

ENGLAND AND WALES / JUDGMENT

Rubery v Ministry of Defence [2026] EWCA Civ 8 (15 January 2026)

[2026] EWCA Civ 8

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Neutral Citation Number: [2026] EWCA Civ 8

Case No: CA-2024-002456

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

The Honourable Mrs Justice Stacey

[2024] EAT 165

Royal Courts of Justice

Strand, London, WC2A 2LL

15 January 2026

B e f o r e :

LORD JUSTICE BEAN

(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE PETER JACKSON

and

LADY JUSTICE ELISABETH LAING

Between:

ANNE-BERNADETTE RUBERY

Appellant

- and -

MINISTRY OF DEFENCE

Respondent

- and -

THE SERVICE COMPLAINTS OMBUDSMAN FOR THE ARMED FORCES

Intervener

Christopher Milsom (instructed by Wace Morgan Solicitors) for the Appellant

Ben Cooper KC and James Chegwiddden (instructed by the Treasury Solicitor) for the Respondent

Patrick Halliday (instructed by the Treasury Solicitor) for the Intervener, the Service Complaints Ombudsman for the Armed Forces (by written submissions only)

Hearing date: 26 November 2025

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Lady Justice Elisabeth Laing:

Introduction

The Appellant ('Mrs Rubery') has served in the Royal Air Force ('the RAF') for over 30 years. She is a Personnel Support Officer Squadron Leader. She made claims of victimisation and indirect discrimination in the Employment Tribunal ('the claims'). The claims related to the way in which the Ministry of Defence had handled a service complaint which she had made. The Ministry of Defence applied to the Employment Tribunal ('the ET') to strike out the claims on the ground that the ET had no jurisdiction to hear them. The ET (Employment Judge Hanning) dismissed that application. The Ministry of Defence appealed to the Employment Appeal Tribunal ('the EAT'). The EAT (Stacey J) allowed the appeal. Mrs Rubery now appeals to this court.

This appeal concerns the interaction between statutory protections against discrimination on the grounds of sex and the legislative scheme under which people who are serving or who have served in the armed forces may make complaints about their service ('service complaints'). The questions it raises are whether section 121 of the Equality Act 2010 ('the 2010 Act'), a restriction

on access to the ET imposed by the relevant legislative scheme, is incompatible with the Convention rights of Mrs Rubery, and, if it is, whether the ET was entitled to re-write it (by adding a subsection to it).

On this appeal, Mrs Rubery was represented by Mr Milsom. Mr Cooper KC and Mr Chegwiddden represented the Ministry of Defence. Mr Milsom and Mr Chegwiddden also represented the parties at the ET. On the appeal to the EAT, the parties were represented by Mr Milsom and by Messrs Cooper and Chegwiddden. I thank them for their written and oral submissions. The Service Complaints Ombudsman for the Armed Forces ('the Ombudsman') intervened by written submissions only. Mr Halliday drafted those, and I thank him, too.

I will start with the facts. I will then summarise the legislative scheme (and the legislative history), then the reasons of the ET and of the EAT. In the next section I will describe the submissions. Finally, I will consider those arguments and explain my conclusion. Paragraph references are to the judgments of the ET and EAT (as the case may be), unless I say otherwise.

For the reasons given in this judgment, I consider that the ET erred in law in holding that section 121 of the 2010 Act is incompatible with Mrs Rubery's Convention rights. It follows that the ET should not have re-written section 121 by adding subsection (1A) to it. Neither section 121, nor the legislative scheme as whole, discriminates, contrary to article 14 read with article 6, between those serving in the armed forces, those who have served in armed forces, and civilian employees. There are no grounds for making a declaration that section 121 of the 2010 Act is contrary to Mrs Rubery's Convention rights. I would therefore dismiss the appeal.

The facts

I have taken the facts from the judgment of the ET. Mrs Rubery's case was that her service in the RAF had been 'blighted by sex discrimination particularly following her treatment for IVF' (paragraph 13). She alleged that three senior officers had discriminated against her and that a fourth had made discriminatory comments during the later investigation of her service complaint.

She made her first service complaint in September 2018 ('complaint 1'). She said that she had been bullied and discriminated against in relation to her career, that she had not been supported and that that had been compounded by a 'derogatory depiction towards a female' in an email. The Ministry of Defence conceded that complaint 1 amounted to a complaint of sex discrimination (paragraph 14). She added further details to complaint 1 in February 2020. The Ministry of Defence dismissed complaint 1 without an oral hearing over two years after it was made. Mrs Rubery's case was that her allegations were dismissed in terms which were 'pejorative and unsustainably critical of her' (paragraph 17).

She appealed through the service complaint procedure in December 2020. Her request for an oral hearing was refused. Her appeal was dismissed in April 2021, except that the Ministry of Defence found that the inordinate delay in deciding complaint 1 amounted to maladministration.

In June 2021, Mrs Rubery made a complaint to the Ombudsman ('complaint 2'). In December 2021, the Ombudsman found that there had been maladministration and upheld complaint 2. The Ombudsman recommended a 'moderate consolatory payment'.

In the meantime, Mrs Rubery had presented her complaint to the ET ('the ET1') in July 2021. The ET summarised her case in paragraph 20. She said that the Ministry of Defence's practice of not holding oral hearings was a provision criterion or practice which discriminated indirectly against women because women are more likely than men to make service complaints and it was harder for them to show discrimination without an oral hearing. She also said that she had been victimised because complaint 1 and her amendments to it were protected acts, and the Ministry of Defence 'contorted its process in various ways so as to avoid upholding' complaint 1. The Ministry of Defence had not investigated complaint 1, or had done so inadequately, had not held an oral hearing and had reached conclusions which were 'at odds with the facts' (paragraph 20).

It was common ground that Mrs Rubery had not made a further service complaint about the two matters on which she relied in her ET1, because the relevant regulations excluded any such service complaint.

The legislation

The issue in this case concerns the relationship between the system for making service complaints and access to the ET. The Armed Forces Act 2006 ('the 2006 Act') and regulations made under the 2006 Act are part of that picture. I will start, however, with the scheme which was in force when the 2010 Act was enacted. That is the scheme which Parliament must be taken to have known about when enacting the 2010 Act and it is therefore potentially relevant to the interpretation of the 2010 Act. This relationship is now a product of amendments made by the Armed Forces (Service Complaints and Financial Assistance) Act 2015 ('the 2015 Act') both to the legislation about service complaints and to the 2010 Act. The current legislative scheme, and its history, support the three points I summarise in paragraph 94, below, and develop in paragraphs 95-97. The relationship between the 2006 Act and the 2010 Act is not accidental. It is a carefully interlocking scheme, as the EAT recognised, and it was designed by Parliament to reflect Parliament's choices about the extent to which serving members of the armed forces should be entitled to bring discrimination claims in the ET against the background of their access to a full process for the raising and decision of service complaints, and of their access to the Ombudsman.

