THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Miss E Gowland	**AND**	**Ministry of Defence**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **21 November 2017**

Before: **Employment Judge A M Buchanan**

Appearances

For the Claimant: **Ms H Gardiner of Counsel**
For the Respondent: **Mr A Serr of Counsel**

JUDGMENT ON PUBLIC PRELIMINARY HEARING

It is the judgment of the Tribunal that:-

1 The claims of disability discrimination have no reasonable prospect of success and are struck out pursuant to rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Regulations").

2 The application to strike out the claim of indirect sex discrimination as having no reasonable prospect of success pursuant to rule 37 of the 2013 Regulations is refused.

3 The application for a deposit order in respect of the claim of indirect sex discrimination as having only little reasonable prospect of success pursuant to rule 39 of the 2013 Regulations is refused.

REASONS

1 By a claim form filed on 18 February 2016 the claimant advanced claims to the Tribunal of indirect sex discrimination and direct disability discrimination and discrimination arising from disability. In addition a claim of victimisation was advanced. All the claims were advanced relying on provisions in the Equality Act 2010 ("the 2010 Act").

2 By a response filed on 11 May 2016 the respondent denied liability to the claimant and raised jurisdictional preliminary matters. It was noted that the claimant had filed a service complaint on 1 December 2015 which was then ongoing. A stay of the proceedings to enable the service complaint to be dealt with was requested.

3 On 7 June 2016 the matter came before Regional Employment Judge Reed on a private preliminary hearing and orders made on that day resulted in the claim being stayed until 30 September 2016 in order to enable the claimant's service complaint to be dealt with. Thereafter various applications were made to continue the stay whilst the service complaint was being dealt with. The service complaint was determined but the claimant submitted an appeal against that determination which was determined in May 2017. The appeal was not successful.

4 The matter next came before Regional Employment Judge Reed on 29 August 2017 at a telephone private preliminary hearing ("TPPH"). It was noted that the claimant brought claims of disability discrimination and that the respondent relied on the provisions of paragraph 4(3) of part 1 to Schedule 9 of the 2010 Act to resist those claims on the basis that the Tribunal had no jurisdiction to consider them. It was noted that the claimant would argue that that provision had no application where, as was contended in this case, the respondent had caused the illness which prevented the claimant from being deployed for more than 30 days and had discharged the claimant as a result. It was also noted that the claimant brought a claim of indirect sex discrimination and would rely on the decision of the Employment Appeal Tribunal ("EAT") in **Ministry of Defence –v- De Bique [2010] IRLR 417** but the respondent would argue that that decision did not support the claimant and that if there was particular disadvantage to the claimant by a PCP applied by the respondent, that case was authority to support an argument that the respondent had taken proportionate steps to achieve legitimate aim. It was decided that these matters should be considered at a public preliminary hearing.

5 Accordingly a public preliminary hearing came before me in order to determine two matters:-

5.1 Whether either or both of the claims for disability discrimination and sex discrimination should be struck out on that basis that it/they have no reasonable prospect of success pursuant to Rule 37(1)(a) of the 2013 Regulations: or

5.2 Whether a deposit order should be made pursuant to rule 39 of the 2013 Regulations on the basis that either or both of the said claims had only little reasonable prospect of success pursuant to Rule 39 of the 2013 Regulations.

6. The claim of victimisation advanced by the claimant was not referred to in the Orders resulting from the TPPH on 29 August 2017. It was common ground that that claim would proceed to a final hearing irrespective of the decision on the two issues before me. It was also common ground that the claimant had complied with the requirements of section 121 of the 2010 Act.

7 **The hearing**

I heard no evidence at the hearing but simply submissions from counsel for the parties. For the purposes of making the assessment of the matters before me, I accept the claimant's case as pleaded without making any findings of fact or hearing any evidence. I had a short agreed bundle before me comprising 94 pages.

8 **Submissions**

I briefly summarise the written submissions which are held on the Tribunal file and the oral submissions made to supplement such submissions.

