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Ministry of Defence Consultation -

Future Reserves 2020: Delivering the

Nation's Security Together

-November 2012

Response from the Employment Lawyers Association

14 January 2013

EMPLOYMENT LAWYERS ASSOCIATION RESPONSE

MINISTRY OF DEFENCE GREEN PAPER ON THE FUTURE OF RESERVISTS – November 2012

WORKING PARTY RESPONSE

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather than to make observations from a legal standpoint. (ELA has therefore restricted its responses to those questions which it considers do not require it to pass judgment on the political merits or otherwise of the proposed changes). ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee, chaired by Paul McFarlane, was set up by the Legislative and Policy Committee of ELA, to respond to Ministry of Defence's Green Paper on the Future of the Reserves in the Armed Forces. (Names of the members of the sub-committee can be found at Annex A). Its report is set out below.

Question 4: For employers, how significant would the proposed changes to reservist training be? What approach would best assist employers in managing any impact on their business? How much warning would an employer reasonably need to mitigate any impact?

4.1 At paragraphs 2.12, 2.20 and 2.23 of the Future Reserves 2020 Green Paper it is proposed that:

4.1.1 The annual training of army reservists will increase to 40 days conducted mainly at evenings and weekends with one annual training camp of up to 16 days;

4.1.2 The annual training of navy and royal marine reservists will remain at 24 days for naval reserves / 35 days for royal marine reserves, conducted mainly at evenings and weekends with one continuous training period of 10-14 days (possibly split up);

4.1.3 The annual training of RAuxAF volunteer reservists will remain at 35 days per year usually conducted at weekends with a period of continuous annual training (of an undetermined length);

4.2 These annual training commitments are supplemented by the proposal at paragraph 2.34 of the Future Reserves 2020 Green Paper that the MOD will use current legislation to mandate attendance for designated training, including a number of mandated training weekends.

4.3 In the ELA's view, these training commitments have a number of employment law implications affecting the legal position of those employing reservists. In particular,

with regards to the reservist's right to unpaid time-off, the employer's working time obligations towards the employee and with regards (if applicable) to drivers hours legislation. These implications are considered separately below.

4.4 Reservists right to unpaid time-off

4.4.1 It cannot be assumed that all armed forces reservists will not be contractually obliged to work for their civilian employers during periods of mandatory MOD training; many modern workplaces operate 24 hours/7 days per week. If an employee is contractually obligated to work for their civilian employer during a period of mandatory evening or weekend MOD training, or during the mandatory annual MOD training camp, this has the potential to cause friction or conflict between the reservist and his civilian employer. The reservist faces a choice between failing to attend the mandatory MOD training (which may result in discharge as a reservist) or failing to attend his civilian employment (which may result in dismissal or disciplinary action for being 'absent without leave').

4.4.2 Currently, the right of employees to take time-off work during working hours for public duties is governed by section 50 of the Employment Rights Act 1996 but the list of public duties to which this right applies does not currently include duties as an armed forces reservist. This means that members of the armed force reservists can only have paid or unpaid time-off work to undertake training with the Reserve Forces with their agreement.

4.4.3 It may be possible for a reservist to use part of their annual civilian leave entitlement to undergo MOD training but their ability to do so may be limited by their civilian employer's policy on the taking of annual leave e.g. denying the taking of annual leave during busy periods, requiring that only a designated number of staff can take leave at one time or allowing a maximum of 2 weeks leave at any one time. Currently, under the Working Time Regulations 1998, employers have a great deal of flexibility in limiting the rights of workers as regards 'when' they are able to take their annual leave.

4.4.4 In the light of the Government's wish to integrate reservists *"…within the Whole Force as they will be routinely part of military deployment at home and abroad …."* (see sub paragraph (vii) of the Executive Summary in the Green Paper) it is ELA's view, that the Government should consider extending the list of public duties contained in section 50 of the Employment Rights Act 1996 so as to grant reservists the right to unpaid time off for mandatory training with the Reserve Forces.

4.5 Civilian Employer's obligations under the Working Time Regulations 1998

4.5.1 Workers enjoy a number of rights under the Working Time Regulations 1998. These include, in summary, the right to a maximum weekly working time of 48 hours (Reg 4), to a daily rest period of 11 consecutive hours (Reg 10), to a weekly rest period of not less than 24 hours or 48 hours in a 14 day period (Reg 11) and to at least 5.6 weeks paid annual leave inclusive of bank holidays (Reg 13 & 13A). These obligations arise regardless of who the work is conducted for and regardless of how many employers are involved. Working time includes any period during which the

worker is receiving relevant training or at his employers disposal carrying out his activities or duties.

