EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103202/2020

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Final Hearing in person held in Glasgow on 17, 18, 19, 20, 21 and 24 April 2023

Employment Judge Employment Judge F Eccles
10 **Tribunal Member R McPherson**
Tribunal Member D Frew

Mr C Milroy	**Claimant** **Represented by:** **Mr A Ohringer -** 15 **Barrister** **[Instructed by Mr S de Lacey - Solicitor]**
Advocate General for Scotland as representing the Ministry of Defence	**Respondent** **Represented by:** 20 **Mr B Napier KC -** **Counsel** **[Instructed by Mr A Gibson - Solicitor]**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that by (i) denying the claimant access to the Armed Forces Pension Scheme 1975 and successor schemes and (ii) using a divisor of 365.25 to calculate the claimant's daily rate of
30 pay, the claimant was treated less favourably as a part-time worker than the respondent treated a comparable full-time worker in terms of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

REASONS

Background

35 1. The final hearing was held on various dates in April 2023. The Tribunal was composed of Employment Judge Ian McPherson and Non-Legal Members Robert McPherson and Donald Frew. It was not possible for the Tribunal to

reach a decision before Judge McPherson's retirement in March 2024. Parties were contacted by the President to explain the position. In response to parties' concerns about the expense, time and inconvenience of a re-hearing, the President proposed that the Vice President could listen to the recording of the evidence, make a decision with the Non-Legal Members of the original Tribunal and issue a judgment. This was on the basis that the Non-Legal Members had already heard the evidence and would, if required, have access to the recording of the evidence. The parties agreed to the above proposal. It transpired that the recording did not include the evidence of Major General Simon Graham. The parties were able to provide the Tribunal with a copy of notes taken at the hearing and which they agreed were an accurate record of the Major's evidence. The Tribunal met on two occasions – 19 June and 17 July 2024 – to discuss the evidence and deliberate. The Tribunal is grateful to the parties for their assistance, cooperation and most of all their patience in relation to the determination of the claim.

2. The hearing was listed to determine liability only. The claimant complained of unauthorised deduction from wages under the Employment Rights Act 1996 (ERA) and less favourable treatment under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR). Following a preliminary hearing, the claim under ERA was found to be out of time and dismissed by judgment dated 6 October 2021.

3. The clam under the PTWR is concerned with reservists ("reservists") not having access to the Armed Forces Pension Scheme 1975 ("AFPS 75") and successor schemes to which reservists were also denied access. The claimant also challenges the basis on which a reservist's daily rate of pay is calculated using a divisor of 365.25 of a regular's annual rate of pay. The period of claim is from the start of the claimant's commission as a reservist in 1982 to 2015 when he was granted access to a pension scheme - the AFPS 15. The respondent denies less favourable treatment because of part time worker status. The respondent disputes that the claimant's service as a reservist brings him in scope of the PTWR. They claim that in any event, access to AFPS 75 would have brought relatively few benefits to the standard

reservist, and it would have been disproportionately expensive to administer the AFPS 75 pension scheme for reservists.

4. The claim was originally combined with the claim of Gavin Queen v Ministry of Defence case number 4110608/2021**.** Mr Queen is also a reservist, and his claim gives rise to issues common to this claim. By the time of the original hearing, a decision had been made that the Tribunal should consider the claim of Mr Milroy separately. Mr Queen's claim was sisted. The respondent objected to the Mr Queen being called as a witness in support of the claimant. The original Tribunal considered the application at the start of the hearing and decided to allow Mr Queen to give evidence, including his witness statement as evidence in chief.

5. The parties provided the Tribunal with witness statements for all witnesses to stand as their evidence in chief. For the claimant, the Tribunal heard evidence from:

- **Major Charles Milroy (claimant)**
- **Major Gene Maxwell (retired)**
- **Lieutenant Colonel John A Kerr (retired)**
- **Major Gavin Queen (retired)**

For the respondent, the Tribunal heard evidence from:

- **Eamonn Moyles, Policy Desk Officer, Pay Policy 2, Armed Forces Remuneration Division, MoD**
- **Kevin Pitt, Senior Policy Officer, Armed Forces Pension Schemes Policy Team, MoD**
- **Martin Quinn (Commodore, Royal Naval Reserve) – Former Head of Reserves, Defence People Division, MoD**
- **Major General Simon Graham (Major General) – Army Director Reserves**

6. The parties provided the Tribunal with a Joint Bundle (to which one document (236) was added during the final hearing), a joint list of authorities, an agreed list of issues and a statement of agreed facts. Paragraph 5 of the statement of agreed facts provided that in respect of periods of mobilisation the pension options available to a mobilised reservist included joining the AFPS 75 scheme. Having considered the evidence before it, the Tribunal asked the parties to confirm whether the above statement was accurate. The respondent confirmed that the statement was accurate. The claimant disagreed. It was suggested to the parties that the Tribunal proceed on the basis that the parties did not agree with the part of paragraph 5 referred to above and that this would be recorded in the judgment. Having had the opportunity to take instructions, parties agreed to the above proposal.

7. The parties provided the Tribunal with written submissions which they supplemented with oral submissions on the final day of the hearing. At the invitation of the Tribunal, the parties also provided further written submission on the decision in **Chief Constable of the Police Service of Northern Ireland and another v Agnew 2023 UKSC 3.**

8. The claimant was represented by Mr Adam Ohringer, Barrister with Mr Slade de Lacey, as Instructing Solicitor. The respondent was represented by Mr Brian Napier KC, with Mr Andrew Gibson as Instructing Solicitor.

Findings in fact

Introduction

9. Including those that are agreed, the Tribunal found the following material facts to be admitted or proved; the Territorial Army (TA) was formed in 1907 to provide a national reserve for service at home and overseas. It was given its present name, the Army Reserve, in 2015. From the late 1940s until the early 1990s its role was primarily to provide units that could be deployed to reinforce the Regular Army during the Cold War. Its role from the end of the Cold War was described in 2011 by the Independent Commission to Review the United

Kingdom's Reserve Forces (at 3021 of 3007 – 3078) ("the Review") as follows:

Over the last 20 years the Reserves have been widely used and, as befits a high quality military reserve, have undertaken a wide variety of roles. They have provided a de facto strategic reserve, additional capacity for large scale conventional operations, and support to enduring operations, as well as filling vital specialist roles and supporting some UK domestic operations. At the peak in 2004, Reservists made up 20% of our forces in Iraq and 12% in Afghanistan. A number have been decorated and 27 have given their lives. A small number of formed sub-units have been deployed in Bosnia, Iraq and Afghanistan and continued to be so until 2009.

10. With the end of the Cold War there was a policy decision by government to make more flexible use of members of the TA, referred to as reservists. This led to the Reserve Forces Act 1996 (RFA 1996) which in addition to training obligations (Section 22) provided for a range of different forms of reserve service, including statutory provisions to allow reservists to undertake full time reserve service (FTRS) (Section 24), additional duties commitments ("ADC") (Section 25) and voluntary training and other voluntary duties. (Section 27). In addition to their training requirements, reservists have always been able to volunteer to undertake additional training. The Reserve Forces Act 1996 formalised these arrangements and introduced the above full time and additional duties as forms of service for reservists. Before the RFA 1996, reserve service was limited to training (Section 38 of the Reserve Forces Act 1980) and permanent service on call out, also referred to as mobilisation. The additional forms of service under RFA 1996 allow reservists to participate in the activities of the armed forces without being mobilised or having to leave the Reserve Forces temporarily to join the Regular Forces. Those involved retain their liabilities for mobilisation as members of the Reserve Forces.

11. Recommendations following the Review in 2011 (3007 – 3078) included providing reservists with better defined and relevant roles, including a more formal role in support of specific security and operational tasks. There was a

recognition that reservists should be offered the "*right mix of interesting and challenging activities*." (2955)

12. Currently reservists provide a contingent capability which the respondent can and does call upon in line with the varying levels of commitment on the part of those who serve.

Claimant's service

13. The claimant joined the TA on 9 May 1982. He was commissioned as an Officer on 12 June 1983 and served as a Territorial Army/Army Reservist Officer until his discharge from service on 1 November 2019, aged 62 (date of birth 20 October 1957). The claimant held a number of ranks with the TA (212-213) and was promoted to the rank of Major in 1990 after which he held a number of Staff Officer appointments. These included a period of mobilisation as a Staff Officer in Iraq from 14 February 2007 to 10 July 2008. For most of his civilian career, the claimant was employed in the Scottish water industry as a Chartered Civil Engineer and Chartered Environmental Manager. Following his retirement from Scottish Water in March 2010, the claimant established a consultancy specialising in recruitment and personal development. Before his retirement from Scottish Water in 2010 the claimant served an average of 46 days each year. This increased significantly after his retirement when he served for up to 150 days each year until his discharge from service in 2019.