Claimant

8.1 The background to the claims was summarised. The claimant's case is that she was fit to deploy overseas albeit for not longer than 30 days. The reason she was not fit for longer deployment was because of her mental health problems and those problems had been caused by the respondent. She was discharged from service in the Royal Air Force ("RAF") at least in part because she could not deploy for longer than 30 days.

8.2 It was submitted that the claimant had been subjected to direct disability discrimination and discrimination arising from disability pursuant to sections 13 and 15 of the 2010 Act. It was accepted that paragraph 4(3) or Part I to Schedule 9 of the 2010 Act provided that "*this Part of this Act so far as relating to age or disability does not apply to service in the armed forces …*". However, it was the claimant's submission that Schedule 9 did not provide a blanket ban allowing the respondent to discriminate against its service personnel because of disability.

8.3 It was noted that that exclusion in Schedule 9 had found its genesis in Article 3(4) of the Council Directive for Equal Treatment in Employment and Occupation 2000/78/EC ("the Directive"). That exclusion had been passed into law without debate in Parliament and therefore it had to be assumed that Parliament intended that the exclusion went no further than was envisaged in the Directive. It was noted that Recitals 18 and 19 of the Directive made clear the purposes of the permitted exclusion and those purposes were (a) to preserve the operational capacity of the services and (b) to safeguard the combat effectiveness of the services. It was submitted that neither the Directive nor the 2010 Act envisaged permitting discrimination because of disability where the disability did not impede the two listed objectives. The claimant was discharged from the RAF because she could not deploy for longer than 30 days but that 30 day limit did not pose a threat to the operational capacity or combat effectiveness of the RAF and so the discrimination she has suffered is outside the permitted exclusion.

8.4 Further, the disability by reason of which the claimant suffered discrimination was caused or alternatively exacerbated by the respondent and its treatment of her in relation to childcare issues. It was submitted that it was plainly unjust that the respondent could be allowed to cause or contribute to a disability otherwise than in the ordinary course of duty and then use that disability in order to subject a claimant to detriment. Such injustice went far outside the narrow exclusion permitted by the Directive and the 2010 Act. It was submitted that a purposive construction ought to be adopted to ensure that the 2010 Act and the Directive achieved their aims to eliminate inequalities and promote equality. It was submitted the claimant should be able to avail herself of the disability discrimination provisions of the 2010 Act.

8.5 In relation to the claim of indirect sex discrimination the claimant relied on a PCP namely "*the respondent required the claimant to be available for service 24/7 attending events as late as 23/24:00 hours*". That PCP manifested itself as a requirement for the claimant to work shifts. The claimant relies on **<u>Ministry of Defence –v- De Bique</u>** where a Tribunal had determined that the PCP engaged in that case was not a proportionate means of achieving a legitimate aim. To apply the requirement to be available 24/7 to the claimant was not proportionate as that requirement for shift work was severable from the requirement to be available for deployment. The claimant was able to deploy as she had her parents available for child care at such exceptional times. The claimant had resolved her childcare issues once she had moved to Darlington yet she was not allowed to withdraw the notice she had given to leave the RAF and was discharged from the RAF. Therefore the claimant ought to be allowed to continue to advance that claim.

8.6 It was noted that the Tribunal had power to strike out a claim if it had no reasonable grounds of success but that was a high test and should not be one exercised in this case.

8.7 It was noted that the Tribunal had power to make a deposit of not exceeding £1,000 in respect of any allegation or argument if it had only little reasonable prospect of success and reference was made of the decision in **<u>Hemdan –v- Ishmail [2017] ICR 486</u>** where Mrs Justice Simler had stated that the purpose of a deposit was to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim failed. It was submitted that neither claim had only little reasonable prospect of success and therefore no deposit order should be made.

