findings from which were not career limiting. We also conclude, therefore, that it was not reasonable for you to believe you had no choice other than to leave the RAF under these circumstances.

17. For these reasons, we partially uphold this HoC in that the support you received was inadequate but that it did not cause significant damage to your career and promotion prospects and it did not therefore warrant you leaving the Service…..(original bold)

22. Having upheld HoC 1 and partially upheld HoC 2 and HoC 3, we have considered the redress you sought in your SC and those within our delegated powers to grant. We concur with the DB that there is clear maladministration demonstrated throughout the original SCs against you, however, we have found that this had not caused significant damage to your career. Further, we also concluded that it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances. As such, the claim for loss of earnings etc covered within your appeal is not considered further.

> Nevertheless, we have proposed a financial award to acknowledge the distress, worry and anxiety caused to you as a result of the maladministration."

Having sought HM Treasury approval, the AB endorsed the original non-quantifiable payment of £3,000, but also added £500 for the additional delay since the DB decision in July 2022. Therefore, the confirmed total award was £3,500.

34. For the Second Claimant, the AB made the same total award of £3,500 for similar reasons. Again, the AB upheld the same complaints the DB had upheld, save on the impact of the mishandling of the service complaints against him on his career:

> "13. Whilst it is evident from the evidence…that policy was not appropriately upheld throughout the administration of the SCs made against you, in particular the Principles of Fairness for the Handling of Service Complaints…we needed to consider whether this had caused 'irretrievable damage to your military career"
>
> 14. Your medical records highlight that the situation had, at times, caused you acute stress, that you were not sleeping properly and were feeling anxious due to the ongoing SCs against you. Your Early Termination paperwork also shows your reasons for wanting to leave the RAF early were; "*Dissatisfaction with Overall Career/Promotion Prospects, Lack of Current Job Satisfaction and a perception that that [you had] not been supported by the RAF*". However, the evidence obtained…appears to demonstrate that you continued to be well thought of by your Chain(s) of Command. This is supported by your last 3 SJARs which clearly identify continuing high performance. Further, the current Career Manager…. states "*I see no evidence that his service was restricted, he could have been employed in any RAF Medic OR9 post and executive employment would have been possible subject to successful interview with job holder*". Accordingly, whilst we acknowledge that the maladministration of this case had impacted your ability to lead a relatively normal life whilst the SCs against you were being administered, we believe on the balance of probabilities, that this had not caused irretrievable damage to your military career. Further….you chose to submit your early termination paperwork and leave the Service whilst the original SCs were ongoing. The outcome of these SCs was that only 2 HoCs were upheld against you in each case and the findings from these would not have been career limiting. We also conclude, therefore, that it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances….
>
> 16…[W]e **partially uphold this HoC in that policy was not adequately followed but that the errors did not infringe your Article 8 rights and did not warrant you leaving the Service** [original bold]…..
>
> 17. Having partially upheld both HoCs, we have considered the redress you sought in your SC and those within our delegated powers to grant. We concur with the DB that there is clear maladministration demonstrated throughout the original SCs against you, however, we have found that this had not caused irretrievable damage to your career. Further, we also concluded that it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances. As such, the claim for loss of earnings etc covered within your appeal is not considered further. Nevertheless, we have proposed a financial award to acknowledge the distress, worry and anxiety caused to you as a result of the maladministration."

35. As I will explain, disappointed service complaint appellants can complain to the Service Complaints Ombudsman for the Armed Forces ('SCOAF', currently Mariette Hughes, whom I shall call 'the Ombudsman'). Both Claimants did so. However, in letters dated 11th May 2023, the Ombudsman said:

> "Having reviewed the key documents I find that there is no reasonable prospect that a new investigation would result in a different outcome. We will not, therefore, be investigating your complaint. Based on the available evidence, you did not appeal the Decision Body's (DB) decision, but appealed the amount you were awarded as redress. In the Appeal Body determination, it is clear the issue of your early termination was considered and that the Appeal Body found your last three appraisals *"clearly identify continuing high performance"*. The Appeal Body said: "….[T]*he findings from* [the Service Complaints in which you were a respondent] *would not have been career limiting. We also conclude therefore, that it* was *not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances."* I am not persuaded that an investigation by SCOAF would achieve significantly more. The DB and Appeal Body appear to have investigated the substantive matters reasonably and found that you were wronged by the poor handling of the Service Complaints in which you were the respondent. Financial redress was awarded in recognition of the distress, worry and anxiety caused as the result of the maladministration found. Based on the available information, SCOAF will not be able to provide the redress you are seeking from an investigation. We cannot 'quash' the Appeal Body's determination or financial redress offer and recommend that a new Appeal Body consider the matter afresh. We also cannot recommend financial redress in relation to potential loss of earnings or for 'constructive dismissal."

The Ombudsman notified the Claimants that should they wish to pursue the matter further, they may be able to bring a claim for judicial review.

36. The Claimants brought their claims for judicial review promptly on 22nd May 2023 in a claim drafted by Mr Dingle who still appears on their behalf. He set out the helpful summaries of facts in both cases, which are not in dispute (save in the articulated challenges) and from which I have already drawn extensively. However, whilst the Second Claimant's claim was not pleaded as akin to a personal injury claim, it is relevant to note that in the First Claimant's claim, Mr Dingle pleaded:

> "The [First] Claimant had become ill with a diagnosed psychiatric condition because of the stress - an Adjustment Disorder and Depression. The DB found that: "An unfortunate and unintended consequence was that Ex-FS Eyton-Hughes was medically downgraded for the remainder of her career and this had damaged both her career and promotion prospects."

What the First Claimant had said herself in her service complaint was this:

> "*This process has caused me huge stress, had a significant impact on my mental health*, *where I was signed off sick with work related stress* and has led to a total lack of trust in the complaints system. *This has resulted in me* to early terminate from the RAF." (my emphasis)

Both Claimants brought seven similar if not identical grounds of challenge:

a. Ground 1 complained of procedural impropriety in failing to convene an oral hearing, applying *R(Ogunmuyiya) v MOD* [2022] EWHC 717 (Admin), which I will discuss in detail below on several topics.

b. Ground 2 in essence complained of procedural impropriety in treating matters as uncontroversial when they were not, including the Claimants' decision to leave the RAF, whether those were reasonable, why they each felt they had no choice but to leave the RAF, the comments of Sgt Davis, the impact on their mental health and their losses from resignation.

c. Ground 3 complained of procedural impropriety in the AB's decision to reverse the DB's decision on the damage caused to the Claimants' careers by the SCs without specific notice, or chance of submissions or evidence.

d. Ground 4 complained of procedural impropriety in failing to make sufficient inquiries and obtain evidence on the Claimants' reasons for leaving or losses

e. Ground 5 complained of procedural impropriety and bias in the AB undertaking investigations into the Claimants' SJARs without seeking their own evidence or submissions on their reasons for leaving the service and adopting a 'closed mind' in rejecting the Claimants' unchallenged reasons.

f. Ground 6 complained of legal error in failing to appreciate the Claimants suffered quantifiable losses, or by treating them as unquantifiable losses.

g. Ground 7 complains of irrationality in not making a quantifiable payment.

37. Unfortunately, both the Claimants' Statements of Facts and Grounds and the Defendant's two Summary Grounds of Defence dated 23rd June 2023 gave the impression that the AB had undertaken its further investigations without giving the Claimants the opportunity to comment on them, when as I have explained, in fact the Claimants did have that opportunity. Whilst not mentioning that, the Defendant otherwise contested all grounds and contended that the AB were entitled simply to make a non-quantifiable payment rather than a quantifiable payment. This was as they were presented in the First Claimant's case as compensation for personal injury and in the Second Claimant's case as damage to reputation both on a common law basis which fell outside the Defendant's guidance as to the categories of quantifiable payments and which the DB and AB were ill-equipped to assess. Accordingly, the various complaints of procedural unfairness were said to be ill-founded and that any unfairness made no difference. Moreover, the Defendant maintained that the challenge should have been brought against the Ombudsman, not the Defendant.

38. When the pleadings were passed to me to consider permission on 21st November 2023, it appeared from them – incorrectly - that the AB had made its decisions without giving the Claimants the opportunity to make representations. That was my third reason for granting permission. However, given the Defendant failed to inform the Court of that in its own Summary Grounds of Defence, sensibly Mr Talalay did not seek to re-open permission. In any event, I would still have granted permission given the importance of the other issue. I consolidated the claims as the Defendant suggested and directed it to file Detailed Grounds for Contesting the Claim. I gave permission on all grounds - but stressed they duplicated each other and encouraged focus on three points. Whilst the first was based on the inaccurate pleadings, the second and third are still live:

> "b. Secondly, it is arguably procedurally unfair and/or irrational to take into account new information on financial loss without either calling for evidence offered by the appellant or if the new evidence raises a significant dispute of fact, offering the appellant an oral hearing: *R(Ogunmuyiya)*…..
>
> c. Thirdly, there is an important question of law as to the principles on which the Defendant *can and if so how it should* make redress for 'quantifiable loss'. This is a subject on which the SOCAF guidance is much clearer than the Defendant's guidance, largely silent on 'quantifiable loss' and more focussed on the need for Treasury approval of 'unquantifiable loss'. This is an important point of law which is squarely raised especially in the First Claimant's case with a decision-maker finding that injustice *had damaged* her career, subject to procedural fairness arguments about the appeal body reaching a different conclusion summarised above. It raises a question whether the Defendant legally erred in failing to award 'quantifiable loss' to the First Claimant and whether it erred to the extent that the Second Claimant had incurred 'quantifiable loss'."

39. In fact, now it is more logical to address those topics in reverse order and to add other points developed in oral argument. I will structure my judgment as follows:

    a. Firstly, the statutory and policy framework on service complaints and in particular on the issue of 'redress' and the role of Treasury authorisation (when I will also address the Defendant's point about whether the Ombudsman not itself should have been the correct 'target' for the claim);

    b. Secondly, the permissible scope of 'redress' and in particular whether it can in principle include compensation for any loss of earnings after resignation;

    c. Thirdly, whether the Defendant lawfully awarded only unquantifiable payments on the basis the SCs against the Claimants had not significantly damaged their careers, so it was unreasonable for them to resign in response;

    d. Fourthly, whether it was procedurally unfair for the Defendant to reach those conclusions without an oral hearing;

    e. Finally, whether it was procedurally unfair for the Defendant to reach those conclusions without giving the Claimants warning it was minded to do so.

    I address the 'no difference' arguments as I proceed. I should add I am very grateful to both Counsel for their assistance. As this is an important issue to servicepeople with relatively little guidance and a familiar field for me as a former Employment Judge, I referred them to cases to ensure that this judgment was comprehensive.

Statutory and Policy Framework

The Statutory Framework

40. As noted at the start of this judgment, the statutory framework for service complaints is found in Part 14A Armed Forces Act 2006 as amended from 2016 ('the AFA'), the Armed Forces (Services Complaints) Regulations 2015 ('the SC Regs'); the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015 ('the 'SCMP Regs') and the Armed Forces (Services Complaints Ombudsman) Regulations 2015 ('the SCOM Regs'). I will summarise the relevant aspects of that statutory framework before turning to the MoD policies on top of it.

41. As I will discuss below, the 'service complaints' regime goes back many decades. However, its current iteration and the one relevant in this case was that inserted into Part 14A of the AFA with effect from 1st January 2016 by the Armed Forces (Service Complaints and Financial Assistance) Act 2015 (the '2015 Act'). Whilst this case concerns 'redress' under s.340C AFA, the starting point is s.340A AFA:

> "(1) If a person subject to service law thinks himself or herself wronged in any matter relating to his or her service, the person may make a complaint about the matter.
>
> (2) If a person who has ceased to be subject to service law thinks himself or herself wronged in any matter relating to his or her service which occurred while he or she was so subject, the person may make a complaint about the matter….
>
> (4) A person may not make a service complaint about a matter of a description specified in regulations made by the Secretary of State."

On that last point, Reg.3(2) SCMP Regs provides that:

> "A person may not make a service complaint about—(b) a decision under regulations made for the purposes of s.340C(2) (decision on the service complaint)…(d) a determination of an appeal brought under regulations made for the purposes of s.340D(1) (appeals) (e) alleged maladministration (including undue delay) in connection with the handling of his or her service complaint; (f) a decision by the Ombudsman for the purposes of any provision of Part 14A of the Act; (g) the handling by the Ombudsman of a service complaint…"

The exclusion in Reg.3(2)(e) was not invoked in this case as the Claimants did not make their service complaints to the DB about maladministration and undue delay in handling of *their own* service complaints. Reg 3(1) adds that a person may not make a service complaint about a matter within the Schedule, which includes in paras 1(t)-(u) of it 'a matter capable of being the subject of a claim for personal injury or clinical negligence against the Ministry of Defence' ('MoD'). However, by reference to Reg.5(2) SCOM Regs, Sch.1 para.2 states that does not prevent a service complaint about some matters (including discrimination, harassment, bullying, dishonest or biased behaviour) 'in connection with a matter specified in para.1 Schedule'. So, a serviceperson cannot bring a service complaint which could be the subject of a personal injury claim against the MoD, but they can bring a service complaint about bullying/harassment etc 'in connection with' such a claim. This provides protection for 'victimisation' in response to personal injury claims.

42. s.340C AFA is central to this claim and provides so far is material (my emphasis):

> "(1) Service complaints regulations must provide for the Defence Council to decide, in the case of a service complaint that is found to be admissible, whether the complaint is to be dealt with— (a) by a person or panel of persons appointed by the Council, or (b) by the Council themselves.
>
> (2) The regulations must provide for the person or panel appointed to deal with the complaint.…(a) to decide whether the complaint is well-founded, and (b) *if the decision is that the complaint is well-founded— (i) to decide what redress (if any), within the authority of (as the case may be) the person [or] the persons on the panel…. would be appropriate, and (ii) to grant any such redress…"*

> (3) The Defence Council must not appoint a person or panel to deal with a service complaint unless— (a) the person is, or all the persons on the panel are, authorised by the Council to decide the matters mentioned in subsection (2) and to grant appropriate redress, or (b) the Council propose to authorise that person or those persons for those purposes…."

s.340D relates to the conduct of appeals of service complaints and states as material:

> "(1) Service complaints regulations must make provision enabling the complainant in relation to a service complaint to appeal to the Defence Council against a decision on the complaint, where the decision was taken by a person or panel appointed by virtue of section 340C(1)(a).
>
> (2) The regulations may make provision—(a) about the way in which an appeal is to be brought…(aa) restricting the grounds on which an appeal against a decision on a complaint…. may be brought; (b) [for time limits to appeal – 2 weeks – see s.240D(3)]…(d) requiring the….Council to decide whether an appeal is to be determined— (i) by a person or panel of persons appointed by the Council, or (ii) by the Council themselves….
>
> (4) The Defence Council must not appoint a person or panel to determine an appeal unless— (a)….all the persons on the panel are authorised by the Council to determine the appeal and to grant appropriate redress, or (b) the Council propose to authorise…those persons for those purposes."

Speaking of authorisation, s.340F AFA provides that:

> "(1) The Defence Council may authorise a person to investigate a particular service complaint— (a) on the Council's behalf, or (b) on behalf of a person or panel of persons appointed to deal with a service complaint or to determine an appeal relating to a service complaint.
>
> (2) Service complaints regulations may authorise the Defence Council to delegate to any person… any of the Council's functions under the preceding provisions of this Part.
>
> (3) Subsection (2) does not apply to— (a) the Defence Council's function of making service complaints regulations, (b) the Council's function of dealing with a service complaint or determining an appeal, or (c) any function of the Council by virtue of section 340C(3)(b) or 340D(4)(b) in connection with authorising a person to make decisions or determinations and to grant redress."

43. The main regulations empowered under these provisions and s.340B and 340E AFA are the Armed Forces (Services Complaints) Regulations 2015 ('the SC Regs'):

> "**4**.—(1) A service complaint is made by a complainant making a statement of complaint in writing to the specified officer.
>
> (2) The statement of complaint must state— (a) how the complainant thinks himself or herself wronged; (b) any allegation which the complainant wishes to make that the complainant's commanding officer or his or her immediate superior in the chain of command is the subject of the complaint or is implicated in any way in the matter, or matters, complained about; (c)whether any matter stated in accordance with sub-paragraph (a) involved discrimination, harassment, bullying, dishonest or biased behaviour, a failure by the Ministry of Defence to provide medical, dental or nursing care for which the Ministry of Defence was

> responsible or the improper exercise by a service policeman of statutory powers as a service policeman; (d) if the complaint is not made within the period which applies under regulation 6(1), (4) or (5), the reason why the complaint was not made within that period; (e) the redress sought; and (f) the date on which the statement of complaint is made….
>
> **9.**—(1) After they receive a referral of a service complaint from the specified officer, the Defence Council must decide whether the complaint is to be dealt with— (a) by a person or panel of persons appointed by the Council; or (b) by the Council themselves.
>
> (2) The person or panel of persons appointed to deal with the service complaint or (in a paragraph (1)(b) case) the Defence Council must— (a) decide whether the complaint is well-founded; and (b) if the decision is that the complaint is well-founded— (i) decide what redress (if any), within the authority of the person or persons on the panel or (in a…(1)(b) case) the Defence Council, would be appropriate; and (ii) grant any such redress.
>
> **10.**—(1) Where a decision under regulation 9(2)(a) or (b) is made by a person or panel of persons appointed under regulation 9(1)(a), the complainant has a right to appeal to the Defence Council against that decision….”

This was the version that was in force at all material times in this case. However, DB decisions made since 15th June 2022 (just after those in this case), now have a more limited appeal: which is a review not a rehearing. Reg.10(1) now provides:

> “(1) Where a decision under Reg.9(2) is made by a person or panel of persons appointed under Reg.9(1)…the complainant may appeal to the Defence Council against that decision on one or more of the following grounds (a) that there was a material procedural error; (b) that the decision was based on a material error as to the facts; (c) that there is new evidence, and it is likely that the decision would have been materially different if the new evidence had been made available to that person or panel.”

In any event, the SC Regs continued in their form at the material time:

> “10(2) An appeal under paragraph (1) must be brought by the complainant in writing to the Defence Council….
>
> **13.**—(1) Where the Defence Council decide… the appeal can be proceeded with, the Defence Council must decide whether the appeal is to be determined— (a) by a person or panel of persons appointed by the Council; or (b) by the Council themselves.
>
> (2) The person or panel of persons appointed to consider the appeal… must— (a) determine whether the complaint is well-founded; and (b) if the determination is that the complaint is well-founded—(i) determine what redress (if any), within the authority of the person or persons on the panel…. would be appropriate; and (ii) grant any such redress.
>
> (3) The person or panel of persons appointed to consider the appeal or, as the case may be, the Defence Council, must notify the complainant in writing of a determination under paragraph (2)(a) or (b), giving reasons for the determination and informing the complainant of the complainant’s right to apply to the Ombudsman to conduct an investigation under section 340H(1) in relation to the service complaint.

> **14.**—(1) For the purposes of making a decision under regulation 9(2)(a) or (b), or a determination under regulation 13(2)(a) or (b), the person or panel of persons or, as the case may be, the Defence Council may request the complainant, or such other person as they consider appropriate, to supply information or produce documents…..
>
> (4) For the purposes of making a decision under regulation 9(2)(a) or (b), or a determination under regulation 13(2)(a) or (b), the person or panel of persons or, as the case may be, the Defence Council must give— (a) any person who they consider is a subject of the complaint, and (b) any person who they consider is likely to be the subject of criticism in the decision or determination in relation to that person's character or professional reputation, an opportunity to comment on any allegations about that person stated in the complaint.
>
> (5) Any comments received under paragraph (4) must be given due weight in making the decision or determination.
>
> (6) The person or panel of persons or, as the case may be, the Defence Council may send a copy of a draft decision under regulation 9(2)(a) or (b), or a copy of a draft determination under regulation 13(2)(a) or (b), to any person within paragraph (4).
>
> (7) If they receive any comments from such a person on the draft decision or determination, they may refer to those comments in the final decision or determination and may state in the decision or determination their response to those comments."

44. So, as Langstaff J said in *R(Wildbur) v MOD* [2016] EWHC 1636 (Admin) at [19] of the predecessor scheme in the AFA, the scheme fleshed out under the SC Regs has many of the hallmarks of an internal grievance procedure. Under Reg.4(2)(a), the complainant must set out how they think they have been 'wronged' (i.e. not a legal cause of action); whereas under Reg.9, the 'decision body' ('DB') and on appeal the 'appeal body' ('AB') appointed by the Defence Council must consider whether the service complaint is 'well-founded'; and if so decide what redress (if any) 'within its authority' would be 'appropriate' and then to 'grant' it.

45. The SCOAF 'Ombudsman' was new in the 2015 Act (which came into force just before *R(Wildbur)* was decided, but did not apply in it), introduced by s.340H AFA:

> "(1) The Service Complaints Ombudsman may, on an application to the Ombudsman by a person within subsection (2), investigate— (a) a service complaint, where the Ombudsman is satisfied that the complaint has been finally determined; (b) an allegation of maladministration in connection with the handling of a service complaint (including an allegation of undue delay), where the Ombudsman is satisfied the complaint has been finally determined; (c) an allegation of undue delay in the handling of a service complaint which has not been finally determined; (d) an allegation of undue delay in the handling of a relevant service matter.
>
> (2) The following persons are within this subsection— (a) in a case relating to a service complaint, the complainant; (b) in a case relating to a matter in respect of which a service complaint has not been made, the person who raised the matter…..

> (4) An application to the Ombudsman—(a) must be made in writing, (b) must specify the kind (or kinds) of investigation which the complainant wishes the Ombudsman to carry out (an investigation under a particular paragraph of subsection (1) being a "kind" of investigation for this purpose), and (c) must contain any other information specified…
>
> (6) The purpose of an investigation is — (a) in the case of an investigation under subsection (1)(a), to decide whether the complaint is well-founded and, if so, to consider what redress (if any) would be appropriate; (b) in the case of an investigation under subsection (1)(b), (c) or (d), to decide— (i) whether the allegation is well-founded, and (ii) if so, whether the maladministration or undue delay to which the allegation relates has or could have resulted in injustice being sustained by the complainant.
>
> (7) The power to carry out an investigation under subsection (1)(a) or (b) includes power to investigate any maladministration in connection with the handling of the service complaint where it becomes apparent to the Ombudsman during the course of an investigation that any such maladministration may have occurred…."

Investigation procedure is governed by s.340I AFA, which states:

> (1) It is for the… Ombudsman to determine— (a) whether to begin, continue or discontinue an investigation; (b) whether to investigate a service complaint, or an allegation, as a whole or only in particular respects.
>
> (2) The Secretary of State may make regulations about the procedure to be followed in an investigation.
>
> (3) Subject to subsection (2), the procedure for carrying out an investigation is to be such as the Ombudsman considers appropriate in the circumstances.
>
> (4) In particular, the Ombudsman may make such inquiries as the Ombudsman considers appropriate…."

(Those Regulations are the SCOM Regs I need not quote). s.340L AFA states:

> "(1) The Service Complaints Ombudsman must, after carrying out an investigation, prepare a report setting out— (a) the Ombudsman's findings, and (b) any recommendations referred to in subsection (2)
>
> (2) Those recommendations are— (a) on an investigation under section 340H(1)(a) where the Ombudsman finds that the service complaint to which the investigation relates is well-founded, the Ombudsman's recommendations (if any) on what redress would be appropriate; (b) on an investigation under section 340H(1)(b), (c) or (d) where the Ombudsman finds that the allegation to which the investigation relates is well-founded, the Ombudsman's recommendations (if any) as a result of that finding; (c) where, by virtue of section 340H(7), the Ombudsman finds maladministration in connection with the handling of a service complaint, the Ombudsman's recommendations (if any) as a result of that finding.
>
> (3) The Ombudsman may for the purposes of subsection (2)(b) or (c) make any recommendations that the Ombudsman considers appropriate, including recommendations for the purpose of remedying— (a)the maladministration or undue delay to which the finding relates, and (b) any injustice that the

> Ombudsman considers has or could have been sustained, in consequence of the maladministration or undue delay, by the complainant…."

The Policy Framework

46. As Lords Sales and Burnett explained in *R(A) v SSHD* [2021] 1 WLR 3931 (SC):

> "2 It is a familiar feature of public law that Ministers and other public authorities often have wide discretionary powers to exercise. Usually these are conferred by statute, but in the case of Ministers they may derive from the common law or prerogative powers of the Crown, which fall to be exercised by them or on their advice. Where public authorities have wide discretionary powers, they may find it helpful to promulgate policy documents to give guidance about how they may use those powers in practice. Policies may promote a number of objectives. In particular, where a number of officials all have to exercise the same discretionary powers in a stream of individual cases which come before them, a policy may provide them with guidance so that they apply the powers in similar ways and the risk of arbitrary or capricious differences of outcomes is reduced. If placed in the public domain, policies can help individuals to understand how discretionary powers are likely to be exercised in their situations and can provide standards against which public authorities can be held to account. In all these ways, policies can be an important tool in promoting good administration.
>
> 3 Policies are different from law. They do not create legal rights as such. In the case of policies in relation to the exercise of statutory discretionary powers, it is unlawful for a public authority to fetter the discretion conferred on it by statute by applying a policy rigidly and without being willing to consider whether it should not be followed in the particular case. However… in certain circumstances a policy may give rise to a legitimate expectation that a public authority will follow a particular procedure before taking a decision..[or] confer a particular substantive benefit when it does...
>
> In these cases, the courts will give effect to the legitimate expectation unless the authority can show that departure from its policy is justified as a proportionate way of promoting some countervailing public interest. If the policy is not made public, and an affected individual is unaware of its relevance to his case and in that sense has no actual expectation arising from it, the authority may still be required to comply with it unless able to justify departing from it: ...*Mandalia v SSHD* [2015] 1 WLR 4546….. Under some conditions the holder of a discretionary power may be required to formulate a policy and to publish it: *R(WL (Congo)) v SSHD* [2012] 1 AC 245. Thus, policies have moved increasingly centre stage in public law.
>
> 4 In..parallel…perhaps reflecting the increased importance of policies, there has been an increase in judicial review of the contents of policies…"

Whilst *R(A)* concerned such a challenge to a policy (in relation to the very different issue of disclosure of information concerning sex offenders), there is no such challenge in the present case. Indeed, the Claimants say the policy guidance here was lawful but misunderstood by the AB (the acronym used in relevant policies, as is 'DB', both of which I continue to use), for which the Defendant is responsible. So, this case is rather closer to *Mandalia* (to which I will return later).