Commission

14. The government and command of the armed forces is vested in the Crown. The Queen's Regulations for the Army 1975 ("The Queen's Regulations 1975") (1452 – 1805) lay down the policy and procedure to be observed in the command and administration of the Army as a whole. The Army is composed of the Regular Army Forces, members of which are referred to as regulars and the Reserve Forces, members of which are referred to as reservists. All members of the armed forces are subject to the Royal prerogative of the Crown and are required to observe the Queen's Regulations 1975. The Territorial Army Regulations 1978 (964-1451) provide that "*candidates*

selected for appointment as officers in the TA will be granted commissions in Her Majesty's Land Forces" (1174). The Queen's Regulations 1975 provide that the order of precedence of Officers in either the Regular Army or the TA is by rank (1470). Regulars and reservists take the same Oath of Allegiance on their commission to the armed forces.

Discipline

15. Being a member of the armed forces, either as a regular or reservist, brings with it limitations on personal freedom and levels of self-discipline that are not expected of those in civilian employment. This includes being subject to military law, known as service law. When accepting his commission in 1983, the claimant was told and understood that as a member of the TA he was subject to service law at all times. This was widely understood by reservists to be the position but was not legally accurate. For example, when the claimant was mobilised in 2007, his call out (230) referred to him "*now*" being subject to military law. The Armed Forces Act 2006 (Section 367(2)) provides that members of the reserved forces are subject to service law only while on call -out; on FTRS; undertaking any training or duty or when serving on the permanent staff of the reserve force. Members of the regular forces are subject to service law at all times (Section 367(1)). Orders and regulations concerning the discipline of reservists are made under the RFA 1996 (Section 4). A reservist who fails to attend training under Section 22 of the RFA 1996 without leave lawfully granted or reasonable excuse, is guilty of absence without leave (Section 97). An offence under Section 97 of RFA is triable by a civil court as well as by court martial. The RFA 1996 is supplemented by the Reserve Land Forces Regulations 2016. (1806-2367) and should be read in conjunction with Queen's Regulations for the Army.

16. In practice, a reservist who fails to attend training without permission or reasonable excuse is very unlikely to be charged with an offence under the RFA 1996. The respondent seeks to be flexible and accommodating in relation to the personal commitments and obligations of reservists. During the claimant's service as a reservist, misconduct or poor performance would have resulted in an informal reprimand as opposed to formal disciplinary action. A

reservist who misses training might be subject to poor appraisals which can stand in the way of army career progression. Persistent failure to attend training can result in administrative discharge from office and normally will if a reservist fails to attend required training for a twelve-month period without the agreement of their Commanding Officer to a period of absence.

17. Breaches of the Queen's Regulations 1975 by regulars or reservists which do not constitute breaches of service law are dealt with by way of Administrative Action under the Army General and Administrative Instructions ("AGAI"). AGAI applies to all members of the armed forces at all times – both on and off duty - regardless of their rank. Administrative Action is taken when conduct amounts to a breach of the Army Values and Standards (1484) as determined by applying the "Service Test" (3638) which asks - "*Have the actions or behaviour of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service?*" The applicable sanctions include removal from office and loss of commission.

18. In addition to standards for wearing uniform, the personal appearance of all members of the Army is prescribed by AGAI (3167 to 3189). This includes hair colour, hair style, make up, tattoos and piercings for which non-compliance can bring censure at best and disciplinary or administrative action in the event of persistent failure to comply.

Duties

19. Apart from limited exceptions, regulars are permanently liable to serve anywhere in the world and can be deployed to any location, without notice. Reservists are only liable to attend for duty when called out for permanent service under Part VI of the RFA 1996 or when they have entered into a commitment of FTRS or ADC. Reservists who enter into an ADC will normally agree to temporarily undertake a specific role or task over an agreed number of specified working days. Only reservists are liable to be called out for permanent service. Until the Defence Reform Act 2014, strict conditions had to be satisfied before a reservist could be called out for permanent service including the use of armed forces in a national emergency or on operations

outside the UK for the protection of life or property, for example in the case of the claimant's period of mobilisation in Iraq. Limits are placed on any continuous period of permanent service. When a reservist is called out for service, they have the statutory right to be reinstated by their (civilian) employer when their call out ends and their employment is deemed to be continuous. During periods of permanent service, reservists join regulars for preparation training, deployment and recuperation.

20. Reservists spend the majority of their time training and in the case of Officer reservists, preparing and delivering training in accordance with the Training Directives of their Commanding Officer. The training provisions in Section 22(1) of RFA 1996 provide that members of a reserve force may be required to train in the UK or elsewhere for: *'(a) one or more periods not exceeding 16 days in aggregate; and (b) such other periods as may be prescribed, none of which shall exceed 36 hours without the consent of the person concerned; and such a person may, while undergoing a period of training under this section, be attached to and trained with any body of Her Majesty's forces*.' While there are exceptions, the majority of reservists are required to attend training on 27 days each year including a two-week annual camp. The average number of days served each year by a reservist is 35 including attendance at training.

21. Depending on their rank, reservists are trained at a variety of different times including evenings, weekends, annual camps and study days. Dates for training are regular, fixed and notified to reservists in advance. A reservist is expected to organise their civilian life around their unit's annual training schedule. A reservist's level of competence is maintained by attendance at training and the requirement to take annual tests to receive a certificate of efficiency. Reservists have no control over the dates set for training events. They are told where to attend. They are told whether to wear uniform or civilian clothes.

22. The training materials for reservists and regulars are the same. Regulars are trained on the same subjects as reservists including weapon training, battlefield casualty drill and navigation. The purpose of the training - to have

the capability to war fight - is the same for both reservists and regulars. To be trained to war fight is the most important part of a regular and reservist's role. In addition to training, reservists like regulars undertake duties to support unit operations such as driving vehicles and fuel replenishment.

23. Like their regular counterparts, reservists at Officer rank have additional duties. Regular and reservist candidates are selected to leadership roles in the same way and assessed against common standards for leadership potential. Officers are responsible for discipline in their unit. Their additional responsibilities require them to evaluate, plan and deliver training in accordance with their Commanding Officer's Directive and undertake annual testing. They can be required to manage issues associated with health and safety compliance, security of weapons, welfare, mentoring, promotion boards, recommendations for honours and awards and service complaints as Investigating or Assisting Officer. The most important part of an Officer's role as a regular or reservist is training to ensure that members of the armed forces have the capability to war fight.

24. Given the part time nature of their service, it can take longer for a reservist to achieve the same level of competence as a regular. Regulars have more time to train in a wider range of skills and obtain more qualifications than their reservist counterparts. Training courses can be shorter and more condensed for a reservist and additional training may be provided to a reservist who has been called up to ensure that they meet required standards.

Pay

25. A regular can be required to attend for duty on any day of the year. They are paid an annual salary. During most of a regular's time in service, they will be required to attend for duty on no more than five days a week or an equivalent number of days over a calendar year. They are entitled to annual leave. Regulars who apply for part-time working are paid on a pro rata basis based on a five-day working week. A regular who agrees to work the equivalent of a four-day week is paid 80% of their annual salary.

26. A reservist is paid for the days they attend for duty. Reservists are paid a daily rate for each 24-hour period or for at least 8 hours for a single day. The claimant's daily rate of pay as a reservist was calculated by applying a divisor of 365.25 to his regular counterpart's annual salary. The same divisor is used to calculate the pay of a reservist on an ADC. Reservists receive a quarter day's pay for 2 plus hours' voluntary service such as attendance at a drill night. They can receive a half day's pay for 4 plus hours' voluntary service, such as a Sunday morning, or three-quarters pay for 6 hours' voluntary service such as service on a Saturday.

27. From 1982, the claimant received monthly pay statements with gross pay based on days worked during the month and deductions for income tax and national insurance. Annually, the claimant received a P60 statement from the respondent and when discharged, a P45. The claimant was paid an allowance for home to duty travel and other incidental expenses at the same rates as his regular counterparts. The claimant was required to submit monthly attendance registers or sign a unit attendance register for the respondent to record his attendance, length of attendance and type of travel allowance claimed. The claimant was provided with an employee number.

28. Reservists earn an annual tax-free payment, referred to as a bounty, when they complete their annual training requirement, normally of 27 days, and obtain their certificate of efficiency. The annual bounty increases each year (up to a maximum of 5 years) in recognition of a reservist's level of commitment.

29. In addition to their basic pay, members of the armed forces receive a payment known as the X Factor. It is paid in recognition of the special conditions of service experienced by members of the armed forces when compared to their civilian peers. (236). It accounts for a range of potential advantages in army life such as job security, training, promotion and early responsibility and potential disadvantages such as turbulence, the impact on family life and a partner's career, danger, separation, hours of work, stress, loss of leave, lack of autonomy and lack of certain individual and collective rights. It is expressed as a percentage of basic pay. The rate of the X-Factor is currently 14.5% for

regulars, mobilised reserves and at varying amounts (14.5%, 5% and 0%) for reservists on FTRS. The rate of the X-factor paid to a reservist is 5%. What are referred to as "spikes"' in activity such as lengthy separation from family, or significantly increased exposure to danger, are additionally compensated through specific allowances paid to regulars such as Longer Separation Allowance and Operational Allowance.

