Neutral Citation Number: [2021] EWHC 2958 (QB)

Case No: QB-2019-004577

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2021

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

Ian Craig Malone	**Claimant/ Respondent**
- and –	
Ministry of Defence	**Defendant/ Applicant**

- -
- -

Mr Nicholas Barnes (instructed by **Biscoes Legal Services Ltd**) for the **Claimant/Respondent**
Mr Tim Johnston (instructed by **the Government Legal Department**) for the **Defendant/Applicant**

Hearing dates: 19 October 2021

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Approved Judgment

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

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MARTIN SPENCER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives and BAILII by email. The date of hand-down is deemed to be as shown above.

MR JUSTICE MARTIN SPENCER :

Introduction

1. By this application the Defendant Ministry of Defence ("MOD") challenges the jurisdiction of the court to hear this claim by the Claimant, Ian Craig Malone, arising out of Mr Malone's service as a soldier in the army. Alternatively, the MOD seeks to strike out the claim on the basis that it discloses no reasonable cause of action or is an abuse of process or has no real prospect of success.

Background Facts

2. The Claimant, who was born on 27 January 1977, joined the army on 11 February 1998 for a 22 year term of service with a prospective termination date of 23 February 2020. He joined the Royal Electrical Mechanical Engineers and trained to become a vehicle mechanic. He had various deployments including in Germany, Canada and the Falkland Islands. In August 2001 he was promoted to Lance Corporal and he was promoted to Full Corporal in February 2007. At the beginning of 2010, he passed the Higher National Diploma in Automotive Engineering and was promoted to Staff Sargeant.

3. In around January 2012, the MOD implemented a series of compulsory redundancy programmes and this led to the Claimant being discharged from the Armed Forces on 11 June 2013. Prior to that, on 24 February 2012, the Claimant filed a Service Complaint in which he sought to challenge the contents of a Soldier Joint Appraisal Report ("SJAR") which was relevant to his being selected for redundancy. The Claimant's Service Complaint was considered by an Army Service Complaint Panel ("SCP") on 13 January 2015 and there was an oral hearing on 24 April 2015. On 16 September 2015 it was found that the Claimant had been wronged and the SCP decided to seek evidence to determine what, if any, redress was appropriate. It was directed that the SJAR in question be expunged from his record and that he be regraded in relation to his selection for redundancy. The SCP's final determination was in March 2016 when it was determined that the Claimant had been wronged within the meaning of the Armed Forces Act 2006 but the only redress was the issue of an apology for any detriment the Claimant had suffered as a result of having been wronged and for the length of time it had taken to resolve his complaint. The reason that no more substantive redress was awarded was that the Regrading Board gave the Claimant a score of 23.5 points and the threshold for selection for compulsory redundancy was a score below 28 points. It was accordingly determined that, but for the wrongful and unfair SJAR, the Claimant would have been selected for redundancy in any event and he had therefore suffered no loss.

4. On 13 April 2017, solicitors acting for the Claimant, Messrs Biscoes, sent a Letter of Claim to the MOD. It is perhaps instructive and significant that the Letter of Claim stated, near the start, "This is a claim for damages for wrongful dismissal/breach of contract." The letter set out the terms on which the Claimant's service was governed, derived from The Queen's Regulations for the Army 1975 which laid down "The policy and procedure to be observed in the command and administration of the Army" together with the Army Terms of Service Regulations 2007. It was alleged that The Queen's Regulations and the 2007 Regulations formed express or implied terms of the contract between a member of the military services and the MOD. The letter challenged the

finding that the Claimant would have been made redundant in any event and asserted that he had sustained significant financial losses.

5. The Government Legal Department, acting for the MOD, responded on 19 July 2017, asserting, so far as the merits of the claim were concerned, that the apology was appropriate and sufficient redress. The alleged financial losses were challenged including those based upon the assumption that, but for his redundancy, the Claimant would have obtained promotion to Warrant Officer Class 2, thereafter Sargeant Major. At the conclusion of the letter the following was stated:

> "The defendant avers that the terms of engagement of members of the Armed Forces do not constitute a contract of service. The claimant was appointed by the Crown under the royal prerogative, and held his appointment at the Crown's pleasure. The claimant is subject to dismissal at any time without notice and without any cause being assigned and the courts will not entertain an action for breach of contract and/or wrongful dismissal."