47. The most general policy promulgated by the Defendant relating to the statutory framework for service complaints (under the AFA as amended by the 2015 Act, the SC Regs, SCMP Regs and SCOM Regs) is Joint Service Protocol ('JSP') 831 'Redress of Service Complaints'. I was not referred to Part 1, but it gives a useful summary and commentary on the statutory framework, stating as far as material:

> "1.2.1 The aim of the Service Complaints system is to provide serving and former Service personnel with a process that is efficient, effective and fair so they can resolve valid grievances on matters relating to their service in the Armed Forces and seek redress. It is the responsibility of all involved in the process to ensure complaints are handled fairly, promptly and correctly. The intent is that complaints are dealt with quickly and at the most appropriate level….
>
> 1.2.8 The SCOAF has an important role if the Complainant is not satisfied when the Service Complaint process has been completed. The Complainant can apply to the SCOAF for an investigation into the complaint itself (substance investigations) or because they believe the complaint was not handled correctly (maladministration investigations), or both. If the SCOAF goes on to investigate, they must produce a report with findings and, if appropriate to the investigation, recommendations which the relevant single Service is to respond to in writing. It is also possible for the Complainant to approach the SCOAF alleging undue delay before or during the handling of a complaint….
>
> 1.5.1 In assessing a Service Complaint, the DB and AB (if applicable) must decide if the complaint is well-founded. They will use the same standard of proof used in employment law, i.e. that it was more likely than not that the wrong alleged by the complainant occurred. This is known as 'on the balance of probabilities'. The decision reached by a DB or AB will be on the basis of a unanimous decision or simple majority when more than one person has been appointed….
>
> 2.9.7 The DB must decide whether the Service Complaint is well-founded, and, if it is, what redress (if any) is appropriate, and grant such redress…..
>
> 3.6.8 The AB appointed to consider the appeal must determine whether the Service Complaint is well-founded, and if it is, what redress (if any) is appropriate, and grant any such redress….
>
> 3.7.1 Once the determination has been received, if the Complainant is dissatisfied with the outcome of the complaint or how it was handled, or both, the Complainant has the right to apply to the SCOAF for an investigation to be carried out…".

48. Part 2 JSP 831 gives detailed procedural guidance to complainants, respondents, DBs and ABs. For complainants appealing, Part 2 (to which I was referred) states:

> "71. The AB appointed by the single Service Secretariat to determine your appeal must decide whether, on the balance of probabilities, it is well founded, and, if it is, what redress (if any) is appropriate, and grant any such redress. The AB can also ask someone to investigate your Service Complaint on its behalf, but the AB that has to reach the final decision…
>
> 72. If appropriate, the AB may decide that further investigation of your Service Complaint, or aspects of it, is required. If this is the case, the AB, or person they appoint, will carry out an investigation to establish the facts of your complaint.

> As part of this investigation and consideration of your Service Complaint, they may ask you or anyone else they consider appropriate, to provide them with information or documents. If that information or those documents are not provided within a reasonable period of time, the AB can go on to reach a decision based on the information or documents they have. It is therefore in your interests to respond within any time limit that is set, and to let anyone who is asking for your reply know as soon as possible if you will need more time.
>
> 74. Having completed an investigation and before making its determination, the AB will disclose to you all relevant documentation and information on which the appeal is to be determined. The same material will also be disclosed to the Respondent(s) (redacted where appropriate) and any other person who might be affected by the outcome. This gives you and the other parties the chance to comment in writing on the papers, and for those comments to be made available to the AB for consideration when making their determination on your appeal. Your response must be provided within ten working days to avoid any unnecessary delay, however in exceptional circumstances, a longer period may be offered…
>
> 75. [T]he AB has to give any person who is the subject of your complaint (a Respondent) or any other person who is likely to be criticised in a decision it might make, an opportunity to comment on allegations about them in your complaint. Any comments received must then be given due weight by the AB in making its decision on your Service Complaint.
>
> 76. Once the AB has considered and determined your appeal they will notify you in writing of the decision giving their reasons for the decision. They will also inform you of your right to apply to the SCOAF for an investigation if you are dissatisfied and the time limit for doing so."

49. For DBs, JSP 831 Part 2 states so far as material:

> "36. As the DB, you have the authority needed to decide what appropriate redress should be granted when any part of a Service Complaint is upheld. MOD does not however have delegated authority from HM Treasury to decide on the value of a financial award to be paid in cases where the decision in the Service Complaints process is a financial award should be paid as redress for delay, injury to feelings, stress, inconvenience caused, damage to reputation or any other such consequence of a wrong. This is because the amount to be awarded is not measurable (i.e. it is 'unquantifiable'), it would for example be measurable if it were found that an allowance should have been paid, and is therefore difficult to determine. The value is subjective, and HM Treasury considers such payments to be 'novel and contentious' in terms of spending public money and so their approval is required as to the sum to be awarded.
>
> 37. Where unquantifiable financial awards of this nature are considered to be, or form part of, appropriate redress in the view of the DB, you will have to pause in finalising your decision and seek Treasury approval…for an appropriate sum, before the final decision on the complaint can be communicated. Advice, including legal advice from the single Service Secretariat must always be sought in these circumstances. Please be aware that authority to award financial redress may ultimately be declined…."

50. For ABs, JSP 831 Part 2 states so far as material:

> "24. Having considered the appeal and undertaken any further investigation required, and prior to making your determination, you must ensure all relevant evidence on which the appeal is to be determined is disclosed to the Complainant….
>
> 25. Pre-decision disclosure provides the opportunity for those parties to comment in writing on the papers, and for you to consider those comments when making your determination.
>
> 28. You must establish whether the Service Complaint is well founded. The standard of proof to be applied when determining the appeal is known as 'on the balance of probabilities'.
>
> 29. In their appeal application (Annex G), the Complainant must state the grounds on which they would like to appeal and why. Whilst this would identify those matters about the decision stage that the Complainant is concerned about, you may decide, if appropriate, to consider the entirety of the complaint afresh. This may result in your findings and determination, and any redress, being different from those of the DB.
>
> 32. You must ensure that any person who is the subject of the Service Complaint (a Respondent), or any other person who is likely to be criticised in a decision you might make, is given an opportunity to comment on allegations about them in the Service Complaint. Any comments received must then be given due weight in making your decision on the Service Complaint….
>
> 35. There is no obligation to hold an Oral Hearing (OH) in any case. A Complainant may request an OH but the final decision lies with the AB.
>
> 36. The complexity of the Service Complaint and its potential wider implications may be considerations to be included in coming to a decision on whether to hold an OH. Similarly, an OH may involve no more than asking the Complainant to state the Service Complaint in person, but might involve others concerned. Straightforward Service Complaints involving no substantial conflicts of evidence on any material issue or difficult points of law may be less likely to require an OH….
>
> 39. Any relevant documents will be considered as well as oral evidence. Evidence is not taken on oath and witnesses may be questioned by the AB considering the Service Complaint and by the Complainant or a representative. The hearing should be investigative rather than adversarial. The Complainant, Respondent or a representative may address the AB and may submit documentary evidence. Witnesses may also be called to give oral evidence based on their witness statement….
>
> 33. As the AB, you have the authority to decide what appropriate redress should be granted when any part of a Service Complaint is upheld. MOD does not however have delegated authority from HM Treasury to decide on the value of a financial award to be paid in cases where the decision in the Service Complaints process is that a financial award should be paid as redress for delay, injury to feelings, stress, inconvenience caused, damage to reputation or any other such finding. This is because the amount to be awarded is not measurable - it would for example be measurable if it were found that an allowance should have been paid -

and is therefore difficult to determine. The value is subjective, and HM Treasury considers such payments to be 'novel and contentious' in terms of spending public money and so their approval is required as to the sum to be awarded.

34. Where unquantifiable awards of this nature are considered to be, or form part of, appropriate redress in the view of the AB, you will have to pause in finalising your decision and seek HM Treasury…. for an appropriate sum, before the final decision on the Service Complaint can be communicated. Advice, including legal advice from the single Service secretariat must always be sought in these circumstances. Please be aware that authority to award financial redress may be declined."

51. I have slightly reversed the order of paras 33-39 Part 2 of JSP 831 because the guidance on redress and the concept of 'delegated authority' leads on the crucial policy documents in this case entitled 'Annex A' and 'Annex B'. However, they do not appear to be Annexes to JSP 831, but rather the November 2021 terms of instruction to ABs (such as Gp Capt Page). From their terms, it appears that 'Annex A' and 'Annex B' are not published policies. So far as material, 'Annex A' states:

"Section 340C… provides for the Defence Council (DC) to delegate its function in relation to a Service Complaint (SC) to a person or panel (hereinafter called the Appeal Body (AB)) to decide on a SC that has been ….appealed following a determination by the Decision Body."

Duties of an Appeal Body

2. The role of the AB is outlined at Part 2 Chapter 7 to JSP 831. This role includes but is not limited to a. Ensuring the timely progression of the complaint. The RAF Service Complaints Journey fully details the timescale and procedures that must be followed; b. Ensuring that a thorough investigation of the complaint takes place and the Complainant, and all Respondents are given opportunity to comment on the said investigation; c. Determine if the complaint is well-founded and if so determine what redress if any is within your authority, would be appropriate and to grant any such redress; d. Exploring appropriate informal resolution opportunities (as long as such exploration does not unduly delay the progression of the complaint itself); e. Ensuring the Complainant and all Respondents are kept informed of progress of the complaint (to also include explaining why any delays or administrative errors have taken place and how you intend to rectify any such issues); f. Capturing in your formal record of decision whether there are any Organisational Learning issues arising from this complaint; g. Keeping a detailed record of your actions as the AB….

Case Conferences and Oral Hearings

4. It is for the AB to decide if it wishes to hear evidence orally in connection with the SC. You should review the Guidance provided on Case Conferences in the RAF Service Complaints Journey before determining whether to convene a case conference or an oral hearing….

Decisions

6. Decisions are to be made on the balance of probabilities, i.e. is it more likely than not that the matter being considered took place…..

Authority to Determine and Grant Appropriate Remedy

9. As an AB you are authorised under the powers delegated to me2 by the Air Secretary and Chief of Staff Personnel to effect: non-financial remedy, including but not limited to remedies relating to terms and conditions of service, and; financial remedies relating to Category D losses and Category E2 (other ex gratia) special payments of up to £250K.

10. Before determining remedy the AB is to as necessary consult with the Subject Matter Expert (SME) relevant to the type of remedy that you are considering. If you have not already been made aware of the most appropriate SME, please contact either the Case Manager or myself….

Financial Redress

12. Financial remedy will be either a Quantifiable or Non-Quantifiable payment:

a. Quantifiable payments include Category D losses (claims abandoned) [Footnote :For examples see: JSP 472 Part 2 Chapter 12 Paragraph 21 Page 133] and special payments Category E2 (other ex gratia payments) [Footnote: For examples see: JSP 472 Part 2 Chapter 12 Paragraph 28 Page 134]. Sums of over £250,000 require HM Treasury approval to be obtained;

b. Non-quantifiable payments include but are not limited to stress and suffering. You are not to award a non-quantifiable financial remedy without first gaining HM Treasury approval.

13. The granting of financial awards is governed by Treasury Guidelines on Managing Public Money and related documents. These guidelines are to be followed.

14. A comprehensive audit trail is to be retained for all cases where a financial payment is authorised including recording how the decision was reached. Where a financial payment is made to a Complainant as a consequence of the primary remedy (for example by back-dating promotion, a commensurate back payment of salary may be required) this must also be recorded.

15. Further guidance on granting financial remedy is at Annex B 'Service Complaints – Financial Remedies – Guidance on Financial Remedies'."

52. 'Annex B' states so far as material:

"**SERVICE COMPLAINTS FINANCIAL REMEDIES – GUIDANCE ON FINANCIAL REMEDIES**

Introduction

1. If the Department has caused injustice or hardship because of maladministration or service failure, it should consider: a. Providing remedies so that, as far as possible, it restores the wronged party to the position that they would have been in had things been done correctly and; b. Whether..policies and procedures need changing to prevent [it] recurring

2. Where financial remedies are identified as the right approach to service failure, they should be fair, reasonable and proportionate to the damage suffered by those complaining. **Financial remedies should not allow recipients to gain a financial advantage over what would have happened if there had not been a service failure** [original bold]

3. Before any individual remedy payments are made, the Department must consult HM Treasury about cases which: a. Fall outside its delegated authority; or b. Raise novel or contentious issues; or c. Could set a potentially expensive precedent or cause repercussions for other public sector organisations.

4. You are to ensure that financial remedies are granted in accordance with HM Treasury guidelines…JSP 472 Parts 1 and 2 Chapter 12, JSP 462 Chapter 14, Defence Instructions and Notices, and other instructions...

Value of Award

5. Things to consider when calculating financial compensation: a. Whether a loss has been caused by failure to pay an entitlement; b. Whether someone has faced any additional costs as a result of the action or inaction of the Department - for example, because of delay; c. Whether the process of making the complaint has imposed costs on the person complaining – for example, lost earnings or costs of pursuing the complaint; d. The circumstances of the person complaining - for example, whether the action or inaction of the Department has caused knock on effects or hardship; e. Whether the damage is likely to persist for some time; f. Whether any financial remedy would be taxable when paid to the complainant; g. Any income earned by the complainant during the period covered by the complaint must be deducted from the proposed financial remedy. For this reason, evidence of civilian earnings, tax and national insurance payments must be provided before a final sum can be arrived at.

6. **Payment for non-financial loss is not within MOD's delegation.** [Original Bold] Compensation for non-financial losses are difficult to quantify, such as stress, hurt feelings or inconvenience and are therefore novel and contentious and MOD has no delegations. All cases must go to HM Treasury for approval…and this should happen prior to the complainant being advised."

53. Where 'Annex A' at para 12 refers (via the footnotes) to Joint Service Protocol ('JSP') 472 Part 2 Chapter 12, that is the (now archived) internal policy on the limits of MoD 'delegated authority' from the Treasury. So far as material, it states:

"**Type D Losses - Claims Waived or Abandoned**

20. Waive or abandonment of a claim occurs where a decision is taken not to present or pursue a claim which could be or has been legitimately made.

21. Examples of claims waived or abandoned include….c. claims which are actually made but then reduced in negotiations or for policy reasons; d. those where there has been a failure to make a claim or to pursue it to finality – for example, owing to procedural delays which allow the Limitations Acts to be invoked; e. those which arise from actual or believed contractual or other legal obligations which are not met (whether or not pursued)…g. those which are dropped on legal advice, or because the amount of liabilities could not be determined…

Type E2 - Ex-Gratia Payments other than to Contractors

28 . Ex-gratia payments other than to contractors are payments which go beyond administrative rules or for which there is no statutory cover or legal liability. Reasons for this type of ex-gratia payment vary widely but include; a. payments made to meet hardship caused through official failure or delay. b. out of court

> settlements to avoid legal action on grounds of official inadequacy. A claim which is statute-barred but where, after considering the claimant's representations, it is decided not to invoke the Limitation Acts…. must be dealt with as an ex-gratia payment.
>
> 29. Any ex-gratia payments to individuals for stress and inconvenience will always be novel and contentious, irrespective of whether MOD has made similar payments before, and require HMT [i.e. HM Treasury] approval….
>
> 33 . Where financial remedies are identified as the right approach to service failure, they should be fair, reasonable and proportionate to the damage suffered by those complaining. Financial remedies should not allow recipients to gain a financial advantage over what would have happened if there had not been a service failure.
>
> **Type E3 - Compensation Payments**
>
> 35. Compensation payments are payments, outside statutory schemes or contracts, to provide redress for personal injuries (except for payments under the Civil Service Injury Benefits Scheme), traffic accidents, damage to property etc, suffered by civil servants or others. Compensation for stress, inconvenience etc are Type E2 .
>
> **Type E4 - Extra-Statutory Payments and Extra-Regulatory Payments**
>
> 36. Extra-statutory payments and extra-regulatory payments are payments made within the broad intention of the statute or regulation but which go beyond a strict interpretation of its terms.
>
> **Type E5 - Special Severance Payments**
>
> 37. Special severance payments made to employees, contractors and others who leave employment in public service, whether by resigning, being dismissed or as the result of termination of contract go beyond normal statutory or contractual requirements. The payments are directly related to the reason the person left employment in public service . They are only permitted on an exceptional basis and always require HMT approval. Legal advice that a particular severance payment appears to offer good value for money for the Department may not be conclusive, as it may not be based on wider public interest."

These categories are summarised in a table in Part 1 of JSP 472, which provides that the MoD delegated authority limit for Types D, E2, E3 and E4 is £250,000, whereas (as Type E5 explicitly states) there is no delegated authority for Type E5. Whilst Annex A in 2021 still specifically referred to JSP 472 archived in 2016, I was also referred to more recent more generic Treasury guidance, which re-iterates many of the same themes which I need not fully repeat. For example, it states:

> "A4.14.3. As section 4.11 explains, when public sector organisations have caused injustice or hardship because of maladministration or service failure, they should consider: • providing remedies so that, as far as reasonably possible, they restore the wronged party to the position that they would be in had things been done correctly, and • whether policies and procedures need change, to prevent the failure reoccurring….

A4.14.8. Where financial remedies are identified as the right approach to service failure, they should be fair, reasonable and proportionate to the damage suffered by those complaining. Financial remedies should not, however, allow recipients to gain a financial advantage compared to what would have happened with no service failure."

54. Finally, I was also referred to the Ombudsman's 2021 guidance on financial remedy (as expanded in further guidance I need not quote). It adopts the same categorisation of ''Quantifiable Payments' and 'Non-Quantifiable Payments' as in Annexes A/B, but the guidance given is not identical on either of those categorisations:

"SCOAF can recommend payments as either quantifiable or non-quantifiable redress.

3.1 Quantifiable consolatory payments

In cases of direct redress there will be a financial loss which can be calculated in monetary terms, with the amount owing clearly determined. This may be a direct financial loss or the monetary value of a lost service. If a direct redress payment can be made to remedy a quantifiable loss, then this will be recommended. Effectively, this will generally be a reimbursement of money owed which can be paid via the existing Service pay and allowances process….Examples of such redress include, but are not limited to: - Payment of an allowance owed - Back payment of salary at a higher rate - Payment of training courses undertaken as part of transition for example from Service life to civilian. *The Ombudsman does not have the power to recommend payment of compensation for negligence. Accordingly claims for personal injury or clinical negligence are legal issues which must be pursued separately through the courts.*

3.2 Non-quantifiable consolatory payments

In cases of indirect redress, the loss is not financial and therefore the amount owed cannot be readily calculated or valued in monetary terms, for example distress caused by failures in the complaint process. In these instances….SCOAF will state at which level (low, medium or high) the payment should be made and give reasons for the selection of that bracket.

Financial redress that is not associated with a monetary loss may be recommended where: - The complainant is found to have suffered obvious distress or injury to feelings - There is no specific action that can be taken to fully remedy the wrong/injustice - The complainant lost a benefit that had a non-monetary value, such as lost opportunity - Where there has been delay that is unjustified and wholly excessive in the circumstances. Please note these are examples only not a definitive list. Such recommendations may be considered 'novel and contentious payments' and require approval from HM Treasury.

It is not always easy to quantify such losses and there is no fixed assessment to undertake. Distress and 'time and trouble' are two types of injustice where an indirect redress payment may need to be considered. Where the loss is a benefit or opportunity that has no clear monetary value, the starting point within the redress scale set out below, is the extent of distress or injury to feelings found to be experienced by the complainant as a consequence of the subject matter of the complaint. In most cases there would be no test and a broad reasonable

assessment will need to be made based on the evidence provided in an impact statement."

55. The SCOAF Guidance goes on to provide three 'non-quantifiable' brackets for awards: 'Low', 'Moderate' and 'High':

"Low £500-£1000

These types of injustice are where we consider that an apology alone is not sufficient remedy. For example: • The complainant experienced a low level of obvious distress, worry and/or anxiety, combined with prolonged undue delay as a result of maladministration. Examples: • The complainant experienced sleepless nights caused by the delay • The complainant demonstrated that they experienced obvious distress and/or anxiety, which has impacted on their family/work life • Lack of contact/updates from the Service and/or explanation for delay, which caused the complainant obvious distress and/or anxiety.

Moderate £1000-£2000

These types of injustice would have a moderate impact, for example obvious distress, worry, anxiety, which has to some extent affected the complainant's ability to lead a normal life over a significant period of time. For example: • The complainant experienced a significant level of obvious distress, worry and/or anxiety • Undue delay in resolving a Service complaint which has led to uncertainty or financial hardship • Stress and/or anxiety caused by undue delay and/or poor administration (and/or poor communication) which has resulted in the complainant being unable to perform at the expected standard • Stress and/or anxiety which impacts on work and/or home life. (Examples): • Where a complainant has been wrongfully discharged which resulted in unemployment and SCOAF found the original redress was insufficient and did not factor in the impact of this on the complainant • Stress and anxiety as a result of bullying and/or harassment (otherwise than for "protected characteristics" within the Equality Act 2010), where the original redress wasn't deemed sufficient or didn't factor in this impact on the complainant….

High £2000-£3000

This level of redress will be where the injustice has severely impacted on the complainant's ability to lead a relatively normal life to some extent over a prolonged period of time. Where the effects of the wrong complained about are ongoing and award in this bracket may be warranted. • The complainant experienced a very significant level of obvious distress, worry and/or anxiety • Significant and/or prolonged financial hardship • Exceptionally poor complaint handling over several years including multiple examples of maladministration and/or significant unnecessary delays • Significant distress lasting over 3 months • Significant impact on the health of the complainant • Significant impact on work and/or home life • Failures by the Service in their duty of care to the complainant during the Service complaint process Examples: • Serious bullying and harassment for reasons unconnected to any "protected Characteristic" as defined in the Equality Act 2010. • Very serious undue delay in the handling of a service complaint with lengthy periods of inactivity

Exceptional circumstances: There may be occasions, albeit rare, when a redress payment will exceed the scales outlined above. In these instances the single

> Services and/or SCOAF will make it clear in the recommendation that this is the expectation by referencing the Vento scale, for example, in complaints even where no breach of the Equality Act 2010 is established.
>
> Nothing in this guidance prevents the consideration and recommendation of 'Vento' payments in Service Complaints where a breach of the Equality Act 2010 has been established."

Was the Ombudsman the correct Defendant ?

56. As is clear from ss.340H - 340I AFA and the SCOM Regs, the Ombudsman has even wider powers to re-investigate service complaints than DBs and ABs (especially now ABs' appeal remit is reduced) and to require documents and evidence under s.340J AFA: enforceable with contempt under s.340K AFA. s.340H(7) AFA also empowers the Ombudsman to investigate maladministration in DB/AB handling of service complaints. Indeed, Reg.3(2) SCMP Regs and s.340H(1) AFA actually *exclude* DBs and ABs from investigating allegations of maladministration (including undue delay) about the handling of service complaints precisely because the Ombudsman is empowered to investigate them. However, that applies to service complaints *about the complainant's own previous complaint*. The Claimants here had been *respondents* and were seeking redetermination of 'redress' under their service complaints under s.340(1)(a) AFA from the Ombudsman, not complaining of delay or maladministration *in the handling of their own service complaints* under s.340H(1)(b) AFA. In any event, they also both (unsuccessfully) alleged discrimination in the handling of their service complaints which under s.121 Equality Act 2010 ('EqA') must be the subject of a service complaint prior to any claim to an Employment Tribunal ('ET'): *Edwards v MoD* [2024] EAT 18. By contrast, since service complaints under Sch.1 SCMP Regs *cannot* relate to a matter which could be the subject of a personal injury or clinical negligence claim against the Defendant, the effect of s.340H AFA is that the Ombudsman also cannot investigate it: so there is no discretion as with personal injury cases for other ombudsmen e.g. in *R(Miller) v Health Service Ombudsman* [2018] PTSR 801 (CA). However, neither Claimant was interpreted by the Ombudsman here as doing so.

57. Certainly, if the Claimants had not brought their complaints to the Ombudsman but simply judicially reviewed the AB's decision, the Defendant would have had a very powerful argument against permission for judicial review. It is a remedy of last resort and may be declined if the Claimant has an alternative remedy: see *R(Glencore) v HMRC* [2017] 4 WLR 213 (CA). In the context of ombudsmen, in *R(Gifford) v Governor of Bure Prison* [2014] EWHC 911 (Admin) at [53]-[57], Coulson J (as he then was) explained ombudsmen (there for prisons) were often more cost-effective and specialist in the particular field than judges in the Administrative Court, who also cannot consider the merits of disputes which ombudsmen can. But Coulson J considered judicial review remained appropriate in urgent cases requiring an injunction, or with wider challenges to policy, although said the Court should be wary of ordinary challenges dressed up as policy ones and would expect Claimants to explain why they had not used the relevant ombudsman. I respectfully agree with all that in the case of the SCOAF Ombudsman here. Any claim for judicial review should also explain why SCOAF would be inappropriate.

58. However, that point does not arise in this case for three reasons. Firstly, this is not just a fact-specific challenge, but one which not only genuinely raises questions of the

interpretation of policy, but the legal meaning of 'redress' in s.340C(2) AFA itself: which points to the Court, not the Ombudsman. Secondly, even the narrower point of whether DBs and ABs are entitled to decline to award post-resignation losses if they find that resignation was not 'reasonable' raises a wider issue about the proper approach to this situation by DBs and ABs. Again, it falls outside the Ombudsman's traditional statutory remit of investigating cases on their own merits: *R(Gossip) v NHS Surrey Downs* [2020] PTSR 1239 at [42]-[44]. Thirdly and most simply, the Claimants did try to pursue that alternative remedy – they did in fact complain to the Ombudsman, but she refused to investigate, considering there was no reasonable prospect of a different outcome than there had been in the AB.

