Neutral Citation Number: [2024] EAT 161

Case Nos: EA-2023-000588-AS,
EA-2023-000590-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 September 2024

Before:

HER HONOUR JUDGE TUCKER

- -

Between:

MS H CURTIS

Appellant

- and -

MINISTRY OF DEFENCE

Respondent

- -
- -

Mr Jeffrey Jupp KC (instructed by **Leigh Day**) for the **Appellant**

Mr Julian Allsop (instructed by **Government Legal Department)** for the **Respondent**

Hearing date: 26 September 2024

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JUDGMENT

SUMMARY

MATERNITY RIGHTS AND PARENTAL LEAVE

The Appellant was a corporal in the RAF. She passed a Promotions Board which meant that she was eligible to promotion to the rank of Sergeant. In order to be able to apply for the full range of opportunities available at that rank, she required a full fitness certificate. However, she sustained an injury and was medically downgraded. She was due to attend a medical board in August 2017 for assessment and, it was hoped, to obtain a full fitness certificate. Prior to that appointment taking place she discovered that she was pregnant. Her attendance at the board was cancelled because of her pregnancy. Consequently, she was unable to apply for her preferred promotion post when it became available. Although she was subsequently appointed, she contended that the cancellation of her medical board appointment had long term, negative, consequences for her career and career extension. She issued claims in an employment tribunal for, amongst other matters, pregnancy discrimination in respect of cancellation of the medical board appointment.

An Employment Judge struck out that claim on the grounds that the Tribunal had no jurisdiction to hear it because that claim had not been included within the summary of her claims set out by a Specified Officer in his/her notification of admissibility of a Service Complaint and was therefore not deemed admissible as part of her Service Complaint. The Judge concluded that the Tribunal did not have jurisdiction to consider the claim because the jurisdiction conferred by s.120(1) of the EqA 2010 did not apply to serving members of the armed forces unless the complaint brought before the Tribunal had been the subject of a Service Complaint and not withdrawn.

The Claimant's appeal was allowed. The combined effect of the relevant statutory provisions set out in sections 340A and B of the Armed Forces Act 2006, the Armed Forces (Services Complaints) Regulations 2015 and sections 120-121(2) of the EqA 2010 set out a careful

structure through which serving members of the armed forces can only bring a claim under the EqA 2010 before an employment tribunal when they have first raised that complaint by way of a Service Complaint and allowed the military authorities to address it through a process of internal investigation. However, at each stage of that procedure, where a decision against the complainant is made, including when a decision is determined to be inadmissible as a Service complaint, there was a right afforded to the serviceman or woman to be told of that decision and the reasons for it, and then a right to seek review to an independent body, namely the Ombudsman or Tribunal.

HER HONOUR JUDGE KATHERINE TUCKER

1. This is an appeal against a decision of an Employment Judge, Employment Judge Fredericks, made at a Preliminary Hearing on the 31st of January 2023. The Judgement was sent to the parties on the 5th of May 2023. In this judgement, I refer to the Appellant as the Claimant, and to the Respondent as the Respondent, as they were before the Tribunal.

The facts

2. The Claimant was a corporal in the Royal Air Force. She issued claims against the Respondent arising from the way in which she asserts she was treated during her pregnancy and maternity leave, during 2017 and into 2018.

3. In 2017, the Claimant passed a Promotions Board for promotion to the rank of Sergeant. The effect of that pass was that she was placed on a list of candidates suitable for promotion to the rank of Sergeant and, together with others on that list, had to wait for a vacancy to become available. The Claimant was ranked number 15 on the list.

4. The Claimant plays netball to a high level, and she had played for the RAF. She sustained an injury playing netball and as a result, was medically downgraded. In order to be passed as fit, and, importantly, to have the ability to apply for the full range of opportunities available for the rank of Sergeant, the Claimant needed a full fitness certificate. The Claimant was due to attend medical board on the 9th of August 2017 for her fitness to be assessed and hopefully, for her then to obtain a full fitness certificate.

5. In 2017, the Claimant learnt that she was pregnant. She informed her manager of her pregnancy in May 2017.

6. On the 6th of August 2017, the Claimant was told that her medical board, due to take place in a matter of days, had been cancelled, and that that was because she was pregnant. A note which was added to the Claimant's medical records on the 18th of July stated:

> "appointment cancelled by service due to patient being pregnant. The appointment with the RAF medical board has been cancelled. Please re-refer on return from maternity leave."

The Claimant has subsequently asserted that that act, the cancellation of her medical board appointment, was discriminatory.

7. The Claimant commenced maternity leave on the 6th of November 2017. She gave birth later that month. She remained on maternity leave until the following September, i.e. September 2018.

8. In April 2018, the Claimant was offered a Sergeant's post at RAF Benson. That RAF base is a long way from her base in Honington. The Claimant asserts that she was given a very short period of time in which to make a decision about that role, some 24 hours. Ultimately, she concluded that it was not feasible for her to take up the role. However, whilst looking at information about the vacancy online, she also saw that a further vacancy had become available at the Military Correction Training Centre (MCTC) in Colchester. That was significantly closer to her base in Honington. The Claimant applied for that role. She was not successful in that application and was told that the reason for that was that the role required someone to have a full fitness certificate. That was something which the Claimant did not have, because of the cancellation, she says, of her medical board which had been scheduled to take place on 6th November 2017. The Claimant was asked if she was declining promotion at RAF Benson.

When she concluded that she would be unable to accept that role, the Claimant was then removed from the Sergeant's list.

9. Since these events, the Claimant has been promoted to the rank of Sergeant. She asserts, however, that the discrimination to which she was subject has had long term consequences for her career and career earnings, both in terms of her earnings and because of the period of time for which she has now been granted a career extension; her assertion is that that extension would have been significantly longer if she had been promoted at an earlier date.

10. On the 24th of January 2019, the Claimant made a "Service Complaint" and later provided some additional information in respect of it. Employment Judge Fredericks, whose decision is subject of this appeal, recorded in the decision that it was clear that in the Service Complaint, the Claimant was complaining about treatment whilst pregnant and whilst on maternity leave. In particular, in her complaint, she made express reference to, and complained about, her medical board appointment being cancelled and that she was unsuccessful in the application she made to the MCTC due to the state of her medical certificate.

11. As part of her Service Complaint, the Claimant was interviewed by a Specified Officer on the 19th of February 2019. I have seen a record of that interview and the information which she gave to the Specified Officer: that document was signed by her, and by that officer.