These proceedings

6. The Claim Form was issued on 24 May 2019 stating the claim as follows:

> "The claimant claims damages arising from his past engagement in HM Armed Forces and his compulsory redundancy therefrom in which the defendant acted in breach of his terms of service, or acted negligently or in breach of The Queen's Regulations to the Army 1975, the Army Terms of Service Regulations 2007 (as amended) and the Army Compulsory Redundancy DIN tranche 2 reference 2012DIN01-017."

The value of the claim was put at £166,075.

7. The claim is supported by Particulars of Claim. Paragraph 8 states:

> "The claimant asserts, among other things, that:
>
> a) The Army is not able to act outside their provisions, including The Queen's Regulations and the 2007 Regulations concerning discharging the claimant for reasons of redundancy and is thus bound by them and their effect;
>
> b) The Army is under a duty, including a duty of care, not to discharge for reasons of redundancy outside their provisions, including The Queen's Regulations and the 2007 Regulations; and/or
>
> c) There is an implied term of mutual trust and confidence between the claimant and the defendant so that the latter will not, without reasonable and proper cause, so conduct itself in its dealings with the claimant or third parties to destroy or seriously damage that or affect the claimant's prospects."

Having set out the facts surrounding the Claimant's selection for redundancy and the making of his service complaint, there is then a section headed "Breach" stating as follows:

> "29. The defendant acted in breach of the terms of service between the Army and the claimant, or acted negligently, in discharging the claimant contrary to The Queen's Regulations, the 2007 Regulations and/or Tranche 2 in that:
>
> a) It dismissed the claimant for reason of redundancy before the Army had determined his Service Complaint that plainly could affect eligibility under Tranche 2; …
>
> f) The Army did not fairly, properly and/or reasonably appraise the claimant in rank for the second time;
>
> g) Had the Army fairly, properly and/or reasonably appraised the claimant in rank for the second time, it is more likely than not that he would have received a score exceeding the redundancy threshold;
>
> h) The Army acted unfairly, illogically and/or contrary to clear published criteria; and/or
>
> i) The defendant has breached the term of mutual trust and confidence between the Army and the complainant without reasonable and/or proper cause thereby destroying, seriously damaging or affecting the claimant's prospects."

8. On 17 June 2019, the MOD issued an Acknowledgment of Service and ticked the box indicating an intention to contest jurisdiction. The solicitor with conduct of the matter on behalf of MOD, Mr John Bolton, was away and in his absence his colleague, Ms Buket Zencirkiran, telephoned the claimant's solicitor, Mr Richard Barnes, on 27 June 2019 in order to request a 28 day extension for the filing and service of the defence <u>in order to contest jurisdiction</u> (see Ms Zencikiran's statement of 19 January 2021 at paragraph 12). Mr Barnes' attendance note, made on 3 July 2019, recorded:

> "GLD telephoned requesting an extension of 28 days for service of the defence. I asked why they were disputing jurisdiction."

It is to be noted that he omitted the words "in order to contest jurisdiction" which Ms Zencikiran states she included. However, I have no doubt that she did include those words because it is agreed between her and Mr Barnes that he immediately asked why jurisdiction was being disputed and that question fits much better with Ms Zencikiran's account of the conversation than with Mr Barnes' account. The request for an extension of time to serve the defence is relied upon by Mr Nicholas Barnes (who is not related to Mr Richard Barnes) on behalf of the claimant as amounting to the MOD having submitted to the jurisdiction. However, I have no difficulty whatever in rejecting this submission. Having ticked the appropriate box in the Acknowledgment of Service and having stated that the request for an extension of time to serve the defence was "in order to contest jurisdiction" the MOD was making it abundantly clear that jurisdiction was and remained contested. Furthermore, the conversation was followed by the MOD's

Application Notice dated 1 July 2019 seeking a declaration that the court had no jurisdiction to hear the claim and/or should not exercise jurisdiction and for an order that the Claim Form and the Particulars of Claim be struck out.

