

**IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT**

AC-2026-LON-001694

B E T W E E N:

**THE KING (on the application of)
(1) STEVEN STEWART
(2) MARK SHEPHARD**

Claimants

- and -

THE SECRETARY OF STATE FOR DEFENCE

Defendant

**(1) FIGHTING WITH PRIDE
(2) ROYAL BRITISH LEGION**

Interested Parties

Defendant's Skeleton Argument

Permission Hearing 28th October 2026

PB/X – Permission Bundle page number

SFG/X – Statement of Facts and Grounds paragraph number

SGD/X – Summary Grounds of Defence paragraph number

Introduction

1. Between 27th July 1967 and 12th January 2000 there was a blanket ban on the presence of gay men and lesbians in HM Armed Forces ("the Ban") and many were investigated and then dismissed or discharged. The Ban was abandoned after the European Court of Human Rights held that such investigations and discharges breached Article 8. In 2022 the Government commissioned Lord Etherton to conduct an Independent Review, whose Final Report is dated May 2023. In response, the Defendant established the LGBT Financial Recognition Scheme, governed by the Scheme Rules, with provisions of £75 million for flat

rate Dismissed or Discharged Payments and individually assessed Impact Payments. The Scheme opened for applications on 13th December 2024 and closes on 12th December 2026.

2. The Claimants, who were investigated and left the services without being dismissed or discharged, challenge their exclusion from the flat-rate £50,000 payment which the LGBT Financial Recognition Scheme makes to those who were dismissed or administratively discharged under the Ban.

3. Both Claimants were investigated and felt under pressure to resign. Both fall within rule 27 of the LGBT Financial Recognition Scheme Rules, Version 5, dated 28th November 2025 (“the Rules”) [PB/329–389], which govern the LGBT Financial Recognition Scheme (“the Scheme”). Rule 27 excludes those who purchased their discharge and those who left at the end of a notice period [PB/338]. Both were refused the Dismissed or Discharged Payment (“DD Payment”) on that basis, and each was awarded an Impact Payment under rule 20(b), of £7,000 and £5,000 respectively. They do not say that £50,000 is too much for the DD Payment award; they say they should receive it. They seek a declaration and an order that the Defendant “revise the Scheme”. The inevitable consequence of the Claimants’ claim is that the Scheme would be wider and more expensive.

The Defendant’s position

4. The Scheme is a non-statutory, ex gratia scheme made under common law powers. It is “not a compensation scheme” [PB/335]; payments are “paid voluntarily”, are “not legally binding” and are made by exercise of the Defendant’s discretion [PB/335]. Setting the levels of award was part of the exercise of that discretion.

5. The Defendant submits that the Claimants’ claim should be refused permission, on the following grounds:

(i) the Claimants have abandoned Ground 1(a);

(ii) Ground 1(b) is not arguable because the Defendant considered the position of those forced to resign at every stage, and the weight given to it was a matter for him;

(iii) Ground 2 is not arguable because the “disparity” is the Dismissed or Discharged Payment (“DD Payment”) itself, and that payment rests on a formal process, a verifiable record and a fixed sum of public money. The decisions made are not arguably irrational.

Nature of the power

6. A scheme made under common law powers is painted “on a clean canvas”; identifying what is relevant is itself a matter for the decision-maker: *R (ABCIFER) v Secretary of State for Defence* [2003] EWCA Civ 473 at [39]. There is no necessary implication that a blanket policy is inappropriate or that there must be room for exceptions: *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, at [62]. The Claimants’ reliance on cases about statutory powers and on *Shvidler*, which concerns the more intensive standard of review under the Human Rights Act 1998, is misplaced [PB/66].

Constructive dismissal

7. Constructive dismissal requires a repudiatory breach of a contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 76. Service personnel have no such contract, and the ban on LGBT personnel serving in HM Armed Forces, lifted on 12th January 2000, was lawful: s.146(4) Criminal Justice and Public Order Act 1994; *R v Secretary of State for Defence, ex parte Smith* [1996] QB 517. The Claimants now accept that their treatment does not meet the formal requirements of constructive dismissal. The label, and the employment cases at paragraph 76 of the Statement of Facts and Grounds (“SFG”) [PB/46], fall away.

Pre-Action Protocol and candour

8. The letter before claim was directed at a different case, an officer/other-ranks distinction under Article 14, which is now abandoned. The Reply says the Defendant's reasons shifted between the Decisions and the pre-action response. They did not. The First Claimant's decision applied rule 27 first and rule 23 second; the pre-action response explained why rule 23 exists. The Decisions dealt with rule 23 because the Claimants' appeals relied on it. The same explanation of rule 23 was given to Fighting with Pride (“FwP”), the First Interested

Party, in February 2025 [PB/101–102], and by the Minister to a Member of Parliament on 2nd March 2026 [PB/327–328]. The reasons are consistent.