30. Financial support is provided to a mobilised reservist, such as top-up (non-pensionable) payments when their civilian salary is higher than their military pay. Reservists on FTRS are paid the same salary as their regular equivalent with varying amounts of X Factor.

Pension

31. Prior to 1 April 2015, only periods of mobilisation were pensionable for part time reservists. In respect of periods of mobilisation, the pension options available to a mobilised reservist included payment of contributions to maintain their civilian pension scheme and payment of contributions to the state second pension scheme (SERPS). From 1997 to 2005 reservists on mobilisation and who took up full time service were allowed to join the Full time Reservists Pension scheme (FTRS 97) and from 6 April 2005, the Reserve Forces Pension Scheme (RFPS 05). The pension arrangements under the schemes for regulars and reservists differed in certain respects including age on receipt of payment and method by which pension entitlement is calculated and were overall less favourable for reservists. When mobilised in 2007, the claimant opted for contributions to be paid to his pension scheme through Scottish Water to preserve continuity of his occupational pension.

32. The AFPS 75 scheme and its successor scheme the AFPS 05 (from 6 April 2005), were open to regulars only. They were designed for regulars serving on a full-time basis who "*make the services their career*." (209). Like all armed forces pension schemes, they were non-contributory. A regular was required to serve two years' paid service to qualify for a pension under the above schemes. Based on their average annual service and total years' service the majority of reservists would not have qualified for a pension under either

scheme. They would have likely left the armed forces before qualifying for a pension. Unlike the majority of reservists, based on his total days and length of service, the claimant would have qualified for a pension had he been allowed access to either scheme.

5 33. In 2005, before the widescale use of computerisation, the cost of administration was higher than it is today. It was not until 2015 that pension administration moved to the JPA computer system. JPA is the computer administration system for the Armed Forces (pay, leave, allowances, expenses etc) which was introduced in stages from 2005 and pension 10 administration was using a legacy system to calculate pensions until 2015. With pay and pension now in the same computer system administration costs have been reduced.

34. With the introduction of the PTWR, the respondent was under pressure to justify exclusion of reservists from the AFPS 75. In response to a request from 15 the respondent for information on the exclusion of reservists from the scheme, the respondent was advised in January 2000 that a typical volunteer reservist with a total length of service of 145 days completed over a 5 year period i.e. 29 days service a year, could expect to receive a notional benefit under the scheme of £104.70 per annum. (194-197). In response to Tribunal 20 proceedings in which reservists claimed indirect sex discrimination, the respondent obtained an actuarial report in 2007 on pension valuation from Stephen Humphrey, Chief Actuary of the Government Actuary Department (921 – 939). In his report, Stephen Humphrey concluded that "*Offering a pension scheme to the TA as a whole involves very significant administration* 25 *costs relative to the value of benefits being provided. This is because the benefits accrued are very small for a significant proportion of the membership.*" In evidence before the subsequent Tribunal hearing (955-962), Stephen Humphrey gave evidence on behalf of the respondent that he estimated the capitalised value of the annual administration costs of 30 administering the pension benefits under the FTRS for each of the typical TA members would be approximately £700. This was £265 more than the capitalised value of pension for a typical Lance Corporal (aged 30 who

completes 3 ½ years' service at 32 days per year) and £1,435 less than that of a typical Captain (aged 40 who completes 7 years of service at 32 days per year). Stephen Humphrey estimated that under the FTRS scheme (958) the annual administration costs per member while an active member of the scheme would be approximately £45, £20 as a deferred member and £30 as a retired member. The respondent informed to the DTI in September 1999 (183) that to give reservists pension rights "*would be very costly in administrative terms, and it would take many years to qualify for a pension*".

35. The AFPS 15 was introduced in April 2015. It was open to both regulars and reservists.

Notes on evidence

36. The period of claim covers 1982 to 2015 excluding the claimant's period of mobilisation when contributions were made by the respondent to his civilian pension. During the period of claim there have been changes to the legislative framework regulating the armed forces. For the most part, the Tribunal was referred to the most recent legislation relative to the period of claim and where its relevance and applicability was not challenged the Tribunal has referred to that legislation in its findings in fact. Where the Tribunal has referred to evidence that dates from outside the period of claim, it is on the basis that it assisted the Tribunal to understand the position at the time of the alleged less favourable treatment, for example the duties undertaken by reservists and regulars.

37. Apart from the issue relating to the statement of agreed facts referred to above, very few of the material facts were in dispute. For the most part, differences arose in the assessment of witnesses as to the level of competence and contribution of the reserve force to the capability of the armed forces generally. It was common ground that all of the witnesses were credible and sought to present truthful accounts of their knowledge and involvement in the matters about which they were questioned. Any inaccurate recollections were taken as attributable to the passage of time.

38. The respondent's witnesses Martin Quinn and Major General Simon Graham in particular, sought to emphasise the voluntary nature of the reservist role when compared to that of regulars who commit to serve on a full-time basis. Despite careful scrutiny of their evidence however, the Tribunal was unable to identify any aspect of the work undertaken by a reservist that was materially different from that of a regular. Major General Graham, who has responsibility for the Army Reserve Policy, did not identify anything of significance in his evidence in this respect apart from a general distinction between the voluntary nature of a reservist's role when compared to that of a regular. He described "*routine activity*" of a regular as "*considerably more varied and non-negotiable*" and the likelihood of being called to support "*one of numerous outputs that the Army is required to provide to Defence*" without further detail of exactly what regulars were required to do during the period of claim that differed from that of reservists.

39. In terms of training, Major General Graham described (at paragraph 10 of his witness statement) that unsurprisingly, the extent to which the Army relies on reservists for outputs other than training is "*generally in proportion to the extent to which they are invested in*". While accepting that regular and reservist candidates are selected in the same way and assessed against common standards for leadership potential, he disputed that this was because the Army intended to employ them in the same way. He referred in cross examination to the "*idea of equivalence*" as a "*chimera*" that "*did not stand up*." He did not accept that reservists and regulars are "*prepared to the same standard*." There was a lack of detail in his evidence however as to how the roles, once appointments were made, differed apart from the time spent in the role. Likewise, Eamonn Moyles rejected any suggestion that regulars were appropriate full-time comparators for part time reservists. He described them as "*separate workforces engaged in different ways*." Again, however there was a lack of persuasive evidence as to the basis on which such an assertion was made by reference to what work was being undertaken by reservists that differs from that of regulars.

40. Major General Graham gave evidence that the role of the reserve "*is and always was warfighting*". It is their primary role. He referred to the reserve force as being "*a foundation*" and available to be deployed in a state of emergency when they would have the ability to "*step up*" if required to mobilise.

41. Kevin Pitt for the respondent gave detailed evidence about the various pension schemes available to regulars and full time reservists. This supplemented paragraph 11 of the statement of agreed facts which recorded historical differences in pension arrangements and remaining differences. In terms of access by a mobilised reservist to the AFPS 75 scheme, Kevin Pitt said (at paragraph 14 of his witness statement), "*Reserves mobilised for full time duty could receive a pension for the period of their mobilisation. This was not however under the AFPS 75 scheme*." There was no evidence that when mobilised the claimant was allowed to join the AFPS 75 scheme. Major Gavin Queen refers at paragraph 1.4 of his witness statement to a period when he was mobilised and "*taken into regular service*". He goes on however to refer to his belief that he required a full year on mobilised service before "*an AF benefit would be accrued*".

42. The claimant's evidence and that of his witness Major Gavin Queen about their duties and work as reservists was not challenged in cross examination. This was also the case in relation to the claimant's evidence that his duties in relation to assessments was the same as a full-time counterpart or that he would not have required any additional training had he taken up a full-time equivalent post.

Joint List of Authorities

41. The Tribunal was provided with a joint list of authorities as follows:

1. Reserve Forces Act 1980, s.38, 39

2. Armed Forces Act 2006, s.367

3. Armed Forces Act (Continuation Order) 2021, 2021 No. 289, (and Explanatory Memorandum)

4. **Army Act 1955 s 205(1)(e), s. 211) (1)(b), Part II (heading only)**
5. **Forth Valley Health Board v Campbell EAT-2020-SCO-000093-SH**
6. **Newell v Ministry of Defence [2002] EWHC 1006,22nd May 2002**
7. **Ministry of Justice v Blackford [2018] UKEAT 0003_17_0603**

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8. **Moultrie v Ministry of Justice [2015] IRLR 264**
9. **Case C-555/07 Seda Kucukdeveci, [2010] ECR I-365**
10. **Engel v Ministry of Justice [2017] ICR 277**
11. **Quayle & Ors v MoD Case numbers: 1802732/04; 1803506/05; 1803891/05.**

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12. **Case C-313/02 Wippel v Peek [2005] ICR 160**
13. **Manson v Ministry of Defence [2006] ICR 355**
14. **G.R. Rubin, "United Kingdom Military Law: Autonomy, Civilianisation, Juridification" MLR 2002, Vol.65, pp. 36-57**
15. **A. McColgan "Missing the Point? The Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, [2000] Industrial Law Journal, pp. 260-267**