59. This leads on to Mr Talalay's submission, which is the Claimants could and should have judicially reviewed the Ombudsman's decision rather than the AB's decision. He relies on another point considered in *R(Gossip)*, where UTJ Allen said:

> "37 It is argued that where there has been an appeal and a review by an independent panel, earlier procedural or substantive errors are fully capable of being cured by that subsequent appeal. Reference is made to paras 5.51 -55 and 5.59 in *Auburn, Moffett and Sharland*, *Judicial Review: Principles and Procedure* (2013). As is said at para 5.51, the correct analysis is that, because of the appeal or review process, the procedure as a whole is fair and therefore there is no unfairness requiring a cure. It is said at para 5.52 that where there has been a fair appeal before an appellate decision-maker which considered the case afresh, heard all relevant evidence and redetermined the merits of the case, it is difficult to see how the ultimate decision could be impugned on the basis of any unfairness arising during the decision-making process leading up to the initial decision, unless that unfairness infected the ultimate decision in some real sense.
>
> 38 In *Calvin v Carr* [1980] AC 574 (HL), it was held that, following an initial decision by racing stewards who adopted an unfair procedure, followed by an appeal to a committee, where the appeal was conducted by way of rehearing de novo and involved hearing all the witnesses who had given evidence to the stewards, and cross-examination of those witnesses, the overall decision-making process was fair, despite flaws in the procedure adopted by the stewards.
>
> 39 It is said at para 5.54 [of *Auburn, Moffett and Sharland*] that where the appeal does not involve a full rehearing, such as an appeal restricted to consideration of whether there has been an error of procedure or law, or where the appellate decision-maker is bound by findings of fact made by the initial decision-maker, it is more likely that unfairness arising in the decision-making process leading up to the initial decision will render the overall procedure unfair. In para 5.59 it is said that where an appeal against, or review of, a decision is available, the courts will usually regard it as an adequate alternative remedy justifying the refusal of permission to apply for judicial review…..The availability of an adequate alternative remedy is a matter that is relevant to the exercise of the court's discretion to grant permission to apply for judicial review; it does not go to the jurisdiction to entertain a claim for judicial review…
>
> 40 On behalf of the claimant it is argued that this was not a curative appeal because the CCG was not obliged to implement the IRP's decision, but… the Regulations provide that the CCG must implement the decision of the review

> panel as soon as possible, unless there are exceptional circumstances. No such exceptional circumstances have been identified.
>
> 41 I consider that the defendant's argument is to be preferred. The hearing before the IRP was a full hearing, including a careful and thorough evaluation of the evidence and submissions and concluding that the decision was sound. The IRP noted that its process can only be used where a person is dissatisfied with the procedure followed in reaching a decision as to their eligibility for NHS continuing healthcare or with the primary health need decision. This covers the issues of challenge in these proceedings. In so far as it is argued that the same errors infect the decision of the IRP as that of the CCG, that in no sense deflects the argument that the former was the proper target. Accordingly, and bearing in mind that judicial review is discretionary only, I refuse relief on the basis that any challenge should have been to the decision of the IRP, not the defendant..."

60. However, whilst there is no doubt about the principle UTJ Allen helpfully summarised at [37]-[39] of *R(Gossip)*, the analysis [40]-[41] shows there had been a full re-hearing by an independent panel of an individual's entitlement to NHS funding, whose decision bound the CCG save in exceptional circumstances. By contrast, here the Ombudsman refused to investigate at all. I repeat she said:

> "Having reviewed the key documents I find that there is no reasonable prospect that a new investigation would result in a different outcome…. The DB and Appeal Body appear to have investigated the substantive matters reasonably and found that you were wronged by the poor handling of the Service Complaints in which you were the respondent. Financial redress was awarded in recognition of the distress, worry and anxiety caused as the result of the maladministration….Based on the available information, SCOAF will not be able to provide the redress you are seeking from an investigation. We cannot 'quash' the Appeal Body's determination or financial redress offer and recommend that a new Appeal Body consider the matter afresh. We also cannot recommend financial redress in relation to potential loss of earnings or for 'constructive dismissal'."

I maintain my view when granting permission – that unlike in *R(Gossip)* and *Calvin* where the original decision had effectively been superseded by a re-hearing or full merits appeal, that did not happen here as the Ombudsman *refused* to investigate, so this principle cannot assist the Defendant. It also means of course that the proper 'target' of the judicial review claim is the AB's decision not the DB's decision since the AB did conduct a rehearing, but the AB is the target anyway. There is a difference between Mr Talalay's points that the Claimants firstly 'could' and secondly 'should' have challenged the Ombudsman. As I have explained, I do not accept that the Claimants 'should' have done so in the sense that relief should be declined if their claims are otherwise meritorious. However, I do accept the Claimants 'could' have challenged the Ombudsman's decision – it is just they have chosen only to challenge the AB. If anything, as I will explain, the Ombudsman's decision raises the key issue of principle more clearly than the AB's decision did and indeed the Defendant here has adopted that point, which I will now consider.

Can post-termination losses be awarded as 'redress' for a service complaint ?

61. Whilst superficially the Ombudsman's decision simply endorsed the AB's decision, her view that she 'cannot recommend financial redress in relation to potential loss of earnings or for 'constructive dismissal' is very different from the AB's decision:

> "We concur with the DB there is clear maladministration demonstrated throughout the original SCs against you, *however, we have found this had not caused* [First Claimant: *'significant damage';* Second Claimant: *'irretrievable damage'] to your career. Further we also concluded it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances*. *As such, the claim for loss of earnings etc covered within your appeal is not considered further*. Nevertheless, we have proposed a financial award to acknowledge the distress, worry and anxiety caused to you as a result of the maladministration." (my emphasis)

Whilst the Ombudsman was declaring in principle she *could not* recommend financial redress for potential loss of earnings or 'constructive dismissal', the AB was saying it *would not* do so because it was 'not reasonable for the Claimants to believe they had no choice other than to leave the RAF under these circumstances' (the 'reasonableness issue'). I decide whether the AB's approach was lawful below.

62. Nevertheless, at paragraphs 55-56 of twin statements responding to each Claimant, Gp Capt Page contended even if the AB had upheld Head of Complaint 2 ('HoC 2') of each Claimant's Service Complaint (i.e. found the maladministration and undue delay in the SCs earlier made against them had caused 'significant damage' to the First Claimant's career and 'irretrievable damage' to the Second Claimant's career) the AB would still not have awarded post-termination financial losses:

> "We were aware that the armed forces are exempt from legislation which allows personnel to submit claims to the Employment Tribunal ['ET'] for unfair/constructive dismissal (section 192 Employment Rights Act 1996). The Claimant[s] stated in [their] appeals that [they] had been '(effectively) constructively dismissed' and the financial award should include an award for loss of earnings/pension. However, the armed forces are exempt from the Employment Rights Act 1996, so this particular case is not a constructive (unfair) dismissal situation. For an AB (or DB) to make a financial award which mimicked what an ET would award in such a case would be circumventing that exemption and we were advised against attempting it. Equally, when courts make such awards, they are looking largely at the breach of contract (and service personnel do not have contracts) and the calculations the courts conduct can be extremely complicated. Injury to feelings awards may be considered by the ET but they do not naturally fall from the breach of contract and personal injury is separate again from any constructive dismissal claim. Personal injury is equally excluded from being the subject of a SC. As such, even if we had upheld HoC 2, a financial award in the same category in the SCOAF Financial Remedies Guidelines would have been advised: unquantifiable maladministration award using the SCOAF guidance as a guide."

Despite that, Mr Talalay conceded that DBs and ABs can award 'post-termination losses' (including 'post-resignation losses'). However, given the views expressed in this case by the Ombudsman and Gp Capt Page, I should explain why I agree.

63. After all, this question goes to the heart of whether service complaints can offer servicepeople a remedy to recover the various losses claimed, that in Armed Forces

personal injury cases can be substantial (e.g. *Brown v MOD* [2006] PIQR Q9 (CA)). I refer to the various losses claimed in the Claimant's appeals to the AB collectively as 'post-termination' or 'post-resignation losses'. The wider importance of this issue led me to supplement Counsel's research with my own in employment and tort law authorities before and after the hearing. But this is not about whether the DB and AB can 'mimic' ET (or Court) awards, but whether post-termination losses can be awarded as 'redress' for a service complaint. This raises three issues:

a. Firstly, whether the concept of 'appropriate redress' under s.340C AFA and Regs.9/13 SC Regs can include 'post-termination losses' and if so, whether both *post-discharge* losses and *post-resignation* losses ('the redress issue');
b. If so, whether 'post-termination losses' (of either kind) fall 'within the authority' of DBs and ABs who uphold complaints ('the authority issue');
c. If so, whether post-termination losses caused by 'stress' can be awarded as a 'quantifiable payment' or only as part of a 'non-quantifiable payment' under the Defendant's policies ('the stress issue').

64. Mr Talalay did not accept this categorisation when I asked for written submissions on it and various cases after the hearing. He suggested the only question on the 'scope' of 'redress' was 'whether the AB erred in its assessment by reference to policy that the redress sought fell outside its authority'. But it is clear from the AB's own decision quoted above the AB did not suggest the losses claimed fell outside its 'authority', it declined to award them on the facts. This makes it all the more surprising that Gp Capt Page opined it would be inappropriate in principle to award them when he never said so at the time. Given the Defendant's rather unclear position, it is all the more important to take them in the three stages I have set out.

The 'Redress' Issue: can 'appropriate redress' include post-termination losses ?

65. The reason why it is necessary to examine the statute first before examining the policies is because any policy must be interpreted in the light of the effect of any statute it is intended to implement. Indeed, the policy will be unlawful if it gives guidance which 'sanctions or positively approves unlawful conduct' (i.e. breaching the statute) as Lords Sales and Burnett said in *R(A)* at [38], then adding at [41]:

> "The test…calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs [a decision-maker] to act in a way which contradicts the law, it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy, as objectively construed."

66. However, to make such a comparison between a policy and the statute which it is intended to implement, it is first necessary to understand the statute itself through interpreting it. The contemporary approach was recently summarised by Lord Hodge in *R(O) v SSHD* [2022] 2 WLR 343 (HL) at [29]-[31]: primarily focussing on the words of the statutory provision in its internal statutory context, but also looking at the external context, including Explanatory Notes; and looking at the 'intention of Parliament' not as the subjective intention of individual lawmakers, but the meaning of the words Parliament used as revealing its collective intention.

67. s.340C(2)(b) AFA and Regs.9(2)(b) and 13(2)(b) SC Regs are effectively the same:

> "13(2)(b)…[I]f the [AB's] determination is that the complaint is well-founded—(i) determine what redress (if any), within the authority of the…[AB]…. would be appropriate; and (ii) grant any such redress."

The only limitations are what the DB/AB decide is (i) 'appropriate' 'redress' (if any) for the 'well-founded complaint'; and (ii) such 'redress' is 'within authority'. The statutory framework does not exclude compensation from 'appropriate redress' - before or after termination. Whether that is 'appropriate redress' to 'grant' is left entirely to the DB or AB, provided it is 'within their authority'.

68. On the *R(O)* approach, this simple interpretation is reinforced by the following:

    a. Firstly, whilst 'redress' is not defined by the statutory framework, the Oxford English Dictionary definition of the noun (not the verb) 'redress' is: *'reparation or compensation for a wrong or consequent loss'*.

    b. Secondly, whilst 'granting appropriate redress' is undefined, the concept of the decision-maker's 'authority' is carefully regulated. Not only s.350C(3) and s.340D(4) but also s.340F AFA together require the Defence Council to authorise the DB or AB 'to grant appropriate redress'. However, the Defence Council can restrict this through the mechanism of '*authority'*.

    c. Thirdly, the Explanatory Notes to the Armed Forces (Service Complaints and Financial Assistance) Act 2015 which overhauled the SC process explained at para.5 that the changes 'includes making the system more streamlined with only one appeal', but then SCOAF. Previously, the process could be cumbersome as in *R(Clayton) v Defence Council* [2014] ACD 110 where due to lack of authority to promote a complainant, a service complaint was escalated through three levels. Under Regs.9/12 SC Regs 2015, the statutory scope of 'redress' (if not 'authority') is the same for DBs and ABs.

69. This approach in s.340C and Regs.9(2) and 13(2) SC Regs is rather different from the approach to 'redress' for the Ombudsman under s.340L AFA. Since the Ombudsman is independent of the Defence Council, she derives her 'authority' purely from the statutory framework, although also promulgates her own policies. As a result, s.340L AFA itself circumscribes the Ombudsman's 'redress powers':

    a. If the Ombudsman finds a complaint that she has reinvestigated under s.340H(1)(a) AFA to be well-founded, s.340L(2)(a) AFA empowers her to make 'recommendations (if any) on what redress would be appropriate', without limitation of 'authority'. However, because her recommendations are not binding under s.340M AFA, the Defence Council need not accept them. The SCOAF Guidance also says that HM Treasury has to approve Ombudsman financial redress outside MOD's delegated authority. So, the Ombudsman was correct to say she cannot 'quash' an AB's determination on redress and require it to be reconsidered. However, as the Explanatory Notes to s.340L and 340M AFA say, the Defence Council's response could be 'reconsideration of the complaint in the light of the recommendations'. Yet there is no limitation on what 'appropriate redress' the Ombudsman can *recommend* under s.340L AFA, including loss of earnings (albeit her guidance limits awards to MoD delegated authority). The Ombudsman may have meant she could not *award* financial compensation for loss of earnings.

b. However, ss.340L(2)(b) and (3)(b) AFA are different: they state where the Ombudsman finds an allegation of maladministration or undue delay of a service complaint well-founded, she may make recommendations, including those 'for the purpose of remedying the maladministration or undue delay or any consequent injustice sustained by the complainant'. The word 'redress' does not appear and so this power may well be narrower. However, the Claimant's complaints *to the Ombudsman* were not about maladministration and undue delay by the DB and AB, but about *redress*.

70. Moreover, the absence of any exclusion from 'redress' in s.340C AFA and Regs.9/13 SC Regs for 'post-termination losses' contrasts markedly with the total exclusion of service complaints about personal injury: Reg.3(1) and Sch.1(t) SCMP Regs: see *R(Ogunmuyiwa)*. By contrast, whilst servicepeople can bring claims in the Employment Tribunal for discrimination if they bring a service complaint first – s.121 Equality Act 2010 ('EqA'), they cannot bring claims for unfair dismissal due to s.192 Employment Rights Act 1996 ('ERA'). Provisions from 1993 to enable servicepeople to claim unfair dismissal have never been implemented: which was held to be lawful in *R(Evans) v MOD* [2022] 1 WLR 4831. Moreover, as Martin Spencer J reaffirmed in *Malone v MoD* [2022] ICR 478 (HC), servicepeople have no contract of employment or otherwise and so also cannot bring a claim in contract, nor circumvent that by framing it in tort. So, a former soldier could not claim his selection for redundancy was 'negligent'. However, at [27], Spencer J explained:

> "[I]s it the position that a serviceman, selected for redundancy when he should not have been and dismissed from the army, has no remedy or recourse to the courts at all ? Were that the case, issues might arise under the Human Rights Act 1998 ['HRA'] and rights protected by Art.6 European Convention of Human Rights ['ECHR']. The answer is no…. [S]oldiers may bring an application for judicial review. Thus, in *R(Wildbur) v MOD* [2016] EWHC 1636 (Admin) Langstaff J entertained an application for judicial review arising out of the applicant's selection for redundancy.."

I referred Counsel to *Malone* and *R(Wildbur)* as both suggested 'appropriate redress' for a service complaint could potentially include post-termination losses.

71. *R(Wildbur)* was a case in which Mr Dingle appeared and he rightly submitted it shows that the service complaint process could be compensatory and make both non-quantifiable and quantifiable awards (which have an analogy with tort but are not assessed on a tortious basis). *R(Wildbur)* involved the predecessor of s.340C(2) AFA / Regs.9/13 SC Regs, namely s.334(8) AFA – but used very similar language:

> "If the appropriate person decides that the complaint is well-founded, he must (a) decide what redress (if any), within his authority, would be appropriate; and (b) grant any such redress."

In *R(Wildbur)*, an Army Captain who was highly likely to be promoted to Major was wrongly selected for redundancy in 2011. He brought a service complaint seeking not reinstatement, but loss of earnings on the basis of promotion until the end of his commission. When his SC was upheld 2½ years later, the DB offered him as redress the choice of reinstatement (which he declined) or his loss of earnings until that point but no further (but which still included post-termination loss of earnings). Langstaff J dismissed his claim for judicial review, saying at [19]-[20]:

> "19. As to the word 'redress', I accept that it is undoubtedly not limited to financial compensation. It may be wider. It seems to me….that the closest analogy is not that of compensation for such as unfair dismissal or for a tort arising in employment, but probably with the resolution of a grievance procedure operated by an employer within employment. In common with those hearing a grievance, within the powers of management [and] the powers granted to officers…there is a wide range of measures…
>
> 20. The word 'appropriate' is a change from [the 1955 legislation]… it was then 'necessary'. It suggests….there must be a clear relationship between the redress which is offered and the wrong which has been suffered. However, it is again a phrase which is wide and which, as I have observed, is at the outset for the decision-making body itself to identify."

72. In *R(Wildbur)*, Langstaff J also referred to the European Court of Human Rights ('ECtHR') decision in *Crompton v UK* (2010) 50 EHRR 36, about a service complaint process under s.334(8) AFA's predecessor, s.181(3) Army Act 1955, which required the Defence Council to investigate complaints and 'to take any steps for redressing the matter complained of which appear to….them to be necessary'. In *Crompton*, the Army Board had finally awarded post-termination losses for redundancy totalling £150,000. The ECtHR found a violation of Art.6 ECHR in the process dragging on for a decade with frequent judicial reviews (I mention one below). However, I should add that in *Crompton*, the applicability of Art.6 was conceded, but Nicol J has twice since (both in *R(Clayton)* and before that in *R(Crosbie) v MoD* [2011] EWHC 879 (Admin)) held that Art.6 ECHR did not apply to service complaints in those cases as it cannot not grant substantive law rights that do not exist in domestic law (*Matthews v MoD* [2003] 2 WLR 435 (HL)) Nevertheless, it appears from the Human Rights Assessment of the 2015 Act that *Crompton* and Art.6 ECHR was a factor in ensuring more independence from the MoD in the service complaints process: above all the independent Ombudsman.

73. In any event, it seems indisputable that DBs and ABs can – and indeed have - awarded *post-discharge* loss of earnings to servicepeople found to have been wrongfully discharged, as in *R(Crompton)* and *R(Wildbur)*. Likewise in *R(Crosbie)*, where an Army Chaplain complained of the non-renewal of his commission and claimed post-termination compensation, it failed on the facts, not on principle. Likewise, as Mr Talalay rightly conceded, in my judgement, 'appropriate redress' is also broad enough to accommodate *post-resignation* losses for three reasons.

74. Firstly, as Mr Talalay accepted, in *R(Wildbur)*, Langstaff J emphasised that what constituted 'appropriate redress' was a matter for the DB and AB, subject to 'irrationality' (similar to what Nicol J had earlier said in *R(Crosbie)*). In *R(Wildbur)* Langstaff J said 'redress' included but was not limited to compensation and that 'appropriate' was different from 'necessary' – it required 'a clear relationship between the redress offered and the wrong suffered'. That is the relationship which the AB was testing in this case with its 'reasonableness test', challenged by the Claimants as the wrong approach in law, as considered below. Nevertheless, one can see cases where it *would be* indisputably reasonable for a serviceperson to resign (e.g. serious bullying condoned by superiors). It would be entirely rational for a DB or AB who upheld such a complaint to conclude that post-resignation compensation for loss of earnings and pension *would* be 'appropriate redress'.

75. Secondly, workers resigning due to discrimination can claim future losses in the Employment Tribunal (e.g. *Shittu v South Maudsley NHS* [2022] ICR D1 (EAT)). The original 1970s sex and race discrimination legislation required such claims to be brought by service complaint (e.g. s.75(9) Race Relations Act 1976 ('RRA'): for example *R v Army Board exp Anderson* [1991] 3 WLR 42 (DC)). However, since the mid-1990s, servicepeople have been able to claim discrimination in Tribunals but have had to make a service complaint first – initially under the RRA or Sex Discrimination Act 1975: *Molaudi v MoD* [2011] ICR D19 (EAT); but now under s.121 EqA as Williams J said in *Edwards* at [12]-[36]. She added at [88(ii)]:

> "As identified by Silber J in *Molaudi*, the purpose of the statutory scheme is to ensure complaints of discrimination are in the first instance determined by a body deemed by the legislature to be the appropriate body for resolving such disputes, with the ET dealing with the matter at the next stage…"

The statutory purpose must be for the DB or AB if upholding a discrimination claim to 'resolve' it by awarding full compensation - not just for 'injury to feelings' (see *Vento v CCWYP* [2003] ICR 318 (CA) noted in the Ombudsman's guidance which Gp Capt Page says is applied), but also post-termination losses as in *Vento* and *Shittu*. Yet 'appropriate redress' under s.340C AFA and Regs 9/13 SC Regs does not distinguish between discrimination and non-discrimination. If wide enough for future losses for the former, it should follow that it is wide enough for them for the latter.

76. Thirdly, the availability of post-resignation losses as 'appropriate redress' is also consistent with the statutory purpose of s.340C and Regs.9/12 SC Regs themselves. Whilst servicepeople cannot bring unfair dismissal claims to ETs due to s.192 ERA, far from that indicating that post-resignation losses *are not* 'appropriate redress' as Gp Capt Page says in his statement, that points to it *including* such compensation, (providing it is 'within authority'). Otherwise, such losses would be irrecoverable in a service complaint or elsewhere (unless due to personal injury, discrimination, defamation, or breach of the ECHR - albeit probably not Art.6). Serious cases falling between those few stools (e.g. serious but non-discriminatory bullying not causing injury) would be left without *any* legal remedy at all, unlike for civilians. As Mr Dingle said, that would also not be easy to square with the 'Armed Forces Covenant' in s.343A AFA commitment to the 'desirability to remove disadvantages arising for service people from membership of the Armed Forces'. Conversely, recoverability of post-resignation compensation would buttress the statutory purpose of the SC process, described in para 7.1 Explanatory Notes to the SC Regs:

> "Members of the armed forces have no contract of employment and no system of collective bargaining…and historically the rights of service personnel to bring legal claims against the Crown are also limited. It has therefore long been recognised that members of the armed forces should have some other effective way of obtaining redress for grievances."

Indeed, as Mr Dingle spotted, in *Malone* the Defendant itself submitted (see [16]):

> "[T]he provisions in Part 14 (now Part 14A) of the 2006 Act represent a bespoke and exclusive dispute resolution mechanism which was required by reason of the very fact that the rights of servicemen and women are not justiciable by any other means. As set out in the Explanatory Memorandum to the legislation, Parliament was legislating to fill the gap left by servicemen who were not able to bring claims otherwise."

77. In short, 'appropriate redress' in s.340C AFA and Regs.9/13 SC Regs is certainly wide enough to encompass not only post-discharge losses, as in *R(Wildbur)*, but also post-resignation losses, as Mr Talalay accepts. That is entirely consistent with the statutory purpose of the service complaint process itself. Indeed, given the sacrifices by servicepeople - which Parliament has recognised in the Armed Forces Covenant - can it truly have been Parliament's intention (in the sense discussed in *R(O)* at [31]) that 'appropriate redress' could not include even in principle compensation for a victim who responds to the sort of horrific abuse as at the Deepcut Barracks by resignation rather than by suicide ? On the contrary, I am satisfied that Parliament 'intended' service complaints to fill this gap. I have only dealt with this at length as in his statement Gp Capt Page disputed it and that misunderstanding must be cleared up. However, it was not an error he made on the facts, as the AB declined to award 'post-resignation losses' on its 'reasonableness' test.

78. Nevertheless, as I discuss in more detail when dealing with that issue below, just because 'appropriate redress' can include 'post-resignation losses', that does not mean they are assessed on the tortious basis as the Claimants' appeals assumed. As Mr Dingle conceded, there is no 'statutory tort'. As Langstaff J said in *R(Wildbur)* at [19], a service complaint has more in common with a grievance (but is not identical as it is statutory) than with litigation in Courts or Employment Tribunals:

    a. Courts and Employment Tribunals are 'independent and impartial tribunals' under Art.6 ECHR (*Tariq v Home Office* [2011] ICR 938 (SC)). The service complaint process is not and does not generally engage Art.6 ((*R(Crosbie)*).

    b. Courts and Employment Tribunals only adjudicate legal claims. Service complaints exclude certain legal claims (i.e. personal injury / clinical negligence) but include complaints that an individual has been 'wronged'. Those do not necessarily involve the commission of a legal wrong such as a tort and so would not be justiciable in Courts and Employment Tribunals.

    c. Courts and Employment Tribunals award compensation under common law principles (albeit modified by statute e.g. with unfair dismissal: *Shittu*). By contrast, 'well-founded service complaints' can be granted 'appropriate redress' determined by the DB or AB subject to rationality *(R(Wildbur)*).

    As Mr Dingle says, the service complaint process is a free-standing regime to redress wrongs affecting servicepeople. But it is different from the Employment Tribunal, not a 'substitute', still less does it 'mimic' Tribunal awards. That would be a non-sequitur: awarding compensation appropriate for a common law claim when there was and could be no such claim. So, even where post-termination losses may be 'appropriate redress', it may well be rational not to use the Ogden Tables nor award speculative 'losses of chance'. In *R(Wildbur)* itself, it was held rational not to award future losses given the reinstatement offer without any failure to mitigate (see e.g. [27]). That said, as discussed below, there are useful analogies.

79. In truth, the real question raised by s.340C AFA and Regs 9/13 SC Regs is not whether post-resignation losses can be 'appropriate redress' – they obviously can be as Mr Talalay accepts - but rather whether to grant such redress is '*within the authority*' of DBs and ABs. The statutory framework asks but does not answer that question. For the answer, we must turn to MoD policy: but recalling that it does not have the same status as statute. That leads me to the 'authority issue'.

The Authority Issue: Are post-resignation losses 'within the authority' of ABs ?

80. The key policies on the 'authority issue' are 'Annexes A and B'. They are a collective instruction issued to ABs like Gp Capt Page by Wing Cdr Dennis, who explained in Annex A that he had been 'delegated' powers to grant 'appropriate redress' by the Defence Council under s.340C AFA. I have already set them out above and need not repeat them. Strictly, they relate to the authority of ABs not DBs - I have not been shown the DB's 'authority policy', only the guidance on 'unquantifiable awards' in paras.36-37 JSP 831, which is similar to that for ABs in paras.33-34 JSP 831. However, those paragraphs are more relevant to 'the stress issue' – and only elaborate what is relevant on 'the authority issue' in Annexes A and B. But it would be surprising if a DB's authority had been different to an AB's authority before in June 2022 (just after the DB decision here) the appeal model moved from 'rehearing' to 'review' under Reg.10 SC Regs as amended. However, as the Ombudsman is not restricted by 'authority', but can only make non-binding 'recommendations', the SCOAF Guidance is not so relevant to 'the authority issue'.