4.5.2 The Working Time Regulations 1998 lists a number of excluded sectors and exclude various specified workers. Reg 18(2)(a) of the Working Time Regulations specifies that those rights do not apply "where characteristics peculiar to certain specific services such as the armed forces…..inevitably conflict with the provision of these Regulations;". However, since Reg 18(2)(a) is a provision which seeks to exclude a 'sector' as opposed to a particular 'worker' it is strongly arguable that it only offers a defence for the MOD not the civilian employer, because it is unlikely that a civilian employer could be said to be operating in the armed forces sector.

4.5.3 Further, members of the armed force reserve are not expressly provided for in the list of excluded workers. Nor are they provided for in the list of 'other special cases' in Reg 21 for whom working time obligations can be applied more flexibly and compensatory rest offered.

4.5.4 The working time legislation as it currently stands leaves civilian employers of reservists in a quandary; many are concerned that by allowing reservists to use what are effectively their statutory daily rest periods (to undertake evening reservist training), weekly rest periods (to undertake weekend reservist training) and annual leave (to undertake the 10-16 day annual training camp) that they are falling foul of their obligations under the Working Time Regulations 1998 and potentially placing themselves at risk of civil claims (brought by the reservist worker) and criminal liability (e.g. the maximum 48 hour working week is currently enforced by HSE inspectors).

4.5.5 It is notable that the website of the main source of advice for employers of reservists – SaBRE – does not give any guidance to employers with regards to managing their working time obligations towards reservists. The Gov.uk website (which has replaced the advice on Business Link) advises employers to ask staff to sign an opt-out of the 48 hour maximum working week if they have a second job (which would presumably include service in the armed forces reserves). However, no guidance is given to employers regarding their other working time obligations, such as daily and weekly rest periods.

4.5.6 ELA considers that the government ought to give consideration to amending the Working Time Regulations 1998 to clarify that a civilian employer will not be in breach of their obligations under the regulations if a worker is permitted to use part of their daily or weekly rest periods to undertake evening or weekend mandatory MOD training or if the worker uses part of their annual leave entitlement and their statutory weekly rest periods to undertake the annual MOD training camp (NB: a 16 day annual training camp would use 10 days annual leave, plus three full weekends for a standard Mon-Friday worker). Consideration should also be given to improving the guidance available to employers on managing their working time obligations with regards to reservists.

4.6 **Civilian Employer's Drivers Hours Obligations**

4.6.1 Although the MOD has exemptions from EU driver's hours legislation, certain individuals working as professional (vocational) civilian drivers are bound by the requirements for rest. In outline, EC Regulation 561/2006 limits drivers to a 9 hour driving day, requires a 45 minute break every 4.5 hours, 11 hours rest each day and 45 hours consecutive rest per week.

4.6.2 The MOD is authorised to grant exemptions from the rest requirements for Reserve Forces personnel who are professional civilian drivers. This currently only applies to annual training camps of 15 days duration or less and to a maximum of 10 weekend training sessions per year (not over consecutive weekends). It is the ELA's understanding that this exemption protects the civilian employer (as opposed to the MOD) and that it, in effect, allows a reservist to drive all week, for their civilian employer and attend a weekend training session (or annual training camp). To benefit, they must have 11 hours rest before returning to their civilian employment and must subsequently start their minimum weekly rest period (of 45 hours) by the end of the 6th day following the period of training. The exemption does not apply to professional drivers operating continental routes.

4.6.3 Domestic legislation in the form of the Transport Act 1968, applies to drivers of certain light vehicles which are exempt from EU law. In summary, these rules limit driving to 10 hours daily/70 hours weekly, provide for a 30 minute rest break after 5.5 hours driving and require a 10 hour daily rest period and 24 hours rest each fortnight. Section 102(2) of the Transport Act 1968, provides the MOD with an exemption from these rules in respect of MOD owned vehicles driven under the orders of a member of the armed forces.

4.6.4 However, there is currently no government guidance for civilian employers explaining how the MOD exemptions from the EU and domestic driver's hours rules operate (notably the SaBRE website does not mention the exemptions). This absence of guidance and clarification may leave employers of professional drivers concerned about their compliance with the driver's hours legislation.

4.6.5 ELA's view is that the Government should consider offering civilian employers and their professional driver employees with clear guidance as to their obligations with regards to driver's hours legislation as it applies to reservist staff who may be required to drive as part of their compulsory reservist training.