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16. **Harvey on Industrial Relations and Employment Law (extract)**
17. **Explanatory Memorandum to The Armed Forces Act (Continuation) Order 2021**

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18. **Reserve Forces Act 1996**
19. **Defence Reform Act 2014**
20. **Kreil v Bundesrepublik Deutschland (C285/98)**
21. **Matthews v Kent and Medway Towns Fire Authority [2006] ICR 365**

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22. **Pettini v Istituto nazionale della previdenza sociale (C-395/08)**

23. McMenemy v Capita Business Services Ltd [2007] IRLR 400

24. Carl v University of Sheffield [2009] ICR 1286

25. Dakin v Brighton Marina Residential Management Company Ltd (UKEAT/0380/12)

5 **26. Ministry of Justice v O'Brien [2012] ICR 955, CJEU**

27. Hospital Medical Group Ltd v Westwood [2013] ICR 415

28. Ministry of Justice v O'Brien [2013] ICR 499, SC

29. Coles v Ministry of Defence [2016] ICR 55

30. Roddis v Sheffield Hallam University [2018] IRLR 706

10 **31. Miller v Ministry of Justice [2020] ICR 1143**

32. R (Highbury Poultry Farm Produce Ltd) v CPS [2020] 1 WLR 4309

33. Heskett v Secretary of State for Justice [2021] ICR 110

34. BK v Republika Slovenija (C742/19)

35. Uber BV v Aslam [2021] ICR 657

15 **36. R v Canning [2022] 1 WLR 3729**

37. Ministry of Justice v Dodds [2023] EAT 31

Discussion and Deliberation: Liability

43. Applying its findings in fact to the relevant law and having considered the authorities to which it was referred, the Tribunal addressed each of the issues
20 before it as follows:

Preliminary issues

1 *Does the Claimant come within the scope of the Part Time Workers Directive, (Council Directive 97/81EC), or is his service as a member of the reserve forces "substantially different from that between employers and their*
25 *employees falling, according to national law, under the category of workers"*

(The test propounded by the Court of Justice of the European Union in O'Brien v Ministry of Justice [2012] EUCJC C-393:10, at para. 43), such as to exclude him from the scope of the Directive?

44. The Part Time Workers Directive (Directive 97/81/EC) ("PTWD") implemented the Framework Agreement on Part-time Work ("FA"), the purpose of which was to improve the quality of part-time work and to remove discrimination against part-time workers. Clause 2.1 of the FA defines its scope as applying to "*part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each member state*." The PTWD was transposed into domestic law by the Part-time Workers (Prevention of Less Favorable Treatment) Regulations 2000 ("PTWR").

45. In the case of **O'Brien v Ministry of Justice 2012 ICR 955**, the European Court of Justice (ECJ) ruled that the exclusion of a category of persons from the scope of the FA cannot be accepted "*unless the nature of the employment relationship is substantially different from that between employees falling, according to national law, within the category of "workers" and their employers*". (paragraph 43). An exclusion of reservists from the protection of the PTWD may therefore be allowed in this case if the nature of the employment relationship between reservists and the respondent is substantially different from that between employers and their employees falling, according to domestic law, under the category of workers. The ECJ in **O'Brien** went on to explain;" It *follows from the criterion of a difference in nature, first of all, that purely formal grounds cannot justify the exclusion of a category of persons*." (paragraph 45) In **O'Brien** for example, the purely formal fact that fee paid judges were classified as "*holders of office*" was not sufficient in itself to justify their exclusion from the protection of the FA.

46. It is necessary for the Tribunal to consider the nature of the employment relationship between reservists and the respondent. The ECJ in **O'Brien** identified principles and criteria that the domestic courts should take into account in the course of its examination of the relationship between judges and the Ministry of Defence (paragraphs 44 to 46). Particular emphasis was

attached to consideration of the distinction between a worker and a self-employed person. The Supreme Court applied the above principles and criteria when finding that fee paid judges are workers in **Ministry of Justice v O'Brien 2013 ICR 499**,

5 47. The Supreme Court in **O'Brien** considered whether the character of the work undertaken by a fee paid judge differs from that of a self-employed person. In the present case, the respondent accepts that the claimant was not self-employed. Mr Napier submitted however that the work done by a reservist (and the claimant in particular) is similar to that of a self-employed person in 10 that they decide whether to carry out their duties and how much work they will do. Likewise, submitted Mr Napier, the nature of the relationship has some of the characteristics of a volunteer to the extent the reservist decides what they will do and for how long they will do it. The lack of compulsion to work, submitted Mr Napier, is apparent when it comes to both training and 15 mobilisation. Referring to current recruitment materials, Mr Napier submitted that the role of the reservist is voluntary. The reservist chooses how much time to spend on training and whether to accept an invitation to be mobilised. It was clear from the evidence before the Tribunal, submitted Mr Napier that the sanction for failing to attend training was the loss of a certificate of 20 efficiency required to receive a bounty payment.

48. Mr Ohringer referred the Tribunal to decisions of the European Court (**Kriel v Bundesreplublik Deutschland (C285/98) and BK v Republika Slovenija 2022 1 CMLR 19)** in which he submitted that it has already been recognised that service in the armed forces is sufficiently similar to an employer/worker 25 relationship to come within the scope of EU employment protections. Mr Ohringer also referred the Tribunal to the case of **R v Canning 2022 1WLR 3729** in which it was conceded by the Army before a Court Martial of a Lance Corporal that the Working Time Regulations 1998 applied to members of the armed forces as workers.

30 49. Having regard to the facts of the present case, the Tribunal was not persuaded that the nature of the claimant's service as a reservist with the respondent was substantially different from that of a worker under national

law. The definition of worker appears at Regulation 1(2) of the PTWR as "*an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under - (a) a contract of service; or (b) any other contract, whether express or implied….., whereby the individual undertakes to do or perform any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual*". This mirrors the definition of worker at Section 230 of the Employment Rights Act 1996.

50. The Tribunal found that to be a reservist the claimant was required to attend training and when holding Officer rank to undertake Officer duties for the respondent. A reservist can undertake voluntary training, but this is in addition to required training to retain their commission. While it was apparent that there is a reluctance on the part of the respondent to sanction reservists who fail to attend training without leave or good reason, to retain their commission reservists are obliged to attend training on a regular basis. Failure to do so could result in discharge from service and this would normally be the case after a year's absence from training. When the claimant signed up for training, he had no control over when or where it would take place. Payment of the bounty, prospects of promotion and ultimately whether he would retain his commission were dependent on regular attendance at training of 27 days each year including attendance at camp. When training or undertaking Officer duties, reservists are subject to the direction and control of their Commanding Officer. They arrange training in terms of their Commanding Officer's Training Directive. Reservists are subject to service law while training and undertaking Officer duties and are required to comply with the "service test" at all times in terms of which their actions or behaviour must not adversely impact or be likely to impact on the efficiency or operational effectiveness of the Army (B1489). As a reservist the claimant did not work for himself in a self-employed capacity or when at work in a manner that suited him, as opposed to the respondent.

51. The claimant did not dispute that his obligations as a reservist were "*different to that of civilian employment*." The Tribunal did not accept however the respondent's submission that the unique nature of the service required from members of the armed forces, including the level of discipline demanded and exclusion from certain employment rights, precludes a finding that reservists come within the meaning of workers. Similarly, the Tribunal did not accept that the legislative provisions in place to provide a reservist with additional protection in their civilian employment made the employment relationship between a reservist and the respondent substantially different from that of employer and worker under domestic law.

52. As referred to by Mr Napier, the relationship between the Crown and a member of the armed forces is non-contractual. Mr Napier referred the Tribunal to the case of **Newell v Ministry of Defence EWHC 1006** in which Elias J stated that it is a very firmly established principle that officers of the army do not have any contractual relationship with the Crown. A reservist is however subject to service law under the Armed Forces Act 2006 (and predecessor provisions) which confers powers and sets out procedures to enforce the duty of members of the armed forces to obey lawful commands. Reservists are required to attend training to retain their commission. When training they are subject to the command and control structure of service law. They are paid for attending training and for undertaking Officer duties. They can be subject to administrative discharge if they fail to undertake required training. The characteristics of the work of a reservist differs from that of a self-employed person. They are not carrying out a business on their own account and the level of control over their work by the respondent is inconsistent with the freedom of a self - employed person to decide when and how they carry out work. Applying a purposive approach to domestic law and the test in **O'Brien,** the Tribunal was satisfied that in all the circumstances the nature of the relationship between reservists and the respondent is not so substantially different from that between employers and their employees falling, according to national law, under the category of workers as to exclude reservists from the scope of the PTWD. The Tribunal was persuaded that in all the circumstances, reservists are in an employment relationship within the

meaning of clause 2.1 of the framework agreement and that they can therefore be treated as workers for the purposes of the PTWD.

2 Does the Claimant's service as a member of the reserve forces come within the scope of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (read in light of the Directive / FA if applicable):

(a) Having regard to the terms of reg.13, and./or

(b) By virtue of reg.12 applying the definitions of 'employee' or 'worker' under reg.1(2)?