81. I also repeat there is no challenge to the *lawfulness* of any policy as in *R(A)*. The issue is the *interpretation* of the relevant policies, especially Annexes A and B. Generally, interpretation of a policy requires it to be read in the context of, and in comparison with, the statute under which it operates (see *R(A)* at [41] above). Further, in *Mandalia v SSHD* [2015] 1 WLR 4546 (SC), when interpreting a process instruction for immigration visa applications, Lord Wilson explained how the requirement to comply with policy unless there was a good reason not to do so had developed originally from published policies on grounds of legitimate expectation to apply now even to unpublished policies on grounds of consistency and fairness:

> "30…[I]n *R (WL(Congo)) v SSHD* [2012] 1 AC 245 [also known as *R(Lumba)*] ….Lord Dyson JSC said…at para 35: "The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute'…..
>
> 31 But, in in *WL(Congo)*, Lord Dyson JSC had articulated two qualifications. He had said, at para 21: "it is a well-established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers'. But there was ample flexibility in the process instruction to save it from amounting to a fetter on the discretion of the caseworkers. Lord Dyson JSC also said, at para 26, 'a decision-maker must follow his published policy . . . unless there are good reasons for not doing so'. But the SSHD does not argue that there were good reasons for not following the process instruction…Her argument is instead that, properly interpreted, the process instruction did not require the caseworker to alert Mr Mandalia to the deficit in his evidence before refusing his application. So, the search is for the proper interpretation of the process instruction, no more and no less. [I]t is now clear…interpretation is a matter of law which the court must therefore decide for itself: *R(SK (Zimbabwe)) v SSHD* [2011] 1 WLR 1299 , para 36…Previous suggestions that the courts should adopt the Secretary of State's own interpretation of her immigration policies unless it is unreasonable….are therefore inaccurate."

82. Comparing the policies to the statutory framework in s.340C AFA and (for ABs) Reg.13 SC Regs discussed, some of the provisions assist ABs to determine 'appropriate redress'

(e.g. paras. 1 and 2 of Annex B and the distinction between 'Quantifiable Payments' and 'Non-Quantifiable Payments' in para.12 Annex A). However, most concern an AB's 'authority'. In particular, Annex A para. 9 'authorises' ABs to grant what may be called for shorthand 'pre-authorised redress':

a. Firstly and primarily, ABs are authorised to grant 'non-financial remedy including but not limited to remedies relating to terms and conditions of service'. That authority is quite general and on the face of it could include adjusting terms and conditions and 'back-dating promotion' – Annex A para.14). As Mr Dingle said, 'service complaints' range from the trivial (e.g. missing kit) to the extremely serious. For very many complaints, 'appropriate redress' will be entirely or primarily *non-financial*. That underlines Langstaff J's point in *R(Wildbur)* that service complaints have a closer analogy to a grievance procedure than to Court or Tribunal litigation.

b. Secondly however, this does not mean the service complaint process cannot itself offer substantial 'financial redress'. In *R(Wildbur)* itself, the DB offered reinstatement or post-redundancy back pay up to the hearing and there was no suggestion this was not 'within its authority'. Under Annex A paras. 9 and 12 ABs are authorised to grant 'financial remedy', albeit limited to payments of no more than £250,000 within Category D and Category E2 payments. Para.12 Annex A incorporates by reference JSP 472 Part 2 Chapter 12 paras.21 and 28. These respectively describe (i) Category D 'payments for claims waived or abandoned' such as claims dropped on legal advice; and (ii) Category E2, which I repeat so far as material:

> "28. Ex-gratia payments other than to contractors are payments which go beyond administrative rules or for which there is no statutory cover or legal liability. Reasons for this type of ex-gratia payment vary widely but include: a. payments made to meet hardship caused through official failure or delay. b. out of court settlements to avoid legal action on grounds of official inadequacy…. A claim which is statute-barred but…it is decided not to invoke the Limitation Acts…..
>
> 29. Ex-gratia payments to individuals for stress and inconvenience will always be novel and contentious, irrespective of whether MOD has made similar payments before, and require HMT approval…."

Those types of 'pre-authorised redress' do not limit what ABs can 'grant as appropriate redress', only circumscribe its delegated 'authority': i.e. what can be granted without specific 'authorisation'. 'Non-quantifiable payments' are not mentioned in Annex A para.9, as they need specific authorisation: Annex B para.6.

83. The question is whether a 'quantifiable payment' for post-resignation losses would fall within an AB's 'pre-authorised redress' in Categories D or E2 from JSP 472. I accept not if the losses were a payment for 'stress' given JSP 472 para.29, nor any compensation for personal injury under Category E3 (discussed under the 'stress issue' below). Post-resignation losses do not fit Category D as 'waived claims' as servicepeople cannot claim those under the ERA, in contract or in tort (*Malone*). As such losses can be 'appropriate redress' in s.340C AFA Category E4 does not apply. But I have paused over whether post termination losses fall within Category E5:

> "Special severance payments made to employees, contractors and others who leave employment in public service…whether by resigning, being dismissed or as

> the result of termination of contract…go beyond normal statutory or contractual requirements. The payments are directly related to the reason the person left employment in public service. They are only permitted on an exceptional basis and always require HMT approval…"

However, it was not suggested by the Defendant that E5 applied to either Claimant. In my judgement that reflects that Category E5 does not apply to service complaint 'redress' (unlike other parts of JSP 472, it is not referred to in Annex A one would have expected if it was a limitation). I have also underlined 'employment' and 'termination of contract' because they show this category is for those 'employed' (including at the Defendant, e.g. in the many civilian roles). This is borne out by the description in the table in JSP 472 Part 1 of Category E5 as 'payments made to an individual who leaves…*employment*'. 'Servicepeople' are neither 'employees' nor 'contractors' (*Malone*), nor are they 'others who leave *employment* in public service' – which is more likely a reference to 'locums' supplied by agencies. Moreover, 'severance payments' in employment law terms are usually *ex gratia* payments made by agreement on termination by 'compromise agreements' (the larger ones colloquially known as 'Golden Parachutes' can be controversial see e.g. *Gibb v Maidstone NHS* [2010] IRLR 786 (CA)) 'Appropriate redress' granted under statute for a service complaint is not a 'severance payment'.

84. On the other hand, I agree with Mr Dingle that 'payments made to meet hardship caused through official failure or delay' in Category E2 is very wide and could pre-authorise payments up to £250,000 for a wide range of compensatory purposes for servicepeople. This is easiest to see with those who are still in service. For example, this would clearly include back pay for a wrongly-deprived promotion, which is specifically contemplated in Annex A para.14 (e.g. *R(Clayton)*). Indeed, it may cover many of the service complaints over 'pay, pensions and allowances' (12% of the 1,225 complaints in 2023). Such 'straightforward' Category E2 payments can be seen to have a very loose analogy to the 'wages' jurisdiction in the Employment Tribunal (although as I have explained, not assessed by the same legal principles).

85. Further, I also agree with Mr Dingle that 'payments made to meet hardship caused through official failure or delay' in Category E2 can include post-discharge or resignation losses for servicepeople, but again not on a common law basis. Both propositions are illustrated by *R(Wildbur)* itself, when as noted, Langstaff J did not find it was irrational not to award common law future losses given an offer of reinstatement, but there was never any doubt over the DB's 'authority' to offer the complainant back pay *after his redundancy* up to the hearing of his service complaint. His wrongful redundancy was certainly 'official failure' which caused him 'hardship'. Similarly in *Crompton*, it was not suggested that the correct redundancy payment was outside the Defence Council's authority to grant. After all, Annex B para.5 includes detailed provision for deductions for civilian income, which would imply that loss of earnings may be 'redress' to have such deductions made. Indeed, on the face of it, 'hardship' is likely to be the more acute if the 'official failure' has *caused* someone to leave service, whether by discharge or resignation. However, that leads to the relevance of 'causation' which I discuss on 'the reasonableness issue'. It also raises whether such payments are made for 'stress or inconvenience' to which I now turn in dealing with 'the stress issue'.

The Stress Issue: can 'quantifiable payments' be made for stress-related losses?

86. The original Ground 6 of the Claimants' claims contended that the AB erred in law by only making a 'non-quantifiable payment' rather than a 'quantifiable' one as sought. However, Mr Talalay turned this around to argue the Defendant's policies on true interpretation meant that *only* a 'non-quantifiable payment' could be made as the Claimants' complaints were of 'injury to mental health', 'stress' and 'loss of reputation' (for ease, I call this 'the stress issue'). It turns on paras.33-34 JSP 831:

> "33….MOD does not however have delegated authority from HM Treasury to decide on the value of a financial award to be paid in cases where the decision in the Service Complaints process is that a financial award should be paid as redress for **delay, injury to feelings**, **stress**, **inconvenience caused, damage to reputation** or any other such finding. This is because the amount to be awarded is not measurable - it would for example be measurable if it were found that an allowance should have been paid - and is therefore difficult to determine. The value is subjective, and HM Treasury considers such payments to be 'novel and contentious' in terms of spending public money and so their approval is required as to the sum to be awarded."
>
> 34. Where **unquantifiable** awards of this nature are considered to…form part of, appropriate redress in the view of the AB, you will have to pause ..and seek Treasury approval….for an appropriate sum…" (my emphasis)

87. Mr Talalay pointed out the Claimants' own appeals described their resignations as closely linked to their mental health, damage to reputation and particularly to stress:

    a. The First Claimant's appeal statement said that:

    > [The SC process] has been extremely stressful and I was crying all the time at the slightest thing. The way I have been treated has significantly damaged my career and promotion prospects…. Although I had expected to serve the next 14 or 15 yrs in the RAF, for the sake of my mental health I felt I had no choice but to Early Terminate….. The SCs still had not reached a conclusion but I felt I had no choice if I was to get an improvement in my mental health.."

    The First Claimant likewise relied on the findings of the DB that:

    > "An unfortunate and unintended consequence was that Ex-FS Eyton-Hughes was medically downgraded for the remainder of her career and this had damaged both her career and promotion prospects".

    b. The Second Claimant does not have such a clear finding from the DB (why he is second), but the DB did accept he 'experienced a very significant level of obvious distress'. The Second Claimant added in his appeal statement:

    > "In addition to the SCs being extremely detrimental to my health, it has caused irretrievable damage to my military career and forced me to prematurely leave the RAF. ….When I returned to work the stress and anxiety returned and I felt I could not go on anymore. Within a month of coming back from sick leave, I [sought Early Termination]… [W]ith how the SC was being handled and the way I was being treated I couldn't go on any longer and I felt I had no choice but to leave for the good of my mental health and wellbeing…."

88. 'Stress' is one of those subjective concepts, rather like 'bullying' and 'harassment', which different people experience in different ways and indeed with different thresholds. That is why in the personal injury 'stress at work' cases discussed by Underhill LJ in *Yapp v FCO* [2015] IRLR 112 (CA), Courts have focussed on the foreseeability of injury through *stress to the particular employee*. He noted that Hale LJ (as she was) said in *Hatton v Sutherland* [2002] IRLR 263 (CA) at [43(2)]:

> "The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: this has two components: (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors)."

Likewise, tort draws a distinction between 'psychiatric injury' which is 'actionable damage' and 'stress' and 'anxiety' about the development of an 'injury', which is not: *Grieves v Everard* [2007] 3 WLR 876 (HL). (*Grieves* at [24] also endorsed the approach in *Hatton* for the employer's duty of care over psychiatric injury – save in cases of risk of physical injury or illness: see *Yapp* at [117]-[118]). This distinction between the normal emotion of '*stress*' (as a *feeling* of pressure, strain or tension in response to a situation) and abnormal *injury to health* is also reflected in the distinction in discrimination compensation between 'psychiatric injury' -and 'injury to feelings' as explained in *Vento* at [63]. Since in in JSP 831 para.33, 'stress' is listed alongside such 'injury to feelings' (as well as other 'non-injury' concepts like 'inconvenience' and 'damage to reputation'), applying the approach in *Mandalia*, 'stress' in para.33 plainly should be interpreted as 'an emotion not an injury'.

89. This 'stress as emotion not injury' interpretation of para.33 JSP 831 is also consistent with its wider context: the exclusion under Sch.1 SCMP Regs from admissible 'service complaints' of 'a matter capable of being the subject of a claim for personal injury or clinical negligence against the Ministry of Defence'; and indeed, the SCOAF Guidance excluding compensation for personal injury as well. So, if servicepeople seek compensation for *psychiatric injury* (as opposed to simply '*occupational stress*' on the distinction Lady Hale drew in *Hatton*) they cannot bring a service complaint about it, but they can bring a civil claim in tort. Of course, as Spencer J said in *Malone*, servicepeople cannot *circumvent* their lack of a contract by bringing a 'quasi-contract' claim in tort. However, he did not say they could not bring claims for *personal injury* in tort just because the same duty of care is owed to ordinary employees in tort and contract – see *Yapp* at [99(3)] and [120]. Of course, as Mr Talalay said, there is a high threshold for foreseeability of psychiatric injury in *Hatton* for 'stress at work', applied to disciplinary processes etc in *Yapp*, which Underhill LJ (another former EAT President) said in at [20] was not altered by the implied term of mutual trust and confidence (discussed below). Indeed, the foreseeability threshold may be particularly high for servicepeople with their intrinsically stressful job (and would not even arise for the 'stress of battle' due to common law 'combat immunity': see *Smith v MoD* [2013] 3 WLR 69 (SC)). Nevertheless, as Mr Talalay rightly accepted, if the First Claimant wished to sue the Defendant for negligent handling of the service complaints against her causing her psychiatric injury, she could do so. I would add that if the First Claimant could prove she sustained a 'mental injury' 'caused wholly or predominantly by service', she could apply under the Armed Forces Compensation Scheme ('AFCS'). This was set up in 2005 after *Matthews* affirmed pre-1987 general tortious immunity of the MoD did not violate Art.6 ECHR: see *MoD v Duncan* [2009] EWCA Civ 1043.

90. Indeed, Mr Talalay submitted the First Claimant in particular had impermissibly brought what was essentially a personal injury claim with post-termination losses as a service complaint. However, this proves too much because if right, logically the First Claimant's service complaint should never have been accepted for investigation at all, let alone had any 'redress'. In any event, as Ellenbogen J said in *R(Ogunmuyiwa)* at [65]-[66] about the 'injury exclusion':

> "Whilst….a claim for personal injury had formed no part of the Service Complaint, that did not mean that the existence of any injury and/or the observations of the treating medic were irrelevant to the issues which did fall within that complaint. For example….the nature and extent of any injury caused (whether physical or mental) would be of relevance to the characterisation and gravity of the conduct in question …..In my judgment, the Appeal Body erroneously put from its mind matters which went to the cause and extent of any personal injury, considering them to be incapable of consideration under the service complaint process and/or more pertinent to personal injury proceedings and/or a claim under the AFCS. It formed such a view as a product of its erroneous belief that matters within the Service Complaint which were, or were capable of being, the subject of a claim for personal injury against the Ministry of Defence were excluded."

91. In my judgement, a similar point applies to the First Claimant here. She was not complaining of 'personal injury' caused by the SCs against her, but rather that their handling had caused her 'stress' and time off sick which led to her being medically downgraded with an effect on her career (which the DB accepted but the AB did not) and she resigned to achieve an *improvement* in her mental health. I appreciate that the same contentions could be re-framed as a claim for personal injury – and indeed were in the First Claimant's Grounds of Challenge. However, that was not what she was alleging at the time. As Ellenbogen J said in *R(Ogunmuyiwa),* DBs and ABs should not read every reference to injury to health in a service complaint as an excluded claim for personal injury. I would respectfully add that still less should DBs and ABs do so in relation to 'stress' which is not even an 'injury'. In my judgement, the same point applies with still greater force to the Second Claimant who may have referred to 'detriment to health' but was not medically downgraded.

92. Alternatively, Mr Talalay submitted the Claimants' service complaints and their resignations were inextricably linked with 'stress' and 'damage to reputation', so under para.33 JSP 831 could only result in an 'non-quantifiable payment'. But I disagree. Firstly, this interpretation wrenches paras. 33-34 JSP 831 out of context. They discuss 'unquantifiable awards' for 'stress' and 'damage to reputation etc', they do not say those *cannot* result in 'quantifiable payments' which are not even mentioned. Secondly, it also ignores Annex A para 12, which not only lists 'stress' as giving rise to a 'non-quantifiable payment', it also includes through JSP 472 paragraphs 29 and 35 'stress' within 'Category E2' 'quantifiable payments', albeit like 'non-quantifiable payments' for 'stress', as requiring Treasury approval. In other words, 'stress' can give rise to a 'quantifiable payment' as well as a 'non-quantifiable one'. Thirdly, that conclusion reflects the common-sense point that the same 'damage' can give rise to both 'non-pecuniary' and 'pecuniary' losses. Whilst this is not a personal injury case, 'non-quantifiable payments' have a loose analogy to 'general damages' and 'quantifiable payments' to 'special damages' as differentiated by Lord Scarman in *Pickett v BRB* [1980] AC 136 (HL) pgs.167-8:

> "[T]he assessment of damages for non-pecuniary loss is a very different matter from assessment of damages for pecuniary loss. There is no way of measuring in money pain, suffering, loss of amenities, loss of expectation of life. All that the court can do is to make an award of fair compensation. ….The judge, inheriting the function of the jury, must make an assessment which in the particular case he thinks fair: and, if his assessment be based on correct principle and a correct understanding of the facts, it is not to be challenged unless it can be demonstrated to be wholly erroneous…But, when a judge is assessing damages for pecuniary loss, the principle of full compensation can properly be applied. Indeed, anything else would be inconsistent with the general rule which Lord Blackburn has formulated:
>
> > '[W]here any injury is to be compensated by damages, in settling the sum of money to be given ... you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong…': *Livingstone* v *Rawyards Coal Co.* (1880) 5 App Cas. 25, 39."

93. I discuss in a moment in addressing the 'reasonableness issue' some tortious and employment law analogies. In fairness, as Mr Dingle pointed out, Annex A para.1 is reminiscent of the tortious measure of loss going back to Lord Blackburn:

> "If the Department has caused injustice or hardship because of maladministration or service failure, it should consider: a. Providing remedies so that, as far as possible, it restores the wronged party to the position that they would have been in had things been done correctly…"

Whilst this principle is inconsistent with Mr Talalay's submission that 'redress' for stress is limited to a non-quantifiable payment even if it has also caused financial loss, as I have explained, this does not mean loss is assessed on the tortious basis. Indeed, neither a non-quantifiable nor quantifiable payment for 'stress' could be granted without Treasury approval (see Annex B para.6 and JSP 472 para. 29). Likewise, if 'damage to reputation' causes both upset and financial loss which an AB consider should be compensated as 'appropriate redress', then again both can be compensated (it is not so clear that financial loss requires Treasury approval).

94. Furthermore, Mr Talalay rightly anticipated another objection to his interpretation: 'fettering discretion', as discussed in *Mandalia* at [31] citing *R(WL Congo)* at [21]. Indeed, Lord Reed developed this point in *Ali v SSHD* [2016] 1 WLR 4799 (SC) at [15] citing two public law landmarks from his illustrious near-namesake, Lord Reid:

> "A perennial challenge…is to achieve consistency in decision-making while reaching decisions which are appropriate to the case in hand. The solution generally lies in the adoption of administrative policies to guide decision-making: something which the courts have accepted is legitimate, provided two general requirements are met. First, discretionary powers must be exercised in accordance with any policy or guidance indicated by Parliament in the relevant legislation: *Padfield v Minister of Agriculture*, [1968] AC 997…. Secondly, decision-makers should not shut their ears to claims falling outside the policies they have adopted: *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610…."

95. In this case, despite his submissions to the contrary, Mr Talalay's interpretation would indeed fetter the discretion of ABs (and indeed DBs), which is another reason to reject it.

I have explained that 'appropriate redress' in the statutory framework can include post-termination losses; how 'stress' is not the same as 'personal injury' for the purposes of Sch.1 SCMP Regs; and how losses caused by 'stress' can be awarded with Treasury approval, including as 'quantifiable payments' – as envisaged in Category E2 itself. So, the discretion to award such payments exists. To interpret JSP 831 paras.33-34 as excluding that discretion would be wrongly to fetter it. That is not at all the same as maintaining a policy but keeping it under review as in *R(Miller) v Health Service Commissioner* [2018] PTSR 801 (CA) at [75]. That was the exercise, not the fettering, of the discretion (albeit it was found to be irrational, to which I return when discussing the 'reasonableness issue' below).

96. Indeed, the 'non-fettering' principle is relevant more widely with 'redress' for service complaints. Where the AB (or DB assuming the same 'authority') considers that non-quantifiable or quantifiable payments for 'stress' would be 'appropriate redress' but that it lacks 'delegated authority', it must seek such authority. Annex B para.3 states that before making a payment 'the [MoD] *must* consult the Treasury about cases which fall outside of its delegated authority or raise novel or contentious issues' etc. In effect, this *requires* the Defendant to consult the Treasury about 'cases which fall outside its delegated authority'. A failure without good reason to follow para.3 of Annex B would be unlawful: *Mandalia*. Moreover, if an AB simply reached the view that it *could not* award post-termination losses as they fell outside its 'delegated authority' (as opposed to not being 'appropriate redress' on the facts), that is unlawful for other reasons. It confuses the different scopes of (i) 'appropriate redress' (and the power to seek Treasury/MoD authorisation) with (ii) its own 'delegated authorisation'. The AB would be exercising its powers *inconsistently* with the statute (*Padfield*) and/or fettering discretion by 'shutting its ears' (*British Oxygen*) to a case just because it fell outside 'pre-authorised redress': not even outside Annex B itself. Indeed, in *R(Wildbur)* at [22]-[24], Langstaff J only on balance rejected a 'fettering' argument over the level of compensation offered. Given there seemed to be some muddle about this too in Gp Capt Page's statement, that is another reason why I have tried to clarify ABs 'delegated authority' as well.

97. Indeed, if the DB or AB did seek authority but that were declined by the Treasury or MoD, that could be challenged as well. Whilst the AB/DB cannot grant payments outside their delegated authority, depending on the reasons for refusal, the Treasury or MoD decision could itself be judicially reviewed for 'fettering'. For example, if a decision-maker *simply* intones that 'payment is against policy' or 'there is no legal entitlement to it', that would be 'shutting their ears' inconsistent with the purpose of the statute (recognised in *Malone*) partially to 'fill the gap' from the ERA exclusion. In *R(Crompton) v Army Board* [2003] EWHC 2478 (Admin) at [18] (which ended at the ECtHR) Mitting J noted from *SoS Education v Tameside MBC Council* [1977] AC 1014 at 1030 that even with the 'widest possible discretion', the Administrative Court in judicial review can investigate whether relevant facts exist and have been taken into account (and irrelevant ones not taken into account) by the decision-maker. Of course, this does not mean the MoD and Treasury *must* accept the DB or AB's view on 'appropriate redress' – they do not even have to accept the independent Ombudsman's recommendations – s.340M AFA. However, it does mean if they refuse approval, that is amenable to judicial review.

98. Be all that as it may, the 'authority issue' did not actually arise in this case. There is no evidence that the Treasury did (or would have) refused authority for the Claimant's post-

resignation losses (so any 'no substantial difference' argument falls away). Indeed, the AB rightly in my view did not interpret the Claimants' post-resignation losses as caused by 'stress', but rather as caused by their *resignations*, albeit in which stress played a large part. Nevertheless, the AB did not refuse to award non-quantifiable payments for the Claimants' post-resignation losses – either because (i) it would fall outside 'appropriate redress' in the statutory framework; or (ii) outside their 'delegated authority'; or (iii) that it was barred because the Claimant's claims were for 'stress' or 'damage to reputation'. The AB actually said:

> "We concur with the DB there is clear maladministration demonstrated throughout the original SCs against you, *however, we have found this had not caused* [First Claimant: *'significant damage';* Second Claimant: *'irretrievable damage'] to your career. Further we also concluded it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances*. *As such, the claim for loss of earnings etc covered within your appeal is not considered further*. Nevertheless, we have proposed a financial award to acknowledge the distress, worry and anxiety caused to you as a result of the maladministration." (my emphasis)

Therefore, in both these cases, the AB plainly refused to award post-resignation losses due to the 'reasonableness' issue, not any unlawful misconstruction or restriction related to 'stress' etc. So, in argument Mr Dingle skilfully 're-framed' Ground 6 to argue that the AB erred in law by failing to make a 'quantifiable payment' because it applied the wrong legal test – i.e. a test of 'reasonableness'.

99. However, before turning to the 'reasonableness issue', which also engages Grounds 1-5, I will turn briefly to Ground 7: the irrationality challenge to the level of the 'non-quantifiable payment' of £3,500. Wisely, Mr Dingle did not spend much time on this. After all, it is not like the 'hard-edged' challenge of the calculation of a 'quantifiable payment' for losses as in *Crompton,* The ECtHR said at [79] that whilst the High Court could not substitute its own view as to an appropriate award in the circumstances of the case, it could (and Mitting J did – in *R(Crompton)*) examine both the method of calculation and base figures used for the calculation. By contrast, a 'non-quantifiable payment' is by its very nature subjective and impressionistic. That is why it always requires Treasury approval even for small figures. It follows that DBs and ABs have a wide discretion in deciding on the right level. This chimes with the wide discretion given to first instance judges in appeals on the level (as opposed to the principle) of 'general damages' in tort which Lord Scarman discussed in *Pickett*. Whilst the SCOAF Guidance does not strictly apply to DBs and ABs and so *need not* be followed irrespective of 'good reason' (*Mandalia*), within their wide discretion it is entirely 'rational' and doubtless very sensible for reasons of consistency for DBs and ABs to apply the SCOAF Guidance (although that does not mean a failure to do so is wrong). Of course, DBs and ABs must not 'shut their ears' (*British Oxygen*) to higher awards, but then the SCOAF Guidance itself does not do so, as it provides for awards of more than £3,000 in 'exceptional circumstances'. Given the awards in this case were of £3,500, in the circumstances of these cases (without features like 'serious bullying and harassment'), £3,500 cannot be said to be 'irrational'. I therefore dismiss Ground 7 of each challenge and can now turn to the 'reasonableness issue'.