Q. 6: Should all mobilisations require specific ministerial authorisation and immediate Parliamentary notification?

6.1 In summary ELA's view is that:

- Employers are not likely to be concerned about what level of parliamentary authority is required for specific reasons for call out but simply whether there is an increase in the number or frequency of reservists being mobilised; and
- A change to the Reserve Forces Act (1996) ('the Reserve Forces Act') to 'downgrade' the type of jobs reservists can be called out to do is likely to be unpopular with employers as

is any reduction in the level of authority required to call out a reservist if this increases numbers or frequency of mobilisation without some form or compensatory measures put in place for employers.

6.2 This question may best be answered by constitutional lawyers and those with political views on the holding of Government to account.

6.3 ELA is aware that the Armed Forces Act 2011 amended the 'call out' powers under Reserve Forces Act so that work of 'national importance' is now a valid reason to 'call out' Reservists. ELA feels that any further amendment to the Reserve Forces Act to allow reservists to undertake routine work would probably not be viewed favourably by employers who may take the view that if the work is not for the purpose of preventing a threat to the UK or of national importance then it should not be necessary to call up their reservist employee to do this work.

6.4 If a government is minded to call out lots of reservists at a particular point in time, then this leaves it open for the relevant Government minister to interpret the term 'national importance' widely. However, employers are likely to have their own views as what term means, which may differ from the view of the MOD.

6.5 ELA feels that the experience of employers over the past decade or more, since the operations in Afghanistan and Iraq began and large number of reservists began to be mobilised should be taken into account. Employers are now more aware of 'intelligent' mobilisation than they were in 2003. This means that some employers now take the view that compulsory mobilisation is not really 'compulsory' at all, as the reservist makes it known to his chain of command that he would be willing to be mobilised for that specific operational tour and that he and his employer would not appeal the mobilisation.

6.6 The fact that this has not caused a large number of appeals to mobilisation or other resistance from employers could be as a result of employers' goodwill towards the Armed Forces generally, who are seen as enduring very harsh conditions in Afghanistan, and doing their best in a difficult situation both militarily and politically. However, such goodwill is less likely to be forthcoming, in our opinion, if mobilisation is for routine tasks in permanent joint operating bases such as Cyprus or the Falklands and certainly for tasks other than disaster relief in the UK.

6.7 In summary, a change to the Reserve Forces Act to 'downgrade' the type of jobs reservists can be called out to do is likely to be unpopular with employers, as is any reduction in the level of authority required to call out a reservist, if this increases numbers or frequency of mobilisation without compensatory measures put in place for employers.

Question 9: For employers, are there existing MOD (or other Government Department) policies, or provisions of UK or EU legislation that impact upon a proactive approach to the employment of reservists? If so, what are they?

9.1 ELA believes the main UK and EU Legislation which impacts upon a proactive approach by employers to the employment of reservists is the legislation discussed in our response to question 4 above, which refers to rights to time-off for public duties, working time and drivers hours obligations (see our comments below in response to question 16).

Question 15: If an Employer Charter for reserve service was introduced, would this result in a positive, negative or neutral contribution in the development of a supportive working environment for reservists and reserve service, and why? What other measures would you suggest to achieve an employment environment that is supportive of reservists and reserve service?

15.1 The working example for the Employer's Charter would not achieve very much on its own. In order to have more effect, there would need to be similar statements of intent provided by Reservists and Government – these could either fit into separate Charters for each group, with some degree of inter-dependence, or (preferably) for a single Charter to cover all three groups. At a minimum, the employers' commitment should be subject to the Government undertaking reciprocal commitments to:

- provide information about forecast Reservist activity requirements;
- to consult with employers, and assist them (if requested) to make resourcing plans for periods when their Reservists are mobilised; and
- to provide financial assistance to employers to provide temporary or short-term staff to fill the roles of reservists away from work due to mobilisation or training (such assistance to reflect the Defence budget savings achieved by requiring employers to accept more business risk from employees' military reserve commitments),

15.2 ELA would suggest that the statement "To protect reservists' civilian employment in accordance with law" in the current draft of the Employers Charter should be replaced by "To comply with all legal requirements to safeguard Reservist employees' civilian jobs."

Question 16: Would legislation be an effective measure to mitigate reservists being disadvantaged in a civilian workplace on the basis of their reserve service?