53. Regulation 13 of the PTWR relates specifically to the armed forces. Service as a member of the armed forces is expressly included in the PTWR by Regulation 13(1) (subject to the exceptions in Regulation 13(2) which are considered below). The Tribunal was therefore satisfied that it did not in these circumstances consider it necessary to consider whether reservists are crown employees in terms of Regulation 12 of the PTWR.

3 The parties agree that, on the face of the Regulations, the Claimant's service as a member of the reserve forces (so far as it falls under sections 22 and 27 of the Reserved Forces Act 1996) is expressly excluded (under Reg. 13(1)-(2)) from the application of the Regulations.

4 That being so, should reg.13(1)-(2) be modified or disapplied to give effect to the Directive / FA?

54. Regulation 13 (2) of the PTWR provides that the Regulations shall not have effect in relation to service as a member of the reserve forces in so far as that service consists in undertaking training obligations under Sections 38, 40 or 41 of the RFA 1980, Section 22 of the RFA 1996 and pursuant to regulations under Section 4 of the RFA 1996 or consists in undertaking voluntary training or duties under Section 27 of the RFA 1996.

55. It is the respondent's position that the vast majority, if not all, of the service undertaken by the claimant as a reservist fell within the meaning of Sections 22 and 27 of the RFA 1996, that is training obligations, voluntary training and

other duties. If this is correct, it effectively excludes the claimant as a reservist from the protection of the PTWR.

56. In the case of **O'Brien**, Regulation 17 sought to exclude part time judges from the PTWR. This was, in part, on the basis that they were classified as "office holders" and the unique characteristic of judicial independence. Regulation 17 of the PTWR was found to be incompatible with the FA and the national courts were entitled to disapply it on the basis that it sought, without justification, to exclude a category of persons from the protection of the PTWD.

57. In this case, the Tribunal is persuaded that Regulation 13(2) also seeks to exclude a category of persons from the protection of the PTWR. By excluding reservists from the scope of the PTWR when they are training and undertaking "*other duties*," Regulation 13(2) effectively seeks to exclude reservists altogether as a category of persons from the scope of the FA and PTWD. The Tribunal was persuaded for the reasons given above that reservists can be regarded as workers within the meaning of the PTWR. Regulation 13(2) seeks to exclude the work reservists do for the respondent and, as a result, a category of persons from the protection of the PTWD. The Tribunal was persuaded that in all the circumstances Regulation 13(2) of the PTWR is incompatible with the FA and PTWD and should therefore, subject to justification, be disapplied when determining the claimant's rights as a reservist in this case.

Substantive issues

5 Is a full-time regular officer of the Armed Forces of the same rank (the comparator) to the Claimant, engaged on "the same type of contract" for the purposes of reg. 2(4)(a)(i) in light of the Directive / FA if applicable?

58. Regulation 2(4) (a) (i) of the PTWR provides that; "*A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place—*

(a) *both workers are—*

(i) *employed by the same employer under the same type of contract…,*"

59. In this case, the Tribunal considered whether the type of employment relationship with the respondent was the same for reservists and regulars holding the same rank, it having been accepted that there was no contract of employment. This is necessary if regulars are to be valid full-time workers for comparison purposes with part-time reservists. Regulation 2(3) describes different types of contracts for this comparison purpose as (a) employees employed under a contract that is not a contract of apprenticeship; (b) employees employed under a contract of apprenticeship and (c) workers (who are not employees). There is also a residual type of contract at Regulation 2(3)(d) that covers "*any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract*".

60. The Tribunal had regard to the case of **Matthews v Kent Fire Authority 2006 ICR** 365 in which retained fire fighters compared themselves to whole-time firefighters. (Like the claimant in this case, the retained fire fighters complained of exclusion from a pension amongst other less favourable treatment as part-time workers). Lord Hope (at paragraph 7) in **Matthews**, emphasised the importance in such a comparison exercise of looking for something that brings different types of things together within the same category as opposed to an over precise view of their variations and differences. He described (at paragraph 8), the wording of Regulation 2(3) of the PTWR as adopting the above approach and observed that the descriptions are broad and "*do not suggest that a contract can be treated as being a different type from another just because the terms and conditions that it lays down are different*".

61. The EAT in the case of **Roddis v Sheffield Hallam University [2018] IRLR 706**, **EAT**, also provides helpful guidance to the correct approach of identifying the applicable type of contract or, in this case, employment

relationship when identifying a valid full-time comparator. In **Roddis**, the claimant was a lecturer employed on a "zero hours" contract and compared himself to a lecturer on a full-time contract. Judge Stacey in the EAT distilled from the case law, in particular **Matthews** the following propositions on the correct application of Regulation 2 (3).

"— *Regulation 2(3) provides a comprehensive list of categories of different types of contracts for the purposes of paragraphs 2(1), (2) and (4).*

— *The categories in Regulation 2(3) are broadly defined and, since the purpose of the Regulation is to provide a threshold to require a comparison of full and part-time workers to take place, the threshold is deliberately set not too high;*

— *A contract cannot be treated as being of a different type from another just because the terms and conditions that it lays down are different, nor because an employer chooses to treat workers of a particular type differently;*

— *Where a worker and his or her comparator are both employed under contracts that answer to the same description given in the same paragraph in Regulation 2(3), they are both to be regarded as employed under the same type of contract for the purposes of Regulation 2(4).*

— *In order to satisfy the requirements of Regulation 2(4)(a)(i), it is not necessary to go further than to find that both workers are employed under contracts that fit into one or other of the listed categories;*

— *The categories are designed to be mutually exclusive;*

— *The category in Regulation 2(3)(d) is a residual category. It refers to a description of worker who is different from those mentioned in categories (a) to (c) and does not apply to a worker who falls into one of those categories;*

— *An example of a description of worker who would fall within category (d) has yet to be identified. A zero-hours contract is not, of itself, a type of contract."*

62. It is not in dispute that the employment relationship of members of the armed forces with the Army differs significantly from that of most workers with their employer. The uniqueness of this relationship applies to both reservists and regulars. Both are commissioned to serve the Crown pursuant to the Royal Prerogative. Mr Napier submitted that the Tribunal should draw a distinction between the employment relationships of reservists and regulars based on a regular being permanently subject to service law as opposed to a reservist who is subject to service law only when carrying out their duties or when mobilised. The Tribunal considered this to be a difference attributable to the full-time nature of a regular's employment relationship as opposed to being a different type of employment relationship. The impact that being a regular can have on family life was also relied on by the respondent to demonstrate a difference in the type of employment relationship between regulars and reservists and the possibility that they might at any time be called to action as opposed to being invited to mobilise. The Tribunal considered these to be consequences of the full-time nature of a regular's work as opposed to being a different type of employment relationship to that of a reservist. The X Factor, relied on by the respondent to demonstrate a contractual difference, was considered by the Tribunal to reflect the relative impact on regulars and reservists of serving in the armed forces. The higher rate is paid in recognition of the additional demands placed on regulars by full time service in the armed forces, as opposed to reflecting the existence of a different type of contract or as in this case, employment relationship of reservists and regulars with the respondent.

63. Looked at overall, the Tribunal was satisfied that the employment relationship of a regular with the respondent can be categorised as the same type of employment relationship as that of a reservist with the respondent for the purposes of comparison under Regulation 2(4) of the PTWR. Neither are employees but for the purposes of the PTWR come within the scope of

workers (who are not employees) under Regulation 2(3) (c) and if the Tribunal is wrong about this, within the residual category of employment relationship under Regulation 2(3)(d).

6 If so, are they engaged in "the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skill or experience" for the purposes of reg. 2(4)(a)(ii) in light of the Directive / FA if applicable?

64. Regulation 2(4)(a) (ii) is the second part of the definition for comparison purposes under the PTWR and provides that a full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place–

(a) both workers are–

(i) ….

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience;

65. When considering whether reservists and regulars are engaged in the same or broadly similar work, the Tribunal returned to the judgment of Lord Hope in **Matthews** where he said (at paragraph 14):

The wording of regulation 2(4)(a)(ii) identifies the matters that must be inquired into. One must look at the work that both the full-time worker and the part-time worker are engaged in. One must then ask oneself whether it is the same work or, if not, whether it is broadly similar. To answer these questions one must look at the whole of the work that these kinds of worker are each engaged in. Nothing that forms part of their work should be left out of account in the assessment. Regard must also be had to the question whether they have a similar level of qualification, skills and experience when judging whether work which at first sight appears to be the same or broadly similar does indeed satisfy this test. But this question must be directed to the whole

of the work that the two kinds of worker are actually engaged in, not to some other work for which they may be qualified but does not form part of that work. (para.14)

66. Lord Hope emphasised in **Matthews** (at paragraph 18) that the question whether the two kinds of worker have a similar level of qualification, skills and experience is relevant only in so far as it bears on the exercise of assessing whether the work that they are actually engaged in is the same or broadly similar. In **Matthews**, the House of Lords found that the Tribunal had concentrated on the differences in the work of retained and full-time firefighters and as opposed to assessing the weight that ought to be given to the similarities. The Tribunal found that the job of the full-time firefighters was a" fuller *wider job*" than that of the retained fire fighter but failed to ask itself whether, in terms of Regulation 2(4)(a)(ii), both groups were engaged nevertheless in work that could be described as "*broadly similar*" (paragraph 20).