8.8 Information was given in respect of the claimant's means.

<u>Respondent</u>

8.9 The background to the claims was set out. It was noted that service personnel could not bring claims for disability discrimination and reference was made to the Directive and to Schedule 9 of the 2010 Act. It was noted that Parliament had chosen to derogate entirely from the provisions of the Directive concerning disability and age in respect of all members of the armed forces as it was entitled to do pursuant to Article 3(4) of the Directive.

8.10 Reference was made to **<u>Child Soldiers International –v- Secretary of State for Defence [2016] 1WLR1062</u>** where the unambiguous and unequivocal right of states to make that derogation was supported. However, it was noted that the claimant argued that if a disability or disability discrimination arises from the actions or omissions of the armed forces themselves then the derogation contained in Schedule 9 did not apply. It was submitted that that argument was misconceived for a number of reasons. First, such an interpretation is wholly unsupported by the Directive or the 2010 Act: the reason for the person having the protected characteristic of disability is irrelevant. Secondly, such an interpretation would in principle be unworkable for it would require the respondent and then a tribunal to attempt to determine how and why a person became disabled rather than concentrating on the whether they are in fact disabled. Thirdly, excluding those from the derogation who could be said to have been made disabled by the armed forces would do nothing to address the rationale for the derogation as set out in the recital to the Directive: combat effectiveness is not affected in any way by the reason for a member of the armed forces being disabled. Fourthly where a person has suffered an injury by reason of the actions of the respondent then in

the majority of cases they would have a cause of action either for negligence or breach of statutory duty in the civil courts or a claim for discrimination in the Employment Tribunal where the injuries are caused by discrimination other than because of age or disability.

8.11 In respect of the indirect sex discrimination claim, comment was made in respect of the factual background which it was not for the Tribunal at this hearing to determine: there may be an issue as to whether the PCP contended for was actually applied by the respondent and whether, if it did, the PCP put the claimant at a particular disadvantage. Taking the claimant's case at its highest, and assuming the PCP had been applied as pleaded and had placed the claimant at a particular disadvantage, the claim had no or only little reasonable prospect of success because the respondent would inevitably establish that such a PCP was a proportionate means of achieving a legitimate aim.

8.12 It was submitted that the **De Bique** case was not on all fours with the present case and that if the claimant's proposition was correct and the requirement of being available for 24 hours a day 7 days a week was required to be justified in each and every case, the consequences would be enormous and hugely detrimental for the respondent. In theory it would disadvantage all female personnel with non adult children compared to males and a legal requirement to justify this in each case was bound to undermine the cohesion and combat effectiveness of the armed forces. It was noted that the role of the armed forces was hugely varied. A 24/7 service requires 24/7 logistical support. Whilst the respondent makes what adjustments it can there cannot be a legal requirement to dispense with the 24/7 requirement for any member of the armed forces.

8.13 It was noted that the claimant continued to have a victimisation claim which it was accepted should continue to a full hearing but the other two claims should either be struck out or made the subject of a deposit order.

The Law

9.1 I set out briefly the legal provisions in question.

Article 3(4) of the Directive states:-

"*Member States may provide that the Directive insofar as it relates to discrimination on the grounds of disability and age shall not apply to the armed forces*".

Recitals 18 and 19 to the Directive provide:-

"(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

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

Schedule 9 of the 2010 Act sets out exceptions to Part V dealing with work and paragraph 4(3) of Schedule 9 reads:-

"*This Part of this Act so far as relating to age or disability does not apply to service in the armed forces........*".

Rule 37(1) of the 2013 Rules reads:-

"*At any stage of the proceedings either on its own initiative or on the application of a party a tribunal may strike out all or part of a claim or response on any of the following grounds –*

(a) that it is scandalous or vexatious or has no reasonable prospect of success".

Rule 39 of the 2013 Rules reads:-

"*Where at a preliminary hearing under rule 53 the tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

(2) The tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit".