12. The Specified Officer then wrote a letter to the Claimant, dated the 22nd of March 2019. That is an important document. It is headed "Notification of admissibility of a formal Service Complaint". After some opening paragraphs, at paragraph 3, the Specified Officer stated as

follows: “I have identified that your grievances may be defined under the following heads of complaint.” The Specified Officer then sets out a number of areas of complaint:

> “a. You complain of a lack of welfare support whilst on maternity leave, and you also believe that you had no line manager during this period and were thus disadvantaged as a result.
>
> b. You complain that you were not career managed effectively whilst on maternity leave.
>
> c. You complain that you were asked to accept an offer of promotion in unreasonable circumstances.
>
> d. You complain that your promotion offer was not processed in accordance with policy. This includes a failure to offer you a deferral of your promotion to Sgt until late in the process.
>
> e. You complain that you were required to perform work related duties whilst on maternity leave in order to process your promotion offer. Additionally, you state that you accrued financial costs in relation to the associated travel that was necessitated by this.
>
> f. You complain that you did not receive a signed copy of your maternity notice form from your Commanding Officer (CO)
>
> g. You complain about misleading information on job application forms for a Military Correctional Training Centre (MCTC) role, in connection with your Temporary Joint Medical Employment Standard (TJMES).
>
> h. You complain about numerous instances of correspondence sent by e-mail to various individuals in the Service for which you have not received any reply.
>
> i. You complain of "the large period of time between the issuing of Board of Officers Decision and my receiving of the outcome from unit level" in relation to AP3392 Vol 2. Leaflet 561 Annex B.
>
> j. You complain that you have been indirectly discriminated against on the grounds of a protected characteristic, namely: pregnancy and maternity.
>
> k. You complain that you did not receive a 2017/18 SJ4R.”

13. At (b) above, the Specified Officer stated “you complain that you were not career managed effectively whilst on maternity leave”; at (c) that “you complain that you were asked to accept an offer of promotion in unreasonable circumstances”, and at (j), “you complain that you have been indirectly discriminated against on the grounds of a protected characteristic, namely: pregnancy and maternity.” As set out above, in the recitation of the facts, the Claimant asserts that the problems she encountered regarding promotion involvedthe cancellation of the medical board.

14. At paragraph 4, the Specified Officer stated as follows:

> "having considered the relevant information and taken appropriate advice, I can now inform you that I have decided that this matter meets with the required criteria and is an admissible service complaint".

I pause there. In my judgment, it is important to consider the heading of that letter: it is "notification of admissibility of a formal service complaint". There is no notification of any part of, or indeed any, Service Complaint not being admissible. In addition, at paragraph 3 of the letter, the Specified Officer was clear that s/he considered that the grievances 'may be defined' under a number of heads of complaint. It did not state that they were exhaustively set out.

15. In submissions, I was told that the Claimant believed that all of her complaints, including her complaints regarding cancellation of the medical board appointment, had been passed for investigation.

16. On the 17th of December 2020, the Claimant was provided with the outcome of the investigation into her complaint. That included in particular, (at page three, paragraph 10) the following passage,

> "You will have noted from the Specified Officer's (SO) letter of admissibility (22 Mar 19) that your complaint regarding the scheduled Medical Board to assess recovery from an operation was not included. Therefore, I have not considered it in this DL"

DL stands for 'decision letter'. In my judgment it was not, 'entirely clear', that that part of the complaint had not been accepted because it was deemed not admissible. The letter, as recorded above, made no reference to any part of the Service Complaint not being admissible.

17. The Claimant then issued proceedings in the Employment Tribunal against the Respondent. The Respondent applied to strike out the Claimant's claims on two grounds. First, that the complaints were out of time, and that it was not just and equitable to extend time. Secondly, that the Claimant's complaint regarding the cancellation of the medical board was a complaint over which the Tribunal did not have jurisdiction. The Claimant's claims included the complaint of maternity and pregnancy discrimination, contrary to section 18 of the Equality Act 2010, and indirect sex discrimination, contrary to section 19 of the Equality Act 2010. The claim of pregnancy and maternity discrimination expressly pleaded that the cancellation of her medical board appointment was an act of direct discrimination. (Paragraph 26a, (i) and (ii) of the Claimant's Claim Form, which is set out at page 56 of the appeal bundle.)

18. At the Preliminary Hearing the Judge determined that the Claimant's claim should not be struck out as being out of time, but determined that it was just and equitable in all the circumstances to extend time under section 123 2(b) of the Equality Act 2010. However, in respect of the claim regarding cancellation of the medical board appointment, the Judge struck out that claim on the grounds that the Tribunal had no jurisdiction to hear it.

The Judge's decision at the Preliminary Hearing

19. The Judge set out the background to the claims, in particular setting out, in detail, a helpful chronology of the events. At paragraph 8, the Judge recorded the application being made by the Respondent, namely that the claim of pregnancy and maternity discrimination relating to cancellation of her medical board appointment had not been taken forward as part of her Service Complaint, and that that had robbed the Tribunal of jurisdiction to hear the claim subsequently issued in the Tribunal. At paragraph 11, the Judge stated as follows:

> **"On 22 March 2019, the Specified Officer advised the claimant of the 11 heads of claim which were being submitted to the Decision Body for determination. None of those heads included the complaint which is presented at paragraph 26(a) of the**

> **Particulars of Claim. I have not seen the letter informing the Claimant which of her complaints have been carried forward, but I am satisfied that the Claimant did not seek to review or appeal the decision to omit that particular complaint."**

It is common ground that the letter of the 22nd of March 2019 was, in fact, before the Judge at the Preliminary Hearing. At paragraph 12, the Judge recorded the paragraph in the decision letter which I have set out. At paragraph 13, the Judge recorded that the Claimant appealed the outcome and made reference to the medical board appointment. The appeal outcome did not consider this issue any further in its review of the service outcome because in the Judge's view, the issue did not, as a matter of fact, form part of the Service Complaint which was taken to determination.

20. The Judge then set out the relevant law. In particular, at paragraph 15, the Judge stated as follows:

> **"The Respondent contends that a complaint is deemed withdrawn if it is not considered by the Defence Council and the complainant does not appeal that decision. In submissions, Mr Jupp quoted s121(2) Equality Act 2010 which currently says something different."**

At paragraph 16, the Judge stated as follows:

> **"What constitutes a 'deemed withdrawal' has, though, been considered in case law. In *Molaudi v Ministry of Defence [2011] UKEAT/463/10/JOJ*; Silber J held that a 'service complaint' is invalid if it is not accepted and put forward to the Defence Council. Whilst that case considered, in part, specific wording from the *Race Relations Act 1976*, I consider that the broad ratio relating to the purpose of the service complaint process bind me in this decision. The important passages, dealing with the service complaint regime broadly, which inform me, is set out in the following paragraphs:-**
>
> > ***24. So a complaint which has not been accepted by the prescribed officer cannot be dealt with by the Defence Council. It must therefore follow that the intention of the legislature was that a 'service complaint' was a complaint which was accepted as valid by the prescribed officer as otherwise it could not have been considered by the Defence Council. As I will explain, the decision of the prescribed officer to refuse to accept what purports to be a 'service complaint' can be challenged by judicial review.***
> >
> > ***26. A second reason why I consider that a 'service complaint' must mean a complaint which has been accepted by the appropriate prescribed officer as being valid is that this meaning is consistent with the purpose of the provisions in requiring a complaint to the prescribed officer as a pre-requisite to making***

> ***a complaint to the Tribunal. There is much authority to the effect that "a certain amount of common sense [must be applied] in construing statutes (per Lord Goddard CJ in Barnes v Jarvis [1953] 1WLR 649,625).***
>
> ***29. First, the need for a serviceman to make a complaint to the prescribed officer before lodging an appeal before the Employment Tribunal explains why the usual period for bringing proceedings for issues of race relations [which this case was about] is not the usual period of three months beginning when the act complained of was done. Instead, in light of the requirements under the service complaint procedure, service personnel are afforded an extra in which to lodge Employment Tribunal proceedings (see RRA s68(1)(b) now enacted by s123(2) Equality Act 2010)."***

The Judge then set out Section 340A of the Armed Forces Act 2006, and referred to s340B and s.340C(1).