16.1 The current legislation in place to protect reservists is not as burdensome on employers as in some other jurisdictions. If it is decided that further protection is needed then in ELA's opinion further legislation would be an effective measure to prevent or mitigate reservists being disadvantaged as follows:

- Legislation could be introduced to prevent discrimination against reservists at the point of recruitment;
- Reservists could be given the right not to suffer a detriment on similar terms to those who are absent from work to undertake jury service in ss43M and s98 of the Employment Rights Act 1996;

- Reservists could also be given a similar right to time off as those currently serving on one of the bodies listed under s.50 of the Employment Rights Act 1996, such as employees who are school governors and local councillors;
- Reservists could be granted continuity of employment during mobilised service which they currently do not enjoy under the Reserve Forces (Safeguard of Employment) Act 1985 ('the 1985 Act') ;
- Compensation under the 1985 Act would need to be increased, or another sanction found to prove an effective deterrent to employer' flouting this legislation; and
- The employment status of Reservists could be clarified as to whether they have the protection of Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 or are to continue to be considered as 'casual labour'.

16.2 The current legislation in place to protect reservists is not as burdensome on employers as in some other jurisdictions such as Australia or Canada. If it is decided that further protection is needed then in our opinion further legislation would be an effective measure to prevent or mitigate reservists being disadvantaged.

16.3 Legislation could be introduced to prevent discrimination against reservists at the point of recruitment. Similar protection granted to those of a protected characteristic under the Equality Act 2010 and its antecedent legislation is not widely used as it is usually difficult to prove why a person was recruited or not. However this should not prevent similar protection being afforded to reservists who may currently be lawfully refused employment on grounds that they are a member of the Reserve Forces.

16.4 In Australia there is an Office of Reservist Protection which would act for the reservist in circumstances where the reservist may otherwise lack the means both legal and financial to bring such discrimination to the courts. We understand that the Office acts in a way similar to the Equality and Human Rights Commission in the UK where an employee has been discriminated against on grounds of a protected characteristic. This may be more of a requirement for High Readiness Reserve or those on an increased liability for call out for whatever reason where the employee is required to bring this to the attention of their employer and their new employer when they move job.

16.5 Currently, armed forces reservists enjoy no free-standing right to freedom from discrimination under the Equality Act 2010 on the grounds of their reserve forces membership or duties. This effectively means that a prospective employer can freely discriminate against armed forces reservists by choosing not to employ them because they are a reservist.

16.6 Dismissal on the grounds reserve service does not appear in the list of automatically unfair dismissals contained in sections 98B through to 107 of the Employment Rights Act 1996, meaning that it is open to an employer to justify the dismissal of a reservist for some other substantial reason. However, a dismissed reservist could only bring an unfair dismissal claim in the first place if they enjoyed the minimum requisite continuous service to bring such a claim (currently two years).

16.7 Reservists could be given the right not to suffer a detriment on similar terms to those who are absent from work to undertake jury service in ss43M and s98 of the Employment Rights Act 1996.

16.8 Reservists could also be given a similar right to time off as those currently serving on one of the bodies listed under s.50 of the Employment Rights Act 1996, such as employees who are school governors and local councillors. We do not think that it would be a matter of simply adding the Reserve Forces to the list of bodies covered as these bodies normally require their member to attend meetings, which is reflected in the legislation, whereas the Reserve Forces may require their members to attend a wider variety of activities and normally outside of normal working hours.

16.9 Reservists could be given the right not to suffer a detriment on similar terms to those who are absent from work to undertake jury service in section 43M and section 98 of the Employment Rights Act 1996.

16.10 Reservists could be given continuity of employment during their mobilised service under the 1985 Act. We believe many reservists and their employers believe that the reservist's civilian employment continues during the period of their mobilised service. In practice it may do so, depending on the understanding between the parties, what benefits are held open for the employee, whether or not a replacement is found for the period of absence etc. However the 1985 Act does not provide for continuity of employment and talks about the employer as the 'former employer' to whom the reservists may 'apply' for similar work on similar terms as that which they enjoyed before being mobilised. Continuous service is an important right for employees as it has implications for the ability to bring unfair dismissal claims, claims for redundancy payments, notice of termination and eligibility for certain allowances e.g. maternity pay. Crucially, the fact that continuous service is reduced by any periods of mobilisation may impact upon the pension benefits the reservist will enjoy from his civilian employer. The fact that this has not been raised as a major issue before now is possibly because of the lack of detailed knowledge of Reserve Forces legislation on the part of employers and/or their goodwill. Both these factors are likely to change as the Reserve is used on a more frequent basis.