The scheme for service complaints which was in force when the 2010 Act was enacted

The 2006 Act

Sections 334-338 of the 2006 Act (which were repealed in 2015) are relevant. Section 334 was headed 'Redress of individual grievances: service complaints'. Section 334(1) gave a person 'subject to service law who thinks himself wronged in any matter relating to his service', and a person 'who has ceased to be subject to service law' who thinks the same, a right to 'make a

complaint about the matter' under section 334 ('a service complaint'). Section 334(2) barred the making of such a complaint 'about a matter of a description specified in regulations made by the Secretary of State'. Section 334(3) imposed a duty on the Defence Council to make regulations dealing with 'the procedure for making and dealing with service complaints'. One of the topics which had to be covered by such regulations was the relationship in that decision-making between the officer to whom such complaints were referred initially and the Defence Council. Section 334(7) and (8) dealt with the structure of decision-making under such regulations. If an officer decided to consider a service complaint himself, or a service complaint was referred to the Defence Council, that officer (or the Defence Council) ('the appropriate person') had to decide whether the complaint was well-founded (section 334(7)). If the appropriate person decided that it was, he/it had to decide 'what redress (if any), within his authority, would be appropriate' and grant it (section 334(8)).

Section 335 was headed 'Service complaints: role of Defence Council and service complaint panels'. Section 335(1) gave the Defence Council power to delegate any of the functions conferred by section 334 to a service complaints panel, in relation to particular complaint, a class of complaints, or complaints generally. Section 336(1) dealt with the composition and procedures of service complaints panels. Section 366(1) created the office of the Service Complaints Commissioner ('the SCC'). Section 338(1) gave the SCC power to refer service complaints to the officer he considered to be 'the relevant officer'.

Regulations made under the 2006 Act

The Armed Forces (Redress of Individual Grievances) Regulations 2007 (2007 SI No 3353) ('the 2007 Regulations') were made under sections 334(2), 336(4)(a) and 336 of the 2006 Act. Regulation 3 of the 2007 Regulations prevented a person from making a service complaint about 'a matter within Schedule 1'. Regulation 4 also prevented a person from making a service complaint about a decision of the Defence Council under section 334(7) or (8) of the 2006 Act, whether or not the Defence Council delegated that decision to a service complaint panel.

Regulation 9(1)(a)-(d) required a service complaint panel to include an independent member if the service complaint alleged discrimination, harassment, bullying or dishonest, improper or biased behaviour. 'Discrimination' was defined in regulation 9(3). Paragraph 1 provided that, subject to paragraph 2, a matter was within Schedule 1 if it was a matter in a list of 18 types of complaint. In short, these were all complaints for which an alternative remedy was available. Paragraph 2 provided that a person could, despite paragraph 1, make a service complaint if it related to anything specified in regulation 9(1)(a)-(d). Thus paragraph 1 did not bar service complaints about discrimination, harassment or bullying, even if an alternative remedy was available for it.

The Armed Forces Act 2006 as amended

The 2006 Act was amended by the 2015 Act. Section 2(1) of the 2015 Act inserted Part 14A in the 2006 Act. Part 14A is headed 'Redress of Service Complaints'. Section 340A is headed 'Who can make a service complaint?'. Section 340A(1) and (2) are in similar terms to section 334(1) of the 2006 Act. Section 340A(4) is in similar terms to section 334(2) of the 2006 Act. The definition of 'service complaint' in section 334(1) of the 2006 Act (see paragraph 13, above) is the same as the definition in 340A(3). Section 340B is headed 'Procedure for making a complaint and determining admissibility'. Section 340B(1) gives the Defence Council power to make regulations, referred to in Part 14A as 'service complaints regulations' about the procedure for making and dealing with a service complaint. Section 340C ('Decisions on service complaints') and section 340B make provision which is broadly similar to that made by sections 334(7)-(8) and 335 of the 2006 Act (see paragraphs 13 and 14, above).

There are several changes to the earlier scheme. There is now a further stage in the process, a decision about whether a complaint is admissible (section 340B(4)(a) and (b)). Section 340B(5) provides that a complaint is not admissible for the purposes of section 340B if it is about 'a matter of a description specified in regulations made under section 340A(4)'. The Defence Council is no longer under a duty to make regulations, but is given a power to make 'service complaints regulations' about 'the procedure for making and dealing with a service complaint' (section 340B(1)). Section 340D makes a further change by requiring service complaints regulations to provide for appeals to the Defence Council from decisions made by individuals or by service complaint panels. Section 340E(1) gives the Secretary of State a further power to make regulations dealing with appointments to panels, including appointments of independent people.

Section 365B(1) of the 2006 Act now provides for the office of the Ombudsman.

Section 340H(1) provides for the Ombudsman to investigate various matters, including a service complaint which has been determined, an allegation of maladministration in the handling of such a service complaint, and allegations of delay in the handling of service complaints. The Ombudsman may also investigate possible maladministration in connection with the handling of a service complaint if it comes to light during an investigation (section 340H(7)). Section 360H(6) describes the purpose of such an investigation. It is to decide whether the complaint is well-founded and, if so, what redress is appropriate. The Ombudsman has a wide discretion about procedure (section 340I(1)). The Secretary of State has power to make regulations about the Ombudsman's procedure (section 340I(2)). Section 340J gives the Ombudsman wide power to require documents and information and to summon witnesses. A court may investigate allegations that a person has obstructed an investigation by the Ombudsman and if satisfied that there has been such obstruction, may punish it as if it were a contempt of court (section 340K).

Section 340L requires the Ombudsman to produce a report after an investigation, with his findings and recommendations. The Defence Council must consider any such report, decide how it will respond, and tell the Ombudsman and the complainant what it has decided (section 340M(1)). It can decide that a complaint should be reconsidered, and if so, to what extent and by

whom (section 340M(2)). If the Ombudsman considers that a communication he has received makes an allegation of a service complaint, he may refer that allegation to 'the appropriate officer' (section 340N(1)).

The Regulations made under the 2006 Act as amended

There are two relevant sets of regulations: the Armed Forces (Service Complaints) Regulations 2015 (2015 SI No 1955) ('the Complaints Regulations'), made by the Defence Council in exercise of the various powers conferred by the 2006 Act, and the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015 (2015 SI No 2064) ('the 2015 Regulations') made by the Secretary of State in exercise of the powers conferred by section 340A(4), among other provisions.

Regulation 3(1) of the Complaints Regulations defines the 'specified officer'. Regulation 4 prescribes the procedure for making a service complaint. The complainant is required to make a service complaint in writing and to specify, among other things, whether the complaint involves discrimination, harassment or bullying, as defined in regulation 4(5) (regulation 4(2)(c)). When he receives it, the specified officer must decide whether the complaint is admissible under section 340B(5) (regulation 4(1)). Regulation 4(2) explains when a complaint is not admissible. If he decides any part of the complaint is admissible, the specified officer must refer it to the Defence Council (regulation 5(3)). A complainant can refer a decision that a complaint is not admissible to the Ombudsman who must consider whether or not it is admissible (regulation 7).

Regulation 3(1) of the 2015 Regulations bars a person from making a service complaint 'about a matter within the Schedule', in the same terms as regulation 3 of the 2007 Regulations. Regulation 3(2) bars a person from making a service complaint about the nine matters which it lists. They are, broadly, decisions made in the course of the complaints process, such as an admissibility decision, the decision on the merits, or a decision whether the complaint has been brought in time or to extend time. Regulation 5, like regulation 9 of the 2007 Regulations, provides that an independent person must be appointed to consider a service complaint if an allegation of discrimination, harassment or bullying is made in a service complaint, if the Defence Council acts in relation to the complaint under section 340D(2)(d) or 340M(2)(a) of the 2006 Act; that is, when the Defence Council decides who should decide an appeal, or when it decides, after a report by the Ombudsman, who should reconsider the complaint.