> **"17. The service complaint process is laid out from *section 340A Armed Forces Act 2006*. That section reads:-**
>
> ***'340A Who can make a service complaint?***
>
> ***(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.***
>
> ***(3) In this Part, "service complaint" means a complaint made under subsection (1) or (2).***
>
> ***(4) A person may not make a service complaint about a matter of a description specified in regulations made by the Secretary of State*.'**
>
> **18. *Section 340B Armed Forces Act 2005* (sic) introduces the 'Specified Officer' who determines whether or not the service complaint made is admissible and then passes admissible claims for determination. Section 340C(1) then reads:**
>
> ***"(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 [as is the case here], or***
>
> ***(b) by the Council themselves."***

And then at paragraph 19, the Judge summarised the procedure. That summary included the following passage:

> **"The first step is to lodge a complaint, which is considered by the designated officer" - in fact, it's a Specified Officer - "That officer determines whether the complaint, in whole or in part, is admissible or valid to be put forward for**

> **determination by the Defence Council. Matters taken forward to the Defence Council form part of the accepted service complaint. Those matters which are not taken forward, are not part of the accepted service complaint.**
> **Complainants may appeal the decision not to take all or part of the complaint forward through the ombudsman or judicial review. Where they do not do so, I consider it is proper that that aspect of the claim should be considered to have been abandoned at that point."**

The Judge did not set out para.5(4) of the Armed Forces (Service Complaints) Regulations 2015. Nor did the Judge address the fact that there is a mandatory requirement for the Specified Officer to inform a complainant, either that the service complaint is admissible, or, is not admissible, but that if the complaint is found not to be admissible, the Specified Officer is required give reasons for that decision.

21. The Judge's analysis regarding the application to strike out the relevant part of the claim on grounds of lack of jurisdiction is set out at paragraph 24, 25 and 26 of the decision:

> **"24. The claimant made the complaints as outlined above. Those included details about the matters set out in this paragraph of the claimant's particulars of claim, namely the cancellation of her medical board and the subsequent alleged impact of that on her ability to secure promotion. Those matters were put before the designated officer, and were not put forward as a head of claim to the Defence Council. I have not seen an explanation for why those matters were not taken forward. I am not clear, and it was not evidenced, whether a specific exclusion was offered or whether (as is possible) the issue was simply missed by the officer reviewing the complaint. In either scenario, the claimant did not appeal or respond to that omission. Instead, she accepted the heads which were proposed to be put forward and trusted that the matters would be dealt with. Her complaints to the Ombudsman about her service complaint deal only with the delay to the dealing of the complaint, not in relation to the substance of what was dealt with.**
>
> **25. In my judgment, this lack of action was an error. It is clear to me that the Defence Council can only deal with heads which the designated officer has put forward for consideration. This makes sense in circumstances where the designated officer's legislative role is to filter valid and admissible complaints through to the Defence Council and screen out those complaints which should not be advanced. In consequence, the issue was not dealt with when the service complaint was determined. That body was bound by what was advanced by the designated officer, as was explained in the outcome letter. Naturally, although the claimant raised the issue again in her appeal, the appeal could only deal with the**

> **issues considered at the previous stage. It, too, was bound by the complaint as it was defined by the designated officer.**
>
> **26. Unfortunately for the claimant, this means that the issues caught by these paragraphs did not form part of her service complaint. Considering the case law outlined above, I am satisfied that this means that these paragraphs cannot be sustained before the Employment Tribunal. The claimant was not able, for whatever reason, to respond to or appeal the omission. From that point, in my judgment, this particular claim was abandoned by the claimant and should be considered to have been withdrawn. Consequently, I consider that I must strike out paragraphs 26(a), 26(a)(i) and 26(a)(ii) of the particulars of claim."**

22. The Claimant applied for reconsideration of that decision. I have seen the Judge's decision on reconsideration dated the 3rd of June 2023. In particular, the Judge recorded as follows, at paragraphs 13 and 14:

> **"13. First, I observe that there was evidence before me that the issue was considered by the Specified Officer and that this part of the service complaint was not put forward as part of the admissible claim. As noted at paragraph 12 of the judgment (quoting from page 96 of the bundle), the service complaint outcome letter includes the passage *'you will have noted from the Specified Officer's (SO) letter of admissibility (22 Mar 19) that your complaint regarding the scheduled Medical Board to assess recovery from your operation was not included. Therefore, I have not included it in this DL*.' This letter was not in the bundle, but at no point has the claimant asserted (that I have seen) that she never received that letter. It did not form part of her appeal, for example.**
>
> **14. In those circumstances, it was open for me to find, as I did, that this particular part of the complaint was considered and was considered to not be admissible. The claimant did not complain about the decision that it was not admissible even after she had been informed of it in the service complaints outcome (assuming the 22 March 2019 letter had not reached her)."**

The Judge also considered that the decision in **Molaudi** remained applicable for the reasons set out in paragraph 16 of the Judgement and stated that a complaint is deemed to have been withdrawn if it is not carried through to the Defence Council. At paragraph 16 the Judge stated:

> **"This application for reconsideration does not offer new evidence or new argument which has persuaded me that it is necessary in the interests of justice to alter my decision. I do not consider, on the wording of *s121 Equality Act 2010*, that the Tribunal has jurisdiction where part of the complaint made has not been put forward to the Defence Council (as is the case here) and where the decision is not reviewed or appealed. I do not see how that position is different where the claimant was not told about the decision not to put forward part of her claim."**

As noted above, it was common ground before the parties that the Specified Officer's letter of 22 March 2019 was, in fact, before the Judge. I consider that the conclusions in paragraph 14 of the reconsideration decision do not sit easily with the Tribunal's initial Judgement and, in particular, paragraph 24, where the Judge expressly stated that he had not seen any explanation for why the cancellation of the medical board complaint was not taken further, and appeared to consider that it may have simply been missed by the Specified Officer. There certainly was not a finding that the complaint had been considered, and was considered not to be admissible, nor any reasons given as to why it had been determined to be inadmissible. The words of the Judge in paragraph 24 of the Judgement (set out in paragraph 21 of this Judgment) do not sit well with such a suggestion. I also consider that the letter itself does not make any express reference to any matter being determined to not be admissible, but rather says, in its heading, that it is a notification of admissibility.