67. Lady Hale also provides guidance in **Matthews** (at paragraph 43) and emphasised that the sole question for the Tribunal at this stage of the inquiry is whether the work on which the full-time and part-time workers are engaged is "*the same or broadly similar*". Lady Hale went on to say:

> *"… The work which they do must be looked at as a whole, taking into account both similarities and differences. But the question is not whether it is different but whether it is the same or broadly similar. That question has also to be approached in the context of Regulations which are inviting a comparison between two types of worker whose work will almost inevitably be different to some extent.* (at paragraph 43)
>
> *… The fact that the full-timers do some extra tasks would not prevent their work being the same or broadly similar. In other words, in answering that question particular weight should be given to the extent to which their work is in fact the same and to the importance of that work to the enterprise as a whole. Otherwise one runs the risk of giving too much*

weight to differences which are the almost inevitable result of one worker working full-time and another working less than full-time. (at paragraph 44)."

68. Mr Ohringer understandably relied on the above passages from **Matthews** to argue that the claimant was engaged in "*the same or broadly similar work*" to that of a regular. He also referred the Tribunal to the case of **Coles v Ministry of Defence 2016 ICR 55** which was concerned with the "*comparable worker*" test under the Agency Worker Regulations 2010 in terms of which the claimant and comparator must also be engaged in the "*same or broadly similar work*". In **Coles**, Langstaff J as President of the EAT referred (at paragraph 42) to **Matthews** and emphasised the importance of the Tribunal focussing on whether the claimant and their comparator are engaged in the" same *or broadly similar work*" rather than whether they have the "*the same or broadly similar qualifications and skills*".

69. Mr Napier submitted that the task identified in **Matthews** of deciding whether the work of part time and full-time workers was the same or broadly similar had been approached correctly by the Tribunal in the case of **Moultrie and others v The Ministry of Justice 2015 IRLR 264.** In **Moultrie** the Tribunal found that fee-paid medical members of Tribunals were not engaged in the "*same or broadly similar work*" as full-time salaried regional medical members. The Tribunal found that 15% of the work undertaken by regional medical members was of such importance that it could not be said that the two groups were engaged in the same or broadly similar work. This was notwithstanding that the other 85% of the work done by regional medical members was also the work, typically, done by fee-paid medical members and that the work of sitting done by both groups was of the highest importance. The Tribunal considered the relative importance of the work and whether the similarities were more or less important than the differences. The EAT concluded that the Tribunal had correctly assessed the question of whether the work of a typical fee-paid medical member was the same or broadly similar to a full-time salaried regional medical member within the meaning of Regulation 2(4)(a)(i) of the PTWR. Based on the facts of the case, 85% of the work undertaken by

full-time regional medical member was identical to the work done by fee-paid medical members and that work was of great importance. The Tribunal took into account that the there was no difference between them in terms of qualifications, skills or experience. The Tribunal gave the relevant matters particular weight and considered whether the differences between the work that the full-time regional medical member did, and the typical fee- paid medical members did not do, were of such importance that they could not be regarded as being engaged in broadly similar work.

70. While it was assisted by the approach taken to compare the work of claimant and comparator in **Moultrie**, in the present case the Tribunal found that the work undertaken by reservists and regulars is broadly similar. The Tribunal accepted the evidence of the claimant about the work he had undertaken at various ranks while a reservist. His evidence on this was not challenged in any material respect. The Tribunal was satisfied that the work undertaken by reservists is undertaken by regulars and similarly the work undertaken by reserve officers is undertaken by regulars at officer rank. Regulars will inevitably do more of the work, more of the time as a consequence of their full-time status. The most important work of members of the armed forces – to train and prepare to "war fight" - is undertaken by both reservists and regulars.

71. The respondent's witnesses questioned the context in which reservists train and prepare to "*war fight*" and referred to the historic divisions between the TA and the regular Army. Major General Graham was sceptical about the ability of regulars and reservists to achieve equivalent competence given the amount of time spent on training by reservists. While recognising the intention of the respondent to use reservists for war fighting, he questioned whether they could be prepared to the same standard as regulars. While the Tribunal did not doubt the sincerity of Major General Graham's observation, it was not persuaded from the evidence before it that the qualifications, skills or experience required to be a regular differ from that required to be a reservist. Major General Graham referred to reservists benefiting from a lower standard in relation to shooting tests and a "*lighter touch*" when exposed to basic

training. Again, the Tribunal did not find that this observation was supported by the evidence before it. The claimant had extensive experience of preparing and delivering training to reservists and of working alongside regulars in particular when mobilised in Iraq. It was his evidence, which the Tribunal accepted, that regulars and reservists are" *interchangeable*" in terms of the training and tasks that they undertake to prepare for mobilisation. Martin Quinn for the respondent agreed that reservists are an integral part of military's war fighting capability.

72. Reservists will inevitably spend less of their time training and undertaking duties, as a result of which it may be unrealistic to expect them to perform to the same standard as regulars. The Tribunal was not persuaded from the evidence before it however that this was a distinction to be drawn between the work of reservists and regulars either in terms of their work or based on a difference in their respective level of qualification, skill or experience.

73. As referred to above, the respondent relied on the case of **Moultrie** to argue that the work of reservists and regulars was not the same or broadly similar. Unlike the facts in the case of **Moultrie**, however, the Tribunal in this case did not find from the evidence before it that there was work undertaken only by regulars, as opposed to the amount of work, that was of such importance that it could not be said that they were engaged in the same or broadly similar work to that of reservists.

74. Having considered the work of reservists and regulars as a whole, and taking into account both similarities and differences, the Tribunal was satisfied that their work is broadly similar for the purposes of Regulation 2(4)(a) (ii) of the PTWR.

7 Was the Claimant treated less favourably than his comparator regular officer (applying the principle of pro rata temporis) in that:

(a) His rate of pay for a day's work was the annual rate of pay divided by 365.25 and not some smaller divisor?

75. Clause 4.1 of the framework agreement prohibits, in respect of employment conditions, part-time workers being treated in a less favorable manner than comparable full-time workers solely because they work part time unless the different treatment is justified on objective grounds.

76. The PTWD implemented the framework agreement. from which followed the PTWR, Regulation 5 of which provides:

"*Less favourable treatment of part-time workers*

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker –

(a) as regards the terms of his contract; or (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if (a) the treatment is on the ground that the worker is a part-time worker, and (b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate."

77. The claimant challenged the basis on which the daily rate of pay for a reservist is calculated. It is not in dispute that a reservist's daily rate of pay is calculated by dividing the annual salary of a regular of the same rank by 365.25. The claimant submits that by using a divisor of 365.25 the respondent is failing to take account of the time when a regular is not working such as at weekends (104 days) and annual leave (38 days). A reservist's daily rate of pay submits the claimant, should be calculated using a divisor that takes account of the above non-working time, for example 261 or 223. The claimant relies on the treatment of part time regulars to highlight the above discrepancy on the basis that part time regulars are paid on a pro rata basis of a five-day working week – a regular who works four days per week is therefore paid 80% of a full-time equivalent salary.

78. Mr Ohringer referred the Tribunal to the case of **Chief Constable of the Police Service of Northern Ireland v Agnew 2019 IRLR 782** in which the Northern Ireland Court of Appeal observed that holiday pay should be calculated in such a way as to ensure that normal remuneration is maintained during a period of leave. This meant dividing the annual salary by the number of working days rather than 365. What constitutes normal remuneration and the reference period for calculating pay were held to be questions of fact from the evidence before the Tribunal. The Supreme Court upheld the Court of Appeal's decision.

79. The respondent sought to argue that as regulars are "*on call to work*" every day of the year, a divisor of 365.25 makes sense and is fair. It is not less favourable treatment under the PTWR. Reservists are paid, according to the respondent, for the days that they are available for work.

80. Eamonn Moyles for the respondent described how a reservist is paid the daily rate for working at least 8 hours in any 24-hour period. He argued that in annual terms they were therefore only required to work a third of the year to earn the equivalent of a regular's salary. For this to be a valid comparison, it must be the case that a regular is working 24 hours' a day, 365 days a year.

81. From the evidence before it, the Tribunal was not persuaded that by being on call regulars work 24 hours' a day, 365 days a year. It was not being suggested by the respondent that this was in fact the case. The respondent argued that given a regular can, in theory, be required to attend for duty at any time, the Tribunal should treat them as working. Regulars were referred to as being available for duty every day if required, unlike reservists who are able to choose when they wish to serve. The Tribunal was not persuaded from the evidence before it that it could make such a finding. It was clear that regulars have days when they do not work, perhaps not always at weekends when reservists are often also working, but for periods including annual leave. It was not being suggested by either party that a member of the armed forces will always have regular periods away from work, for example when on active duty. The Tribunal did not find however that the reality of army life involved being on call in the sense of working or for that matter being expected to work

365 days a year without leave While in principle they could be called to duty on any day of the year, it did not follow that this resulted in any regular having to work 365 days a year. There would still for example be periods of annual leave in any such year. When a reservist undertakes ADC on specific days, they are required to attend on those days and continue to be paid at the rate of 365.25 of a regular's pay at the same rank. The argument that by applying a lower divisor would result in reservists being paid more than regulars – as argued by Mr Moyes – relies on acceptance of the respondent's position that by being on call to duty at all times, regulars are in fact working every day of the year. From the evidence before it, the Tribunal was unable to accept this submission as justifying the use of a divisor of 365.25 to calculate a reservist's pay.