Subject to paragraph 2, paragraph 1 of the Schedule provides that a matter is within the Schedule if it is one of the 22 matters listed in paragraph 1 of the Schedule. As with the equivalent provision in the 2007 Regulations, the list is broadly of matters for which an alternative remedy is available. Two notable additions are matters which could be the subject of a claim for clinical negligence or for personal injury against the Ministry of Defence. As with the equivalent provision in the 2007 Regulations, paragraph 2 of the Schedule provides that paragraph 1 does not prevent a person making a service complaint about anything referred to in regulation 5(2) if it concerns a matter specified in paragraph 2.

The Equality Act 2010

The predecessors of the 2010 Act

We were not referred to any provisions dealing with service complaints in the Sex Discrimination Act 1975 ('the 1975 Act'), or in the Disability Discrimination Act 1995 ('the 1995 Act'). The 1975 Act, the Race Relations Act 1976 ('the 1976 Act') and the 1995 Act were repealed and replaced by the 2010 Act. Section 75 of the 1976 Act, headed 'Application to Crown etc.' applied the 1976 Act to the Crown. Section 76(2) of the 1976 Act applied Parts II and IV to service in the armed forces.

Section 76(8) applied to complaints of contraventions of section 4 of the 1976 Act made a person who was serving in the armed forces at the time of the act complained of ('the act'), and if the complaint related to service in the armed forces. Section 76(9) prevented the making of such a complaint to the ET unless the complainant had made a service complaint in relation to the act, and the Defence Council had made a decision about the complaint. 'Service complaint' was defined in section 76(10)(a) as 'a complaint under section 334 of the Armed Forces Act 2006'. Section 76(9A) conferred a power to make regulations enabling such a complaint 'to be presented to [an ET] ...in such circumstances as may be specified in the register, notwithstanding that subsection (9) would otherwise preclude' the making of such a complaint to the ET. Section 76(9B) permitted a complaint to the ET made under such regulations to continue after the presentation of the complaint to the ET.

The Equality Act 2010 as originally enacted

Sections 120 and 121 of the 2010 Act were and are in Chapter 3 of Part 9. Part 9 is headed 'Enforcement'. Chapter 3 was and is headed 'Employment Tribunals'. Section 120 of the 2010 Act was and is headed 'Jurisdiction'. Section 120(1) gave and gives an ET jurisdiction, subject to section 121, to decide a complaint relating to an allegation of a contravention of Part 5 (work) and 'of section 108, 111 or 112 that relates to Part 5'. The effect of section 120(7) was and is to exclude the jurisdiction of the ET under Part 5 in relation to a complaint against a qualifications body where by virtue of an enactment, that complaint is subject to 'an appeal or proceedings in the nature of an appeal'.

Section 121 was and is headed 'Armed forces cases'. Section 121(1) provided and now provides:

'Section 120(1) does not apply to a complaint relating to an act done when the complainant was serving as a member of the armed forces unless

- (a) the complainant has made a service complaint about the matter; and
- (b) the complaint has not been withdrawn.'

Section 121(2)-(4) provided for the circumstances in which a complaint made under the service complaint procedures, including a complaint made under the old 'service redress procedures' was to be treated as withdrawn for the purposes of section 121(1)(b). Those were if neither the officer to whom the complaint was made, nor a superior officer, referred it to the Defence

Council, and the complainant did not apply for it to be referred to the Defence Council (section 121(2)). Section 121(4) defined the 'old service redress procedures'. The making of a complaint to the ET in reliance on section 121(1) did not prevent 'the continuation of the service complaint procedures' (or, as the case might be) of the old service redress procedures (section 121(5)).

Chapter 5 of Part 9 was and is headed 'Miscellaneous'. Section 141 was and is headed 'Interpretation etc.'. Section 141(1) provided and provides that section 141 applies 'for the purposes of this Part'. Section 141(8) defined 'service complaint' as 'a complaint made under section 334 of the Armed Forces Act 2006', and 'service complaint procedures' as 'the procedures prescribed by regulations made under that section (except in so far as relating to references under section 337 of that Act)'. Section 337 provided for the reference of an individual grievance to Her Majesty.

The Armed Forces (Service Complaints and Financial Assistance) Act 2015

There are four substantive sections in the 2015 Act. Section 1 creates the office of the Ombudsman. It inserts section 365B in the 2006 Act to that end. Section 2 is headed 'Reform of the system for redress of individual grievances'. It inserts Part 14A into the 2006 Act (sections 340A-340O). Section 3 introduces the Schedule, which makes amendments which are consequential on sections 1 and 2. Paragraphs 12-15 make amendments to the 2010 Act. Paragraph 13(1) describes section 121 as providing for '(armed forces cases in relation to which employment tribunal has jurisdiction)'. Paragraph 13(2) replaces section 121(2), omits section 121(3) and (4), amends section 121(5), and adds in section 121(6), definitions of 'the 2006 Act' and 'service complaints regulations'. Paragraph 14 amends section 127(7) (which concerns the ET's jurisdiction in relation to equality clauses) by substituting 'Subsections (2) to (6)' for 'Subsections (2) to (5)'. Paragraph 15 substitutes a new definition of 'service complaint' in section 141(8).

The 2010 Act as amended by the 2015 Act

Section 120 has not been amended. Section 121(2) of the 2010 Act has been amended. The circumstances in which a complaint will now be treated as withdrawn are only if the period in accordance with service regulations for bringing an appeal against a decision of a person or a panel has expired, there are grounds of which the complainant is aware on which the complainant is entitled to bring an appeal and she either does not apply to the Ombudsman for a review, under section 340D(6)(a) of the 2006 Act, of a decision that an appeal brought out of time cannot proceed, or the complainant applies for such a review and the Ombudsman decides that an appeal against the decision cannot be proceeded with. Section 121(3) and (4) have been repealed. Section 121(5) now provides that the making of a complaint to the ET does not 'affect the continuation of the procedures set out in service complaint regulations'. Section 121(6) now defines 'the 2006 Act' for the purposes of section 121 as 'the Armed Forces Act 2006', and 'service complaints regulations' as 'regulations made under section 340B(1) of the 2006 Act' (see paragraph 17, above).

Section 141(8) now defines service complaint as 'a complaint made under section 340A(1) or (2) of the 2006 Act'.

The Human Rights Act 1998

Section 1(1) of the Human Rights Act 1998 ('the HRA') defines 'the Convention rights'. The articles of the European Convention on Human Rights ('the ECHR') which have effect for the purposes of the HRA are set out in Schedule 1 to the HRA (section 1(1), 1(2) and 1(3)). Section 2 makes provision for the interpretation of Convention rights by courts and tribunals.

Section 3(1) provides 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. Section 3(1) applies to primary and subordinate legislation whenever enacted, but does not 'affect the validity, continuing operation or enforcement of any incompatible primary legislation, or affect the validity, continuing operation or enforcement of any incompatible primary legislation if (disregarding any possibility of revocation) primary legislation prevents the removal of the incompatibility'.

If a court is satisfied that a provision of primary legislation is incompatible with a Convention right, it may make a declaration of incompatibility (section 4(1) and (2)). If a court is satisfied that a provision of subordinate legislation made under a provision of primary legislation is incompatible with a Convention right, and that (disregarding any possibility of revocation) the relevant primary legislation prevents the removal of the incompatibility, a court may make a declaration of that incompatibility (section 4(3) and 4(4)). The definition of 'court' includes, in England and Wales, the High Court and this court (section 4(5)). It does not include the ET or the EAT.