The appeal and submissions

23. The Claimant advanced the following grounds of appeal. First, that the Judge failed to consider Regulation 5(4) of the Armed Forces (Services Complaints) Regulations 2015 in the original decision. Secondly, that the Judge erred and concluded that those Regulation had been complied with. Thirdly, that there was an error of law in that the Judge failed to understand the evidence, stating that he had not seen the letter sent to the Claimant, whereas, in fact, it was before the Judge and indeed referred to by the Judge in one paragraph, (paragraph 11). Fourthly, it was contended that the Judge had erred in determining that the Claimant had erred in not applying for a review of the non-inclusion of the medical board complaint. This was because the Claimant could not do so until she was told that the medical board complaint was not admissible, and the reason for that non-admissibility. Fifthly, it was contended that the Judge

wrongly held that the Tribunal was bound by the decision in **Molaudi** : that was a decision in connection with a different statutory scheme and was not binding in respect of the current and revised statutory scheme. Sixthly, it was contended that the Judge had erred in concluding that the Tribunal lacked jurisdiction to hear the complaint. It was submitted that the withdrawal provision in section 121(2) of the Equality Act only applies to Service Complaints which had been held to be admissible and then rejected, and no application was made for a review, or, if made, the review is not upheld. In this case, it was submitted that the medical board complaint had not been expressly withdrawn and, further, that there was no positive decision on non-admissibility by the Specified Officer. Consequently, it was submitted the deemed withdrawal provisions did not apply and the Tribunal did not lack jurisdiction over the complaint.

24. The Respondent addressed each of those grounds in turn. First, the Respondent made the important submission, drawing my attention to **DPP Law Limited v Greenberg** [2021] IRLR 106, that this appellate court should be mindful of its role on appeal and the parameters of its ability to interfere with a first instance decision, particularly where the statement of the relevant legal principles was accurate or that that those principles could be correctly discerned from the judge's decision. It was submitted that, on a fair reading of the Judgement and the reconsideration decision in this case, it was evident that the Tribunal had indeed considered the correct legal principles and the Claimant's argument under Regulation 5(4) of the 2015 Regulations. It was submitted that this appellate Tribunal should be slow to conclude that correct principles have not been applied when those legal principles are correctly stated and should only do so where it is very clear from the language used that a difference principle has been considered and applied. Secondly, my attention was drawn to the fact that the Tribunal had clearly focused on the fact that the admissibility letter had not included the medical board allegations and that consequently, it could not be right to suggest that the Tribunal found that

Regulation 5(4) had been applied or considered. Rather, what the Tribunal found was that there had been compliance with it, but that the medical board allegation had been excluded and consequently, was deemed not to be, admissible. The Tribunal had clearly accepted and preferred the Respondent's arguments as set out, in particular by paragraph 16 of the Tribunal's reasoning and Judgment.

25. It was submitted that the primary difficulty for the Claimant was that the Tribunal is a creature of statute: it only has power to determine those matters which Parliament, through statute, has granted it a power to make decisions upon. There were strictly prescribed rules about when Service Complaints from military personnel could be considered by a Tribunal. In this case, there had not been a determination that the complaint regarding the medical board was admissible. Consequently, there was no express conferral of jurisdiction upon the Tribunal. In those circumstances, it was submitted that Grounds 1 and 2 should be dismissed.

26. In respect of Ground 3, again it was submitted that this was an attempt to invite an overly critical analysis of the decision and impermissibly engage in critique of phrases and language used without undertaking a fair reading of the Judgment and Reasons as a whole. It was submitted that it was important that the Judgement should be read as a whole, not focusing on individual phrases or passages in isolation. In particular, my attention was drawn to the Judgement at paragraphs 11 and 12. It was submitted that the misstatement by the Tribunal in relation to whether or not it had before it the admissibility letter did not vitiate the conclusions reached, and that there was no error of law or approach. It was submitted that Ground 4 was, in truth, a perversity challenge, seeking to challenge the Tribunal's legitimate findings. It was submitted that the Claimant had made a fatal error in not applying for a review of the admissibility decision and the omission of reference to the medical board allegations within it.

It was submitted that there was nothing which should enable this appeal Court to intervene. It was submitted that this ground of challenge fell far short of the overwhelming case that is required to justify a challenge on grounds of perversity. In respect of Grounds 5 and 6, it was re-stated that the Tribunal was a creature of statute; it was submitted that there is a clear policy decision that where discrimination claims are made, the decision is that, as a matter of policy, these types of complaints should be addressed first, internally, within the military, and that only, therefore, some limited jurisdiction was conferred on Tribunals. It was submitted that the Judge was right to apply what was described as the 'broad ratio' of **Molaudi**, and furthermore, that **Molaudi** had been considered and approved by the Employment Appeal Tribunal in **Edwards v Ministry of Defence** [2024] ICR 687 where Mrs Justice Williams approved the decision that was made and also approved its application to the Equality Act 2010 and the 2015 Regulations. It was submitted that if there was an omission or an error in respect of admissibility decision, the remedy was not to create a jurisdiction for the Tribunal which did not exist. Rather, it was for the Claimant to use other avenues open to her, including, for example, a challenge by judicial review or a complaint of maladministration to the Ombudsman.

The statutory provisions

27. I turn first to the relevant statutory provisions. Section 120(1) of the Equality Act 2010 ("EqA 2010"), confers jurisdiction upon the Employment Tribunal in respect to claims under the Act in the sphere of "Work." That provision, however, is expressly stated to be subject to section 121 of the EqA 2010. Section 121 is headed "Armed forces cases". It provides that the jurisdiction conferred by section 120(1) of the EqA 2010 does not apply to complaints relating to an act done when the complainant was, as this Claimant is, serving as a member of the armed

forces, unless (i) the complainant has made a Service Complaint about the matter and (ii) that complaint has not been withdrawn.

28. Section 121(2) sets out deeming provisions about when a complaint is deemed to be withdrawn:

> "(2) Where the complaint is dealt with by a person or panel appointed by the Defence Council by virtue of section 340C(1)(a) of the 2006 Act, it is to be treated for the purposes of subsection (1)(b) as withdrawn if—
>
> (a)the period allowed in accordance with service complaints regulations for bringing an appeal against the person's or panel's decision expires, ...
> (aa)there are grounds (of which the complainant is aware) on which the complainant is entitled to bring such an appeal, and
>
> (b)either—
> (i) the complainant does not apply to the Service Complaints Ombudsman for a review by virtue of section 340D(6)(a) of the 2006 Act (review of decision that appeal brought out of time cannot proceed), or
>
> (ii) the complainant does apply for such a review and the Ombudsman decides that an appeal against the person's or panel's decision cannot be proceeded with."

29. Primary legislation makes provision for secondary legislation to be passed about how and when service complaints can be brought: sections 340A and section 340B of the Armed Forces Act 2006. Section 340A(3) provides that a service complaint means a complaint made under subsections 1 or 2, which provide as follows:

> "(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."

Section 340B sets out procedure for making a complaint and determining admissibility. That provides that the Defence Council may make regulations, referred to as Service Complaints Regulations, about the procedure for making and dealing with a service complaint. Presently

that secondary legislation is set out in The Armed Forces (Services Complaints) Regulations 2015. Those Regulations set out the procedure for making a service complaint. Regulation 4 provides as follows:

> "**Procedure for making a service complaint**
>
> **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.
>
> (3) The statement of complaint must also state one of the following—
>
> (a) the date on which, to the best of the complainant's recollection, the matter complained about occurred or probably occurred;
>
> (b) that the matter complained about occurred over a period, and the date on which, to the best of his or her recollection, that period ended or probably ended;
>
> (c) that the matter complained about is continuing to occur;
>
> (d) that the complainant is unable to recollect the date referred to in sub-paragraph (a) or (b).
>
> (4) A service complaint may only be made by one person, but other persons may make service complaints about the same or similar matters.
>
> (5) In this regulation, "discrimination" means discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender reassignment, status as a married person or civil partner, religion, belief or sexual orientation, and less favourable treatment of the complainant as a part-time employee."