Was the AB entitled to find the Claimants' resignations 'not reasonable' ?

100. I have just quoted the key passage on redress in the AB's decisions for each Claimant. The key reasoning challenged is this (which for ease I repeat again):

> "[The]…maladministration….had not caused [First Claimant: 'significant damage'; Second Claimant: 'irretrievable damage'] to your career. [W]e also concluded it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances. As such, the claim for loss of earnings etc covered within your appeal is not considered."

Whilst Grounds 1-6 all attack this analysis of the AB, they boil down to three broad topics. The second and third topic relate to alleged procedural unfairness of (i) reaching this conclusion without an oral hearing ('the oral hearing issue' – which is Ground 1); and then (ii) reaching this conclusion without fair warning and opportunity to make representations on it (the 'fair warning issue' – which is the 'procedural' dimension to the overlapping Grounds 2-5). I consider below those and Mr Talalay's procedural 'no substantial difference' points about them.

101. However, for the moment, I focus on the AB's 'reasonableness' test, which is how Mr Dingle sensibly focussed Ground 6 and the 'substantive' dimension of Grounds 2-5. (I return to the 'procedural'/'substantive' divide below). As is clear, the AB did not actually say that the Claimants were 'not reasonable to leave'– that is just convenient shorthand. Indeed, the first task is to analyse what the AB actually *did* decide. Then I will consider whether this was the wrong legal approach. Mr Dingle drew on several analogies from employment and tort law: constructive dismissal, causation, remoteness and mitigation with which he argued the AB's 'reasonable to leave' test was inconsistent. Mr Talalay responded with an analogy of his own from defamation law but really submitted such analogies were themselves the wrong approach. Finally in this section, I consider whether the AB were rationally entitled to reach the conclusion they did as a matter of *substance*. This will lead into the *procedural* unfairness challenges that the AB should have had an oral hearing, or at least given a fair warning and had further representations (where I also differentiate 'substance' from 'procedure')

What did the AB actually decide ?

102. To understand what the AB decided in concluding that the maladministration in both cases had not caused 'significant' or 'irretrievable' damage to either Claimant's career and it was 'not reasonable for either to believe they had not choice but to leave the RAF in the circumstances', it is necessary to go back to the original service complaints and summarise the process. I detailed this in the 'Factual Background', but here it helps to consider the Claimants separately.

103. In the First Claimant's service complaint, in addition to discussing the stress the SCs against her had caused, she raised this specific complaint:

> "I believe the way that I have been treated has caused significant damage to my career and promotion prospects and that my reputation has been tarnished due to the way the complaints have been mishandled…"

As discussed earlier, the DB teased out the First Claimant's complaints into three 'heads of complaint' ('HoCs') and picked up that allegation as the second HoC:

> "HOC 2: The First Claimant felt unsupported as a respondent through the previous SCs which she alleged caused significant damage to her career and promotion

prospects which eventually led to her 'Early Termination'."

The DB upheld HOC2 for the First Claimant in the 8th June 2022 decision:

> "[F]ailings in the original investigations and maladministration by the Service, over a 3-year period, had caused ex-FS Eyton-Hughes significant stress and anxiety. As a Respondent in the original complaints, [she] had experienced unwarranted and unnecessary pressure; her mental health had deteriorated significantly, such that she struggled to perform her duties at her subsequent posting at RAF Henlow and was signed off sick with work related stress. An unfortunate and unintended consequence was that [she] was medically downgraded for the remainder of her career *and this had damaged both her career and promotion prospects*." (my emphasis)

Yet in the redress letter of 20th July, the last point was diluted (my emphasis):

> "[T]he injustice, over a considerable period, had caused you significant stress and anxiety and that your mental health had deteriorated significantly such that you struggled to perform your duties at a subsequent posting. Unfortunately, an unintended consequence of the deterioration in your health was that you were medically downgraded for the remainder of your career, *which had implications on your career and promotion prospects*."

This is why in the AB's decision letter of 28th February 2023 said (my emphasis):

> "…[It] is not clear from the DB's [decision letter] whether the DB upheld your allegation that this has *caused* significant damage to your career and promotion prospects which eventually led to you early terminating…"

104. Nevertheless, as quoted above, the First Claimant maintained in her appeal statement in November 2022 the way she was treated 'significantly damaged her career and promotion prospects' and also said that:

> "Although I had expected to serve the next 14 or 15 yrs in the RAF, for the sake of my mental health I felt I had no choice but to Early Terminate….. The SCs still had not reached a conclusion but I felt I had no choice if I was to get an improvement in my mental health."

As part of its own reinvestigation, the AB obtained the First Claimant's appraisals ('SJAR's). The AB's investigator Sq Ldr Pollock also contacted the 'career manager' Sgt Davis who commented that her SJARs had been positive with a 'High' promotion recommendation. However, he added that she had said in her early termination application that she was *'disillusioned with service life'* and whilst he tried to retain her in service, there were no assignment options for her at that time and so she left in February 2022. The First Claimant was sent this information and she specifically highlighted in response the high scores on her SJARs and did not contradict her positive promotion prospects. Notably, whilst the First Claimant applied for 'Early Termination' (i.e. tendered her resignation) before her the service complaints against her were concluded, they did conclude and she then brought her own service complaint before she left. Therefore, by that time, she was aware that the actual damage to her career and promotion prospects may not have turned out to be as bad as she may have earlier feared.

105. It was against that evidential background that the AB turned to the decision under challenge (the point at which it the 'oral hearing' and 'fair warning' challenges contend

the AB should have taken those paths). On career damage, the AB said:

> "The evidence obtained….demonstrates that you continued to be well thought of by your Chain(s) of Command. This is supported by your last 3 SJARs which clearly identify continuing high performance and solid 'High' recommendations for promotion. In addition, the current Career Manager, having assessed these reports states "*....It's entirely possible that had she remained in the Service she may have been promoted on the 2022 PSB…* W*hen she reached FAD she would have been employable in any FS post*". It appears, therefore, on the balance of probabilities, that neither your on-going medical condition, nor the ongoing SCs had caused 'significant damage to your career and promotion prospects'. Further, the outcome of these SCs was that only one HoC was upheld in the [first SC against you] and 2 within the [second] the findings from which were not career limiting. We also conclude, therefore, that it was not reasonable for you to believe you had no choice other than to leave the RAF under these circumstances.
>
> **17. For these reasons, we partially uphold this HoC in that the support you received was inadequate but that it did not cause significant damage to your career and promotion prospects and it did not therefore warrant you leaving the Service…..**(original bold)
>
> 22. Having upheld HoC 1 and partially upheld HoC 2 and HoC 3, we have considered the redress you sought in your SC and those within our delegated powers to grant. We concur with the DB that there is clear maladministration demonstrated throughout the original SCs against you, however, we have found that this had not caused significant damage to your career. Further, we also concluded that it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances. As such, the claim for loss of earnings etc covered within your appeal is not considered further. Nevertheless, we have proposed a financial award to acknowledge the distress, worry and anxiety caused to you as a result of the maladministration."

106. Therefore, on the AB's 'reasonableness' decision for the First Claimant:

a. Firstly, the contention that the First Claimant had suffered 'significant damage to her career and promotion prospects' came from her own service complaint. Moreover, the contention that 'she had no choice but to early terminate' (i.e. resign) came from her own appeal statement. She linked both to her being signed off sick with work-related stress and her total lack of trust in the complaints system, which led her to resign from the RAF.

b. Secondly, the First Claimant's contention was incorporated by the DB into 'HOC 2' which it upheld, including the contention of significant damage on career prospects, based on her medical downgrading.

c. However, in the redress decision, the DB diluted that finding of 'significant damage' to one where the medical downgrading 'had implications' for her career prospects. Moreover, there was no reference in either of the DB's decisions to any objective evidence for any 'damage' to career prospects other than the fact of medical downgrading, such as SJARs.

d. When the AB obtained that career evidence – and the First Claimant's comments on it, they considered it did not show 'significant damage' to her career. Therefore, on the basis of a rather different evidential picture, the AB only

partially upheld HOC 2, finding the First Claimant had not been adequately supported, but rejecting her contention that it caused significant damage to her career and promotion prospects. This was essentially a conclusion of fact which the AB reached, namely *whether or not* the failings had caused the First Claimant 'significant career damage'.

e. Finally, the AB built on this 'no significant career damage conclusion' to reach consequential conclusions, which were *evaluative rather than factual*, that it expressed in three different ways I will emphasise:

   i. Firstly, in HOC 2, the AB said the outcome of the SCs against the First Claimant was that only one HoC was upheld in one and two in another and *'the findings were not career limiting. We also conclude, therefore, that it was not reasonable for you to believe you had no choice other than to leave the RAF under these circumstances'*.

   ii. Secondly, in HOC 2, the AB said that the inadequate support 'did not cause significant damage to her career and promotion prospects and *'did not therefore warrant you leaving the Service'*.

   iii. Thirdly, in the redress conclusion, the AB recited it fully upheld HOC 1 (maladministration and undue delay) and partly upheld HOC 2 (support but not significant career damage) and HOC 3 (breach of 'fairness principles' but not discrimination). However, the AB said the 'maladministration' demonstrated (clearly a reference to all its findings upholding her complaint, not just HOC 1 or lack of support in HOC 2) had not caused significant damage to her career. The AB therefore added what I am calling as shorthand its 'reasonableness test': '*Further, we also concluded that it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances'*. The AB then proceeded from that to rule out a quantifiable payment (as I have said, but not on the basis that it *could not* have made one): "*As such, the claim for loss of earnings etc covered within your appeal is not considered further'*. Instead, it factored that into its non-quantifiable payment.

107. Similar points can be made, more briefly, in relation to the Second Claimant:

a. Firstly, the contention that 'policy was not appropriately applied causing irretrievable damage to the Second Claimant's military career' once again came from the Second Claimant's own service complaint. Likewise, the contention that he 'had no choice but to leave for the good of my mental health and wellbeing' came from his own appeal statement.

b. Secondly, the DB did not accept the 'irretrievable damage' point, it said:

> "[T]he injustice had severely impacted [his] ability to lead a relatively normal life and ultimately this led to him leaving the Service *believing* his reputation had been besmirched and value as a Warrant Officer irrevocably undermined." (my emphasis)

Unlike the First Claimant, this is not even a finding of 'significant damage' to the Second Claimant's career, let alone 'irretrievable damage'. It was the DB acknowledging the injustice 'severely impacted the Second Claimant's ability to live a relatively normal life' (i.e. at the time – which did not imply long-term

damage to career prospects) and that the Second Claimant *believed* his reputation had been affected (not that it was *in fact* affected).

c. However, as with the First Claimant, when the AB investigated the 'damage' to the Second Claimant's career, again it made a factual decision:

> "However, the evidence obtained…appears to demonstrate that you continued to be well thought of….This is supported by your last 3 SJARs which clearly identify continuing high performance. Further, the….Career Manager…. states 'I see no evidence that his service was restricted, he could have been employed in any RAF Medic OR9 post and executive employment would have been possible subject to successful interview.' Accordingly, whilst we acknowledge that the maladministration of this case had impacted your ability to lead a relatively normal life whilst the SCs against you were being administered, we believe on the balance of probabilities, that this had not caused irretrievable damage to your military career."

d. Moreover, the AB relied on a distinct feature of the Second Claimant's case - his resignation before the SC against him was completed - and concluded:

> "Further….you chose to submit your early termination paperwork and leave the Service whilst the original SCs were ongoing. The outcome of these SCs only 2 HoCs were upheld against you in each case and findings from these would not have been career limiting."

e. Finally, the AB built on its 'no irretrievable career damage conclusion' to reach an evaluative consequential conclusion in the same three ways:

i. Firstly, the AB applied these conclusions on HOC 2 *'to conclude therefore that it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances'*.

ii. Secondly on HOC 2, the AB said that the proven failure to follow policy adequately *'did not warrant you leaving the Service'*;

iii. Thirdly, in the redress decision, again having recited it had partly upheld HOC 1 (accepting breach of fairness principles but not discrimination) and HOC 2 (accepting misapplication of policy but not irretrievable damage to career or breach of Art.8 ECHR) the AB concluded the maladministration it had found proven had not caused 'irretrievable damage' to his career. The AB therefore added: '*Further, we also concluded that it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances'*. The AB then proceeded from that to rule out a quantifiable payment (as I have said, not on the basis that it *could not* have made one): "*As such, the claim for loss of earnings etc covered within your appeal is not considered further'*. Instead, it again factored that into the non-quantifiable payment of £3,500.

108. Therefore, in both cases, the AB investigated the HoCs distilled by the DB from the particular Claimant's own service complaint. The AB obtained evidence the DB had not obtained and therefore reached a different conclusion from the DB for the First Claimant and stated its conclusion more directly for the Second Claimant. The AB reached factual and then evaluative conclusions. As I said, it was *the Claimants* who contended (i) the mishandled service complaints against them caused them 'significant'

and 'irretrievable' career damage respectively and (ii) that owing to this and their mental health they each 'believed they had no choice but to leave the RAF'. So, in essence in each case the AB rejected (i) because it disagreed factually and (ii) because it found that belief was 'not reasonable' – that is why I have said the AB applied a 'reasonableness test'.

109. For convenience, once again I repeat and emphasise this challenged decision:

> "[W]e have found [the maladministration etc] had not *caused* [First Claimant: '*significant damage*'; Second Claimant: *'irretrievable damage'*] to your career. Further we also concluded *it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances*. *As such*, *the claim for loss of earnings etc covered within your appeal is not considered further*. Nevertheless, we have proposed a financial award to acknowledge the distress, worry and anxiety *caused*…"

Was the AB's 'reasonableness test' for post-resignation losses wrong in law ?

110. Mr Dingle submitted the AB's approach was 'novel' (in the pejorative 'Sir Humphrey' sense), as it fitted no established legal analyses in employment or tort law. Whilst it was not Mr Dingle's main focus in argument, I will start with what Mr Talalay called the Claimant's 'quasi-constructive dismissal' argument which they made in their applications to the Ombudsman. As Mr Dingle rightly says, in 'constructive unfair dismissal' claims, the Employment Tribunal's focus is on the 'reasonableness' of the employer's conduct prompting the employee to resign, not on the reasonableness of the employee's resignation. However, the problem with this argument is that servicepeople are not legally analogous to employees. As explained in *Malone*, they have no contract, whether of employment or otherwise. However, in *Western Excavating v Sharp* [1978] ICR 221 (CA), Lord Denning stressed that 'constructive dismissal' is a *contractual* concept – the issue is whether the employer commits a repudiatory breach of contract the employee is entitled to accept. The most common alleged breach is the implied term of 'mutual trust and confidence'. As discussed by Lord Nicholls at [4]-[6] of *Eastwood v Magnox* [2004] ICR 1064 (HL), after *Sharp*, the Employment Appeal Tribunal ('EAT') developed the implied term in contracts of employment that an employer 'must not without reasonable cause destroy or seriously damage the relationship of trust and confidence between employer and employee'. However, as affirmed in *Omilaju v Waltham Forest LBC* [2005] ICR 481 (CA) at [14], not only is breach of that implied term of 'mutual trust and confidence' assessed objectively not subjectively (which ironically is precisely Mr Dingle's own complaint about the AB's 'reasonableness' test), it remains a *contractual* analysis as breach of the implied term is by definition repudiatory. Therefore, I entirely accept Mr Talalay's point that it would be irrelevant and unhelpful for DBs and ABs to get bogged down in trying to evaluate whether there has been a 'repudiatory breach' of a non-existent contract.

111. Having said that, the reason why I referred Counsel to *Sharp* (other than a former Employment Judge's interest in the genealogy of 'constructive dismissal') was to explore whether the right approach – at least by analogy - for assessment of 'post-resignation losses' may be what the Court rejected in *Sharp* for constructive dismissal claims. Indeed, Lord Denning also called this the 'reasonableness test', namely: 'the treatment was so unreasonable the complainant could not have fairly been expected to put up with it any longer'. This test would not presuppose or require a contract, so it

could be applied to servicepeople. However, the test was developed by the EAT in the 1970s before *Sharp* for a very different purpose: to guide (then) Industrial Tribunals in determining whether a resignation should be treated as a 'dismissal' under what is now s.95(1)(c) Employment Rights Act 1996. That is not necessarily related to the pecuniary losses that an unfairly dismissed employee can actually recover. As Stacey J explained in *Shittu,* the latter depends on the chances they would have resigned anyway and the extent of the chance is then reflected in a percentage deduction (and has been since another employment law milestone: *Polkey v Dayton Services* [1988] ICR 142 (HL)). Therefore, the test rejected in *Sharp* is not really apposite to the present context.

112. As both Claimants argued that alleged 'damage to reputation' within the RAF caused by the service complaints against them was relevant to each of their decisions to resign, Mr Talalay argued that the principles of defamation were more analogous. The well-established test for 'defamation' is whether '*the words tend to lower the claimant in the estimation of right-thinking members of society generally*' and whether the defamatory allegation '*is one that tends to make reasonable people think the worse of the claimant*' (see *Clerk & Lindsell on Torts* para 21.16, and *Sim v Stretch* (1936) 52 T.L.R. 669 at 671). As Mr Talalay submitted, this has something in common with asking whether objectively, the Claimants had suffered any damage to reputation. However, while I can see a loose analogy with non-quantifiable payments for 'damage to reputation' under JSP 831 para.33 (noted above on 'the stress issue'), the test of defamation itself is for liability in tort, not recoverability of pecuniary losses. So, this is also inapt.

113. However, the tort law analogies of causation, remoteness and mitigation of loss are more relevant to the present context of what losses should be recoverable – or as s.340C AFA and Regs.9/13 SC Regs states: what 'redress' is 'appropriate' in the sense Langstaff J described in *R(Wildbur)*: 'a clear relationship between the redress which is offered and the wrong which has been suffered'. Indeed, I found redress for 'post-termination losses' can fall into Category E2 of JSP 472 including 'payment to meet hardship *caused* through official failure or delay'. There is considerable overlap between causation, remoteness and mitigation in pecuniary loss. This is shown by *Corr v IBC* [2008] ICR 372 (HL), where an injured employee developed severe depression and committed suicide, that was held not to prevent his widow's claim on various bases including remoteness and causation (mitigation was not raised). In *Morris v Richards* [2004] PIQR Q3 (CA) an employee negligently injured by an employer found a new job but soon resigned from it and the issue was whether losses after that resignation were recoverable from the original employer. The Court found this raised both remoteness and mitigation of loss, but ultimately neither availed the employer because the employee was not at fault in resigning. I referred Counsel to these cases as illustrating relevant principles of causation, remoteness and mitigation.

114. Mr Dingle initially placed reliance on 'remoteness', as he said in his skeleton (in relation to the First Claimant, but in oral argument, he related it to both Claimants)

> "The AB's thinking was flawed. The effect on a person of unfairness, of stress and of years of delay is not a matter for objective analysis. The effects should be considered subjectively as every individual will react differently to circumstances. Yet here, the AB had commissioned an objective analysis. The career manager providing the objective assessment did not know [the Claimants] and had not spoken to [them]….. The task of the AB was to consider whether [they] had been treated unfairly, which it so found; then to go on to consider what

> that unfairness had on the balance of probabilities caused. In tort, it is the 'eggshell skull principle': *Smith v Leech Brain* [1962] 2 QB 405.…Instead, the AB sought to imagine how a notional senior [NCO] ought objectively to have reacted based on the annual appraisals they received without…consider[ing] what it was like to be [the Claimants] in all the circumstances – and put itself into [each of their shoes]. The test that the AB applied is…novel and to the extent that it was exploring the extent that that [the Claimants] mitigated [their loss] (to describe the idea from tortious principles) then [they] should have been heard."

I consider below whether the Claimants 'should have been heard' under the 'oral hearing' and 'fair warning' issues – what matters for now was whether the AB applied the wrong test. Mr Dingle's basic point was the AB erred in approaching the issue objectively rather than 'subjectively': as he said in his skeleton:

> "The proper approach to the reasonableness of a decision to leave the RAF following the unfairness, delay and stress visited on the Claimant in the circumstances was to examine the matter subjectively taking the victim of the maladministration as the Defendant found them..: *Smith v Leech Brain*."

115. However, the 'eggshell skull' analogy is not relevant to whether post-resignation losses would be 'appropriate redress' under s.340C AFA / Regs.9/13 SC Regs, nor indeed Mr Dingle's 'subjective/objective' distinction in 'reasonableness'. After all, as Lord Scott explained in *Corr* at [29], the 'eggshell skull principle' in *Leech Brain* relates to remoteness of damage in negligence and particularly, *what* damage needs to be reasonably foreseeable. *Leech Brain* confirmed that if the *kind* of damage was foreseeable, the *extent* of damage need not be, as a tortfeasor must 'take their victim as they find them', including any latent vulnerabilities. Further, in *Corr*, Lord Scott noted that *Page v Smith* [1996] AC 155 (HL) had decided physical and injury and psychiatric injury were the same 'kind of damage', so if physical injury were foreseeable from negligence, any resulting psychiatric injury need not be separately foreseeable. As Lord Lloyd said in *Page:* 'there is no difference in principle between an eggshell skull and an eggshell personality'. However, whilst *Grieves* was not referred to in *Corr* (although Lord Scott sat on both cases), in *Grieves* the Lords effectively limited *Page* to that principle – so that where a physical injury was *not* foreseeable from negligence, then psychiatric injury was only recoverable if it was *in itself* foreseeable. Indeed, in *Grieves* Lord Hoffmann gave 'stress at work' cases as analysed in *Hatton* as an example of that principle. However, turning back to the present cases, 'the kind of damage' the Claimants suffered has nothing to do with whether 'redress' of post-resignation losses is 'appropriate', especially where personal injury claims are excluded from being service complaints at all.

116. However, in argument both Counsel focussed more on tortious causation which applies beyond personal injury claims. The word 'caused' was also used by the AB in the challenged passage. Counsel debated whether the resignations here were a 'new intervening act or cause' (in Latin a *'novus actus interveniens'*). This is why I referred them after the hearing to *Corr,* where Lord Bingham said at [15]:

> "The rationale of the principle that a *novus actus interveniens* breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage caused to the claimant not by the tortfeasor's breach of duty but by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible. This is not the less

> where the independent, supervening cause is a voluntary, informed decision taken by the victim as an adult of sound mind making and giving effect to a personal decision about his own future."

In *Corr* at [16], Lord Bingham explained that in that case, Mr Corr's suicide was not such a voluntary act by an adult of sound mind. However, he went on to observe at [17] that conclusion also addressed a distinct but entirely overlapping argument for the employers – that Mr Corr's suicide was an 'unreasonable act':

> "In *Simmons v British Steel Plc* [2004] ICR 585 at [67], Lord Rodger refers to both a *novus actus interveniens* and unreasonable conduct on the part of the [claimant] as potentially breaking the chain of causation. No doubt there is room for a theoretical distinction between the two. But [for] the reasons I have given for holding the suicide of the deceased not to be a *novus actus*, I would find it impossible to hold that the damages attributable to the death were rendered too remote because the deceased's conduct was unreasonable

Indeed, the main case Lord Rodger was referring to in *Simmons* at [67(2)] for these overlapping principles was *McKew v Holland* [1970] SC 20 (HL) at pg.25 where Lord Reid said the unreasonable act of a claimant *was itself* a '*novus actus interveniens*' breaking the chain of causation. However, that is not so if a resignation is a reasonable response to an employer's repudiatory breach of contract - the employee's cause of action survives his own act: c.f. *Eastwood* at [27]. After I raised *Corr*, in written submissions Mr Dingle relied on this 'unreasonable act' test and submitted it showed that 'unreasonableness' did not apply here, especially as the AB had not challenged or investigated their accounts.

117. As discussed above on 'the stress issue', I accept that both Claimants experienced stress and had sick leave due to the mishandled and delayed service complaints against them. However, their cases are very different from *Corr* - I repeat, neither were bringing personal injury claims for psychiatric injury caused by the Defendant prompting their resignations. As Mr Dingle accepted, on tortious principles, whether their resignations were a 'new intervening cause' of loss from the maladministration and delay of the service complaints against them depended on whether their resignations were 'unreasonable'. However, that brings us back to the AB's challenged analysis: 'we also concluded it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances'. Since the 'no choice other than to leave' aspect came from the Claimants, this was in effect the AB finding 'unreasonableness': close to the principles discussed by Lord Bingham in *Corr* at [15]-[17]. Of course, whether the AB were *entitled* to reach that conclusion is a different point I consider below.

118. There is also an analogy between the AB's 'reasonableness test' and mitigation, again overlapping with causation and remoteness. Indeed, in *Morris,* Schiemann LJ noted the overlap at [14] and at [15] said whilst the burden of proof was on the claimant for remoteness and defendant for mitigation, if positive findings were made, the burden of proof did not arise. On mitigation, he added at [16]:

> "The crucial question is whether, in respect of the period in issue, it is just that she should recover damages from the tortfeasor. If she was at fault in losing her new job, then she will have difficulty in recovering for the period in issue. If she was not at fault, then in general she will recover. The question whether she was at fault is one which in principle the trial judge should resolve bearing in mind that

> it was the wrongful act of the defendant which put the claimant in the position of having to find a new job and that therefore she should not be judged too harshly."

By 'fault', Scheimann LJ meant what he went on to quote in *Morris* at [16] that Sachs LJ said in the unreported decision of *Melia v Key Terrai*n (1969) (CA):

> "As between a claimant and a tortfeasor the onus is on the latter to show that the former has unreasonably neglected to mitigate the damages. The standard of reasonable conduct required must take into account that a claimant in such circumstances is not to be unduly pressed at the instance of the tortfeasor… [T]he claimant's conduct ought not to be weighed in nice scales at the instance of the party which occasioned the difficulty."

The AB's conclusion that 'it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances' is close to – but again not identical to - a 'mitigation of loss' approach in tort (or indeed, contract) and as a positive finding, the 'burden of proof' is irrelevant (*Morris*). In short, I do not accept the AB's 'reasonableness' test was 'novel' and so wrong.