Section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(2) provides that section 6(1) does not apply, in short, if the authority could not have acted differently because of a provision of primary legislation, or because of a provision of subordinate legislation made under such a provision of primary legislation. In

RR v Secretary of State for Work and Pensions

[2019] UKSC 52

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[2019] 1 WLR 6430

the Supreme Court held that if the exception in section 6(2) does not apply, a public authority (including a tribunal) is not bound to comply with or to apply a provision of subordinate legislation which is incompatible with Convention rights. A public authority could disregard such subordinate legislation, unless it was not clear how the statutory scheme should be applied without it.

The ET's reasons

The ET summarised the legislation in paragraphs 5-8. In paragraph 8 it noted that it was impossible for Mrs Rubery to satisfy the requirement of section 121 of the 2010 Act. 'It follows that where the alleged discrimination relates to the administration or outcome of a service complaint by a serving member of the armed forces the ET can never have jurisdiction'.

The ET recorded in paragraph 22 that Mrs Rubery had not made a further service complaint because of the effect of the 2015 Regulations. In paragraph 21 it had stated 'Insofar as that serves to exclude [the ET's] jurisdiction [Mrs Rubery] says that the ET is compelled to adopt a construction of [section 121 of the 2010 Act] compatible with EHCR rights and retained EU law as, otherwise, [section 121 of the 2010 Act] would be incompatible with the principles of effectiveness and equivalence and/or with Articles 6, 8 and/or 14 of the European Convention on Human Rights ...'

In paragraphs 23 (and 89) it set out Mrs Rubery's suggestion for making section 121 of the 2010 Act compatible with her rights. She suggested that a further subsection be added to section 121.

'(1A) Section 121(1) is not applicable to the extent that the matter is an excluded matter as defined by Reg. 3(2) of [the 2015 Regulations].'

The Ministry of Defence resisted the claim based on EU law on the ground that it no longer applied. The application or otherwise of EU law is not in issue on the appeal to this court. The Ministry of Defence also argued that the current legislation did not breach any of Mrs Rubery's rights under the ECHR; but even if it did, it was not 'possible' to 'read down/into' the legislation as section 3 of the HRA requires (paragraph 25).

The ET listed the issues it had to decide in paragraph 26. The ET framed the issues which are relevant to this appeal as follows:

Do the existing statutory formulations exclude the jurisdiction of [the ET] to consider the claims?...

...may [the ET] 'read-in' to the relevant provisions in order to give effect to them in a way which is compatible with Convention rights pursuant to section 3 of the HRA?

The ET then quoted sections 120(1) and 121(1) of the 2010 Act. It commented in paragraph 28 that the reference in section 121(1) to a 'service complaint' is 'to a complaint brought within the statutory service complaints process set out in the Armed Forces Act 2006 (AFA) and the regulations made thereunder' including the 2015 Regulations. It quoted regulation 3(2) of the 2015 Regulations in paragraph 29.

The ET took stock in paragraph 30. The 'effect of the domestic legislation is clear. As [the Ministry of Defence] had pleaded and, quite properly, [Mrs Rubery] now concedes, [the ET] cannot have jurisdiction. [Mrs Rubery] is not allowed to bring a service complaint in respect of the subject matter of this claim. This means she cannot meet the condition...in [section 121 of the 2010 Act]. Having failed to do so, jurisdiction is not afforded. But for the possible impact of EU law, that would be an end of the matter'.

In paragraphs 31-49 the ET summarised or quoted the materials which were relevant to the EU arguments. In paragraphs 54-61, the ET dismissed those arguments. It indicated that it might have accepted the arguments on their merits, but held that it could not do so because it did not have power to disapply any enactment or rule of law on the grounds that it was incompatible with the EU law principles of effectiveness and equivalence.

The ET quoted the materials which it considered were relevant to the arguments about the HRA in paragraphs 50-51 and 53. It quoted section 3(1) of the HRA and paragraphs 26-33, 50 and 123-14 of the speeches in

Ghaidan v Godin-Mendoza

[2004] UKHL 30

;

[2004] 2 AC 557

('

Ghaidan

'), and paragraph 8 of the judgment of Lady Black in

R (Stott) v Secretary of State for Justice

[2018] UKSC 59

;

[2020] AC 51

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The ET's understanding was that section 3 'in principle permits a court or Tribunal to rewrite even a wholly unambiguous legislative provision if the Convention requires but only if doing so does not go against a fundamental feature of the legislation' (paragraph 52).

In paragraph 62, the ET summarised the argument of the Ministry of Defence: '...there is no violation of Article 14 read with Article 6 or other ECHR rights but that even if there were, to interpret the legislation in the way proposed by [Mrs Rubery] would be to fly impermissibly "against the grain" of the legislation'. It recorded the Ministry of Defence's submission that the effect of the 2015 Regulations was intentional and for 'a legislative good', that is, 'appropriately to

protect the principle of finality' in the service complaints process 'by preventing repeat claims and other challenges to the internal system or review' by the Ombudsman (paragraph 63).

The ET agreed, 'but only up to a point'. It described the extent of that agreement in paragraph 64. But that was 'not the same thing as providing complete finality and deliberately intending to exclude the jurisdiction of' the ET. The Ministry of Defence accepted that Mrs Rubery could challenge the handling of complaint 1 by referring that to the Ombudsman or by an application for judicial review. 'The finality was only in the SC process...' (paragraph 65).

There was nothing which suggested that the 2015 Regulations 'were intended to oust the jurisdiction' of the ET. The relevant explanatory note did not refer to the ET. The ET quoted the relevant passage and commented that it was not inconsistent with the ET dealing with 'such a "process" complaint' (paragraph 66).

In an important passage, the ET said that Mrs Rubery was asking it 'to interpret' section 121 of the 2010 Act 'and not the 2015 Regulations. Were the effect of [section 121 of the 2010 Act] altered so as permit [the ET] to have jurisdiction over [Mrs Rubery's] complaint, that would do nothing to undermine the stated intent and result of the 2015 Regulations. They would still exclude [Mrs Rubery's] complaint from the SC process and provide that process with the desired finality. The only change would be to enable [Mrs Rubery] to bring the complaint to the ET as an additional remedy to those [the Ministry of Defence] concedes would otherwise still exist' (paragraph 67).

The Employment Judge added that 'such a revision would not 'fly against the grain' of [section 121 of the 2010 Act]. The underlying purpose of [section 121] is for the services to deal with its complaints in the SC process first. In my judgment, an interpretation which excludes from that requirement only those complaints which are themselves excluded from the SC process is not so inconsistent as to amount to 'flying against the grain' (paragraph 68).

The ET rejected the submission that 'this would risk' the ET making a decision which it was not equipped to make, and which involved 'issues calling for legislative determination' (paragraph 69). The ET distinguished

Steer v Stormsure

[2021] EWCA Civ 887

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[2021] ICR 1671

on the basis that the argument in that case would have extended the jurisdiction of the ET 'to a new and potentially very large category of claims'. This case was concerned 'only with a limited number of claims' (paragraph 70).

The ET was 'therefore satisfied that, if it is required' the ET 'may legitimately read-in in such a way as to permit this claim' (paragraph 71).

The Ministry of Defence had conceded for the purposes of the claim that it was within the ambit of article 6 (paragraph 72). The ET did not therefore consider articles 8 or 1 of Protocol 1 (paragraph 73). The Ministry of Defence also conceded that being a person who is serving in the armed forces, 'as opposed to a civilian employee employed under a contract of employment by a private body' was an 'other status' for the purposes of article 14 (paragraph 74). The ET therefore only needed to consider whether Mrs Rubery 'and the person who has been treated differently [are] in analogous situations, and, even if so, can the different treatment be justified?' (paragraph 75).