30. Regulation 5 sets out the action which should be taken on receipt of a service complaint and admissibility. That provision, in my judgment, is important. Regulation 5 provides as follows:

> "**Action on receipt of a service complaint and admissibility**
> **5.**— (1) After receipt of a statement of complaint, the Specified Officer must decide whether the complaint is admissible in accordance with section 340B(5).
>
> (2) For the purposes of section 340B(5)(c), a service complaint is not admissible if—
>
> (a) the complaint does not meet the requirements of whichever of section 340A(1) and (2) applies to the complainant; or
> (b) the complaint is substantially the same as a complaint brought by the same person which has either been decided previously under the service complaints process or is currently being considered under the service complaints process.
>
> (3) If the Specified Officer decides that any part or all of the service complaint is admissible, he must notify the complainant in writing of the decision and refer that part or all of the service complaint to the Defence Council.
>
> (4) If the Specified Officer decides that any part or all of the service complaint is not admissible, he must notify the complainant in writing of the decision, giving the reasons for the decision and informing the complainant of his or her right to apply for a review of the decision by the Ombudsman." (Underlining added)

31. Regulation 6 sets out periods within which service complaints need to be made and Regulation 7 sets out the power of the Ombudsman to review a decision on admissibility:

> "**Period for making a service complaint and power to stay**
> **6.**— (1) Subject to paragraphs (4) and (5), a person may not make a service complaint after three months beginning with the relevant day.
>
> (2) Except in a case within paragraph (3), the "relevant day" means the day on which the matter the person wishes to complain about occurred or (if it occurred over a period of time) the last day on which it occurred.
>
> (3) Where it appears to the Specified Officer that, before a service complaint about a matter is or would be considered, the person is or was expected or required to comply with another formal system for the consideration of that matter, the "relevant day" means the day on which it appears to the Specified Officer that the person exhausts or exhausted the process provided for under that other formal system.
>
> (4) If a matter is or has been capable of being pursued as a claim under Chapter 3 of Part 9 of the Equality Act 2010(2), a service complaint may not be made about the matter after six months beginning with the day on which the matter complained about occurred or, where the matter occurred over a period of time, the final day of that period.

(5) If a matter is or has been capable of being pursued as a claim under Chapter 4 of Part 9 of the Equality Act 2010, a service complaint may not be made about the matter after the end of the qualifying period for a claim as determined in accordance with section 129 of that Act.

(6) A person may make a service complaint after the end of the period in whichever of paragraphs (1) and (4) applies to the complaint if, in all the circumstances, the Specified Officer considers it is just and equitable to allow this.

(7) Where a person makes a service complaint about a matter, and it appears to the Specified Officer that the person is expected or required to comply with another formal system for consideration of that matter, the Specified Officer may stay consideration of part or all of the complaint until the person has exhausted the process provided for under that other formal system."

Ombudsman's review of admissibility
7.— (1) After receiving an application by the complainant for a review of the Specified Officer's decision that a service complaint is not admissible, the Ombudsman must decide whether the service complaint is admissible and notify both the Specified Officer and the complainant in writing of his or her decision and the reasons for it.

(2) The Ombudsman must not consider an application under paragraph (1) made after four weeks beginning with the day the complainant received notification of the Specified Officer's decision, unless the Ombudsman considers it is just and equitable to allow the complainant to apply after that period.

(3) A decision by the Ombudsman in relation to admissibility is binding on the complainant and the Specified Officer.

(4) Where under paragraph (1) the Ombudsman decides that the service complaint is admissible, the Specified Officer must refer the complaint to the Defence Council as soon as reasonably practicable."

32. The other provisions which are relevant are "decisions on a service complaint" (Regulation 9), "appeal against decisions on a service complaint" (Regulation 10), "period for bringing an appeal" (Regulation 11) and "the power for an Ombudsman's review of a decision not to proceed with an appeal" (Regulation 12). For completeness, they are set out below:

"**Decisions on a service complaint**
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 paragraph (1)(b) case) the Defence Council, would be appropriate; and

(ii) grant any such redress.

(3) The person or panel of persons appointed to deal with the service complaint or (in a paragraph (1)(b) case) the Defence Council must notify the complainant in writing of a decision made under paragraph (2)(a) or (b), giving reasons for the decision.

(4) If a decision under paragraph (2)(a) or (b) is made by a person or panel of persons appointed under paragraph (1)(a), that person or panel of persons must inform the complainant of the right of appeal under regulation 10(1).

(5) If a decision under paragraph (2)(a) or (b) is made by the Defence Council, they must inform the complainant of the right to apply to the Ombudsman to conduct an investigation in relation to the service complaint under section 340H(1).

Appeal against decisions on a service complaint
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.

(2) An appeal under paragraph (1) must be brought by the complainant in writing to the Defence Council.

(3) The appeal must be dated and state those aspects of the decision under regulation 9(2)(a) or (b) which the complainant disagrees with and his or her reasons for disagreeing.

(4) If the complainant brings an appeal after the end of the period stated in regulation 11(1) the appeal must state the reason why it was not brought within that period.

Period for bringing an appeal
11.— (1) An appeal under regulation 10(1) against a decision under regulation 9(2)(a) or (b) may be proceeded with if—

(a) the appeal is brought within six weeks beginning with the day on which the complainant received notification under regulation 9(3) of that decision; or

(b) the appeal is brought after the end of the period stated in sub-paragraph (a), but the Defence Council consider it is just and equitable to allow the appeal to be proceeded with.

(2) If the Defence Council decide that an appeal cannot be proceeded with, they must notify the complainant in writing, giving reasons for that decision and informing the complainant of the right to apply for a review of that decision by the Ombudsman.

Ombudsman's review of a decision not to proceed with an appeal
12.— (1) After receiving an application by the complainant for a review of the Defence Council's decision under regulation 11(2), the Ombudsman must decide whether the appeal can be proceeded with and notify both the Council and the complainant in writing of his or her decision, giving reasons for the decision.

(2) The Ombudsman must not consider an application under paragraph (1) made after four weeks beginning with the day the complainant received notification of the decision under

regulation 11(2), unless the Ombudsman considers it is just and equitable to allow the complainant to apply after that period.

(3) A decision by the Ombudsman in relation to whether an appeal can be proceeded with is binding on the complainant and the Defence Council."

"(4) Service complaints regulations must [emphasis added] make provision—

(a) for the officer to whom a service complaint is made to decide whether the complaint is admissible and to notify the complainant of that decision;

(b) for the Service Complaints Ombudsman, on an application by the complainant, to review a decision by the officer to whom a service complaint is made that the complaint is not admissible;

(c) for securing that the Ombudsman's decision in relation to admissibility, on such a review, is binding on the complainant and the officer to whom the complaint was made.

(5) For the purposes of subsection (4), a service complaint is not admissible if—

(a) the complaint is about a matter of a description specified in regulations made under section 340A(4),

(b) the complaint is made after the end of the period referred to in subsection (2)(c) and the case is not one in which circumstances referred to in that provision apply, or

(c) the complaint is not admissible on any other ground specified in service complaints regulations."