82. Different levels of X Factor for regulars and reservists did not persuade the Tribunal that a regular should be treated as working 365 days a year and that the daily rate of pay of a reservist is therefore correctly calculated by using a divisor of 365.25 of a regular's annual salary. The X Factor recognises and compensates regulars for the disadvantages that can arise from having to be available to work 365 days including the impact on leave, turbulence and hours of work. As described by Major General Graham, the X Factor was an increment to his salary "*recognising the unique 24/7 call that the Army had over me*". The fact that the X Factor is lower for reservists is not challenged as being less favourable treatment. The X Factor enhances the pay of a regular, in part at least, to compensate them for the potential impact on their private and family life.

83. The Tribunal was persuaded that in all the circumstances, by calculating the claimant's daily rate of pay using a divisor of 365.25 of a regular's annual salary and not a smaller divisor to reflect periods when a regular is not working amounted to the claimant being treated less favourably than his comparator regular (applying the principle of pro rata temporis).

(b) His retirement pension does not take into account his service prior to 1 April 2015? (Claimant's position). The Respondent says the Claimant's complaint

is limited to a failure on the part of the Respondent to afford him access to AFPS 75.

84. Having considered the claimant's submissions before the hearing and the claim as pled, the Tribunal was satisfied that the claim was of less favourable treatment for being denied access to a pension under the AFPS 1975. The Tribunal was also satisfied that the claim was concerned with refusal on the part of the respondent to allow the claimant access to schemes in operation during the period of claim to which access was limited to regulars only – referred to by the Tribunal as successor schemes. While there was reference in the claimant's service complaint and paper apart to his ET1 that he sought an equivalent pension provision to that of regulars, it was clear from his further and better particulars of claim (15-16) and his answers to questions in cross examination about the basis of his claim that the claimant's complaint was about his lack of access to the AFPS 1975 scheme and successor schemes and not to an equivalent pension. This was the claim about which the respondent was given notice and prepared their case. It would not be in accordance with the overriding objective to permit the claimant to vary and expand his claim without further procedure.

8 If so, has the Respondent identified the ground (reg.8(6)) for the less favourable treatment?

85. In terms of Regulation 8(6) of the PTWR: "*Where a worker presents a complaint under this regulation it is for the employer to identify the ground for the less favourable treatment or detriment*.

86. The respondent identified the design and costs involved as the grounds for excluding the claimant from the AFPS 75. It was not designed to meet the career path of reservists. In his evidence, Kevin Pitt described the AFPS 1975 as being "*created for Regular service personnel who made the Armed Forces their career*" and was simply not suitable for reservists. The length of time it would take a reservist to accrue sufficient service to qualify for a pension under the AFPS 75 and the small number of reservists who would qualify for a pension were given as examples of the scheme's incompatibility with a

reservist's pattern of working. Mr Napier also referred the Tribunal to various sources of evidence including an explanation provided by the Treasury in 2001 (B209) to support the respondent's position that "*it would be administratively burdensome and extremely expensive to provide pensions under the AFPS 75 to cover the ad hoc and irregular training pattern of the Volunteer services*". (209). Reference was also made to the conclusion of Stephen Humphrey in his actuarial report for separate proceedings (939) that offering a pension scheme to the TA as a whole would involve "*very significant administration costs relative to the value of benefits being provided. This is because the benefits accrued are very small for a significant proportion of the membership*". As the respondent confirmed to the DTI in September 1999 (183), to give reservists pension rights "*would be very costly in administrative terms, and it would take many years to qualify for a pension*".

87. Mr Napier referred the Tribunal to the fact that full time reservists were also not permitted to join the AFPS 75. They had access to a separate scheme – the FTRS 1997 and subsequent schemes for full time reservists. This was further evidence, submitted, Mr Napier, that his part- time status was not a ground for exclusion of the claimant from the AFPS 75.

88. In terms of the respondent using a divisor of 365.25 to calculate the claimant's daily rate of pay, the respondent did not accept that the claimant had been treated less favourably. They relied on regulars having to be on call for duty at all times as the ground for the less favourable treatment. No further reasons for using the 365.25 divisor to calculate the claimant's daily rate of pay were relied on by the respondent in response to this issue (8).

9 If so, was the less favourable treatment "on the ground that" he was a part-time worker? (reg. 5(2)(a))

89. Regulation 5(2) of the PTWR provides that a part time worker's right not to be treated less favourably than a comparable full-time worker only applies if.

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds. Clause 4 of the FA states that people shall not be discriminated against "*solely because they work part-time".*

90. There is a divergence of approach between the EAT and the Inner House as to what is meant by "*on the ground that*" in Regulation 5(2)(a) of the PTWR. The EAT in the case of **Sharma v Manchester City Council 2008 ICR 623** interpreted "*on the ground that*" as meaning that part-time work "*must be the effective and predominant cause*" of the less favourable treatment complained of. It need not be the only cause. In **Sharma** there were found to be factors other than part-time worker status for the less favourable treatment but the EAT held that the Tribunal had been entitled to find that it was *one* of the reasons and therefore the treatment was" *on the ground that*" the claimant was a part-time worker. The EAT applied the same interpretation to Regulation 5(2)(a) in the case of **Carl v University of Sheffield 2009 ICR.** In the case of **McMenemy v Capita Business Services Ltd 2007 IRLR 400** however**,** the Inner House held (at paragraph 6) that a part time worker who complains of less favourable treatment compared to a full-time worker, must establish that the employer "*intends to treat him less favourably on the sole ground that he is a part-time worker*." A similar approach was taken in the case of **Engel v Ministry of Justice 2017 ICR 277**. Lady Wise, sitting in the EAT, in **Ministry of Justice v Mr S Blackford 2018 WL** noted that there remains a direct conflict between the approach in **Carl** and the cases of **McMenemy** and **Engel** as regards the correct interpretation of the phrase "*the treatment on the ground that the worker is a part-time worker*". The difference remains unresolved.

91. Mr Ohringer submitted that the Inner House was wrong in **McMenemey**. It had failed to construe Regulation 5 of the PTWR to give it its full effect and its interpretation was limited by reference to only the PTWD. The Tribunal, submitted Mr Ohringer, was therefore entitled to distinguish the case of **McMenemy** and apply the broader meaning to be found in judgments of the EAT. Mr Napier submitted that the Tribunal cannot depart from the decision in **McMenemy** on the issue of causation. It is a decision of the Inner House

and binding on the Tribunal. There is a plethora of evidence submitted Mr Napier indicating that the claimant was excluded from the AFPS 75 for reasons that had nothing to do with his part-time status.

92. The Tribunal agreed with the respondent that it is bound by the decision of the Inner House in **McMenemy** and must apply its interpretation of "*on the ground that*" when determining the issue of causation for less favourable treatment of the claimant. It was however persuaded that in this case, it should find that the grounds relied upon by the respondent for treating the claimant as a reservist less favourably than regulars were solely because of his part time worker status.

93. The Inner House in **McMenemy** said that "*the prohibition is against less favourable treatment of part- time workers, than comparable full -time workers, for the reason that they work part- time and for that reason alone. This necessitates inquiry into the employer's intention in so treating the part-time worker.*" (paragraph 6). The question is therefore did the respondent intend to treat the claimant less favourably for the sole reason that he was a part-time worker? In the case of **McMenemy**, the claimant was denied the benefit of statutory holidays which fell on a Monday because he had agreed to work a shift that did not include Monday as a working day. The same provision would apply to full time colleagues who also did not work on a Monday. Had working Mondays been part of his shift, the claimant would have benefited from the statutory holiday. The reason for the less favourable treatment was not that he was a part- time worker therefore but that he did not work on a Monday.

94. In this case the claimant was excluded from the AFPS 75 because as a reservist he worked part time. The AFPS 75 and successor schemes were only designed for regulars who worked full time. Thet were not intended for reservists. When the claimant sought access to the AFPS 75 scheme it was considered unsuitable and too expensive to administer because as a reservist he worked part time. The fact that reservists who took up full time service were provided with a separate scheme such as the FTRS 97 (albeit less favourable than the AFPS 75 in terms of Kevin Pitt's analysis at paragraph 19 of his

witness statement), was relied on by the respondent to argue that exclusion from the AFPS 75 was nothing to do with the claimant's part time status. The Tribunal did not accept that the existence of a separate scheme for reservists who were no longer working part time demonstrated a reason other than part time status for exclusion from the AFPS 75. Access to a pension scheme such as the FTRS 97 was available to reservists because they had been part-time. Being part time was why they had been denied access to the AFPS 75.