The ET only recorded one argument on the first issue: the process for service personnel is statutory and there are 'unlimited powers of redress', and they can apply to the Ombudsman and make an application for judicial review. The position of civilian employees is different. They only have access to the ET or to the county court. The ET rejected that argument.

Michalak v General Medical Council

[2017] UKSC 71

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[2017] 1 WLR 4193

,

P v Commissioner of Police of the Metropolis

[2017] UKSC 65

;

[2018] ICR 560

and

Eckland v Chief Constable of Avon and Somerset

[2021] EWCA Civ 1961

;

[2022] ICR 606

show that the ET is the appropriate forum for complaints of this nature and that access to the Ombudsman or Judicial Review are not an adequate substitute. They do not have 'the expertise independence and remedial powers' of the ET (paragraph 79).

Service personnel and civilians complaining of discrimination in the handling of their internal complaints were in 'a directly analogous position'. The fact that they have additional remedies did not change that. There was an obvious difference in treatment because service personnel were barred from the ET but civilians were not.

The legitimate aim on which the Ministry of Defence relied was 'the aim of securing "adequate" (but as [counsel] accepts not absolute) finality of the "internal SC process and its protection from repeat claims, or concurrent external claims"' (paragraph 81). That was a proportionate means of achieving a legitimate aim, but barring ET claims was not (paragraph 82). There was 'no evidence' that that was the legitimate aim nor was it argued that it was justified. 'Barring a claim from [the ET] is a much broader outcome than is needed to achieve finality of the internal SC process' (paragraph 83). The ET questioned whether the reference to 'concurrent external claims' was correct (paragraph 84). The ET was 'therefore satisfied that' the Ministry of Defence had not shown that barring ET complaints about the SC process was justified (paragraph 85).

The ET concluded that the exclusion by the 2015 Regulations of a complaint based on discrimination in the service complaint process itself made it impossible for Mrs Rubery to make a complaint of discrimination to the ET. It considered that 'the natural reading of the legislation would be inconsistent with' Mrs Rubery's rights under articles 6 and 14 of the ECHR. It was 'therefore appropriate to interpret' section 121 of the 2010 Act in such a way as to avoid that violation (paragraph 88). The simplest way of doing that would have an effect which was too wide. So the ET adopted Mrs Rubery's suggestion (see paragraph 40, above).

The appeal to the EAT

The Ministry of Defence appealed to the EAT on two grounds.

1. The ET erred in law in reading a provision into section 121 of the 2010 Act, for four reasons.
2. The ET erred in law in any event in finding that there was a breach of article 14, for two reasons.

Mrs Rubery cross-appealed against the finding that the ET could not disapply the legislation on the ground that it breached the EU principles of equivalence and effectiveness as the relevant EU law no longer applied.

The decision of the EAT

The EAT summarised the facts in paragraphs 9-21, adding some points which were not the subject of findings of fact by the ET. It recorded that Mrs Rubery had made an earlier complaint to the ET on '9 July 2021' which had been stayed. That date is the same date as the ET claim which is the subject of this appeal, and, should, I think, be '6 May 2020' instead.

The EAT summarised the legislative scheme and its effect in paragraphs 23-38. The EAT recorded the Ministry of Defence's submission that the legislative history, which the EAT summarised in paragraphs 39-44, supported its argument that the HRA could not be used to interpret section 121 as the ET had done. Section 75 of the Race Relations Act 1976 required a service complaint to have been decided before a claim could be brought in the ET. The legislation governing service complaints had been materially the same when the 2010 Act was enacted as it now is. The 2015 Act enacted new primary legislation governing service complaints, including adding Part 14A to

the 2006 Act. New regulations were also brought into force. The main changes included the 'introduction of' the Ombudsman. Regulation 3(2) of the 2015 Regulations 'effectively excludes the same matters...' (paragraph 41). Schedule 1 to the 2015 Act made consequential amendments to section 121 of the 2010 Act (paragraph 42).

The EAT described the justification for 'the overall legislative framework' advanced in the Ministry of Defence's ground of appeal. It was preventing concurrent proceedings in the service complaint and the Ombudsman process and the ET only as to the handling by a service complaints panel of the SC process itself. The source of that aim was said to be the explanatory memorandum to the 2015 Regulations. The EAT was aware of the criticism that the Ministry of Defence's case on justification had changed. The EAT nevertheless held that it been properly set out, 'had remained sufficiently consistent' and had been understood by Mrs Rubery (paragraph 46). The EAT recorded in paragraph 49 that it had been and was common ground that, read literally, section 121 of the 2010 Act, the 2006 Act and the 2015 Regulations prevented a member of the armed forces from bringing a claim under the 2010 Act about the conduct or outcome of a service complaint because she cannot make a service complaint about it.

In paragraph 54, the EAT listed the agreed issues. The first issue it considered was whether the effect of section 121, read with the scheme for service complaints, breached article 6 read with article 14 of the ECHR. The parties disagreed about whether serving members of the armed forces are in an analogous situation to civilian employees or to former serving members of the armed forces, and whether any difference in treatment was justified. The EAT dealt shortly with whether current members of the armed forces were or were not in a 'disanalogous position' to former members or employees and concluded that they were not (paragraphs 65-66).

The Ministry of Defence's consistent justification for the scheme's different treatment of those groups was that (1) it prevented repeat complaints, (2) it prevented challenges to decisions made in the complaints regime or by the Ombudsman and (3) it otherwise excluded complaints for which there was an adequate alternative remedy (paragraph 68). The Ministry of Defence challenged the ET's reasoning in paragraphs 81-85 (see paragraph 58, above) on the grounds that the ET had erred in law in applying a strict proportionality test; the ET had failed to analyse the alternative remedies which were available and that it could not therefore have concluded that the alternatives were inadequate; and the ET had 'failed sufficiently to grapple with the specific issues in the case'.

The EAT started with the Ministry of Defence's explanation for the difference in treatment. Avoiding repeat complaints and procedural wrangles, and the delays they caused was a legitimate aim. 'In a service environment where high morale and discipline is essential in what is often a closed environment, potentially involving active service, long-running unresolved complaints, like festering sores, are to be avoided if possible. Evidence is not needed for that proposition, it is self-evident and commonsense' (paragraph 72). The list of excluded complaints in regulation 3(2) of the 2015 Regulations was 'the means adopted to achieve that legitimate aim' (paragraph 73). The EAT explained how regulation 3(2) excluded the complaints which Mrs Rubery wanted to make, and that that also prevented her from basing a claim to the ET on them. The EAT described

this as 'A classic catch-22'. A civilian worker could bring such complaints, other things being equal, as could a former member of the armed forces, provided that the complaint concerned events during her service (paragraph 74).

Mrs Rubery was nevertheless able to appeal internally about these complaints, and to raise them with the Ombudsman (paragraph 75). Her complaints were, to some extent, vindicated in those processes (paragraph 76). She had already made an ET claim about her treatment by her line managers. It was possible that the matters about which she could not complain directly to the ET might increase the compensation she might be awarded in that claim, or be the subject of a recommendation by the ET (paragraph 77). The disadvantage of not being able to make an ET claim 'has to be assessed against the adequacy of' the service complaints process, the Ombudsman 'and any other remedies available. Adequate does not mean identical' (paragraph 78).