There was no suggestion that the substance of the complainant's complaint regarding cancellation of the medial board was inadmissible in this case.

33. Prior to the present statutory scheme and legislation set out above coming into force, there was a scheme through which service complaints could be determined under section 75(8)-(9) of the Race Relations Act 1976, and through the Redress of Individual Grievances Service Complaints issued 2.2 under the Armed Forces (Redress of Individual Grievances) Regulations 2007. That set out the procedure for making a complaint. For example, Regulation 6 stated

> "a person wishing to make a service complaint shall do so by delivering a written, signed and dated statement of the complaint and of the redress which he seeks to the prescribed officer, to his commanding officer".

The action that was then to be taken was set out in Regulation 10A and following. That provided that the prescribed officer" shall decide" whether regulations made under section 334(2) of the Act applied to the matter complained of in the statement of the complaint; that if the prescribed officer decided that the regulations applied to all of the matters complained of in the statement that he should notify the complainant that they were matters about which a service complaint may not be made and was required to give the complaint written reasons of the decision. If the prescribed officer decided that regulation made under section 334(2) of the Act applied to some, but not all of the matter complained, he or she was required to inform the complainant in writing of that decision. There was a scope for notification of a decision and for an application for referral to be made under regulation 20. That scheme did not, however, provide for a right of review to an Ombudsman.

34. In submissions, it was accepted that the Regulations which are now in force, appear to have set up a scheme whereby service men and women's complaints should initially go to a process of internal investigation and possible resolution through the services complaints procedure, but that at each step throughout that procedure, where a decision against the complainant is made, there was a right to be told of that decision and the reasons for it, and then a right to seek review to an independent body, namely the Ombudsman or Tribunal.

Relevant appellate decisions

35. There are two reported decisions which are of particular importance. The first is the decision of Mr. Justice Silber sitting in the EAT in **Molaudi v Ministry of Defence (UKEAT/0463/10 JPJ)**. In that decision, the Claimant, a serviceman, had brought a claim for

race discrimination against the Ministry of Defence which had concerned events said to have occurred whilst he was a serving soldier. The Tribunal had held that he was required to bring a Service Complaint to military authorities before the complaint could be brought to an Employment Tribunal. It found that the complaint brought by the Claimant was out of time and rejected by the authorities for that reason, and, therefore, was not a valid service complaint. The Tribunal found that the pre-condition for bringing a claim in the Tribunal, therefore had not been satisfied. The Claimant appealed against that decision. The EAT upheld the Tribunal's decision and held that a Service Complaint under the then applicable legislation meant a complaint which could be considered substantively by the military authorities. Consequently, a complaint rejected by military authorities because it had been brought out of time, did not fall within that definition. At paragraphs 9, 12 and 13 of the Judgment the EAT stated:

> "9. Members of the Armed Forces who wish to bring claims of racial discrimination before an Employment Tribunal are required to make a "service complaint" before bringing a claim on the same basis to an Employment Tribunal. At the time when the Claimant made his complaint, the statutory requirement in respect of claims for race discrimination was to be found in section 75(8)-(10) of the RRA and which has now been re-enacted in the **Equality Act 2010**. The relevant provisions in the RRA stated (with a provision in the original version which, I was reminded when the draft of this judgment was circulated to counsel, later ceased to have effect when section 75(9A) was enacted and the regulation set out in paragraph 11 below came into effect) that: -
>
> > *"(8). This sub-section applies to any complaint by a person ("the complainant") that another person –*
> > *(a) has committed an act of discrimination against the complainant which is lawful by virtue of section 4; or*
> > *(b) is by virtue of section 32 or section 33 to be treated as having committed such an act of discrimination against the complainant.*
> > *If at the time when the act complained of was done the complainant was serving in the Armed Forces and the discrimination in question relates to his service in those Forces.*
> >
> > *(9) No complaint to which sub-section (8) applies shall be presented to an Employment Tribunal under section 54 unless (a) the complainant has made a service complaint in respect of the act complained of; and (b) The Defence Council have made a determination with respect to the service complaint;*
> >
> > *(9A) Regulations may make provisions enabling a complaint to which sub-section (8) applies to be presented to an Employment Tribunal under section 54 in such circumstances as may be specified by the regulations, notwithstanding that sub-section (9) would otherwise preclude the presentation of the complaint to an Employment Tribunal;*
> >
> > *(10) In this section-*

.. (aa) "regulations" means regulations made by the Secretary of State;
(ac) "Service Complaint" means a complaint under section 334 of the Armed Forces Act 2006." ”

…

“12. The effect of regulation 2(1) of the 1997 Regulation and section 75(9)(a) of the RRA is that a requirement for bringing a race relations complaint against the military authorities in the Employment Tribunal is that a prior complaint has been made in respect of the same matter under "*the service complaint procedure*". When a draft of this judgment was circulated to counsel, I was reminded that the additional requirement in the words underlined in section 75(9)(b) and set out in paragraph 9 above, ceased to have effect when section 75(9A) was enacted and the regulation set out in paragraph 11 below came into effect.

13. This appeal requires consideration of the proper meaning of the term "*the service complaint procedure*". Section 334 of the **Armed Forces Act 2006** states, in so far as is material, that:-

"(1) If—
(a) a person subject to service law thinks himself wronged in any matter relating to his service, or
(b) a person who has ceased to be subject to service law thinks himself wronged in any such matter which occurred while he was so subject,
he may make a complaint about the matter under this section (a "service complaint").

(2) But a person may not make a service complaint about a matter of a description specified in regulations made by the Secretary of State.

(3) The Defence Council must by regulation make provision with respect to the procedure for making and dealing with service complaints.

(4) The regulations must in particular make provision requiring—
(a) a service complaint to be made to an officer of a prescribed description;
(b) the officer to whom a service complaint is made to decide whether to consider the complaint himself or to refer it to a superior officer of a prescribed description or to the Defence Council;

(5) Without prejudice to the generality of subsections (3) and (4), the regulations may also make provisions—
(a) as to the way in which a service complaint is to be made (including provision as to the information to be provided by the complainant);
(b) that a service complaint, or an application of a kind mentioned in sub-section (4)(c) or (e), may not be made, except in prescribed circumstances, after the end of a prescribed period.

(6) A period prescribed under subsection (5)(b) must not be less than three months beginning with the day on which the matter complained of occurred.

(7) If, under provision made by virtue of subsections (3) and (4)—
(a) an officer decides to consider a service complaint himself..
the officer.. must decide whether the complaint is well-founded.