9. On 23 August 2019, DDJ Dack transferred the action to the High Court, requesting that a Master review the claim and the defendant's application of 1 July 2019, and make directions for the hearing of that application before a High Court Judge. Unfortunately, the listing of the application was delayed by reason of the pandemic and the shutting of the National Archives which the defendant's solicitor wished to interrogate in order to provide information about the history of the Queen's Regulations, formerly the King's Regulations.

10. In the above context, the matter eventually came before me in 20 October 2021 to hear the application of 1 July 2019. It is clearly a matter of regret that it has taken two and a quarter years for that application to come on for hearing.

The application

11. The application is supported by a statement by Mr Bolton dated 22 August 2019. In that statement, Mr Bolton sets out the MOD's position that the claim is "deeply flawed and ill-conceived for a multitude of reasons". The principal reason stated is that the terms of engagement of the claimant did not constitute a contract of service but rather that the claimant was appointed by the Crown under the Royal prerogative and held his an appointment "at the Crown's pleasure" whereby his appointment was liable to termination at any time without notice and without any cause being assigned so that no duty of care could be owed by the defendant to the claimant. Mr Bolton also stated:

> "15. Another example of the flawed nature of the claim is that it is not sufficient to allege that there has been a breach of a statutory duty. The claimant must show that the alleged breach gave rise to the right to bring a civil action. In the present action, the claimant fails to and cannot do so."

The detail of the defendant's position and arguments was not, however, included in Mr Bolton's statement and first fully emerged in the skeleton argument of Mr Johnston prepared for the hearing before me. This was a matter of complaint at the hearing by Mr Barnes but Mr Johnston's skeleton argument, dated 8 October 2021, was served well in advance of the hearing and I take the view that the claimant's legal advisors had ample time to consider and deal with the defendant's arguments which are, in any event, principally matters of law. No application for an adjournment was made by Mr Barnes and he did not indicate that he needed an adjournment to deal with the arguments.

12. On the claimant's side, there have been two statements by Mr Richard Barnes. The first, dated 13 March 2020, helpfully sets out the relevant chronology and also asserts that there had been a submission to the jurisdiction on the part of the defendant. The second statement dated 21 April 2021 was a response to the statement of Ms Zencikiran dated 19 January 2021.

The case for the applicant (MOD)

13. For the applicant, Mr Tim Johnston relies firstly on the evidence of Mr Stephen Love contained in his statement dated 19 January 2021, asserting that members of the Armed Forces have no contract of employment and no system of collective bargaining, but are Crown Servants, appointed by the Crown under the Royal prerogative with appointments being held at the Crown's pleasure. Whilst the majority of the protections otherwise available to employees are equally applied to Crown Servants pursuant to section 273 of the Trade Union and Labour Relations (Consolidation) Act 1992, section 274 of the Act specifically excludes members of the naval, military or air forces of the Crown. Such military personnel are subject to service law. Instead of having the usual legal redress open to ordinary employees, military personnel have available a Service Complaints system to provide members of the armed forces with a fair, effective and efficient method for obtaining redress for grievances. This system of redress was substantially reformed by the Armed Forces Act 2006 which came into force on 1 January 2008. There were further reforms introduced on 1 January 2016. Under this system of redress a member of the armed forces who "thinks himself wronged in any matter relating to his service" may make a Service Complaint and, indeed, this claimant did so, including availing himself of the appeal process available within the overall system.

14. For the basic proposition that Crown Servants are not engaged pursuant to a contract of service and therefore cannot pursue a claim in contract, Mr Johnston relied upon the decision of the Court of Appeal on *Quinn v Ministry of Defence* [1998] PIQRP 387 and the history of decisions going back to the 19th century which were reviewed in that case. Mr Johnston also relied on the decision of Supperstone J in *Broni v MOD* [2015] 1 Costs LR 111 which applied *Quinn* in the context of a costs dispute. I shall return to *Quinn* in paragraph 22 below.

15. Furthermore, Mr Johnston submitted that the unique manner in which servicemen are engaged by the Crown has repeatedly been recognised in primary legislation. Thus, he refers to section 274 of the TULRA 1992 which excludes members of the armed forces from the benefits conferred on most Crown Servants by section 273. Equally, section 191 of the Employment Rights Act 1996 makes specific provision for the treatment of servicemen, but section 192 includes a carve-out for "service as a member of the naval, military or air forces of the Crown" with the result that only certain specific provisions apply to military personnel. Mr Johnston also relies on the explanatory memoranda to various acts of parliament which have expressly drawn attention to the distinct status and treatment of servicemen.