119. In any event, more fundamentally, I agree with Mr Talalay that whilst Annexes A and B may borrow analogies from common law, it would be 'wrong in law' to 'transplant root and branch' common law principles into a statutory concept. In *R(Miller)* at [67]-[82], Ryder LJ stressed that in evaluating whether a clinician had committed 'maladministration' in their clinical judgment, the Health Ombudsman did not necessarily have to apply the classic *Bolam* test, provided the alternative was rational (which it was not in that case). Closer to home, when considering the meaning of 'redress' in s.180 Army Act 1955, the predecessor of s.340C AFA and Regs.9/13 SC Regs, Nicol J said in *R(Crosbie)* at [72] that 'redress' is a different to 'rules of law which determine what legal remedies a court must grant if an appropriate private law cause of action is proved'. Indeed, that leads back to Langstaff J's analysis of 'appropriate redress' in *R(Wildbur)*:

> "13. My task is to determine if the decision which the Panel reached is unlawful. It would be so….if the Panel had misconstrued the statute so as to misapply it; or, if properly construing and applying the statute, it had reached a decision which was *Wednesbury* unreasonable which, for these purposes, I take as meaning that it took into account a factor which it should not have taken into account or failed to take into account one which it was obliged to; or reached a decision which no reasonable panel in its position could have reached: in other words, a perverse decision, one which, as it has been described in other cases, flies in the face of reality.
>
> 14. The fact a differently composed body may quite reasonably have reached a different result is irrelevant to the question whether this Panel erred….it is of the nature of decisions involving the exercise of judgment that they may very well be made differently by different panels, and most decision-making bodies have a wide range within which a proper decision may be reached even though views may be strongly held on both sides…
>
> 18. As to the statute, the words are….deliberately chosen. The significant words in [then s.334(8) AFA] are 'redress (if any)' and 'appropriate'. It is common ground between the parties that the decision as to whether any and, if so, what 'redress' is 'appropriate' is for the Panel. No objective standard exists against which to measure it save that it must not be irrational.

> 19. As to the word 'redress', I accept that it is undoubtedly not limited to financial compensation. It may be wider. It seems to me….that the closest analogy is not that of compensation for such as unfair dismissal or for a tort arising in employment, but probably with the resolution of a grievance procedure operated by an employer within employment. In common with those hearing a grievance, within the powers of management [and] the powers granted to officers….there is a wide range of measures…
>
> 20. The word 'appropriate' is a change from a word which I am told was used in [the Army Act 1955 as in *R(Crosbie)*]; it was then 'necessary'. It suggests that there must be a clear relationship between the redress which is offered and the wrong which has been suffered. However, it is again a phrase which is wide and which, as I have observed, is at the outset for the decision-making body itself to identify. Provided… the decision is within… the *Wednesbury* test (as I have expressed it), there can be nothing wrong.."

120. So, the question of what is 'appropriate redress' is a matter for the evaluative judgment of the decision-maker, subject to the 'rationality' ground of judicial review that Langstaff J summarised in *R(Wildbur)*. However, it must also be consistent with policy unless there is a good reason (*Mandalia*), including in Annex B 'so far as is possible restoring the wronged party to the position they would have been in had things been done correctly' but not providing a financial advantage and ensuring redress is 'fair, reasonable and proportionate' to the damage suffered. Here, the AB's 'reasonableness test' was close (and needed to be no more) to the analogies of tortious causation and mitigation of loss. Moreover, it held a fair balance between objectivity and subjectivity. On objectivity, whilst the decision to resign is for the individual, the DB/AB must be able to decide whether it was objectively 'reasonable' – otherwise they would be required to redress 'unreasonable' losses, which would be irrational. Having said that, as Mr Dingle says, it would not be rational to apply a purely objective test such as 'a reasonable NCO'. What is objectively 'reasonable' for a person to decide depends on their own circumstances and beliefs – as the law recognises in a number of fields from crime to employment law. However, the AB here did not fall into that error as they applied their 'reasonableness test' to the Claimant's own beliefs and what they had said: as the AB put it (my emphasis), 'it was not reasonable for *you to believe that you had no choice other than to leave the RAF* under these circumstances'. That rightly focussed on the objective reasonableness of the Claimant's subjective beliefs in their own particular circumstances. So, the real issue is whether the AB rationally reached that conclusion in each case.

Was the AB rational in concluding it was not reasonable for the Claimants to leave ?

121. It is important to start this topic by clearing up something also relevant to the procedural fairness challenges which I consider next. The Claimants complain the AB rejected post-resignation losses even though Gp Capt Page's statement said the AB did not seek to challenge their account. But what he said was:

> "We did not disbelieve the First Claimant's account that her reputation had suffered and we did not seek to challenge her account. However, the objective evidence did not lead us to this conclusion….[and w]e did not think that the [Second] Claimant was wrong in his belief, therefore we did not consider an oral hearing was necessary in the circumstances."

Therefore, the AB differentiated between the *subjective beliefs* of the Claimants which it respected and did not challenge and the *objective evidence* about the situation. That is one reason why it is helpful to differentiate between two of the AB's conclusions in the challenged passages. The first is what I have called the AB's 'factual' conclusions that the maladministration had not caused 'significant' (the First Claimant), still less 'irretrievable' (the Second Claimant) damage to their careers. The second is what I have called the AB's 'evaluative' conclusion that 'it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances'. I will deal with each of those in turn.

122. On the rationality of *factual* conclusions under challenge, the Administrative Court on judicial review affords considerable leeway to the decision-maker. In *R(Wildbur)* at [37] Langstaff J referred to the familiar words (which I emphasise) of Lord Brightman in *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484 at 518E:

> "Where *the existence or non-existence of a fact* is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave *the decision of that fact* to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious the..body consciously or unconsciously, are acting perversely."

Having said that, the Court can still investigate the existence of facts, as Lord Wilberforce said in *Tameside* cited by Mitting J in *R(Crompton),* mentioned above. In summary, if a judgment requires the existence of facts, whilst their evaluation is for the decision-maker, the Court can still inquire whether the facts exist. As a matter of *substance*, the AB's *factual* judgment that maladministration and undue delay etc had not caused 'significant' damage to the First Claimant's career or 'irretrievable' damage to the Second Claimant's career was not only not 'perverse', it was plainly right. The objective career information which the AB had obtained was different from the information the DB had before it and entirely justified a different conclusion. (Indeed, the DB itself equivocated in the First Claimant's case between causation of 'significant damage to career prospects' and 'implications' for it). The DB had made no mention of the Claimants' consistently good SJARs and did not make any inquiries of their career manager, Sgt Davis. Since the Claimants' promotion and career trajectory was in the hands not of themselves but the RAF itself, he was in a more objective and specialised position than they were to understand their own realistic career prospects. He assessed those as remaining good notwithstanding the service complaints against them - that were largely rejected (and ignored by the SJARs).

123. The AB's *evaluative* judgment - whether it was 'reasonable for the Claimants to believe they had no choice other than to leave the RAF under the circumstances' – is different. As Langstaff J explained in *R(Wildbur)* at [13]-[14] quoted above, this is reviewed on a '*Wednesbury* rationality' basis of either 'perversity' in the *Puhlhofer* sense, *or* (as Langstaff J said) whether the decision-maker took into account a factor it should not have or failed to take into account one which it should have done. But as he added in *R(Wildbur)* at [14], it did not matter that others might have made the decision differently. He elaborated at [38]-[39]:

> "*Since the decision in the present case is not perverse, the question remains whether in its approach to making it the Panel took into account that which it should not, or left out of account that which it should have considered*. Here, the

> statute does not prescribe any particular procedure which the Panel is required to adopt. It is in that respect, too, analogous to a panel of managers hearing a grievance arising in employment: there is nothing that statute or regulation requires should be taken specifically into account. In *Newham LBC v Khatun* [2004] EWCA Civ 55…[at [34]] Lord Justice Laws cited…Lord Scarman in *Re Findlay* [1985] AC 318 (HL) at 333F - 334B: 'If those challenging the approach of a decision maker could not show some factor which statute or regulation required to be taken into account, they would have to demonstrate 'matters so obviously material to a decision on a particular project that anything short of direct consideration of them ..... would not be in accordance with the intention of the Act'…..Laws LJ said at [40] that the procedures he was considering in that case, in relation to the making of a decision by a council, were obviously not perfect and observed: *'...A more intensive fact-gathering exercise would or might well have picked up the problems…' Nonetheless he concluded that the procedures could not be categorised as inadequate so as to violate the common law standard of rationality'.* In short, in determining what other factors might be taken into account, he adopted both an exacting standard in assessing any such violation and a wide margin of discretion." (my emphasis)

Here, s.340C AFA and Regs,9/13 SC Regs do not require any factor to be taken into account on 'rationality' other than 'appropriate redress' and 'authority', but I bear in mind the statutory purpose to redress complaints of servicepeople who cannot bring non-discrimination claims in the Employment Tribunal. However, the issue is not whether I consider the Claimants' resignations were reasonable, but whether the AB were rationally entitled to conclude that they were not, even if a different decision-maker might have reached a different view. (Ironically, this is not so very different from the 'range of reasonableness' approach to unfair dismissal, also not a perversity test: *Foley v Post Office* [2000] ICR 1283 (CA)). However, s.31(2A) SCA is very different from unfair dismissal (c.f. *Polkey*):

> "The High Court— (a) must refuse to grant relief on an application for judicial review….if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred…."

However, the expression 'substantially different' means what it says, rather than importing any limitation on s.31(2A) SCA to purely 'procedural' rather than 'substantive' complaints: *R(Goring PC) v SODC* [2018] 1 WLR 5161 (CA) [47].

124. In the Second Claimant's appeal statement (quoted above), he said 'with how the SCs were (mis)handled and he was being treated, he could not go on any longer and felt he had no choice but to leave for the good of his mental health and wellbeing'. In my judgement, even on the more exacting rationality standard in *R(Wildbur)*, the AB were entitled to find that it was not reasonable for him to believe he had no choice other than to leave the RAF in the circumstances:

    a. Firstly, it was the Second Claimant himself who said he had 'no choice' but to leave the RAF in those circumstances. The AB simply decided it was not reasonable for him to believe that in the circumstances. That was partly based on their (rational) finding about career damage. I accept his mental health is a relevant factor to reasonableness which the AB did not specifically mention. However, the AB took that factor into account in the very same paragraph when

assessing the non-quantifiable payment and I do not accept they ignored it on 'reasonableness' even if not stated explicitly.

b. Secondly and in any event, the AB also relied on the fact that the Second Claimant had resigned before the service complaint process against him was ongoing. Of course, some decision-makers may have said he was reasonable to leave to improve his mental health, but it was open to the AB to take into account on 'reasonableness' his leaving prior to the end of the process, especially as the findings later made 'were not career limiting' and the AB's (rational) finding he did not sustain 'irretrievable career damage'.

c. Indeed, even if I am wrong about that, here it does seem that s.31(2A) SCA bites. Even if the AB had not applied a 'reasonableness' approach, it is highly likely they would have found on the facts that (i) the Second Claimant had not suffered 'irretrievable damage to his military career' as he believed; and that (ii) even making allowances for his mental health, he did still have a legitimate 'choice' rather than to resign – i.e. to await the outcome of his service complaint. In those circumstances, I find the AB would still (and rationally) have reached the same conclusion on the Second Claimant's post-resignation losses. But I emphasise this is only an alternative finding.

125. The First Claimant's position is more complex. Not only did the AB reach a different conclusion than the DB's (initial) conclusion in her case, the First Claimant gave a more reasoned argument about 'career damage' in her statement and about 'stress' relevant to 'reasonableness' the AB did not challenge:

> "This whole process has been extremely stressful… The way I have been treated has significantly damaged my career and promotion prospects. Before the SCs I was competitive for promotion but in the 3 yr period of the SCs, I was not competitive at all….. As soon as the SCs were finalised I became competitive again. Although I had expected to serve the next 14-15 yrs. in the RAF, for the sake of my mental health I felt that I had no choice but to Early Terminate from the RAF and I submitted by application for ET in July 2021. The SCs still had not reached a conclusion but I felt I had no choice if I was to get an improvement in my mental health."

Yet in my judgement, whilst it may be that other ABs might not have come to this conclusion, the AB were rationally entitled to find it was not reasonable for her to believe she had no choice other than to leave the RAF in the circumstances:

a. Firstly, the AB's conclusion was built upon its rejection of one of the key planks in her appeal – that the mishandling of the service complaints against her had 'significantly damaged her career and promotion prospects'. I do not accept Mr Dingle's criticism that it wrongly focussed on 'potential not actual damage', as I have said, as a matter of *substance* on the information before it, the AB were entitled to conclude there was no *significant* actual damage. As the First Claimant said herself, after the SCs were finalised (unlike for the Second Claimant, before the First Claimant left, although she had already applied for Early Termination), she 'became competitive again'. Whilst the AB did not say this in terms, it was entitled to take it into account on the 'reasonableness' of her belief that 'she had no choice but to leave'.

b. Secondly, it may have been better if the AB had explicitly addressed the First Claimant's stress as relevant to the 'reasonableness' of her resignation. Indeed, it

may be other ABs would have decided that meant her resignation was reasonable. Nevertheless, the AB specifically referred to the issue of stress – and not only in making the non-quantifiable payment, but in analysing the DB's decision. Just as with a judge's judgment, it is wrong to assume a factor has not been considered on one point just because it is not mentioned, when it has been mentioned on another. While the First Claimant contended that the service complaints against her had damaged her health, she did not say that her stress had affected her judgement – she said she resigned to *improve* her health. Given the AB clearly did consider her stress in its reasoning, in my judgement it cannot be said that its 'reasonableness' decision was irrational for not explicitly linking her stress at the time to it.

c. Thirdly, moreover, the AB did explicitly mention the very limited findings of the service complaints, which it again described as 'not career limiting'. Whilst the First Claimant was unhappy about those modest findings about her 'leadership style', this demonstrated that for all its flaws, the service complaint process had exonerated her of the more serious allegations.

d. Fourthly, whilst I accept the First Claimant may well have suffered reputational damage from breaches of confidentiality in the SC process, that does not mean she was 'reasonable' to consider that an RAF career was 'untenable' as Mr Dingle submitted, especially after she was largely exonerated. The AB were entitled to find her view about it 'not reasonable'.

e. Finally, even if I am wrong about that, again I consider that s.31(2A) SCA bites. Even if the AB had not applied a 'reasonableness' approach and simply examined whether the First Claimant's reasons for resignation were established, it is highly likely they would have found that (i) she had not in fact suffered 'significant damage to her career' as she believed; and that (ii) even making allowances for her mental health, she did still have a legitimate 'choice' rather than to resign, especially after effective exoneration on her service complaint which concluded before she left.. In those circumstances, I find the AB would still (and rationally) have reached the same conclusion on the Second Claimant's post-resignation losses. However, again this is only an alternative finding, not my primary finding.

I dismiss Ground 6 of the Claimants' challenges to the substance of the AB's 'reasonableness' decision and turn to the procedural challenges in Grounds 1-5.

Did fairness require the AB to have oral hearings for either or both Claimants ?

126. Whilst Ground 1 is the 'oral hearing' challenge and pleaded as the main ground, I said when granting permission that it was not the strongest of the Claimant's grounds. Having heard the argument, I remain of that view. In an already over-long judgment, I shall therefore deal with it relatively briefly. However, the oral hearing argument is of interest not only in the context of 'redress issues', but also because it leads directly into what I consider is the strongest argument for the Claimants – the 'fair warning' point. Also, it is an opportunity to look again at the guidance in *R v Army Board exp Anderson* [1991] 3 WLR 42 (DC) which Nicol J in *R(Clayton) v Army Board* [2014] ACD 110 (HC) said save in one respect 'had stood the test of time'. Both were applied still more recently by Ellenbogen J in *R(Ogunmuyiwa) v Army Board* [2022] ACD 96 (HC). However, in neither of the latter two was the Court referred to the Supreme Court's guidance on oral hearings in *Osborn v Parole Board* [2013] 3 WLR 1020, which is why I raised it in my decision when granting permission. In my view, the

Anderson approach still holds good but needs to be seen in the contemporary context explained in *Osborn*: it is the same picture, but in a new frame.

127. At the time *Anderson* was decided, as discussed above, servicepeople could not bring claims for discrimination in (then) Industrial Tribunals at all. Mr Anderson was a solider who was racially abused. He raised a service complaint alleging discrimination, but it was peremptorily dismissed, in part because some of those involved had been disciplined. In quashing that decision, Taylor LJ and Morland J (ably assisted by Counsel - Sedley LJ and David Pannick KC as they later became) found comprehensive unfairness (an aspect of which I return to on 'fair warning'). On the issue of oral hearings, Taylor LJ said not all discrimination complaints would require oral hearings, but said this more generally at pg.55-56:

> "(2) The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute, are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing…Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made. It will also depend upon whether there are substantial issues of fact which cannot be satisfactorily resolved on the available written evidence. This does not mean that whenever there is a conflict of evidence in the statements taken, an oral hearing must be held to resolve it. Sometimes such a conflict can be resolved merely by the inherent unlikelihood of one version or the other. Sometimes the conflict is not central to the issue for determination and would not justify an oral hearing. Even when such a hearing is necessary, it may only require one or two witnesses to be called and cross-examined…. (3) The opportunity to have the evidence tested by cross-examination is again within the Army Board's discretion. The decision whether to allow it will usually be inseparable from the decision whether to have an oral hearing. The object of the latter will usually be to enable witnesses to be tested in cross-examination, although it would be possible to have an oral hearing simply to hear submissions..."

128. In *R(Clayton)*, the factual context was very different. The complainant contended that owing to mismanagement, he had not been promoted as he should have been. Under the original s.334 AFA (the same scheme as in *R(Wildbur)* before the amendments in the 2015 Act), there was a three-tier process. The lower level decision-makers thought the complaint had merit but (back then) did not have the delegated authority to grant the redress of promotion and back pay (as mentioned above). However, at Level 3, the complaint was dismissed on paper on the basis that whilst the complainant had not had an appraisal, he had been insufficiently proactive on his own career progression. In upholding the absence of oral hearing on the basis there was no significant contested issue of fact, Nicol J said:

> "22…[In *Anderson*] observed (also at p.187) that, 'The Army Board as the forum of last resort, dealing with an individual's fundamental statutory rights, must by its procedures achieve a high standard of fairness. I would list the principles as follows' and the passage quoted [(2) above] was then one of those principles. It is not entirely clear whether the Court was intending to limit its enunciated

> principles to cases where the Army Board was only dealing with fundamental statutory rights. If that was so, then I would agree that the common law has moved on. …This is not to say that the subject matter of the complaint is irrelevant to the question of whether fairness requires an oral hearing.
>
> 23. That apart, the statement in *Anderson* as to when the common law principles of fairness require an oral hearing has stood the test of time. Thus, for instance, in *R (Smith) v Parole Board (No.2)* [2004] 1 WLR 421 at [37] Kennedy LJ said that an oral hearing should be ordered where there is a disputed issue of fact which is central to the board's assessment and which cannot fairly be resolved without hearing oral evidence. The same approach was adopted in *R (Thompson) v the Law Society* [2004] 1 WLR 2522 (CA).
>
> 24.….Despite the Claimant not asking for an oral hearing, the Panel considered whether fairness required one. If they erred in law in answering that question, I would not have thought it right to deprive the Claimant of a remedy because he himself had not raised the matter."

129. In *R(Ogunmuyiwa),* the factual position was very different yet again. This time, there were hotly-contested disputes of fact about whether the complainant had been 'bullied' by an NCO, where the DB rejected the complainant's account and the AB agreed without an oral hearing. In finding that and various other conduct was unlawful (including the personal injury point discussed above), Ellenbogen J referred to *Anderson* and *R(Clayton)* and summarised the principles at [88]:

> "There is no dispute that the Appeal Body was not mandated, whether by the regulations or [JSP 831], to receive oral evidence; the issue was a matter for its discretion. But that discretion had to be exercised in an appropriate way. As *Clayton* makes clear at [20], citing *Anderson*, whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made. Such a hearing will not be necessary if there is an inherent unlikelihood of one version of events, or where the conflict of evidence is not central to the issue for determination. That is echoed by paragraph 30 of JSP 831: *'Straightforward cases involving no substantial conflicts of evidence on any material issue or difficult points of law may be less likely to require an oral hearing.'* The corollary of that position was set out in *R (Smith) v Parole Board (No.2)* (cited at paragraph 23 of *Clayton*), in which Kennedy LJ stated that an oral hearing should be ordered where there is a disputed issue of fact which is central to the board's assessment and which cannot fairly be resolved without hearing oral evidence. Ultimately, the question is whether the hearing of oral evidence was required in order to achieve the degree of fairness appropriate to the Appeal Body's task and irrespective of whether such a hearing had been requested."

130. The same guidance on oral hearings in JSP 831 still appears, but for ABs it says:

> "35. There is no obligation to hold an Oral Hearing (OH) in any case. A Complainant may request an OH but the final decision lies with the AB.
>
> 36. The complexity of the Service Complaint and its potential wider implications may be considerations to be included in coming to a decision on whether to hold an OH. Similarly, an OH may involve no more than asking the Complainant to state the Service Complaint in person, but might involve others concerned.

> Straightforward Service Complaints involving no substantial conflicts of evidence on any material issue or difficult points of law may be less likely to require an OH….
>
> 39. Any relevant documents will be considered as well as oral evidence. Evidence is not taken on oath and witnesses may be questioned by the AB considering the Service Complaint and by the Complainant or a representative. The hearing should be investigative rather than adversarial. The Complainant, Respondent or a representative may address the AB and may submit documentary evidence. Witnesses may also be called to give oral evidence based on their witness statement…."

131. However, whilst these principles remain valid, in my judgement they now need to be placed in the contemporary context of procedural fairness explained by Lord Reed in *Osborn*. That was not only a different factual context, but a different legal one: whether prisoners were entitled to oral hearings to adjudicate whether they could be released or transferred to open conditions (although that was the same context as *R(Smith)* which was still cited in *R(Clayton)* and *R(Ogunmuyiwa)*). Therefore, some of Lord Reed's discussion in *Osborn* of factors indicating the need for an oral hearing are inapposite, e.g. assessment of risk or the 'screening assessment' for oral hearings. However, at [1] he set out some general guidance:

> "(ii) It is impossible to define exhaustively the circumstances in which an oral hearing will be necessary, but such circumstances will often include.... (a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation……... (c) Where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him….
>
> (iv) The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him where he has something useful to contribute.
>
> (v) The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of [success] and cannot be answered by assessing that likelihood…..
>
> (viii) The board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense."

132. In *Osborn*, that guidance about oral hearings was underpinned by Lord Reed re-examining some of the fundamentals of procedural fairness in judicial review itself at [54]-[72]. It should be required reading for any public lawyer, but an already over-long judgment I will just inelegantly summarise it - in reverse order, but perhaps in ascending order of fundamental importance to procedural fairness:

    a. Firstly, to pick up on that point at [1(viii)] of *Osborn*, Lord Reed at [72] warned against 'easy assumptions' that oral hearings were not cost effective, since as they

improve decision-making, they may avoid future hidden costs.

b. Secondly, at [71], Lord Reed explained that procedural fairness which encouraged decision-makers to listen to the people they made decisions about promoted congruence between their actions and the law.

c. Thirdly, developing his point at [1(ii)(c) and (iv),] Lord Reed emphasised the importance of not just better decision-making, but also avoiding a sense of injustice in the individual. This is best encapsulated in Lord Hewart's maxim: 'Justice must not only be done, but also must be seen to be done'.

d. Fourthly, at [65], Lord Reed clarified that unlike *Wednesbury* irrationality, procedural fairness is assessed by the Court itself. As he said:

> "The Court must determine for itself whether a fair procedure was followed… Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required."

e. Fifthly, at [54]-[63], Lord Reed stressed that the primary source of the principles of procedural fairness remains the common law not the ECHR.

133. Indeed, applying Lord Reed's guidance in *Osborn* generally to service complaints in the light of *Anderson, Clayton* and *R(Ogunmuyiwa)*, I would observe that:

a. As originally stated in *Anderson*, whether fairness requires an oral hearing still depends on the particular case and is a decision for the DB/AB. To that extent JSP 831 para 35 is correct (see *R(A)*). However, if that decision is judicially reviewed, what fairness requires is determined by the Court itself, not on a 'rationality' basis, so in that sense the DB/AB decision is not 'final'.

b. The paradigm oral hearing remains, as said in *Anderson,* one with a core factual dispute where credibility is in issue exemplified by *R(Ogunmuyiwa*). However, as also said in *Anderson* and exemplified by *R(Clayton)*, if any dispute of fact is not central, or can be fairly determined on documents or inherent unlikelihood, fairness will still not require an oral hearing. JSP 831 para.36 has reflected not changed this in saying it is less likely to be needed.

c. However, even where there are no core factual disputes, procedural fairness may now more often require oral hearings where necessary to enable the individual to participate fairly in the process – as Lord Reed put it in *Osborn* 'to put his case effectively or to test the views of those who dealt with him'. Another pointer to oral hearings given in JSP 831 para.36 (although it is not a rule which must be followed unless there is good reason (*Mandalia*)) is where a service complaint is particularly complex or has wider implications.

d. Whilst *Anderson* was discussing service complaints of discrimination at a time when there was no access to the Employment Tribunal, the fact there is now access does not mean the guidance is out of date in such cases, because the statutory purpose of s.120 EqA is still for the disputes to be resolved internally if possible. Moreover, the advent of the ECHR since *Anderson* may mean changes in other fields on oral hearings under Art.6 ECHR (or in parole under Art.5 ECHR), but even there *Osborn* shows the common law remains dominant. That is particular so with service complaints as Art.6 (generally) does not apply to them – *R(Clayton)*.

e. Finally, as JSP 831 para.36 and 39 state and as mentioned back in *Anderson*, 'oral hearings' are not 'one size fits all', requiring cross-examination of multiple witnesses, submissions and all the paraphernalia of civil litigation. That may be appropriate where there are highly contentious factual disputes and credibility of one or more witnesses and/or the complainant is in issue. However, in cases where fairness requires an oral hearing for other reasons, it may only require an opportunity for the complainant to give submissions without cross-examination; and indeed, it could be 'remote'. That is another reason not to make simplistic assumptions about the cost of oral hearings.