95. The issue before the Tribunal was whether the claimant as a reservist was denied access to the AFPS 75 because of his part-time status. In **McMenemy** the part time status of the claimant was not the sole reason for the less favourable treatment. In the present case, the Tribunal was persuaded that the claimant's exclusion from the AFPS 75 was because of his part time status and not for some other reason or number of different reasons. The Tribunal concluded that in all the circumstances the less favourable treatment of the claimant as a reservist of not having access to the AFPS 75 and successor schemes for regulars only was on the ground that he was a part- time worker.

96. The respondent did not advance a reason for use of the divisor of 365.25 to calculate a reservist's daily rate of pay other than because a regular should be treated as working 365 days a year unlike a reservist who works on days of their choosing. The Tribunal did not agree that regulars should be treated as working 365 days for the reasons given above. There was no persuasive evidence before the Tribunal of any other reason for the differential in pay apart from the part- time status of reservists and in all the circumstances, the Tribunal concluded that use of a divisor of 365.25 to calculate the daily rate of pay for the claimant as a reservist was on the ground that he was a part-time worker.

10 If so, has the Respondent demonstrated that the less favourable treatment is justified on objective grounds for the purposes of reg.5(2)(b) in light of the Directive /FA if applicable?

97. Having found that the less favourable treatment of the claimant as a reservist was on the ground that he was a part-time worker, the Tribunal went on to

consider whether the treatment was justified on objective grounds in terms of Regulation 5(1) of the PTWR.

98. This requires the respondent to show that the difference in treatment was for a legitimate aim for which there is a genuine need; the treatment is suitable and appropriate for meeting that objective and is proportionate and reasonably necessary.

99. Mr Napier referred the Tribunal to the case of **Heskett v Secretary of State for Justice** in support of the respondent's justification for not allowing the claimant to join the AFPS 75 scheme. He referred to the aim on the part of the respondent to avoid cost and wasting resources which the respondent claimed would have been the outcome of allowing reservists to join the AFPS 75 scheme. Mr Napier referred the Tribunal to the evidence of Kevin Pitt that it would have been "*administratively burdensome*" to provide pensions under the AFPS 75 scheme to reservists in particular given the limited benefits that admission would have brought to most of them and also to the conclusion of the Government Actuary that offering a pensions scheme to the TA as a whole involves very significant administrative costs relative to the value of the benefits being provided (39). It is not only about the costs of providing a pension, submitted Mr Napier referring to Underhill LJ's statement in **Heskett** (at paragraph 85), "*It is legitimate for a public authority (or indeed any employer) to seek not to make payments to employees to whom the rationale for those payments does not apply*". The very limited benefits that admission to the AFPS 75 scheme would bring to most reservists and the costs of running such an amended scheme is justification, submitted Mr Napier for the claimant's exclusion from the AFPS 75.

100. Mr Napier referred the Tribunal to the Employment Tribunal's reasons in the case of **Quayle & Others v The Ministry of Defence 1802732/04 & Others**. The claim was concerned with a challenge under the Equal Pay Act 1970 to the respondent's refusal to allow reservists access to the FRPS 75 scheme and only in the alternative as less favorable treatment under the PTWR. The respondent's argument that they could justify exclusion of reservists from the AFPS 75 was based on two grounds; (i) because any benefits which

reservists would receive under the scheme in respect of their service would be disproportionate to the administrative costs involved; and (ii) because it is more appropriate to remunerate reservists by way of a tax-free bounty subject to completion of a stipulated amount of annual training. The Tribunal accepted that that the objective justification defence was made out to the Equal Pay claim and referred to any attempt to compare a reservist's life with an ordinary part-time worker as being "*virtually meaningless*" (paragraph 100). While of general interest, the Tribunal did not find the above reasons to be of any particular assistance in its analysis of the evidence and issues before it.

101. The Tribunal was provided with the report of Stephen Humphrey who was the Chief Actuary in the Government's Actuary's Department in 2007 (921-939). The report had been prepared in relation to a claim of indirect sex discrimination against the respondent for denying members of the TA access to the AFPS 75 scheme. Stephen Humphrey had been asked to provide a comparison of the capitalised value of pension benefits that would have accrued by a typical member of the TA if their service were to be made pensionable with the capitalised value of the administration costs that would be expected to be incurred in administering these pension benefits (921). Stephen Humphrey concluded (938) that offering a pensions scheme to the TA as a whole involves very significant administration costs relative to the value of benefits being provided. This is because the benefits accrued are very small for a significant proportion of the membership. His calculations and worked examples are based on the FTRS scheme (958) but assuming some of estimates are of general application, he estimates that the annual administration costs per member while an active member of the scheme would be approximately £45, £20 as a deferred member and £30 as a retired member. It is not in dispute that the majority of reservists would have left the armed services well before they were entitled to receive a pension and therefore it can be assumed no further significant costs would be incurred in terms of ongoing administrative costs or pension payments on leaving the armed forces. Mr Humphreys also estimated the capitalised value of the annual administration costs of administering the pension benefits of reservists with 3 ½ and 7 years' service respectively, both having undertaken an

average of 32 days' service each year. He calculated this to be £700. This was more – by about £265 than the capitalised value of the pension they would receive and around £1,435 less than a Captain's capitalised value of their pension on leaving. Kevin Pitt readily accepted that the administration costs of providing a pension benefit to reservists, identified at paragraph 22 of his witness statement, were 17 years out of date, and that they had not been quantified in today's costs, nor to take account of the respondent's computerised joint personnel administration systems reducing administration costs.

102. When the AFPS 75 was designed, it did not take account of membership by reservists. It was, as referred to above, a scheme designed only for regulars. Cost was clearly a factor in the respondent's decision to deny reservists access to the AFPS 75 scheme from 2000 onwards. There was no evidence before this Tribunal of alternatives being considered until the AFPS 2015 was introduced to which both reservists and regulars were given access. The Tribunal carefully considered whether the respondent's decision to refuse to allow reservists access to the AFPS 75 was justified having regard to the administration costs to them when compared to the limited benefits to a large number of reservists. The Tribunal concluded that to deny all reservists access to the AFPS 75 in circumstances where a relatively small number of reservists would qualify for a pension was disproportionate. Unlike the situation in **Heskett**, it was not being suggested by the respondent that any decision to deny reservists access to the AFPS 75 and successor schemes was caused by an absence of means or urgent measures. The aim was to avoid the cost of administering a scheme for reservists which could be more than some reservists might receive by way of a pension. Based on the respondent's own figures provided in Mr Humphrey's witness statement (955-962), the majority of reservists would have left the armed services well before the cost of administration had exceeded £100 (based on 2006 figures). (957) After the first couple of years, as Mr Humphrey states (958), the rate at which Officers leave is quite stable. They will therefore accrue a higher pension than the administration costs incurred.

103. The Tribunal was not provided with actuarial valuation of the what the claimant would have received by way of a pension had he been granted access to the AFPS 75 scheme. It was however not in dispute that he would have received a pension that was significantly higher than the capitalised cost of administering the scheme. The claimant estimated that he could, using a divisor of 225 days, be entitled to a pension of around £7,300 per annum.

104. In all the circumstances, the Tribunal was not persuaded that exclusion of reservists from the AFPS 75 scheme had been objectively justified. Including reservists in the scheme would inevitably increase the administrative burden and cost to the respondent. The respondent cannot be criticised for seeking to avoid unnecessary costs and administrative burdens on the public purse. It is a legitimate aim. The Tribunal was not persuaded however that the administrative burden and costs of allowing reservists to join the AFPS 75 scheme was sufficiently high to justify their exclusion. The respondent already has the training records of reservists. They record this information regardless of whether the reservist is a member of a pension scheme or not. The projected administration costs provided by the respondent were comparatively small when compared with the pension that a qualifying reservist such as the claimant might receive from the scheme. If mobilised reservists were allowed to join the AFPS 75 scheme as submitted by the respondent, but which based on the evidence before it the Tribunal was unable to conclude was the case, it is similarly difficult to understand the basis on which the respondent's rely on the irregularity of part time service to justify exclusion from the scheme. The Tribunal was not persuaded that to exclude all reservists from the AFPS scheme regardless of their length of service was proportionate in all the circumstances. No objective justification defence has therefore been made out.

105. The respondent did not advance an objective justification defence for using a divisor of 365.25 to calculate a reservist's daily rate of pay as opposed to a lower figure that more accurately reflects a pro rata equivalent of regular's pay. The Tribunal has therefore concluded that no objective justification defence is made out.

Conclusion

106. In conclusion, the Employment Tribunal was persuaded that by denying the claimant access to the AFPS 75 scheme and successor schemes and by using a divisor of 365.25 to calculate his daily rate of pay the claimant was treated less favourably as a part-time worker than the respondent treated a comparable full-time worker. The claim under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 was therefore well-founded.

Employment Judge:	**F Eccles**
Date of Judgment:	**05 August 2024**
Entered in register:	**06 August 2024**
and copied to parties	