16. Mr Johnston submitted that the provisions in part 14 (now part 14A) of the Armed Forces Act 2006 represent a bespoke and exclusive dispute resolution mechanism which was required by reason of the very fact that the rights of servicemen and women are not justiciable by any other means. As set out in the explanatory memorandum to the legislation, parliament was legislating to fill the gap left by servicemen who were not able to bring claims otherwise. He submits that if this claim is capable of being heard by the court, then the alternative regime laid down by parliament would have been unnecessary or could be easily circumvented. He submits that the claimant's argument, namely that the claim is pleaded in negligence or breach of statutory duty is no answer: the deliberate lacuna in the law preventing servicemen from litigating their

"employment" rights in the courts cannot, he submits, be re-packaged by framing the claim as a tortious one.

17. Mr Johnston also submits that the non-justiciable nature of these "employment" rights is impliedly recognised by the right of servicemen to seek judicial review of decisions made under the Service Complaint procedure: see for example the decision of Mr Justice Langstaff in *The Queen on the application of Wildbur v Ministry of Defence* [2016] EWHC 1636 (Admin) and the decision of the European Court of Human Rights in *Crompton v United Kingdom* [2010] 50 EHRR 36. Mr Johnston submits that, given that judicial review is a remedy of last resort, the recognition in those cases of the right of those applicants to bring proceedings for judicial review (thus also making the statutory system of redress compatible with the rights protected by the European Convention of Human Rights) is incompatible and inconsistent with the claimant having the right to bring proceedings in the civil courts.

The argument for the Respondent (Claimant, Mr Malone)

18. For the Respondent, Mr Barnes concedes that the effect of *Quinn* and the authorities cited in it is that there is no contract of employment between the MOD and servicemen but he submits that the MOD does owe its servicemen a duty of care which is enforceable through the law of negligence. He cites the judgment of Moses LJ in *Smith v MOD* [2012] EWCA Civ 1365 where he stated:

> "The duty of care owed by the MOD, as employer, to the members of the armed forces as their employees, does exist and has been recognised, without demur, by the courts. It includes a duty to provide safe systems of work and safe equipment, as I have demonstrated. There was no suggestion that the courts were ill-equipped to deal with such issues, or that the resolution of the claims would be detrimental to the troops. The question whether a duty of care owed by the MOD to armed forces should be recognised has long since been answered."

Equally, he submits that the MOD has a statutory duty to act within the provisions of the Queen's Regulations for the Army (1975) and the Army Terms of Service Regulations 2007 and that a failure to do so gives rise to an action in tort for breach of statutory duty. He submits:

> "Accordingly the claimant avers that whilst the regulations themselves may not be a contract of employment between the parties, the defendant cannot act outside the Queen's Regulations' provision concerning discharging him. The defendant chose to be bound by them when making the claimant redundant. They and their effect thus bind the defendant."

Mr Barnes relies on the provisions of sections 1 and 2 of the Crown Proceedings Act 1947 as showing that the defendant is no longer immune from liability to members of the armed forces in tort and that this claim is therefore justiciable because it is founded in negligence and breach of statutory or regulatory duty.

19. Mr Barnes supplements his submissions by pointing out that there is no statute of which he is aware, or which has been referred to by the applicant, which specifically states, in terms, that the jurisdiction of the civil courts has been ousted by the Service Complaint regime, at least so far as claims in tort are concerned. Nor is the applicant able to point to any previous decision, he says, where the court has refused jurisdiction to try such an action in tort.

20. In his oral submissions, Mr Barnes reiterated the claimant's position that where statute and subsidiary provisions provide for the MOD to act in a particular way, and the MOD fails to do so, that amounts to a breach of statutory duty which is a claim based in tort, not contract, and is therefore not barred by the line of authority represented by *Quinn*. Equally, so far as negligence is concerned, he submits that the Service Complaint Panel which determined the claimant's Service Complaint, had a duty to act in accordance with published criteria and that by failing to do so, as alleged in the Particulars of Claim, the SCP acted negligently allowing the claimant to bring this action in negligence as well in breach of statutory duty.