9.2 I have considered the authorities of **De Bique** (above) and **Child Soldiers International** (above) to which I was referred. I set out an extract from the Judgment of Kenneth Parker J in **Child Soldiers International**:

"My first task is to decide what Article 3(4) means. In my view, the meaning cannot be plainer. Member States are unambiguously given an unqualified and unrestricted power not to apply the Directive to the armed forces......... To put my conclusion in short, Article 3(4) simply permits a Member State entirely to disapply the Directive, in so far as it concerns age discrimination, in relation to the armed forces. In defining the scope of the derogation, the Member State could, of course, choose to limit the extent to which it should apply, for example, by restricting the derogation to certain parts of the armed forces or to specified functions of the armed forces".

10. **The claimant's pleaded case**

10.1 I set out briefly the claimant's pleaded case which for the purposes of this hearing I accept. I reiterate that I have made no findings of fact.

10.2 The claimant was employed as an RAF steward. At material times she was a single parent to 3 young children. In April 2014 she transferred to RAF Leeming in North Yorkshire from RAF Benson in Oxfordshire. She did this to be closer to her parents who could assist with childcare. When she arrived at RAF Leeming childcare difficulties arose which prevented her from working late shifts. She was told if these difficulties continued she could face disciplinary action. On 18 February 2015 the claimant was put on formal disciplinary warning by reason of childcare issues and told she would be better off handing in her notice which could be withdrawn once she had resolved the issues. In March 2015 the claimant arranged to move to Darlington where childcare was easier. The claimant was told that if the move did not work she would be discharged from the RAF as unsuitable. The claimant accepted the advice given and submitted her early termination notice with a view to rescinding it when her difficulties with childcare were resolved.

10.3 On 16 April 2015 the claimant was seen by a consultant psychiatrist who stated that the claimant could not perform her duties effectively because of a change in her domestic circumstances and unless there was a change to her occupational circumstances she would continue to present with recurring bouts of anxiety and

depression. The claimant went through a fitness test on 17 May 2015 which she failed and as a result the warning given on 18 February 2015 was extended by three months. On 12 August 2015 the claimant passed a fitness test. By then her childcare issues were resolved and she felt better. The medical board said that the claimant was fit for service with two limitations namely that she was unfit for service outside base areas and secondly that she was fit to deploy worldwide areas but not for longer than 30 days.

10.4 The disciplinary warning was lifted in August 2015 and the claimant asked to rescind her notice but that was refused until she had demonstrated a sustained improvement in performance of duties for a further three months. On 8 September 2015 claimant was told she could not rescind her notice because manning levels for stewards were at a sufficient level, because her service reports gave her a lower than average career profile with limited potential for promotion and because for medical reasons, she could not deploy to worldwide areas for more than 30 days. As a result the claimant left the RAF on 23 January 2016.

11 **Conclusions**

The claims of disability discrimination

11.1 I have given this matter careful and detailed attention. The claimant advances two claims of disability discrimination. There are many elements which make up such claims but the issue before me is whether the claimant can advance such a claim at all in light of the provisions set out at paragraph 4 (3) of part 1 of schedule 9 of the 2010 Act.

11.2 I note that the claimant asserts that the clear wording of paragraph 4(3) should not apply in cases where the respondent has caused or contributed to the impairment which renders the claimant disabled as is her assertion in this matter. I reject that submission. The wording of paragraph 4(3) is clear and unequivocal. The provision arises out of the Directive and Article 3(4) of the Directive provides for an unambiguous and unqualified and unrestricted right of member states to exclude the protected characteristics of disability and age in respect of the armed forces. I find that that unqualified and unrestricted right finds voice in paragraph 4(3) of schedule 9. The provisions make no reference whatever to the exclusion being qualified in any way - let alone when a member of the Armed Forces is said to have been rendered disabled by reason of the actions the respondent. I reject that argument advanced by the claimant.