> *(9) In this section "prescribed" means prescribed by regulations made by the Defence Council." ”*

At paragraphs 21, 24, 28 and 30 the EAT stated:

> “21. In this case, the term "*service complaint*" in section 75(9) RRA has to be construed in the context of the subsequent words, which were included when the RRA was passed and they are that "*(b) the Defence Council have made a determination with respect to the service complaint*".
> ….
> 24. So a complaint which has not been accepted by the prescribed officer cannot be dealt with by the Defence Council. It must therefore follow that the intention of the legislature was that a "*service complaint*" was a complaint which was accepted as valid by the prescribed officer as otherwise it could not have been considered by the Defence Council. As I will explain, the decision of the prescribed officer to refuse to accept what purports to be a "service complaint" can be challenged by judicial review.”
> ….
> 28. I agree with Mr Serr, counsel for the Respondent, that the purpose of the statutory scheme is to ensure that the complaint of racial discrimination by the soldier is in the first instance determined by a body deemed by the legislature to be the appropriate body to resolve such disputes with the Employment Tribunal being the body dealing with this matter at the next stage. There are three further factors which are consistent with this approach, if not supportive of it.”
> ….
> 30. Second, the wording of regulation 14 of the 2007 Regulations (which I set out at paragraph 14) makes it clear that if the prescribed officer decides the complainant has made their service complaint outside the specified time period (but subject to the power to extend where "*it is just and equitable to do so*"), the prescribed officer "*shall not consider the service complaint*" this wording is significant because it repeats the language of s111(2) of the ERA and its predecessors. It is the use of this precise terminology in that provision in the words of Elias LJ in **Radakovits v Abbey National PLC** [2010] IRLR 307 ".. what makes these issues jurisdictional rather than mere limitation issues" ([16]).”

At paragraphs 37 and 39:

> “37. In any event the law of this country does (in the words of paragraph 2 of the Directive) provide "*judicial and/or administrative procedures.. are available to all persons who considers themselves wronged by failure to apply the principle of equal treatment to them*..". The critical factor is that any decision by the military authorities to reject for any reason a complaint made by a serviceman on the basis that it does not meet the requirements of a "service complaint" can be the subject of an application for judicial review (see for example **Crompton v United Kingdom** [2009] ECHR 42509/05 [79]). I should add that no attempt has been made to challenge by judicial review or otherwise the decision of the service authorities that the complaint purporting to be a "*service complaint*" and made by the Claimant's solicitors was made out of time.
> ….
> 39. Furthermore legal assistance is available in the Administrative Court while it is not available in the Employment Tribunal. So I am unable to understand any reason why judicial review of a decision made by the military authorities to reject a complaint made by a soldier as not being a valid "*service complaint*" cannot be speedily effectively challenged. It therefore becomes unnecessary to consider further the reliance placed by the Respondent on the facts the very recent decision of the Court of Appeal in **Ministry of Defence v Wallis and Grocott** [2011] EWCA Civ 231.”

36. More recently, the EAT has considered that decision and the statutory provisions which are now in force under the Equality Act 2010 and the 2015 Regulations. Again, in that case, a Tribunal had determined that it did not have jurisdiction to consider a complaint from a serving soldier, on this occasion because the complaint lodged before the Tribunal did not concern the same matter or issue which had been the subject of a Service Complaint. Mrs. Justice Heather Williams dismissed the appeal. Williams J set out the relevant legislation and then stated:

> "29. **Molaudi v Ministry of Defence** UKEAT/0463/10/JOJ ("**Molaudi**") concerned an appeal under the earlier **Race Relations Act 1976** ("**RRA 1976**") provisions. Section 75(8) and (9) provided that if at the time when the act complained of was done, the complainant was serving in the Armed Forces and the discrimination in question related to the complainant's service in the Armed Forces, no complaint could be presented to the ET unless the complainant had (a) "made a service complaint in respect of the act complained of" and (b) the Defence Council had made a determination with respect to the service complaint. The appeal failed as the Employment Appeal Tribunal ("EAT") concluded that a "service complaint" for these purposes meant a complaint which could be considered substantively, so that a complaint rejected by the military authorities as brought out of time did not fall within that definition (paras 24 and 26 – 27). Mr Justice Silber continued:
>
> > "27. ...If a valid service complaint was not a pre-requisite, then all that would be required to constitute a 'service complaint' would be a simple short note made long after the event by a dissatisfied soldier saying that he has suffered from racial discrimination without giving any particulars and therefore not allowing the prescribed officer to make a sensible or realistic determination of it. This indicates clearly that what is required for a 'service complaint' is a valid one, which is capable of being determined on its merits by the prescribed officer or the service authorities before any matter is brought before the Employment Tribunal.
> > 28. I agree with Mr Serr, counsel for the Respondent, that the purpose of the statutory scheme is to ensure that the complaint of racial discrimination by the solider is in the first instance determined by a body deemed by the legislature to be the appropriate body to resolve such disputes with the Employment Tribunal being the body dealing with this matter at the next stage..."
>
> 30. Although the wording of section 121 **AFA 2006** is not identical to the **RRA 1976** provisions, the purpose is plainly the same, as the parties agreed. As I discuss below, Mr Tolley also relies upon Silber J's observation that what is required is a complaint "which is capable of being determined on its merits" by the service authorities before a claim is brought before the Tribunal. Mr Shankland, on the other hand, emphasises the differences between the wording of the RRA 1976 provisions and section 121 EQA which I have already referred to."

37. In particular, she observed that although the wording in section 121 of the Armed Forces Act 2006 is not identical to the Race Relations Act 1976 provisions, the purpose was plainly the same.

38. At paragraphs 85 to 88 she stated:

"**Discussion and conclusions**

The section 121(1)(a) EQA requirement
85. I will first consider the phrase "about the matter" in section 121(1)(a), in order to address when the section 121 jurisdictional bar applies. I will then turn to the specific grounds of appeal.

86. The effect of this provision is that the Tribunal will have no jurisdiction to determine a complaint relating to "an act done when the complainant was serving as a member of the armed forces" unless they "made a service complaint about the matter".

87. I accept that a purposive construction should be applied to this statutory provision, as explained by HHJ Eady QC (as she then was) in **Duncan** (para 32 above).

88. In terms of the context of the section 121 requirement, the following are of particular significance:

i) Section 340B(2)(b) of the **AFA 2006** provides that service complaint regulations (if made) *must* make provision for the way in which the complaint is to be made "including about the information to be provided by the complainant" (para 18 above). In turn, regulation 4(2) of the **Service Complaint Regs** stipulates that the complaint must state "(a) how the complainant thinks himself or herself wronged" and "(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" (para 22 above). As I have already noted, Mr Shankland rightly accepted that regulation 4(2)(c) envisages that the complainant will identify in their service complaint *which* of the circumstances there listed applies (para 23 above). Indeed any suggestion to the contrary – that it would be sufficient for a complainant to simply recite the regulation 4(2)(c) list – is untenable. Accordingly, there is a legislative requirement for a service complaint to include a statement of how the complainant believes that they were wronged and, where it is the case, that this involved discrimination and/or harassment; and

ii) As identified by Silber J in **Molaudi**, the purpose of the statutory scheme is to ensure that 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 (para 29 above). Whilst the **EQA** does not stipulate that the service complaint must have been determined by the Defence Council *before* the claim is presented to the Tribunal, as was required under the **RRA 1976** provisions (para 29 above), the purpose of the current provision is in keeping with the earlier provisions. As indicated by my earlier citation of the authorities, this has also been identified as the purpose of section 121 **EQA** and the parties accept this proposition. Accordingly, there remains force in Silber J's observation that a service complaint is one that is "capable of being determined on its merits by the…[decision-maker] before any matter is brought before the Employment Tribunal", particularly if "brought" is now read in the sense of "decided by" the Tribunal. (Where a claim is presented before the service redress procedure has concluded, the ET proceedings will usually be stayed: **Williams** at para 1.) The intention that the internal process is resolved first is also reflected in the extended six months' time limit provisions that apply to both the service complaint and the EQA claim (paras 15 and 26 above). Whilst the **Service Complaint Regs** contemplate that further information may be provided before a complaint is determined (para 27 above), the investigation will, inevitably, be framed by the terms of the complaint that has been made."