21. Mr Barnes referred to section 334 of the Armed Forces Act 2006, which provides:

> "**Redress of individual grievances: Service Complaints**
>
> 1) If -
>
> (a) A person subject to service law thinks himself wronged in any matter relating to his service, or
>
> (b) A person who has ceased to be subject to service law thinks himself wronged in any such matter which occurred while he was so subject,
>
> he may make a complaint about the matter under this section (a "service complaint")

Mr Barnes relies on the word "may" and submits that the only provision which makes the making of service complaint a precondition to the making of a claim is contained in the Employment Rights Act 1996 but there is no statutory provision providing that the making of a service complaint is a precursor to any other sort of claim or that other claims are excluded.

Discussion

22. The starting point is, as is agreed, that military servicemen are not engaged pursuant to a contract of employment. The authorities were summarised in *Quinn v Ministry of Defence* [1998] PIQRP 387 starting with *Tufnell* [1876] 3 CH. D. 161 where it was held that every officer in the army holds his office subject to the will of the Crown and is liable to be dismissed at any moment without cause. Of particular significance is, perhaps, is *Mitchell v R* [1896] 1 QB 121 where it was held that "no engagement made by the Crown with any of its military or naval officers in respect of services either present, past or future can be enforced in any court of law" (emphasis added). In *Quinn's* case, Swinton Thomas LJ, with whom the other members of the court agreed stated towards the end of his judgment:

> "For my part, I would have no doubt at all that when Mr Quinn enlisted in the Royal Navy pursuant to the King's Regulation neither he nor the Crown had any intention to create legal relations. Further, as a matter of public policy, following the decisions to which I have referred there is binding authority that there is no such contract" (emphasis added).

Thus, as has been recognised by Mr Barnes, any claim founded upon an alleged contract between the claimant and the Ministry of Defence is bound to fail.

23. The real issue in this case is therefore whether the general rule can be circumvented in the way the claimant tries to do by framing the claim in tort rather than contract, alleging negligence or breach of statutory duty. The answer to this question involves an analysis of the true nature of the claimant's claim in this case. It is clear that, since the passing of the Crown Proceedings Act 1947, the Crown has been liable in principle to claims brought in tort. In section 2 of the 1947 Act provides:

> "Liability of the Crown in tort
>
> i) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:
>
> (a) In respect of torts committed by its servants or agents;
>
> (b) In respect of any breach of those duties which a person owes to his servant or agents like common law by reason of being their employer; and
>
> (c) In respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property …
>
> ii) Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officer, then, subject to the provisions of this Act the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.
>
> iii) Where any functions are conferred or imposed on an officer of the Crown either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown."

Thus, military personnel have, since the Crown Proceedings Act 1947, been able to sue the Ministry of Defence for personal injuries arising from negligence or from breach of statutes such as the Health and Safety at Work Act and Mr Johnston conceded that

servicemen are owed a duty of care by the Crown. However, in my judgment, this does not extend, as the claimant asserts, to a duty of care in the way that the Crown exercises its functions under the Queen's Regulations. The Queen's Regulations and the provisions of the Armed Forces Act 2006, part 14 (now part 14A) are provisions which govern the service of the claimant as a soldier in the army and although there is no contract of employment as such, they are akin to the terms of the contract of employment which would have applied had the parties intended to enter into legal relations when the claimant signed up to join the army. Thus, in my judgment, any claim made by reference to the Queen's Regulations or the Armed Forces Act 2006 falls within the umbrella of non-justiciability which results from the fact that there is no contract of employment and no intention on the part of the parties, when a person enlists in the army, to create legal relations. That umbrella of protection for the Crown is not pierced or removed by framing the claim in tort, whether as a claim of negligence or as a claim for breach of statutory duty, when the remedy claimed is damages by reference to the terms of the Queen's Regulations or part 14 of the Armed Forces Act (2006).

24. The above principles are easily seen when one considers the way that the claim is put in this case. Starting with the Letter of Claim dated 13 April 2017, it was broadly stated:

> "This is a claim for damages for wrongful dismissal/breach of contract."