134. Against that background, I can turn back to this case. In various grounds of challenge, the Claimants maintain their joint argument that fairness did require an oral hearing (potentially a joint one as with this case) for the following reasons:

a. Firstly, both Claimants also maintain that fairness required an oral hearing for there to be a proper assessment of their complex post-resignation losses as set out in detail by their solicitors in their appeals.

b. Secondly, both Claimants maintain there were factual disputes where at least their own credibility or evidence was in issue about (i) their reasons for leaving the RAF; (ii) whether they believed they had no choice but to leave; (iii) whether that was 'reasonable'; (iv) whether the mishandling of the service complaints against them had 'significantly' or 'irretrievably' damaged their military careers and prospects of promotion and (v) the weight to be given to the information from Sgt Davis about that.

c. Thirdly, the First Claimant maintains that fairness also required an oral hearing in her case on the issue of her medical downgrading and stress; and on the change from the DB's conclusion about it to the AB's conclusion.

In oral argument, Mr Dingle really put these submissions in the alternative. He contended they justified an oral hearing, but if not, they cried out for a further opportunity to make representations on these points having seen the AB's provisional views. This illustrates how the Claimants' 'oral hearing' challenge leads naturally into their 'fair warning' challenge, which I consider in a moment.

135. However, Mr Dingle's wise forensic approach reflected I think that he recognised that most if not all of the points the Claimants wanted to make could have been made if the AB had invited written representations on 'reasonableness'. Of course, I will consider in a moment whether the absence of that was unfair, but it is entirely clear the absence of *oral hearings* was not unfair to either Claimant:

a. Firstly, the Claimants would have only needed an oral hearing to quantify their post-resignation losses if the AB had been satisfied that to do so would be 'appropriate redress' in the first place. The AB did not (and for the reasons already given was entitled to do so subject to the points on fairness below). Moreover, there is a precedent for a 'in principle first' approach – and once again it is *R(Wildbur)* at [25]-[32], where Langstaff J rejected the criticism of the decision for not making inquiries as to the extent of losses and deductions or setting out the detail of calculations and – as he said, the Panel was making the decision of principle first. So too was the AB here.

b. Secondly, as Mr Talalay submitted, none of the suggested 'disputed facts' are the sort of central disputed facts turning on credibility where fairness would require

an oral hearing. Even the dispute about career damage and Sgt Davis' evidence about it was not a true 'core factual dispute' – for the reasons discussed it was a dispute between his *facts* and the Claimants' *belief*s – rather like the situation on contested promotion in *R(Clayton)*. In any event, the Claimants had an opportunity to comment on his evidence. As to the Claimants' reasons for resigning and their 'reasonableness', as Gp Capt Page said, they did not dispute the Claimants' beliefs, but did evaluate their 'reasonableness' against the objective evidence. That did not require an oral hearing, even if written representations on the point may have been of value (to which I return on the 'fair warning' issue). Moreover, it would have enabled these Claimants (neither of whom had any difficulties in articulation or ongoing mental health issues) to put their cases fully.

c. Thirdly, it is true that the First Claimant has perhaps a slightly better argument for an oral hearing – the impact of stress and mental health on her medical downgrading and change in decision on that issue between the DB and AB. However, there was no factual dispute about what happened – only about whether it caused 'significant damage' – on which there was no clash of evidence – the AB just investigated evidence which the DB had not. Indeed, one of the reasons the AB did so was because the DB had equivocated. Therefore, an oral hearing would have added little to written representations. Whether the absence of the opportunity to provide those was unfair goes to the 'fair warning' issue which is the last issue before me.

In summary, it was not unfair to either Claimant not to hold an oral hearing. Even if I am wrong about that because of the importance of justice being seen to be done by the Claimants, applying s.31(2A) SCA, it is entirely clear for the reasons stated, an oral hearing would not have made any difference. As Gp Capt Page explained, the AB preferred objective evidence over the subjective beliefs of the Claimants – that would not have been any different if they had heard them articulate those beliefs in an oral hearing. Indeed, I would go so far as to say that this point is a paradigm use of the 'no substantial difference' rule in s.31(2A) SCA. I therefore dismiss Ground 1 of each challenge. This therefore leaves only the 'procedural' aspect of Grounds 2-5, to which I finally turn.

Did fairness require 'fair warning' of the AB's view so the Claimants could reply?

136. I will first analyse and deal briefly with the parts of those grounds which were not pursued or fall away in the light of what I have already decided – and show how what remains is the 'fair warning' challenge on the issue of the AB's 'reasonableness' test. Then I will set out the relevant legal principles to that challenge and on s.31(2A) SCA, drawn from cases Counsel cited and other I referred to when granting permission. Then I set out my conclusions, including on that 'no substantial difference' argument relating to the 'fair warning' issue.

Grounds 2-5

137. As mentioned above, I granted permission in part on the understanding - especially from Ground 5 - that the AB had obtained the SJARs and spoken to Sgt Davis without giving the Claimants the opportunity to comment. That would clearly have been procedurally unfair. However, it is now clear they *were* able to comment, albeit the First Claimant simply highlighted the positive aspects and the Second Claimant did not

address this issue at all. Perhaps, because they knew the AB was re-investigating, their main focus in response were their allegations of maladministration and delay, not the issue of its impact on their careers. In any event, contrary to what Ground 5 alleges, the Claimants' comments were taken into account, but they did not really address the relevant evidence, despite being given the chance to do so. Moreover, far from these inquiries showing the AB had a 'closed mind' or was 'biased', they were clearly neutral inquiries on a relevant point – career damage - on which the DB had equivocated, as I said. These inquiries were a world away from the unambiguous predetermination of a complaint against doctors by the Health Ombudsman in its 'draft report' in *R(Miller)* (which I discuss in more detail below on procedural fairness as both Counsel addressed me at length on it orally and in writing). Sensibly, Mr Dingle did not really pursue Ground 5 and I dismiss it. However, insofar as the points within it overlap with the 'fair warning' issue, I will still address them.

138. I can also deal with Ground 4 briefly. It is expressed quite differently as between the Claimants. Under this Ground, the First Claimant challenges the AB's failure to give weight to her evidence or to obtain further evidence from her on the various heads of loss in her appeal. However, as discussed in relation to the oral hearing issue, that was unnecessary if the AB was deciding first the principle of whether any post-resignation losses would be recoverable – as was done in *R(Wildbur)*. As discussed, at [25]-[32], Langstaff J rejected the criticism of the decision for not making inquiries as to the extent of losses and deductions – as he said, the Panel was making the decision of principle first. That is what the AB here did – they did not get to making inquiries into, still less calculating, any losses, because they did not consider such losses were in principle 'appropriate redress'. Therefore, for the First Claimant, Ground 4 is misconceived and I dismiss it. However, for the Second Claimant, Ground 4 is expressed as a failure to take into account his evidence or to obtain further evidence from him on the 'reasonableness' issue in various ways. That merits more detailed consideration as part of the 'fair warning issue', but in fairness to the First Claimant, I will consider it for her as well even though her own Ground 4 does not raise this point.

139. By contrast, Ground 3 is more relevant for the First Claimant than the Second Claimant. His challenge is that despite the appeal from the DB being limited to redress, the AB 'reopened and ultimately rejected the findings of the DB in respect of his reasons for leaving without giving specific notice of intention to do so or calling for submissions on the point'. As I have said, the DB did not find the Second Claimant's reasons for leaving were 'reasonable', only that 'the injustice had severely impacted his ability to lead a relatively normal life and ultimately led to him leaving the service *believing* that his reputation had been besmirched and his value as a Warrant Officer undermined' (my emphasis). However, as I also explained, the AB did not challenge the Second Claimant's beliefs were genuinely held, he just found they were 'not reasonable'. Moreover, as discussed in more detail below, both the DB and AB warned the Second Claimant that if he appealed, the AB was not restricted by the DB's decision. Indeed, in argument Mr Dingle accepted the AB was entitled to re-investigate. Therefore, in the case of the Second Claimant, Ground 3 is misconceived and I dismiss it. However, whilst the same points could generally be made in relation to the First Claimant, the reason I named her as such was because the DB *did* accept in the initial letter that her medical downgrading 'had damaged both her career and promotion prospects', albeit then diluted it in the redress letter to having 'implications on her career and promotion prospects'. By contrast, the AB concluded the inadequate support

'did not cause significant damage to her career'. Mr Dingle accepted in argument the AB was entitled in principle to re-investigate and reach a different conclusion, but only if the process was fair and involved an oral hearing (which I have rejected) or 'fair warning' and the chance to make representations. Again, that merits more detailed consideration in the 'fair warning issue', but in fairness to the Second Claimant, I consider it for him too.

140. This brings me to Ground 2, that is slightly more extensive for the First Claimant:

> "The Appeal Body failed to identify as matters of controversy to be determined going to the heart of matter, including: a. the Claimant's reasons for leaving the (RAF) Service, b. whether the Claimant decision to leave the Service was reasonable, c. why the Claimant felt she had no choice but to leave the Service, d. the extent to which the comments of the branch career manager were relevant; e. the impact of the Claimant's medical downgrading and mental illness; and f. the quantifiable financial loss the Claimant had incurred as a result of leaving; but instead treated them as uncontroversial and made findings on the same based on limited evidence.."

Ground 2 for the Second Claimant is the same except there is no reference to (d) or (e). (f) in each case is misconceived for the reasons discussed in relation to the First Claimant on Ground 4. However, the broad thrust of this ground, read in addition to those parts of Grounds 3-5 which I have accepted remain relevant, is to coalesce into one overarching point – the 'fair warning issue'. In short, the arguable parts of Grounds 2-5 can be encapsulated in the following question:

> 'In each Claimant's case, did procedural fairness require that each be given 'fair warning' and the opportunity to make written representations on - the AB's provisional adverse conclusions that (i) the maladministration and undue delay did not cause significant damage to their career and promotion prospects; and (ii) that 'it was not reasonable for them to believe they had no choice other than to leave the RAF under the circumstances' ?'

The 'Fair Warning Principle', 'Pointlessness' and its Relationship to s.31(2A) SCA

141. Whilst *Osborn* is the leading contemporary case on procedural fairness generally and oral hearings specifically, both the boundaries of 'procedural fairness' generally and what I am calling 'the fair warning principle' specifically were re-considered by the Supreme Court in *Pathan v SSHD* [2020] 1 WLR 4506, (which is why I referred to both cases when granting permission). *Pathan* is a complex decision, involving two overlapping issues but different majorities of the Court. In short, Mr Pathan was an Indian national with leave to remain as a worker under the 'Points Based Scheme'. It was a condition of his leave he remain employed by a licenced 'sponsor' employer. In September 2015, he applied to renew his leave which expired but was automatically extended until that was determined by the Home Office. However, in March 2016, unbeknownst to Mr Pathan, his application was rendered bound to fail when his employer lost its 'sponsorship licence'. However, neither the employer nor the Home Office told Mr Pathan this until June 2016, at the same time as his application was refused for that reason, by which time it was too late to do anything about it. Had he been told in March 2016 before his application was determined in June 2016, he could have made representations (albeit they would have made no difference), or more

realistically, he could have switched to a sponsor employer who was licenced and re-applied.

142. In *Pathan*, one majority of the Supreme Court (Lord Kerr, Lady Black, Lady Arden and Lord Wilson, with Lord Briggs dissenting) found that it was procedurally unfair of the Home Office *to fail to tell* Mr Pathan immediately that his employer had lost its licence, as he could have done something about it, so it was not 'pointless' (a common law exception to procedural fairness which still applies but has been affected by s.31(2A) SCA which did not apply in that case). However, another majority of the Court (Lord Kerr, Lady Black and Lord Briggs, with Lady Arden and Lord Briggs dissenting) held that it was *not procedurally unfair* for the Home Office *not to extend Mr Pathan's leave by a particular period of time* to enable him to take such action. That was because an extension in leave was what Mr Pathan was originally asking for, so a failure to extend leave was not *procedural*, but *substantive*. It could be challenged on a different ground – e.g. 'rationality', but only on the *Wednesbury* basis of scrutinising the decision-maker's judgment (e.g. as in *R(Wildbur)*), rather than the Court reaching its own judgment on fairness (as in *Osborn*). There is a less acute overlap here; and 'pointlessness' does not directly arise, but I discuss it below with s.31(2A) SCA.

143. Although in *Pathan* Lord Briggs was in the minority on the 'failure to warn' point, his judgment helpfully identifies its starting-point at [157]-[158] and [170]:

> "157 'Procedural unfairness' is a modern title for a form of unlawfulness which used to be called 'breach of the rules of natural justice'. That phrase collected together a number of traditional doctrines, the most important of which were the requirement that a decision should be unaffected by bias ('nemo judex in causa sua') and the principle espoused by the Latin tag 'audi alteram partem' or, literally translated, 'hear the other side'. The rules of natural justice served originally to protect the integrity of decision-making by courts but have been applied for more than 150 years to maintain the lawfulness of administrative decision-making…
>
> 158 For present purposes the court is concerned only with the second of those main principles, which enshrines the healthy notion that a matter should not be decided against a party without that person being offered a fair opportunity to present their case to the decision maker…
>
> 170 I would readily accept that, in appropriate cases, the rules of natural justice may require a party to be afforded time to amend his case in a way that cures an otherwise fatal defect of which he had, without fault on his part, previously been unaware. Such time is frequently given to a party in civil proceedings, whose statement of case is found to disclose no cause of action, to attempt to amend it to cure that defect, before his claim is struck out. Whether the rules of natural justice do or do not impose that requirement is heavily context-specific…"

144. That last point was endorsed by Lord Kerr and Lady Black, in both majorities in *Pathan*, at [104] of their joint judgment, which focussed on 'pointlessness', but also explained this on the boundary between 'procedure' and 'substance':

> "138 The procedural duty to act fairly by giving the opportunity to make representations exists whether or not [it] is availed of. Likewise, in the case of the duty to provide relevant information promptly. In both cases the agency responsible acts in contemplation that the person affected will take a particular

> course to avoid the impact of the decision and that it is fair that he or she should have the chance to do so…If ..a different outcome is obtained, that can be regarded as a substantive benefit. But it does not make the duty to inform or allow representations to be made any less…procedural
>
> 139….. [W]hy should it not also be fair to allow the affected person to have the chance by a different means to secure that outcome ? …[I]n both cases, in our opinion, the duty is properly to be regarded as a procedural duty.
>
> 140 The answer to this difficult issue lies, we believe, in maintaining a strict segregation between the procedural duty to act fairly at the time when the decision is taken or is imminent and the steps which a person affected might take to achieve a different result. Once the opportunity to make submissions or the chance to take different steps has been provided, the procedural duty has been fulfilled. To deny the chance to make submissions or to fail to inform promptly involves breach of that duty.
>
> 141 By contrast, an obligation positively to confer a particular period of grace during which to take action would….amount to the imposition of a substantive rather than a procedural duty."

Likewise, I have tried to maintain a 'strict segregation' between (1) the *substance* of the AB's decision on 'reasonableness' which I have already analysed in the last part of dealing with under the 'reasonableness' issue on the 'rationality' standard in *R(Wildbur);* and (2) the procedural fairness issue of whether the AB should have sought out more information by giving 'fair warning' and the opportunity to make more representations.

145. In *Pathan*, Lady Arden was in the majority on the first 'fair warning' point and explained that the old principle of 'hearing the other side' went further than warning applicants of a fatal defect and giving an opportunity to address it. At [43]-[47], she gave examples of the 'fair warning' principle, including at [46]:

> "[In] *R(Balajigari) v SSHD* [2019] 1 WLR 4647 the Court of Appeal… held that where the Secretary of State was minded to refuse indefinite leave on the basis of dishonesty, which was likely to be a serious matter, common law procedural fairness required that an indication of that suspicion should be supplied to the applicant to give him an opportunity to respond."

Whilst 'dishonesty' is not the same as 'unreasonableness', that is not so very different from the argument the Claimants make in the present case. However, in *Pathan* at [48]-[52], Lady Arden went on to place the 'fair warning principle' in the contemporary juristic context of Lord Reed's analysis in *Osborn*, but also at [55], Lord Mustill's speech in *R v SSHD exp Doody* [1994] 1 AC 531 (HL). He held in *Doody* that procedural fairness required that a life prisoner should have the chance to make representations to the Home Secretary on their 'tariff' before becoming eligible for parole (under the system then). Lord Mustill said at pg.560:

> "(1) [W]here an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context

> of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) As the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require he is informed of the gist of the case he has to answer."

146. In that passage in *Doody*, Lord Mustill said three things of relevance in this case. Firstly, at (5) and (6), one way of examining the 'fair warning' issue here is to ask whether the Claimants were given the 'gist of the case they had to answer' and 'the opportunity to make representations' on 'career damage' and 'reasonableness'. Secondly, Lord Mustill also said in *Doody* at (2) the standards of fairness can change over time. This is why I referred Counsel to *Osborn* on oral hearings to raise whether *Anderson* needed re-examination; but also why I raised *Pathan* as a recent decision quoting *Doody*, rather that case itself. Thirdly, Lord Mustill in *Doody* at (3) and (4) explained the requirements of procedural fairness may vary between different statutory contexts, not least as (1) it operated as a presumption that a statutory power will be exercised fairly – what that presumption of fairness entails depends on what the statutory power actually says. An example which came up in argument were the homelessness provisions of the Housing Act 1996 and Homelessness Regulations made under it. Those require a 'minded to find' letter to be sent out be a reviewer who considers there was a 'deficiency' in the original decision but is minded to reach an adverse conclusion (see e.g. *Hall v Wandsworth LBC* [2005] HLR 23 (CA)). That specific statutory safeguard cannot simply be read across by analogy to statues not including it.

147. This is relevant here because both Counsel relied heavily on another ombudsman case, *R(Miller)*. It concerned complaints under the Health Service Commissioners Act 1993 ('HSCA'), but that framework is also different in key respects from the AFA and SC Regs in this case. Indeed, in *R(Miller)* at [39], Ryder LJ specifically quoted Lord Mustill's points (3) and (4) in *Doody*. In *R(Miller)*, the claimants were two GPs challenging the report of the Health Ombudsman into a complaint made by the widow of their patient contending their conduct had played a part in his death. One of the issues in *R(Miller)* (which is the reason I mentioned it on 'the wrong defendant' point) was whether the Health Ombudsman should have declined to investigate the complaint under s.4 HSCA which prohibited an investigation where there was a legal remedy (e.g. a claim for clinical negligence) unless the ombudsman considered it is not reasonable for the complainant to use that alternative. Ryder LJ held the ombudsman in *R(Miller)* had not made a proper decision on that point. However, as I have explained when dealing above with 'the stress issue', a stricter form of 'personal injury and clinical negligence' exclusion applies under the SCMP Regs (and also in SCOAF guidance). As also mentioned above in dismissing Ground 5 in each case, in contrast to the neutral inquiries and responses of Sgt Davis and the SJARs in this case, in *R(Miller)*, the Health Ombudsman sent out a draft report in which it found the claimant GPs responsible for poor clinical care in trenchant and conclusive rather than provisional

terms, despite the fact the GPs had not yet been able to comment. Ryder LJ also found at [78]-[82] the Health Ombudsman had applied an irrational standard of 'maladministration' in departing from the well-established *Bolam* test but then not adopting a different objective standard but an entirely subjective one.

148. More presently relevant to the 'fair warning' issue in this case, in *R(Miller)* the Health Ombudsman did not give the claimant GPs the opportunity to comment on the complaint before they investigated and produced a draft report, on which the claimants could then comment. At first instance, Lewis J (as he was) held this was fair, but on appeal, Ryder LJ held that while the use of a draft report process was fair, the failure to give the GPs the chance to comment earlier before deciding whether to investigate was not (especially given the clinical negligence exclusion in s.4 HSCA). However, this turned on a specific statutory provision, s.11(1A) HSCA (my emphasis) stating: 'Where the commissioner *proposes to conduct* an investigation….he shall afford [to the doctor] an opportunity to comment on any allegations in the complaint'. Ryder LJ said it required before the decision to investigate, the Ombudsman had to disclose 'the gist of the allegations', at [43]:

> "The use of the phrase 'gist of the allegations' should not be seen to obscure a fundamental right accorded to the person affected by the common law rules of natural justice, namely 'to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it'…. Decision-making bodies whether administrative or adjudicative in character should not consider relevant material (supportive or adverse to their case) without giving the affected person the right to comment upon it."

Whilst Ryder LJ held that had not been done in *R(Miller)*, since s.11(3) HSCA said 'in other respects, the procedure for conducting an investigation shall be such as the commissioner considers appropriate in the circumstances of the case', Ryder LJ did emphasise at [55] (in a point of some relevance to this case):

> "…[I]t is important that this court does not import into the informal, non-judicial process of administrative and complaints adjudicators like the ombudsman the procedures of courts and tribunals. The adjudication process is an informal resolution of a complaint or problem where other remedies are not reasonably available or appropriate. The procedure is a matter entirely within the gift of the ombudsman provided that her decision- making process is lawful, rational and reasonable."

149. A similar point was made about the service complaints procedures in *Anderson*, suggesting in this respect too, it has stood the test of time. Taylor LJ rejected the submission of Sedley LJ (as he later became) that the Army Board as a substitute for the (then) Industrial Tribunal should replicate its procedures at pg.55:

> "Since Parliament has deliberately excluded soldier's complaints from industrial tribunals and thus from the procedures laid down for such tribunals, it cannot be axiomatic that by analogy all those procedures must be made available by the Army Board. Had Parliament wished to impose those detailed procedures on the Army Board, it could have done so."

However, Taylor LJ then rejected the submission of Mr Pannick KC (as he now is) that the Army Board only give a complainant a chance to respond to the basic points against him, provided it acted rationally. Taylor LJ said at pg.56:

> "(4) Whether oral or not, there must be what amounts to a hearing of any complaint under the Act of 1976. This means that the Army Board must have such a complaint investigated, consider all the material gathered in the investigation, give the complainant an opportunity to respond to it and consider his response. But what is the board obliged to disclose to the complainant to obtain his response ? Is it sufficient to indicate the gist of any material adverse to his case or should he be shown all the material seen by the board ?....Because of the nature of the Army's Board's function pursuant to the Race Relations Act 1976, already analysed above, I consider that a soldier complainant under that Act should be shown all the material seen by the board, apart from any documents for which public interest immunity can properly be claimed. The board is not simply making an administrative decision requiring it to consult interested parties and hear their representations. It has a duty to adjudicate on a specific complaint of breach of a statutory right. Except where public interest immunity is established, I see no reason why on such an adjudication, the board should consider material withheld from the complainant."

150. However, in the more than 30 years since *Anderson*, the statutory framework for service complaints has changed substantially (not least the availability of Employment Tribunals for discrimination claims) and given what was said in *Doody* about the standards of procedural fairness varying with time and statutory context, I will re-iterate some of the relevant provisions. Reg 14 SC Regs states:

> "14**.**—(1) For the purposes of making a decision under regulation 9(2)(a) or (b), or a determination under regulation 13(2)(a) or (b), the person or panel of persons or, as the case may be, the Defence Council may request the complainant, or such other person as they consider appropriate, to supply information or produce documents…..
>
> (4) For the purposes of…a determination under regulation 13(2)(a) or (b), the person or panel of persons….must give— (a) any person who they consider is a subject of the complaint, and (b) any person who they consider is likely to be the subject of criticism in the….determination in relation to that person's character or professional reputation, an opportunity to comment on any allegations about that person stated in the complaint.
>
> (5) Any comments received under paragraph (4) must be given due weight in making the…determination.
>
> (6) The person or panel of persons…may send a copy…of a draft determination under Reg.13(2)(a) or (b) to any person within paragraph (4).
>
> (7) If they receive any comments from such a person on the draft determination, they may refer to those comments in the final …determination and may state in the…determination their response..."

151. In isolation, the 'subject of the complaint' in Reg.14(4)(a) SC Regs might appear to refer to the complainant, such as the Claimants here. However, following the approach in *R(O)* of reading a statutory provision in its statutory context and with the assistance of 'external aids' such as Policy JSP 831, it is clear these provisions – just like s.11(1A) HSCA in *R(Miller)* albeit not before an investigation – protect the *respondent* to the complaint, not the *complainant*. That is why Regs.14(4)(a) or (b) give each of the people described ('the subject of the complaint' – i.e. in the sense of its 'target'; and

any other person who is likely to be criticised) 'an opportunity to comment on any allegations about *that person* in the complaint'.

152. This interpretation is supported by JSP 831 in the guidance for ABs at para 32 and the similar guidance for complainants at para.75

> "75. You should also be aware that the AB has to give any person who is the subject of your complaint (a Respondent) or any other person who is likely to be criticised in a decision it might make, an opportunity to comment on allegations about them in your complaint. Any comments received must then be given due weight by the AB in making its decision on your Service Complaint."

There is no suggestion in the guidance of the possibility of a draft report for complainants. Immediately before it, the complainant guidance in JSP 831 says:

> "72. If appropriate, the AB may decide that further investigation of your Service Complaint, or aspects of it, is required. If this is the case, the AB, or person they appoint, will carry out an investigation to establish the facts...
>
> 74. Having completed an investigation and before making its determination, the AB will disclose to you all relevant documentation and information on which the appeal is to be determined. The same material will also be disclosed to the Respondent(s) (redacted where appropriate) and any other person who might be affected by the outcome. This gives you and the other parties the chance to comment in writing on the papers, and for those comments to be made available to the AB for consideration when making their determination on your appeal. Your response must be provided within ten working days to avoid any unnecessary delay, however in exceptional circumstances, a longer period may be offered…"

153. Just before turning to my conclusions, it may be helpful briefly to address the relationship between the concept of 'pointlessness' in a 'fair warning' case and s.31(2A) SCA, not discussed in *Pathan*, where Lord Kerr and Lady Black said:

> "120 There is ample authority on the issue of whether the duty to afford the opportunity to make representations arises where any such representations are bound to fail. [I]n *Cinnamond v BAA* [1980] 1 WLR 582, 593, it was said that no one could complain of not being given an opportunity to make representations if it would have achieved nothing. A somewhat similar view was expressed in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 [179]... [But] Lord Neuberger PSC was at pains to point out any argument advanced in support of pointlessness 'should be very closely examined, as a court will be slow to hold that there is ==no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute'…
>
> 121 Pointlessness can have two dimensions. The first is that there is no possibility of bringing about a change of mind on the part of the authority on the terms of the decision that has been made…..The second dimension is different. It involves an examination of whether, on becoming aware of the decision, there was simply nothing the affected person could do to achieve his aim. In other words, there was no other avenue which he or she could explore to avoid the impact of the adverse decision …."