The EAT accepted that there was 'disadvantage to' Mrs Rubery. It took into account her rights under the service complaints procedure, the fact that this was 'satellite litigation' from her substantive complaint and the ET's 'ability...to consider some aspects albeit through a side wind'. The EAT here referred to paragraphs 78-79 of

Z v Hackney London Borough Council

[2020] UKHL 40;

[2020] 1 WLR 4327

, a passage which does not obviously support that observation. Be that as it may, the EAT concluded that the exclusion in regulation 3(2) was justified, both on 'the strict proportionality test' and under the 'manifestly without a reasonable foundation' test (paragraph 80).

The EAT then considered whether the HRA could 'be used to interpret' section 121 of the 2010 Act so as to allow Mrs Rubery to make her claim in the ET. The power conferred by section 3 is limited to a 'possible' reading of the relevant provision. The EAT said the relevant 'dividing line' was described by Lord Nicholls in paragraph 33 of

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. The issues were whether 'the proposed interpretation was inconsistent with a fundamental feature of the legislation' and whether 'the proposed read-down would engage policy questions properly a matter for Parliament' (paragraph 88).

The EAT quoted paragraphs 64-71 of the ET's judgment (paragraphs 49-54, above). It considered two relevant decisions in paragraphs 90-94; one a decision of the EAT approving a consent order and the other, a decision of the ET. In

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[UKEAT] 0191/14/RN, 2 October 2014 the Ministry of Defence consented to a remittal to the ET and agreed that section 121 should be given a 'purposive construction' (I would describe that as a euphemism for a construction which re-wrote section 121). The EAT endorsed the consent order in a short judgment. The EAT in this case said that those cases did 'not take the issue any further forward' (paragraph 94). The EAT commented further, nevertheless, in paragraphs 101 and 102, that the reading proposed in

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'went with the grain of the legislation'.

Section 121 cannot be read in isolation as it is 'an interlocking code with' the 2015 Regulations and Part 14A of the 2006 Act. That the position was the same on the enactment of the 2010 Act and under the Race Relations Act 1976 'strengthens the point' (paragraph 96).

Mrs Rubery's proposed interpretation of section 121 'directly contradicts the wording of the legislation by seeking to make a matter which is excluded from being made a service complaint by' regulation 3(2) of the 2015 Regulations 'something which is not excluded. It therefore goes exactly against the grain of the wording of the statutory provision' (paragraph 97). Where 'it is sought to read down the exact opposite of the literal meaning of the words, it is not possible to do so' (paragraph 98). That was obvious when the suggested changes were considered (paragraph 99). Section 121(1A) 'reverses the meaning of that part of the section' (paragraph 100).

In paragraph 103, the EAT said that the exclusion from the service complaints procedure and thus from the jurisdiction of the tribunal of the matters listed in regulation 3(2) of the 2015 Regulations was 'deliberate and intentional'. It continued, 'Parliament had clearly thought about it and differentiated between' what was listed in paragraph 1 of Schedule to the 2015 Regulations, 'and the override for discrimination matters' in paragraph 2 of that Schedule, 'and the list of excluded matters in' regulation 3(2) 'for which there is no such override. This is not the case of an inadvertent consequence occurring through a side wind or infelicity of wording creating an unintended result' (paragraph 103). The legislative history 'further demonstrates that this was not an inadvertent omission, but a deliberate legislative choice. Regulation 3(2) is a fundamental feature of the legislation for the purposes of the issues in this case' (paragraph 104). The ET had therefore erred in 're-writing' section 121 in the way that it had, and should have dismissed the claim (paragraph 105).

The EAT dismissed the cross-appeal (paragraphs 106-142). It held that the principles of equivalence and effectiveness were breached, but that it had not been open to the ET to 'read... down the interpretation sought by' Mrs Rubery as that 'would amount to disapplying an enactment' (paragraph 140).

The parties agreed that there was no basis for remitting the case to the ET, and that the EAT should exercise the ET's powers itself. It quashed the ET's decision and substituted a decision striking out Mrs Rubery's claim.

The grounds of appeal to this court

Mrs Rubery was given permission to appeal to this court on two grounds. I have put them in their logical order.

1. The EAT erred in holding that there was no breach of Mrs Rubery's Convention rights.
2. The EAT erred in holding that a 'Convention-compliant' construction of section 121 the 2010 Act was impossible.

She was also given permission to ask, if ground 1 succeeded but ground 2 failed, for a declaration of incompatibility, a remedy which was not available to her in the ET or in the EAT (see paragraph 36, above). Her application for permission to appeal against the EAT's decision on her cross-appeal, which relied on the EU principles of equivalence and effectiveness (see paragraph 75 above) was refused.

Ground 1

The submissions

Mrs Rubery

Mr Milsom argued that the ET was right for the reasons which it gave and the EAT should not have interfered with its decision. He submitted that the EAT had made four independent errors.

1. It wrongly narrowed the scope of the measure which was to be justified. What had to be justified was not finality in the internal process, but 'the wholesale exclusion of the right' to make discrimination claims in relation to the handling of service complaints.
2. It was wrong to rely on the adequacy of other remedies. That was no answer to a claim of different treatment under article 14.
3. It erred in conflating the aim of avoiding repeat complaints with barring access to the ET. Access to the civil courts to bring a claim for personal injury is not subject to a condition that a service complaint has first been made. Former serving personnel are not barred from bringing ET claims. The EAT's acknowledgement that some of Mrs Rubery's complaints could be raised by her in a 'side wind' in her existing ET claim was inconsistent with the idea that she could not raise them in a freestanding complaint to the ET.
4. The EAT should have applied the four-stage proportionality test. The EAT's conclusions on stages (ii), (iii) and (iv) were wrong. The ET's construction of section 121 was the less intrusive measure. There were ten reasons why the EAT consideration of the severity of the intrusion into Mrs Rubery's article 6 rights was inadequate.

The Service Complaints Ombudsman for the Armed Forces

The Ombudsman argued that the differential treatment at issue is not justified. She pointed out that the 'aim' relied on by the Ministry of Defence has 'evolved' in the course of the proceedings. Before the ET, the aim was securing adequate but not absolute finality in the service complaints process and protecting it from repeat claims. That aim justifies restricting access to the service complaints process, but not to the ET.

The aim was described differently in various passages in the EAT's judgment (paragraphs 46 and 72: see paragraphs 64 and 67, above). The first aim could have been secured by requiring the making of a maladministration complaint and its determination by the Ombudsman as condition of the ET's jurisdiction. The second aim did not require the exclusion of the jurisdiction of the ET.

The aim had further evolved in this court. It was now avoiding collateral challenges to the service complaints process in the interests of maintaining high morale and discipline, and excluding collateral challenges to the internal system where high morale and discipline are essential. Granting the Ministry of Defence immunity from liability for discrimination is not a legitimate aim in itself. The real aim is to maintain high morale and discipline, and it is said that excluding external challenges to the service complaints process is the means by which the aim is said to be pursued. In fact, the scheme does not bar external challenges to the system of service complaints. The Ombudsman is 'external' to the Ministry of Defence. The effect of the scheme is to permit one kind of external challenge, a complaint of maladministration to the Ombudsman, but to bar a claim in the ET, which is another type of external challenge. There is no reason to think that the second would damage morale and discipline more than the first. That was 'pure assertion'. The disadvantage for not being able to present a claim to the ET is substantial. The Ombudsman is not the equivalent of the ET. Deciding a complaint of maladministration is not the same as deciding a complaint of discrimination. The Ombudsman may decide whether there has been discrimination but is not required to do that. Morale and discipline could have been protected by a less intrusive measure; that is prohibiting service complaints about the handling of service complaints, rather than preventing access to the ET. The measure does not strike a fair balance.