The basis for the claim could not have been put more clearly. Then, when one looks at the Particulars of Claim, it is clear that the allegations of "breach" at paragraph 29 are framed by reference to complaints in respect of how the Queen's Regulations, the 2007 Regulations and part 14 of the Armed Forces Act 2006 were applied by the defendant. Thus, paragraph 29 pleads:

> "The defendant acted in breach of the terms of service between the Army and the claimant, or acted negligently, in discharging the claimant contrary to the Queen's Regulations, the 2007 Regulations and/or the Tranche 2 in that:
>
> a) It dismissed the claimant for reason of redundancy before the army had determined his service complaint that plainly could affect eligibility under Tranche 2;
>
> b) Contrary to Tranche 2 the SGB and/or SCP regraded the claimant on one in-rank SJA;
>
> c) Contrary to Tranche the SGB and/or SCB regraded the claimant when he was ineligible for redundancy, or it was a reasonable prospect that he would be ineligible for redundancy"

and so forth.

Then, when it comes to loss and damage, it is pleaded that financial loss has been incurred by the claimant by reference to his selection for redundancy including loss of the opportunity to earn wages and allowances, loss of access to service benefits and loss of the opportunity to obtain promotion. The foundation for all these alleged losses is

the claimant's selection for redundancy by the MOD and that, in turn, is archetypally a matter relating to terms of service and thus comes within the umbrella of exclusion to which I have referred. In my judgment, adding the words "or acted negligently" in paragraph 29 does not alter the nature of the claim and convert this into a tortious claim (for which there is no immunity) from a contractual claim (for which there is immunity).

25. I am reinforced in the above conclusion by the way in which, where there are concurrent duties in tort and contract, but the damages are wider for torts than in contract, it is generally accepted that the parties are bound by their contractual duties. As stated in McGregor on Damages (21st edition) at paragraph 24-009:

> "Since the tort of negligence has been expanded to allow recovery for pure economic loss so that in cases of professional negligence there is concurrent liability in contract and for a tort, the question arises whether, where it would make a difference, the victim of the negligence may rely on the wider tortious test of reasonable foreseeability and ignore the stricter and more limiting contractual test of contemplation of the parties. It is thought that there is much to be said for not allowing this to be done. Where the claim for a tort is in the context of a contractual relationship, the parties are not strangers, as most tortfeasor's and tort victims are, and they should be bound by what they have brought to their contractual relationship in terms of what risks have been communicated by the one and undertaken by the other."

An earlier version of this passage, contained in an earlier edition of the work, was approved by the Court of Appeal in *Wellesley Partners LLP v Withers* LLP [2016] Ch 529 at paragraph 76. Thus where, as here, the parties have a relationship which is non-contractual because they have not intended to create legal relations and the relationship they have is non-justiciable, that immunity from suit should extend to claims made arising from that relationship, even if there is a concurrent duty in tort.

26. This general position is illustrated and reinforced by Parliament's recognition that, in certain circumstances, exceptions have had to be made for servicemen. Nowhere is this more clear than in the Employment Rights Act 1996 which, by section 111, provides for complaints to be made by employees to an employment tribunal in relation to unfair dismissal. This would not apply, without more, to Crown employees because of the general rule that Crown Servants are not engaged pursuant to a justiciable contract for employment. Section 191 relates to Crown employment and provides that

> "(i) subject to sections 192 and 193, the provisions of this Act to which this section applies have affect in relation to Crown employment and persons in Crown employment as they have affect in relation to other employment and other employees and workers."

However, section 192 provides specific provision in relation to the armed forces stating:

> "i) Section 191
>
> (a) Applies to service as a member of the naval, military or air forces of the Crown but subject to the following provisions of this section … "

Specific provisions are then made in relation to members of the armed forces so that no application can be made to an employment tribunal unless the serviceman has first made a Service Complaint pursuant to the provisions of part 14 of the Armed Forces Act 2006. This is a statutory example of the maxim "the exception proves the rule": the fact that a specific exception is made for members of the armed forces, and such an exception is deemed necessary by parliament, proves the general rule that, without the exception, there can be no application of the Employment Rights Act because a serviceman is not an employee.