Indeed, Lord Kerr and Lady Black disagreed with Lord Briggs, as although representations on the lost licence would have been 'bound to fail' so 'pointless' on the first dimension, 'fair warning' of that would have given Mr Pathan a chance on the second dimension to take other steps to achieve the same outcome (e.g. a different and licenced employer). So, 'pointlessness' is a very narrow exception to procedural fairness – assessed by the Court itself, not the decision-maker subject to rationality (*Osborn*) – where *prospectively* giving fair warning and an opportunity to comment *would be* 'pointless' in both senses. In other words, the Court is saying that it was *not unfair* not to take a truly 'pointless' step.

154. By contrast, s.31(2A) SCA works differently and I repeat it as is material:

> "The High Court— (a) must refuse to grant relief on an application for judicial review….if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred…."

The first difference between s.31(2A) SCA and 'common law pointlessness' in *Pathan* is that 'conduct' in s.31(2A) SCA can include both procedural and substantive 'conduct' (*R(Goring)* at [47] and [53]): there is not the same 'sharp line' as with 'procedural fairness' Lord Kerr and Lady Black discussed in *Pathan*. The second difference is their conception of 'pointlessness' was *prospective* ('where any representations *are* bound to fail' not '*were* bound to fail') whilst the language of s.31(2A) SCA is *retrospective* and *counterfactual*: ('the outcome *would not have been* substantially different'). Thirdly, that is because s.31(2A) SCA is a statutory replacement for a different common law principle, as explained in *R(Goring)* and *R(Plan B Earth) v SS Transport* [2020] EWCA Civ 214, a challenge to the Heathrow third runway, succeeding in the Court of Appeal, but reversed by the Supreme Court, but not on s.31(2A) SCA. The Court of Appeal's analysis of s.31(2A) SCA was quoted by Ellenbogen J in *R(Ogunmuyiwa)*:

> "267. It has long been established that, in a claim for judicial review, the court has a discretion whether to grant any remedy even if a ground of challenge succeeds on its substance. It was established by Purchas L.J. in *Simplex GE (Holdings) Ltd. v SoS Env.* [1988] 3 P.L.R. 25 that it is not necessary for the claimant to show that a public authority would – or even probably would – have come to a different conclusion. What has to be excluded is only the contrary contention, namely that the Minister "necessarily" would still have made the same decision. The *Simplex* test …therefore requires that, before a court may exercise its discretion to refuse relief, it must be satisfied that the outcome would inevitably have been the same even if the public law error identified by the court had not occurred….
>
> 272. The new statutory test modifies the *Simplex* test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of 'exceptional public interest'. Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely 'highly likely'. Thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been 'substantially different' for the claimant.

> 273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about them decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, the threshold remains a high one…"

155. Of course, in both tests, the Court is analysing matters 'retrospectively' in the sense of 'after the event'. However, with 'common law pointlessness' in *Pathan* the focus is on the 'prospective' position before the decision is made, whereas with s.31(2A) SCA, the focus is on the counterfactual world of whether the outcome *would have been* 'highly likely' *to have been* 'not substantially different' had any unlawful conduct found not occurred. Of course there may well be an overlap between the two principles and the same factual matters may be relevant to both. However, whilst s.31(2A) SCA *has* replaced the *Simplex* principle (*R(Goring)* at [53]) in refusing relief if there is a finding of unlawful conduct, it has not replaced the different 'pointlessness' principle which avoids there being a finding of unlawful (procedural) conduct in the first place. Therefore, I shall consider both in my conclusions on this issue, to which I will now finally turn.

Conclusions on the Fair Warning Issue

156. As carried over from the 'procedural' aspects of Grounds 2-5 and the oral submissions of Mr Dingle, I have summarised the 'fair warning issue' this way:

> 'In each Claimant's case, did procedural fairness require that each be given 'fair warning' and the opportunity to make written representations on the AB's provisional adverse conclusions that (i) the maladministration and undue delay did not cause significant damage to their career and promotion prospects; and (ii) that 'it was not reasonable for them to believe they had no choice other than to leave the RAF under the circumstances' ?'

Most of Mr Dingle's submissions applied to both Claimants (and in fairness it was because their positions are so similar that I consolidated their cases), but he did differentiate on certain points. I will draw his submissions together into five alternative procedural steps which he submitted procedural fairness required for 'fair warning' and 'opportunity to make representations' on 'career damage' and 'reasonableness' and then apply those conclusions briefly to each Claimant.

157. However, before turning to Mr Dingle's specific submissions, his overarching point was three-fold. Firstly, the Claimants appealed only the redress decision of the DB, who found each had suffered damage to their career and prospects and had not suggested that either had resigned 'unreasonably'. Secondly, the AB did not engage

with the Claimants' grounds of appeal setting out the extent of their financial loss, but instead reached essentially the same result as the DB by reversing the DB on career damage and invoking a legal test of 'reasonableness'. Thirdly, the AB could only fairly take that course if it had (i) warned the Claimants it was minded to do so; and (ii) received their representations in reply. However, the AB had not done so and so its decision was procedurally unfair.

158. The first submission of Mr Dingle was the AB should not have reversed the DB's conclusion on career damage and reached its new conclusion on reasonableness without providing a 'draft report' as in *R(Miller)* (or perhaps a 'minded to find letter' as in homelessness cases like *Hall*). However, Ryder LJ noted in *R(Miller)* Lord Mustill's point (4) in *Doody* that the statute is an essential feature of the context of common law procedural fairness. Those procedural safeguards are either a specific feature of those particular statutory schemes (as with the 'minded to find letters' in homelessness cases), or at the least an established practice for the Health Ombudsman with draft reports, as noted in *R(Miller)* by Ryder LJ at [52]-[53]. Indeed, *R(Miller)* concerned a specific statutory safeguard for *respondents* to complaints not *complainants*, which is mirrored in Reg.14 SC Regs. Even then, Regs.14(6) and (7) SC Regs do not impose a duty on an AB to send the respondent a draft report, only a power – and a discretion - to do so: 'The…panel…*may* send a copy…of a draft determination under Reg.13(2)(a) or (b) to any person within paragraph (4)'. Where Parliament has provided for a specific 'draft report' mechanism to protect respondents but has not done so for complainants in a 'rehearing' of an appeal (as the appeal was for DB decisions prior to June 2022), I do not accept that common law procedural fairness requires such a draft report or 'minded to find letter' to be sent to complainants even when an AB is reversing a DB's decision on a basis not considered by the DB. This is especially so where the AB is only the second stage in the process and the Claimants had the right to apply to as independent Ombudsman (as in *R(Miller)*).

159. Secondly, drawing on the procedural side of Ground 3, Mr Dingle submitted that it was procedurally unfair of the AB to reverse the decision of the DB on career damage to the Claimants without giving them an opportunity to comment. Of course, as I have discussed, this point is rather stronger with the First Claimant – where the DB positively found in the June 2022 decision letter the consequence of the maladministration was her medical downgrading and that 'this had damaged both her career and promotion prospects'. However, as also discussed, the DB diluted this in the July 2022 redress letter to this having 'implications on her career and promotion prospects', as the AB itself remarked, the DB's view was not clear. In any event, the AB was entitled to re-investigate and reach its own conclusion as a matter of *substance*. The same is all the more true with the Second Claimant where the DB had not reached such a firm conclusion on career damage in the first place, only that the maladministration had 'severely impacted his ability to lead a relatively normal life' and 'ultimately this led to him leaving the Service *believing* his reputation had been besmirched' etc – this was not a finding of actual career damage anyway. I do not accept the AB 'reversed' it.

160. In any event, the simple answer to this argument in both cases is that both Claimants always did have a very clear 'fair warning' that the AB might come to a different conclusion than the DB had, not least in the DB's own letter to them:

> "If you disagree with the DB's decision you have the right to appeal and escalate your complaint to an Appeal Body….If you appeal, the Appeal Body is not bound, restricted or confided by my decision and will consider the whole of your Service Complaint again, including **any parts that have been upheld and any redress that I have recommended**. The Appeal Body may not reach the same decisions as the DB." (Original Bold)."

Likewise, in the AB's own determination letter to each of the Claimants, it said:

> "[W]e are not bound by the findings of the DB and have independently and objectively formed our own view on all aspects of your SC. However, to avoid unnecessary repetition and duplication, where we agree with the findings and reasons provided by the DB, we will adopt them by reference."

This is also consistent with the guidance to AB's in JSP 831 para 29:

> "In their appeal application…the Complainant must state the grounds on which they would like to appeal and why. Whilst this would identify those matters about the decision stage that the Complainant is concerned about, you may decide, if appropriate, to consider the entirety of the complaint afresh. This may result in your findings and determination, and any redress, being different from those of the DB."

It is difficult to see what clearer warning that the Claimants could have expected that if they appealed on redress, the AB could reach its own conclusions on other matters, although in the end the AB essentially reached similar conclusions on maladministration and undue delay, just not the impact that had on the Claimants. Whilst the system has since changed to a 'review model', under such a 'rehearing' model, ABs are caught between the 'rock' of simply adopting the DB's conclusions and being criticised for not re-investigating and reaching their own conclusions as in *R(Ogunmuyiwa)* at [74]-[76] and the 'hard place' of re-investigating and reaching their own conclusions as in this case. For the reasons I have explained, the AB was entitled to do so and the Claimants had fair warning.

161. Thirdly, drawing on the procedural aspects of Grounds 4 and 5, Mr Dingle submitted that even if the AB was entitled to reach different conclusions on career damage in *substance*, it should have undertaken further inquiries of the Claimants as to the circumstances of their decisions to resign to feed into its conclusions as to their 'reasonableness'. This is clearer with the Second Claimant, where Mr Dingle pleaded specific information which he could have provided: the circumstances leading up to his resignation; the debilitating effects of stress on him; why he believed that his reputation had been besmirched etc as the DB found; the reasons he felt 'constructively dismissed' (or more relevantly, why he felt why he had no choice but to leave the RAF); how but for the failings he would have stayed in the RAF; and the financial impact of resignation upon him. Whilst none of this is in Ground 4 for the First Claimant, in Mr Dingle's skeleton he added similar points for her, including how the breaches of confidentiality led her to believe her RAF career was untenable, the actual damage during the complaints done to her career and her own views of her career prospects. Indeed, drawing on Ground 5, even if not showing a closed mind, bias or predetermination (which I have rejected) Mr Dingle suggested that the failure of the AB even to ask the Claimants more detail about their decisions to resign showed a lack of fairness.

162. Looking at this challenge initially as a 'failure to allow representations' before and/or after a decision in the sense summarised by Lord Mustill in *Doody* at (5), far from being an unfair decision, this is an unfair criticism. It looks at the opportunity to make representations of 'reasonableness' in isolation from the three separate opportunities to make representations generally. After all, these were the Claimants' appeals from the DB's decision on redress, knowing the AB could reach different conclusions. Firstly, their solicitors had drafted long grounds of appeal setting out detailed legal arguments seeking payments of between £150,000 and £300,000. The Claimants must have known the circumstances of the resignation may well be scrutinised and they certainly did know the DB had not awarded them post-resignation losses. Secondly, they both went into many of these points in their long and detailed appeal statements obtained by the AB's investigator. Thirdly, even if the Claimants did not realise the need to do so at the start of their appeals, surely it was obvious when they were sent the career information from Sgt Davis and the SJARs on which they were given yet another chance to respond (contrary to how the case was pleaded).

163. In any event, these are not in reality 'procedural' criticisms, but rather criticisms in substance of the AB's conclusion. The correct test is rationality, explained by Langstaff J in *R(Wildbur)* at [38]-[39] quoted above and as he added at [40]:

> "[T]he Panel might well have chosen to make further inquiries …[But] it seems to me that rationality did not require the Panel here to make further inquiry or adjourn to do so: many panels might, and indeed…might be encouraged hereafter to do so, but the circumstances do not so obviously cry out for the gathering of that information as to oblige it."

It is even clearer here. The AB here were dealing with an appeal on redress and had undertaken their own investigation of it from third parties and enabled the Claimants to comment on it. Subject to the points below, they cannot be criticised for failing to ask the Claimants for yet more information relevant to their own appeals on redress when they had already had three opportunities to provide it.

164. Fourthly – drawing on the original formulation of Ground 2 – Mr Dingle submitted it was unfair of the AB to treat the Claimants' evidence on their reasons for resignation as uncontroversial but then find the resignations to be 'not reasonable'. This has something in common with the challenge in the case of *R(Balajigari)* which Lady Arden mentioned in *Pathan* as quoted above. The Court of Appeal held it was unfair for the Home Office to find an applicant for leave to remain 'dishonest' because of discrepancies between earnings declared to them and to HMRC without giving him fair warning of their suspicion and the chance to respond. Equally here, Mr Dingle submitted the AB's decision that the Claimants' resignations were 'not reasonable' was unfair when they had not been warned of that risk or had the opportunity to address it. It had come 'out the blue'. However, as I explained above, when finding the AB were rationally entitled to reach the conclusion on 'reasonableness' on the information they then had, it is important to remember what the AB *actually decided*:

> "[W]e have found [the maladministration etc] had not *caused* [First Claimant: '*significant damage*'; Second Claimant: *'irretrievable damage'*] to your career. Further we also concluded *it was not reasonable for you to believe that you had no choice other than to leave the RAF under these circumstances*. *As such*, *the claim for loss of earnings etc covered within your appeal is not considered*

further. Nevertheless, we have proposed a financial award to acknowledge the distress, worry and anxiety *caused*…"

As I said, it was the Claimants who had contended (i) the mishandled service complaints against them caused them 'significant' and 'irretrievable' career damage respectively and (ii) that owing to this and their mental health they each 'believed they had no choice but to leave the RAF'. So, in essence in each case the AB rejected (i) because it disagreed factually and (ii) because it found that belief was 'not reasonable' – it applied its 'reasonableness test'. I also explained above that test was entirely rational on the *R(Wildbur)* approach, not least as it was analogous to tortious principles of 'new intervening cause' and mitigation. It was quite unlike the Health Ombudsman's idiosyncratic departure in *R(Miller)* from the *Bolam* test for clinical judgment with a subjective 'best practice' test.

165. Moreover, the AB's decision was also very different from the decision (not the challenge) in *R(Balajigari)*. The Home Office leapt without warning from factual discrepancies in disclosed earnings which could have been innocent to a finding of dishonesty. In this case, what I have called 'the reasonableness test' was actually simply the AB's evaluative conclusion flowing from its factual rejection of the Claimant's contentions. In other words, the AB rationally and I would now find fairly concluded the Claimants had not suffered 'significant' (still less 'irretrievable') 'career damage'. They did not need 'fair warning' of that, because it was their own case. The AB could have just then said 'you may have *believed* you had no choice, but you clearly did' – the Claimants would not have needed 'fair warning' of that either. Instead, the AB said that the Claimants' beliefs were not 'reasonable' and they now complain they had no fair warning of that. But a decision-maker does not have to give 'fair warning' of every conclusion they are minded to make, still less every word they propose to use. For the reasons given, the Claimants had ample opportunity to explain the reasons for their resignations that they must have known were central to their claims for post-resignation losses.

166. Finally, I turn to Mr Dingle's simplest – and strongest – challenge: that even aside from all those other points, it was simply unfair that the AB failed to ask the Claimants this straightforward question after receiving their responses to the new evidence: 'Why do you say your resignations were reasonable ?' This simple question would not only have given 'fair warning' of 'the reasonableness test' but allowed the Claimants to (i) object to that test in principle; and (ii) provide in the alternative any additional information relevant to 'reasonableness'. Moreover, unlike an oral hearing, it was entirely convenient for everyone and proportionate. It would also have avoided the Claimants' sense of injustice about being 'blindsided' (*Osborn*). I accept that question would have been helpful and fair.

167. However, just because it would have been fair for the AB to have asked that question, does not mean it was *unfair* of the AB *not* to have done so, even applying my own judgment on fairness not the 'rationality' standard (*Osborn*). In my judgement, after careful consideration, I am driven to find that it was not unfair of the AB not to ask that question and enable a response, for three reasons:

    a. Firstly, this argument stretches the 'fair warning' principle beyond its fair extent. It is not only fair but mandatory to be consulted before a decision is made where Parliament has said so, as with respondents to an ombudsman complaint before an investigation is launched in *R(Miller)*. Likewise, it is basic fairness, as in *Pathan*,

to give an applicant 'fair warning' of a fatal flaw in their application, from the start or due to change in circumstances. Similarly, it is only fair to warn an applicant of the risk of a potential finding as serious as 'dishonesty' in an immigration application in *R(Balijigari)*. However, even if I am wrong to have concluded 'the reasonableness test' here was simply an evaluative conclusion flowing from findings of fact that were fully 'in play'; but instead was a 'novel' legal test developed by the AB, that does not mean the AB had to send out their proposed test for comment first. I have not been shown any case which said anything like that. Indeed, it would be surprising, as a judge would not be expected to do that provided they had sufficient submissions relevant to the point (which is why I raised further cases and asked for written submissions after the hearing). As Ryder LJ said in *R(Miller)*, courts should not apply the same procedural standards as their own to complaints processes. Still less should courts insist on stricter requirements than their own for complaint decision-makers. For the reasons given, the Claimants had ample opportunity to explain their resignations in any way relevant to the application of a 'reasonableness' test.

b. Secondly, even if I am wrong about that and an AB should generally give the complainant the opportunity to comment on a legal test it envisages like 'reasonableness', I do not accept it was unfair of the AB in *this* case. After all, as explained, the AB's 'reasonableness test' was closely analogous to the tortious principles of 'new intervening cause' and 'mitigation'. It is ironic that Claimants with solicitor-drafted appeals effectively seeking substantial damages on tortious heads of loss complain they were blindsided by the decision-maker applying a test closely resembling tortious principles on causation and mitigation. Ironic or not, in the circumstances, there was no need to do so with as basic an evaluative concept as 'reasonableness'. The Claimants were not unrepresented complainants unfamiliar with the process. Again, they had ample opportunities to make their representations.

c. Thirdly, even if I am wrong about that and procedural fairness ordinarily would have required the AB to ask a complainant (represented or not) why they considered resignation was reasonable before concluding otherwise, on balance I find fairness did not require it in the circumstances of this case. That is for all the various reasons expressed throughout this judgement. For fear of further repetition, the main reasons are as follows. The Claimants appealed the DB's redress decision and the onus was on them to explain why 'post resignation losses' were 'appropriate redress' not in principle but on the facts of their cases. They had three separate chances to do so – in their solicitor-drafted appeal; in the detailed appeal statement the AB's investigator took from each of them before investigating further; and in the opportunity to respond to the new evidence on career damage. The AB reached their own conclusions on career damage as they were entitled to do and they and the DB had warned the Claimants that the AB may do. In each case (as already explained) the AB rejected the contention on career damage of each Claimant in their service complaint, so they had fair warning. The AB accepted each Claimant genuinely believed they had no choice but to resign, but largely on the new evidence obtained on which the AB specifically gave the Claimants the opportunity to comment, the AB found their beliefs were not reasonable, which was a rational test, closely analogous to the most relevant test in tort, which was how the Claimants had framed their appeal in the first place. In all those circumstances, I do not accept that the failure to ask the

Claimants to re-explain their resignations by asking why they considered them reasonable was necessary, even if it may have been helpful. In my judgment, put simply, it was not unfair.

For those reasons, I reject the Claimants' arguments on 'the fair warning issue'.

168. For completeness, I will now apply those conclusions to each Claimant's grounds of challenge. For individual reasons tailored to them, I dismiss their claims.

    a. For the First Claimant, whilst I accept the DB initially concluded that the maladministration had caused significant damage to her career prospects, the DB then diluted that down. So, the AB was entitled to re-investigate and on new evidence on which she had the opportunity to comment, reached a rational conclusion. I therefore dismiss her Ground 3. Moreover, I find that the AB made all reasonable inquiries into the issue of principle they were deciding and were entitled not to investigate the evidence of individual items of loss as in *R(Wildbur)*, so I dismiss her Ground 4. I also reject her criticism of the AB's investigation or conclusion showed a closed mind, bias or predetermination or failed to attach sufficient weight to her representations and I dismiss Ground 5. An oral hearing was unnecessary and I dismiss her Ground 1. I find the AB followed both a fair process and reached a rational conclusion that it was not reasonable for her to believe that she had no choice but to resign especially as she was largely exonerated before she did so and I dismiss her Ground 2. That test was rational and closely analogous to tortious principles, so I reject her Ground 6. Instead, the AB made a substantial 'non-quantifiable payment' of £3,500 which was rational in all the circumstances and so I dismiss her Ground 7. For the avoidance of doubt, to the extent Mr Dingle's submissions went further than the Claimant's grounds, she had no permission to amend but I have dealt with them anyway.

    b. For the Second Claimant, I gave him that position as unlike the First Claimant, the DB never reached a firm conclusion that he had in fact suffered career damage. In those circumstances, especially with the new evidence on which he had the chance to comment, the AB's conclusion he had not suffered 'irretrievable' damage was plainly rational. I therefore dismiss his Ground 3. I also consider the AB made all reasonable enquiries into whether in principle to award post-resignation losses, but also into the reasonableness of his decision to resign and that he had ample opportunity to make representations about that. I therefore also dismiss his Ground 4. As with the First Claimant, I reject the Second Claimant's criticisms of bias, predetermination etc by the AB and dismiss his Ground 5. Similarly, an oral hearing was unnecessary and I dismiss his Ground 1. I also dismiss his Ground 2, since the AB was entitled to conclude that it was not reasonable for him to believe that he had no choice but to leave when he did so, especially before the service complaint process against him concluded. As with the First Claimant, that test was rational and closely analogous to tortious principles, so I reject his Ground 6. Instead, the AB made a substantial 'non-quantifiable payment' of £3,500 which was rational in all the circumstances and so I dismiss his Ground 7. For the avoidance of doubt, to the extent Mr Dingle's submissions went further than the Claimant's grounds, he had no permission to amend but I have dealt with them anyway.

169. Very finally and in case I am wrong, I turn to Mr Talalay's fall-back 'no substantial difference' argument under s.31(2A) SCA. Indeed, this case is a good example of the

difference between it and 'common law pointlessness' discussed in *Pathan*. I did not dismiss the Claimants' 'fair warning' challenges on the basis that further representations would have been 'pointless' in both senses discussed there. Whilst they would not have enabled a different route to the same outcome as in *Pathan*, I cannot say it was *apparent* in advance that further representations on the 'reasonableness' of their resignations would have been 'bound to fail' as with the failed licence in *Pathan*. However, that is not the test for s.31(2A) SCA. Instead, I must refuse to grant relief if it is highly likely that the result would not have been substantially different had the conduct complained of not occurred. As discussed in *R(Plan B Earth)*, especially where there is found to be unlawfulness in 'substantive decisions' (to which s.31(2A) SCA applies: *R(Goring)*), the Court must be cautious about straying into the merits and it will often be difficult or even impossible for the s.31(2A) SCA threshold to be met. An example from the current field is *R(Ogunmuyiwa)* at [98] where having found unlawfulness in an AB's substantive determination of a complaint, Ellenbogen J did not consider she was in a position to say s.31(2A) SCA applied By contrast, purely procedural unlawfulness which would not have substantially changed the information on which the decision was based may more apt for s.31(2A) SCA. In my judgement, that applies to the present case, which can be tested by taking Mr Dingle's widest 'fair warning' submission and asking what would have happened had the AB sent out its letter as a draft report for further representations from the Claimants. In my judgment, that specific sort of exercise gives a strong evidential basis for what the Claimants would have said to the draft decision because I already have what they have said in response to the actual decision in the same terms. Without repeating this whole judgment, I am satisfied it is highly likely if not inevitable the decision would have been exactly the same:

a. Firstly, the Claimants would have said, as they have said, that it was unfair to depart from the DB's decisions on career damage. However, since the AB was entitled to do so and did so after taking the Claimants' responses to the evidence on career damage, it is difficult to see what else they would have said that would not have involved mere repetition of their perspective on the impact on their career (already set out in detail in their appeal statements). Therefore, I am satisfied it is inevitable, or at least highly likely, that the AB's decision on career damage would have remained the same.

b. Secondly, faced with the AB's decision letter as a draft, the Claimants would have said, as they have said, that the 'reasonableness' test was wrong because it was objective not subjective. However, I have found the AB was rationally entitled to adopt that test and indeed it was analogous to tortious principles on causation and mitigation. Given the Claimants' appeal relied on tortious heads of loss, in those circumstances, I find that the AB would inevitably have lawfully maintained it, as it has before me.

c. Thirdly, the Claimants would have said, as they have said, that it was wrong for the AB to conclude that they were not reasonable to believe they had no option but to leave the RAF. However, the information suggested by the Claimants they would have wanted to give – such as the impact of confidentiality failings on them, the levels of stress etc – was all information that they had already raised through their appeal and statements etc. This would have been an exercise in repeating and highlighting what they had already said (just as their responses to the new evidence were). In those circumstances, I find the same outcome would have been highly likely.

d. Fourthly, I have said 'the same outcome' each time because the AB had made a decision of principle not to award post-resignation losses as a quantifiable payment and the AB would have had to change that decision to change the outcome and I find that even with the Claimants' likely representations in response to their draft report, the AB would not have done. Whilst it is possible the AB might have slightly increased the 'non-quantifiable payment', given it was above the SCOAF Guidance top band, it is 'highly likely' that it would not have done so, at least to any extent that would have amounted to a 'substantially different outcome'.

e. Finally, I have dealt in several places with the contentions that the AB should have undertaken an Oral Hearing; and/or investigated further the Claimants' actual losses with a view to calculating a payment. I accept either outcome would not have been 'substantially the same' – there is a difference between a decision after an oral hearing on paper, even if the decision is the same. However, the Claimants had already asked for those things and the AB rationally and lawfully declined. Even if the Claimants had asked yet again, the AB would inevitably have given the same response.

I am fortified in this by the fact the Ombudsman felt a further investigation would not make any difference. Therefore, had I found unlawfulness, s.31(2A) SCA would have applied. However, I have not, so it is academic.

Conclusion

170. Therefore, I dismiss all grounds of challenge as both originally presented and as I have approached them. I am particularly grateful for the assistance of Counsel in an interesting and important case. I know the Claimants will be disappointed with the result. However, it was clear they brought these claims not simply in their own interests but for other servicepeople and former servicepeople: indeed, in the same comradeship with which they served. I hope they will feel this case has brought some clarification to the important role of service complaints in ensuring justice for those who put their lives at risk to keep us all safe. They deserve nothing less.