The Ministry of Defence

For the purposes of this appeal, the Ministry of Defence was 'content to accept' that the facts are within the ambit of article 6 and that being a member of the armed forces as opposed to a civilian employee, or a former member of the armed forces, are 'other statuses' for the purposes of article 14 (paragraph 18 of its skeleton argument). The Ministry of Defence argued that the question of justification overlaps with the question whether situations of the relevant groups are analogous (

R (Carson) v Secretary of State for Work and Pensions

[2004] UKHL 37

;

[2006] 1 AC 173

, paragraph 3). It was also 'content' to accept that the situations of the relevant groups 'are sufficiently similar, save for the circumstances on which [it] relies as justifying the difference in treatment (including the availability of alternative forms of redress), that the focus should be on justification'.

The Ministry of Defence relied on the extent of the margin of appreciation in a case like this. The ground for the difference in treatment in this case is not a 'suspect' ground such as sex or race. A less intensive review of proportionality is appropriate in such cases than in a case involving a suspect ground:

R

(

SC) v Secretary of State for Work and Pensions

[2021] UKSC 26

;

[2022] AC 223

(paragraph 98). The margin of appreciation in such a case is that a measure will only be disproportionate if it is manifestly without reasonable foundation. That is supported by considerations of military discipline and morale.

Section 121 is part of a code with the 2006 Act and the 2015 Regulations. Section 121 provides for the ET's jurisdiction and the latter scheme provides for service complaints and the jurisdiction of the Ombudsman. It is wrong to disentangle the purposes of the two schemes. In enacting and amending the 2010 Act, Parliament must be taken to have understood and to have intended the interaction of the two schemes for which they together provide. That effect is to minimise the potential for collateral challenges and to confine collateral challenges to the specialist service complaints system and the jurisdiction of the Ombudsman. That is a legitimate aim.

The Ministry of Defence submitted that the difference in treatment between the relevant groups is rationally connected with and proportionate to that aim. Considerations relating to discipline, morale, and trust in the complaints system do not apply to civilian employees. The availability of applications to the Ombudsman reduces the extent of any disadvantage. The same considerations do not apply to those who are currently serving and to those whose service has ended.

Ground 2

Mrs Rubery

Mr Milsom again argued that the ET was right for the reasons which it gave. He added that the EAT had made four errors of its own.

1. It failed to identify the purpose of the 2010 Act and of the service complaints scheme. The EAT had conflated the purpose of section 121 with the purpose of the scheme; but it was construing section 121. The EAT should have realised that it was not a 'fundamental feature' of the 2010 Act to require Mrs Rubery to take a step which she was 'statutorily incapable of performing'.
2. It diluted the obligation imposed by section 3 of the HRA. A compliant construction can be found in 'almost all cases'. The purpose of the 2010 Act is to protect against discrimination by deeming service in the armed forces to be employment. It is not a fundamental feature of the 2010 Act to make that protection depend on the taking of a step which it is impossible to take.
3. The EAT failed to give effect to the 2010 Act as transposing EU law, yet the EAT held that section 121 breached the principles of equivalence and effectiveness.
4. The EAT was wrong to distinguish

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and the ET decision to which it also referred.

The Ombudsman

The Ombudsman argued that the underlying purpose of section 121(1) is to give the Ministry of Defence an opportunity to consider and resolve allegations of discrimination before they are made to an ET. The Ministry of Defence agreed that this was one purpose of section 121(1). The Ombudsman agreed with the Ministry of Defence that the ET's suggested amendment went too far. Permitting a claimant to make a claim to the ET when she had not taken the opportunity to make a service complaint by making an internal appeal or an application to the Ombudsman was 'inconsistent with the underlying thrust of section 121'.

The Ombudsman's case on construction was that section 121 could be read compatibly with Mrs Rubery's article 14 rights by giving the phrase 'service complaint' a meaning wide enough to include service complaint appeals and applications to the Ombudsman. The Ombudsman acknowledged that this might not help Mrs Rubery, noting the Ministry of Defence's argument that her internal appeal and application to the Ombudsman did not contain the allegations of discrimination and victimisation which she later wanted to raise in the ET. The Ombudsman accepted that this would give 'service complaint' a 'strained reading', which was wider than its meaning elsewhere in the legislation.

The Ombudsman did not agree with the Ministry of Defence that the exclusion of claims about the conduct of or outcome of service complaints is a 'deliberate and fundamental feature of the legislation', noting that this arises from a combination of section 121(1) and the 2015 Regulations. Regulation 3(2) of the 2015 Regulations is not a 'fundamental feature' of section 121. Regulation 3(2) has nothing to do with claims in the ET. The explanatory memorandum for the 2015 Regulations says nothing about ET claims. It is possible that the bar on ET claims is 'inadvertent'.

Parliament might not have appreciated the combined effect of section 121(1), section 340A(4) and regulation 3(2) of the 2015 Regulations. The Ombudsman did not agree that any question of legislative policy is engaged. 'There are no policy choices realistically involved here'.

The Ministry of Defence

There are two relevant limits to the court's duty 'so far as it is possible to do so' to read and to give effect to primary and secondary legislation in a way which is compatible with Convention rights (

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, paragraph 33).

1. The relevant provision must not be read inconsistently with a deliberate and fundamental feature of the legislation, when the legislation is read as a whole.
2. The proposed reading must not engage practical or policy considerations which are not for the court but are for Parliament.

The general purpose of section 121 is to require complaints of discrimination to be raised first in the service complaints process to give the Ministry of Defence an opportunity to resolve them internally. The effect of the ET's reading would be to allow a person to bring a complaint about discrimination by a decision-maker in the service complaints process without appealing first, or making an application to the Ombudsman, even though she could have done.

A deliberate feature of the scheme read as a whole is to exclude claims in respect of the conduct or outcome of a service complaint made by people who are currently serving. Parliament must be taken to have understood the effect here. The purpose of section 121 is to limit the jurisdiction of the ET against the background of the availability of service complaints and applications to the Ombudsman.

If, contrary to the Ministry of Defence's arguments, there is a breach of article 14 read with article 6, there are different ways of resolving that breach which raise policy and legislative questions. Mr Cooper started his oral submissions with a very detailed argument which was designed to show, on the assumption that there was a breach of article 14, how difficult it would be confidently to substitute a different reading of section 121. Such a substitution would involve choices between, and the balancing of, different policy aims and options which were for Parliament and the Secretary of State, not for the court. There were at least three relevant objectives: giving the armed forces an opportunity to deal with complaints before they went to the ET, limiting satellite litigation about the service complaints process, and ensuring appropriate redress in the service complaints process for discrimination allegations. He submitted that Parliament has made a deliberate choice about how those objectives are to be balanced.

Discussion

Three initial points about the legislative scheme

There are three initial points about the legislative scheme. I will outline what they are and then say a little more about each. First, in most cases in which there is an issue about the application of section 3 of the HRA, it is logical to start by asking whether or not the actual effect of the provision in question is a breach of a claimant's Convention rights. In this case, however, a convenient starting point is to ask whether or not section 121 is even potentially incompatible with Mrs Rubery's Convention rights. If it is not, then there is no reason to 'read it down', let alone a power to do so. Second, Parliament must be taken to have been aware, when enacting the 2010 Act, and when enacting the 2015 Act (which amended both the 2010 Act and the 2006 Act) of the existence and outline of the primary legislation scheme about service complaints. Third, Parliament must also be taken to have known about the detailed scheme of exclusions in the 2007 and the 2015 Regulations.