27. The question then arises: is it the position that a serviceman, selected for redundancy when he should not have been and dismissed from the army, has no remedy or recourse to the courts at all? Were that the case, issues might arise under the Human Rights Act 1998 and the rights protected by Article 6 of the European Convention of Human Rights. The answer however is no. As Mr Johnston conceded, and as has been shown by previous authorities, a soldier may bring an application for judicial review. Thus, in *Wildbur* [2016] EWHC 1636 (Admin) Langstaff J entertained an application for judicial review arising out of the applicant's selection for redundancy from the army. On the facts, the application failed but the significance of *Wildbur* is that the application was entertained. In that case, Captain Wildbur had been selected for compulsory redundancy under regulations made in 2011 required to adjust the size of the army. As set out in the judgment:

> "3. Until 12 June 2013 Captain Wildbur was a full-time commissioned officer in the British army. He was on a short-service commission but had been provisionally been accepted for a long-term IRC (a regular commission) in substitution. The IRC is an intermediate step to a full regular commission which attracts a pension. Around two-thirds of those on an IRC convert to a RC. The claimant was highly likely it was thought to obtain promotion to Major and it was asserted on his behalf in his grounds that he had a reasonable prospect thereafter of securing an appointment as Lieutenant Colonel.
>
> 4. Under regulations made in 2011, required to adjust the size of the army, some officers had to be selected for compulsory redundancy. The defendant was required by the government to ensure that the process of selection was fair, logical and based on clear published criteria. The claimant, as it happened, did not fall within the criteria, but because of errors on the part of the defendant was erroneously thought to do so and was regarded as eligible for – and therefore selected for – redundancy. In short it was held by the Service Complaint Panel (SCP) some two and half years after the date of his dismissal from the service as redundant that he had been wrongfully dismissed from the armed services."

The decision of the SCP was to offer the applicant reinstatement to the army with appropriate restoration of pay and benefits but the applicant had no wish to re-join the army in the circumstances in which he found himself and complained that the decision was irrational and unlawful. As Langstaff J stated:

> "13. My task is to determine if the decision which the panel reached is unlawful. It would be so in these circumstances: if the panel had misconstrued the statute so as to misapply, or, if properly construing and applying the statute it had reached a decision which was *Wednesbury* unreasonable, which, for these purposes, I take as meaning it took into account a factor which it should not have taken into account or failed to take into account one which it was obliged to; or reached a decision which no reasonable panel in its position could have reached: in other words, a perverse decision, one which, as it has been described in other cases, flies in the face of reality. "

28. The significance of the decision in *Wildbur* for present purposes is two-fold. First, the applicant was not without recourse to the courts at all as a result of the decision in respect of which he was aggrieved, but could bring an application for judicial review. Thus, the jurisdiction of the courts was not excluded altogether. Secondly, the existence of the kind of right which is asserted in the present case, namely a right to sue for negligence or breach of statutory duty, is gainsaid by the existence of the Judicial Review remedy: Judicial Review is, of course, a remedy of last resort when other avenues for legal redress have been exhausted and the Administrative Court would not have entertained the application if the applicant could have sued for damages in the civil courts.

29. In the circumstances, in my judgment this claim made by Mr Malone against the MOD must inevitably fail. Mr Barnes has raised the question whether it was appropriate for the MOD to challenge the jurisdiction of the court or whether the appropriate remedy was to seek summary judgment or to strike out the claim as disclosing no reasonable cause of action. This application in fact encompasses all these grounds in the alternative and, in a sense, it does not matter from the point of view of the parties upon which ground the claim is dismissed. However, in my view, the decision of the MOD to challenge the jurisdiction of the court was appropriate: a challenge to jurisdiction seeks to emphasise the very special and unusual position of members of the armed forces whereby their relationship with the Crown is non-justiciable unless specifically provided for by statute and whereby, as was stated in *Quinn*, there is no intention to create legal relations. In my judgment, it is appropriate, looking at the claim and remedy sought by the claimant in this case, for the court to decline jurisdiction because of the non-justiciable relationship between the parties. If, though, I am wrong about that, then I take the view that the claim should be struck out as an abuse of the process of the court on the basis that it is in reality a claim for damages for breach of contract when there is no contract and it is an abuse of the court's process to "repackage" the claim, as Mr Johnston put it, as a claim in tort and thereby seek to avoid the consequences of the true relationship between these parties.

30. The application by the MOD is accordingly allowed.