16.11 Once employed, reservists enjoy only a very limited right not to be dismissed on the basis of their liability to be mobilised on active service under section 17 of the Reserve Forces (Safeguard of Employment) Act 1985 ('the 1985 Act'). This right appears only to apply once a reservists has been warned off that they are to be mobilised. An employer dismissing a reservist once this has happened commits a criminal offence and can be fined up to £1,000. However the employer can only be ordered to pay up to a maximum of five weeks' pay to the dismissed employee. This is a considerably lower financial risk than other 'public service' related dismissals e.g. dismissal for undertaking jury service, which would both be automatically unfair and allow the normal maximum award of up to £85,200 compensation. Compensation under the 1985 Act would need to be increased to prove an effective deterrent to employer's simply flouting this legislation, or a more effective sanction of a different kind employed.

16.12 We would expect to see substantial amendments made to the 1985 Act if many of the ideas discussed in the Consultation paper are to come into effect.

16.11 The employment status of Reservists should be clarified as to whether they have the protection of Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 or are to be continue to be considered as 'casual labour', which we understand is currently the case. Many of the benefits which would have to be offered to reservists by the MOD are being considered or proposed in the consultation paper, but for the sake of clarity the provision of these benefits as part of the increased 'offer' to reservists should

not screen the issue of employment status of reservists within the MOD which we believe requires clarification.

Question 20: What type and level of support is required for employers in order to minimise any impact of the absence of their reservist employees? How should this vary for a) large employers, b) medium employers, c) small employers, d) micro businesses and e) the self-employed?

20.1 Currently, employers can claim financial assistance to cover additional salary costs incurred whilst their employee is mobilised. Such additional costs may include, for example, overtime for other employees used to cover the reservists work or the salary costs of a temporary replacement, but they can only be claimed if they exceed the usual cost of the Reservist's usual salary (which they will not be in receipt of). The cap on financial assistance that the employer can claim from the MOD is currently £110 per day, normally paid monthly in arrears. Employers can also claim financial assistance to cover costs associated with recruiting a temporary replacement or retraining the reservist under certain circumstances upon their return to work.

20.2 Anecdotal evidence from employers suggests that the process for bringing such claims for financial assistance is cumbersome. One employer (a small employer) reported that the process took so much management time the first time their employee was mobilised, and that the amount of financial support they received was so low, that they actively chose not to pursue a claim for financial support on future mobilisations. One employer was so aggrieved at the lack of financial support that they actively chose to appeal the second mobilisation (with their appeal being successful).

20.3 Many small and medium sized employers will find it very difficult to manage the sudden loss of a staff member so pre-planning of periods of mobilisation (where this is possible) might allow them to properly plan for the employee's absence from the business. Likewise, even with larger employers, if an employee is very crucial to a business (e.g. the only person able to undertake that role) or is very difficult to replace (e.g. holds rare qualifications) then greater advanced notice of mobilisation (where this is possible) would be advantageous.

20.3 In ELA's view the Government should consider:

20.3.1 Simplifying the process of claiming financial assistance;

20.3.1 Giving increased notice of mobilisation (where this is possible) to allow employers to better prepare for the loss of their staff member.

Q31. What other measures could we consider to ensure reservists and their families are provided with appropriate health, welfare and mental health support, particularly after a) an operational deployment and b) as the reservist returns to civilian employment?

31.1 ELA notes that for injuries and medical conditions attributed to military service (including mental health conditions), reservists are supported by the NHS and RMHP. However, where reservists sustain injury or develop a medical or mental health condition while on service, their injury or condition may trigger legal obligations on their return to civilian employment on the part of their employer, either pursuant to equality (in particular

disability discrimination) legislation or in terms of performance, health and safety or occupational health management.

31.2 In such circumstances, both reservists and their employers may benefit if provision is made for liaison between Defence Medical Services and the employer identifying any new injury or condition and any relevant matters arising from such an injury or condition (such as, for example, an identified need for adjustments in the workplace, a need for time off work or a need to undergo treatment in future).

31.3 No such liaison would be appropriate without the consent of the individual to disclosure of their confidential medical details.

31.4 Both employers and employees may also benefit from support where difficulties arise for reservists in managing the transition from life on deployment to civilian working life.

Annex A

List of members on this sub-committee

Paul McFarlane, Weightmans LLP (chair)

Bronwyn McKenna, Unison (chair of ELA's Legislative & Policy Committee)

Simon McMenemy, Signet Partners LLP

Emma Cross, Pannone LLP

Ben Collins, Old Square Chambers

Emma Harvey, Gorvins

Justin Beevor, Barclays

Hywel Griffiths, Ashton KCJ