The first initial point

On its own, section 121 simply imposes two conditions on the jurisdiction of the ET. The complainant must first have made a service complaint, and second, must not have withdrawn that complaint. There is nothing in the text of section 121 which does or might breach a complainant's Convention rights. Section 121, is not, in itself, incompatible with Mrs Rubery's Convention rights. This point seems to have eluded the ET. The 'catch-22' to which the EAT referred in its judgment is a consequence, not of the words of section 121, but of what the EAT described as 'the interlocking statutory scheme'. Section 3 of the HRA did not therefore require (or permit) the ET to do anything with the text of section 121, other than to give it its ordinary meaning. It follows, without more, that by purporting to insert a new subsection in section 121, the ET erred in law. Even if (and this point has not been argued at any stage), the 2015 Regulations are incompatible with Mrs Rubery's Convention rights, for the reasons given in paragraph 97, below, this is not a case (unlike

RR v Secretary of State for Work and Pensions

) in which it is possible simply to ignore an obviously incompatible provision of subordinate legislation, not least because there is no such provision which, at face value, is incompatible.

The second initial point

I have set out the current provisions governing service complaints, and the earlier scheme, in some detail, together with the legislative history of section 121. Three further points emerge from the history of section 121 and of the 2006 Act and of their interaction. First, when the 2010 Act was enacted, Parliament was aware of the 2006 Act. That is clear from the fact that sections 121 and 141 of the 2010 Act referred to it. It is also clear, second, that Parliament knew (see the reference to section 334 of the 2006 Act) that the Secretary of State had a power to make regulations excluding certain types of complaint. As the 2007 Regulations (made under section 334(2) of the 2006 Act) were in force when the 2010 Act was enacted, it is reasonable to assume

both that Parliament knew that the power conferred by section 334(2) had been exercised, and in what way. In other words, Parliament took the statutory scheme about service complaints as read when it first enacted the 2010 Act. Parliament amended both the 2006 Act and the 2010 Act by means of the four substantive sections of the 2015 Act. The first point applies to this scheme, perhaps with greater force, after the enactment of the 2015 Act.

The third initial point

The third point is that on its initial enactment, and when the 2010 Act was amended by the 2015 Act, it is reasonable to assume that Parliament also knew about the 2007 Regulations, and 2015 Regulations, as the case may be. The 2015 Regulations, like their predecessors, the 2007 Regulations, are a detailed and nuanced scheme of exclusions. The most significant point about both sets of regulations for present purposes is that they show that, in making them, the Secretary of State exercised a conscious choice (see regulations 3, and 9 of, and paragraph 2 of the Schedule to, the 2007 Regulations, and regulations 3, and 5 of, and paragraph 2 of the Schedule to, the 2015 Regulations) about the precise extent to which a person would, or would not, be barred by the regulations from making a service complaint about discrimination, bullying or harassment. For the reasons given by Mr Cooper in his oral submissions, a court is simply not qualified to tinker with this scheme in any way. That is a question for the Secretary of State, not for the court.

Is the legislative scheme, or any of its provisions incompatible with Mrs Rubery's Convention rights?

For the reasons I have already given, it is very difficult, if not impossible, to isolate a particular provision of the relevant primary or subordinate legislation which is incompatible with Mrs Rubery's Convention rights. I will assume, against that view, that such a provision could be isolated, although I cannot identify it; the relevant effect is a combination of different provisions.

There are two issues, in the light of the Ministry of Defence's concessions. The first is whether Mrs Rubery in a position which is analogous to that of a former member of the armed forces or a civilian employee. The second, if so, is whether the difference in treatment between them (that is, in short, a difference in their right of access to the ET for the purposes of claiming discrimination in relation to the service complaints process or to an internal grievance process) justified. For reasons similar to those on which the EAT relied in its conclusion on justification (see paragraphs 65-69, above), and disagreeing with the EAT's view on this question (paragraph 65, above), I do not consider that they are in analogous situations. The key reason for that view, in the words of sections 334(1) and 340A(1) of the 2006 Act, is that she is, and they are not, subject to service law, with all that that entails. She is, and they are not, part of a disciplined force, in which, not least because of the possibility of armed service, obedience, cohesion and the protection of morale are essential. She has in relation to her current and past service, and they do not, access to a statutory service complaints process and to the Ombudsman (a former member of the armed forces only has such access in relation to matters which arose during her service).

If I add to my view that they are not in analogous situations the EAT's reasoning on justification, I consider, if it is necessary to deal with justification, that the difference in treatment is justified. Prolonged disputes and satellite litigation about the complaints process are not conducive to cohesion or to good morale. Being a serving member of the armed forces is not a suspect category. A difference in treatment can be justified if it is not manifestly without reasonable foundation. The precise details of the relationship between the system for making services complaints with the jurisdiction of the ET over discrimination claims, and with other alternative remedies, are questions for policy and legislative judgments which this court is not well equipped to make, and in which it should give a wide margin of appreciation to Parliament and to the Secretary of State (see also, the third initial point made in paragraph 97, above).

For those reasons I would hold that if there is, in any part of this 'interlocking' legislative scheme, any difference in treatment on the grounds of status between people who are in analogous situations, it is amply justified, whether by reference to a conventional proportionality test, or to the manifestly without reasonable foundation test.

Conclusions

For those reasons, the ET erred in law in holding that this legislative scheme, or any part of it, discriminates, contrary to article 14 read with article 6, between those serving in the armed forces, those who have served in armed forces, and civilian employees. It also erred in law in adding subsection (1A) to section 121 of the 2010 Act. There are no grounds for making a declaration that section 121 of the 2010 Act is contrary to Mrs Rubery's Convention rights. I would therefore dismiss this appeal.

Finally, this is not a case in which Mrs Rubery's right of access to the ET has been significantly reduced. The ET has listed a 9-day hearing in 2026 for the complaint which she made in 2020 about bullying, and to hear the aspects of her 2021 claim over which it does have jurisdiction. That hearing of those claims has been stayed so that she could argue, in addition, that the way in which her service complaint was handled amounted to indirect discrimination, and that she was victimised by the way in which the service was handled.

Lord Justice Peter Jackson

I agree.

Lord Justice Bean

I also agree with the judgment of Elisabeth Laing LJ. I add only two brief comments. One is to note how long this dispute has been going on. Mrs Rubery submitted her service complaint in 2018. In May 2020 and July 2021 she issued two ET claims. The first alleged sex discrimination and harassment in respect of the substantive matters raised in her service complaint. The second alleged sex discrimination and victimisation in handling of the service complaint. While the interesting questions of law concerning the latter have been debated in the ET, EAT and this court, the original claim of discrimination and harassment has been stayed from time to time

and has yet to be tried – we were told that a nine day hearing has been listed for November 2026, eight years or more after the incidents complained of.

The other point is to note that EJ Nick Hanning, who tried this case at first instance and made history in the profession as the first chartered legal executive to be appointed a Recorder, died in December 2024. We have disagreed with him on some points of law, but the quality of his judgment demonstrates that his untimely death was a great loss to the law.

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Prepared on 22 October 2026 · Esheria