Analysis and conclusions

40. I take, as the Claimant did in submissions, all of the grounds of appeal together.

41. In **Molaudi** the word "valid" or "valid complaint" is used in several parts of the decision. I consider that that word, in the present context, can be misleading. When considering the issue of jurisdiction, the question to be determined is not whether the complaint is "valid" (which has connotations of whether the complaint is well founded); rather, the question to be determined is whether the complaint presented to the Tribunal was one which could be considered as a matter of substance by the military authorities. In my judgment, that is the meaning for which the term 'valid' is used as a convenient (albeit possibly misleading) form of shorthand. The complaint in **Molaudi** had been rejected by military authorities because it had been brought out of time; for that reason, the complaint could not proceed to the Employment Tribunal; it was not one which could have been considered as a matter of substance by the military authorities.

42. I agree that before a complaint can be brought before an employment tribunal a Service Complaint must be raised through the applicable internal procedure and that complaint must be one which is capable of being considered as a matter of substance by the military authorities. That, in my judgment, is the true ratio of **Molaudi**. The decision also identified the broader policy considerations that serving soldiers and military personnel should first address their grievances and complaints with military authorities to provide them with an opportunity to resolve and address those matters before they can before an Employment Tribunal.

43. I agree with the following passage from the Judgment of Mrs Justice Williams in **Edwards**:

> "There remains force in Silber J's observation that a service complaint is one that is capable of being determined on its merits by the decision maker …. the provisions of the Equality Act are in keeping with the earlier provisions that service complaints should first be presented to the military authorities prior to any claim being issued before the Employment Tribunal".

44. However, I consider that a significant degree of caution needs to be exercised with the formulation of the ratio of **Molaudi** as one which focuses on the 'validity' of a complaint. That, in my judgment, is a phrase or use of words which give can give a misleading impression and an inaccurate reflection of the statutory provisions.

45. In addition, I consider it is important to recognise both the similarities and differences between the statutory scheme under the Race Relations Act 1976 and that set out under the Equality Act 2010. In submissions, it was accepted that it appears that the Equality Act sets up a scheme whereby military authorities properly have an opportunity at first to address any grievances or complaints made by military personal. Within that scheme, a structure is now imposed through which, at each stage, there is the possibility of review by or appeal to an independent body (either because of complaint about the way in which the manner has been dealt with, or, the substance of the decision made). That structure did not exist under the previous legislation. Some caution must therefore be exercised in directly transposing the substance of earlier judicial decisions made in respect of those earlier regulations and legislation onto the present scheme.

46. I also note the mandatory terms both of the primary and secondary legislation in and under the Armed Forces Act 2006 about the requirement for an individual to be told that either that a complaint is admissible and is going forward, or that it is inadmissible and the reasons for that inadmissibility, thereby enabling and triggering a time limit for the complainant to

exercise their right to review of that decision by an Ombudsman. In this case, there was no positive decision that the complaint regarding cancellation of the medical board was inadmissible, nor any reasons given for such a decision.

47. Finally, I consider that there was merit in the structure set out within the Claimant's counsel's submissions at paragraph 51 of the skeleton argument. When considering the issue of jurisdiction in the present context it may be helpful to adopt the following structure of analysis:

(i) **The first question is whether or not the Claimant has brought a service complaint**. In this case, there is no doubt that the Claimant did so, and that it contained a complaint about cancellation of her medical review.

(ii) **The second question is whether or not the Claimant has withdrawn that complaint.** In this case there was no suggestion that she had done so.

(iii) **The third question is whether or not the Claimant is deemed to have withdrawn the complaint under the statutory provisions.** As noted above, through all of those deeming provisions there would need to be an opportunity for the individual to appeal or to apply to the Ombudsman, triggered by notification of a decision against them and the reasons for it. In this case, in my judgment, that opportunity did not arise because the Respondent had not complied with the mandatory statutory requirements to inform the Claimant that it had determined that part of her complaint was inadmissible and then provided the reasons for that decision. Not providing that decision, and the reasons for it, meant that the Claimant could not apply to the Ombudsman for a review of the decision.

48. I add that, as a matter of fact, it was not clear on the face of the letter that that indeed was the decision that was taken by the Specified Officer. In other words, it was not clear that a decision of inadmissibility had been made.

49. In any event, in my judgement, for the reasons set out above, I do not consider that any of the deemed withdrawal provisions apply.

50. Consequently, I consider that the Tribunal was in error in reaching the conclusion that it did not have jurisdiction to hear the complaint. In particular, the Judge, in my judgment, erred in his consideration of the letter informing the Claimant of the admissibility of the complaint, and his explanation regarding that letter was confused; and, erred in his consideration and application of the 2015 Regulations. This is a case where a complaint which could have been considered as a matter of substance by the military authorities, was made as part of a Service complaint and placed before the military authorities. The military authorities then had an opportunity to address that complaint. They did not do so, for reasons which remain wholly unclear. They failed to inform the complainant that part of that the complaint was inadmissible, as they were mandated to do by relevant statutory provisions.

51. Finally, I consider that the arguments of the Respondent required me to read into Regulation 5(4) of the Armed Forces (Service Complaints) something which is simply not there on the face of the Statute, or indeed on the face of the primary legislation. Principles of statutory interpretation require language in legislation to be given their ordinary and natural meaning, absent ambiguity in the wording used. In my judgment, there is no relevant ambiguity. The provisions of Regulation 5 are clear, as are the provisions of the primary legislation. Prior to issuing a Tribunal claim a service man or woman must lodge a Service Complaint

which is then considered by the Specified Officer. The Specified Officer must make a decision; admissible or not. If they decide that the decision is admissible, they must inform the complainant in writing (Regulation 5(3)). If the Specified Officer decides that a complaint is not admissible, he must notify the complainant in writing, giving reasons and informing the complainant of their right to apply to a review to the Ombudsman. There is no third option in the statute or Regulations. The Respondent's submissions in my judgement, requires me to read in or create one; that is, if the Specified Officer remains silent on the question of admissibility, the Claimant must apply for a review to the Ombudsman. That simply is not there on the words of the legislation. There is no necessity for that to be read into or understood in the statute. The words are clear. It is for the military authorities to make a decision, admissible or not, and to provide a clear statement of that decision and in case of the rejection of admissibility, to give reasons, thereby triggering the possibility of further review of that decision. The purpose of the statutory scheme is to enable consideration of complaints internally; not to facilitate their oversight or to otherwise place unnecessary hurdles in the way of their consideration.

52. Having heard brief submissions on disposal, the Claimant asked that the EAT substitutes its own decision. In this case, I am satisfied that the basis is for me to do that is made out. There is, in my judgement, only one decision and only one way that this decision could be taken. It was conceded in submissions that, subject to the arguments on this appeal, there was no basis on which the complaint would have been held to be inadmissible. I consider that the only decision which could have been made was that the complaint of pregnancy and maternity discrimination is admissible, and that the Tribunal has jurisdiction to hear it.