11.3 The second argument advanced is that I should pay attention to the provisions of Recitals 18 and 19 to the Directive and read the ability to exclude the protected characteristics of age and disability as being restricted to circumstances only of the operational capacity of the Armed Forces and/or its combat effectiveness. I do not read those recitals in the way Miss Gardiner would have me read them. I read the recitals as setting out the rationale for the unequivocal and unrestricted exclusion which appears in Article 3(4). Recital 19 requires the member state to define the scope of the derogation and it is clear that the scope is defined in the 2010 Act and it is unqualified unrestricted and unequivocal. I conclude that the wording of paragraph 4(3) is entirely clear. The claimant cannot advance a claim against the respondent relying on the protected characteristic of disability. I find myself in full agreement with the submissions advanced by Mr Serr on behalf of the respondent in relation to the claims of disability discrimination. In particular I accept the submissions referred to at paragraph 8.10 above which provide a compelling answer to both strands of the the argument advanced

by the claimant that I should interpret paragraph 4(3) in a purposive way in order to allow the claims advanced by the claimant to proceed.

11.4 in reaching that conclusion I have paid close attention to the decision in **Child Soldiers International** (above). That decision is not binding on me: it relates to the protected characteristic of age and not disability. However, it is highly persuasive authority and I agree with its rationale and I follow it.

11.5 In those circumstances I conclude that the claims of disability discrimination have no reasonable prospect of success and I strike out those claims pursuant to Rule 37(1)(a) of the 2013 Regulations.

The claim of indirect sex discrimination

11.6 There is no bar to a claim of sex discrimination been advanced by the claimant. The claim advanced is reliant on section 19 of the 2010 Act and is a claim of indirect sex discrimination. I am asked to strike out the claim or in the alternative order a deposit on the basis that the respondent is bound to succeed in arguing that it acted in a proportionate way to achieve a legitimate aim.

11.7 The function of a tribunal in assessing whether a respondent has acted in a proportionate way to achieve a legitimate aim is highly fact sensitive. The tribunal must take account of all matters which are placed before it. In this case and accepting what the claimant says, it is arguable that the claimant was misled in some way when she was advised to put in her early termination notice. Furthermore, the service complaint itself has concluded that the claimant ought not to have had her formal warning extended as it was in May 2015 after her failure of the RAF Fitness Test and that some minor administrative action should first have been considered. The Appeal Board dealing with the service complaint set out clearly at paragraph 44 (page 91 of the bundle before me) that the formal warning should not have been extended in May 2015 and therefore an application to rescind the early termination notice could have been made in May 2015 and not three months later as it was. There was an error made and the Appeal Board expresses itself as "*very disappointed*" that that error occurred. That matter is something which the tribunal will take account of in assessing whether or not the respondent acted proportionately in this matter. There are other matters also such as a consideration of the possibility of adjusting the duties of the claimant and whether or not in practice her ability to deploy abroad for 30 days would have been sufficient to enable the claimant to give proper and effective service. It seems to me having looked at this matter in detail that the claimant advances an arguable case in respect of the proportionality of the respondent's actions. The other elements of an indirect sex discrimination claim are also plainly arguable and were not focussed on in the submissions of the parties. If I decide – as I do – that the argument on proportionality has more than little reasonable prospect of success, then it is right that the claim should proceed to a full hearing.

11.8 I conclude without difficulty that it would be wrong to strike out this claim on the basis that it has no reasonable prospect of success. I have considered carefully whether it has only little reasonable prospect of success and I conclude that I am unable to say that the case has only little reasonable prospect of success. I conclude that it would be wrong to order the claimant to pay a deposit as a condition of continuing with this claim and with the arguments she advances within it.

11.9 Accordingly I reject the application to strike out the claim of indirect sex discrimination and I reject the application for a deposit.

Next Steps

11.10 The result of this judgement is that the claimant can proceed with her claims of sex discrimination and victimisation. I will instruct that a telephone private preliminary hearing be convened at the earliest opportunity in order to enable the issues in those claims to be clarified and for case management orders to be made to bring those matters on a final hearing.

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EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 2 February 2018