Ground 1(a): failure to consider a relevant matter

Abandoned

9. The Claimants “no longer pursue this ground” [PB/128]. The Defendant agrees; the Scheme itself addresses those who resigned: rule 27 [PB/338]; rule 29(5), “Felt pressured to leave HM Armed Forces because of the Ban” [PB/338]; Level Two, “Pressured to resign or leave” and “Investigation which did not lead to discharge/dismissal” [PB/383]. The Minister confirmed in December 2025 that inclusion of those who felt under pressure to leave “was carefully considered during the scheme’s creation”, and that PVR cases were excluded “due to the broad range of reasons individuals may have had to leave Service voluntarily” [PB/286]. The pre-Scheme documents identify “three cohorts”, including “those who left due to pressure/culture” [PB/78], and a group identified by the Government Actuary’s Department (“GAD”) of those “who felt compelled to resign” [PB/84].

The narrower group

10. The Reply recasts the Claimants’ class as those “investigated and forced to resign”, and says the Defendant conflated it with a broader group [PB/128]. That narrower group was considered specifically. The February 2025 letter addressed “veterans who were pressured to resign where there is clear and credible evidence”, and those “who resigned following an unambiguous threat” [PB/103]. Ground 1(a) was bound to fail; the same documents defeat Ground 1(b).

Ground 1(b): weight so slight as to be irrational

11. The Defendant submits that:

- (i) the weight given to competing considerations is for the decision-maker, and the threshold is high;
- (ii) the line between dismissal and resignation is a formal line, verifiable from the record, and it permits timely payment;
- (iii) the Reply’s points on delay and fraud misread the evidence.

The Defendant's case

12. The Independent Review into the service and experience of LGBT veterans who served prior to 2000, conducted by Lord Etherton (“the Review”) [PB/390–658], left the question of who could apply, and how much they should receive, to the Government [PB/549] other than those who were dismissed or administratively discharged, who were explicitly captured in the recommendations. It described those who felt compelled to leave as “not a homogeneous group”, and said that the Government would have to decide “whether it is practical or fair to make a distinction” between its sub-categories [PB/550]. It recorded that, unlike the dismissed, there was “no legal or factual precedent giving guidance on either eligibility or amount” for that group [PB/550]. It stressed that “Any further delay can only be to their detriment” [PB/549]. The Defendant chose a flat-rate DD Payment for those removed by formal process, and an individually assessed Impact Payment for other impacts of the Ban [PB/69–70; PB/382–383]. The DD Payment includes those who gave notice but were then administratively discharged; service records are examined to confirm “under what process an individual did leave service” [PB/101]. The IP has three tiers and payments can vary from £1,000 to £20,000. The line follows the formal process, not motive.

Fraud

13. Because of “the targeted destruction of records in 2010”, the Scheme operates on a reverse burden of proof; that “does not provide a high level of protection against fraudulent claims, which must be taken into account when considering payment amounts” [PB/109]. The Rules record the same risk and the checks against it [PB/356, rule 122]. Opening the DD Payment to anyone who reports being pressured to resign would increase the risk of fraudulent claims and would have reduced what was available to genuine applicants [PB/102–103]. Threats “are unlikely to have been written down” [PB/103].

Delay

14. Including those under pressure to resign in the DD Payment would require “a more detailed assessment of each application”, which “could significantly delay the pace at which assessments for the DD Payment could be made” [PB/103]. Those assessments are “better

suited to the assessment process for the Impact Payment, where the differences in the level of pressure ... can be properly considered” [PB/103]. The officials warned that any redesign would cause delay to a launch date publicly committed to [PB/97 [12]; PB/109 [5].

Fighting with Pride’s own model

15. FwP proposed a two-tier scheme, with the dismissed and discharged in Group 1 and 70% (£35M) of the funds allocated to that group [PB/123]. The Defendant’s structure follows the same logic; the total amount payable under the scheme is, however, higher.

Reply [7]: identification from records

16. The Reply says that forced resignations can be identified from service records “in the same or similar way” as dismissals, relying on GAD’s quotation of the Ministry of Defence (“MOD”) Laydown report and the “8,000” row [PB/129].

17. The Laydown figure of 10,000 is an extrapolation from investigation numbers and destroyed-record returns, combining “dismissed or resigned”; GAD says “The exact basis for calculation ... is not given” [PB/87]. The 8,000 figure is “Inferred from old investigation records” for population estimation [PB/88]; it does not identify any individual. GAD’s own table places “forced resignations after detection” in a row of 5,440 “where documentation is not present” [PB/89]. The investigation records were destroyed in 2010; what survives is the rest of the service record [PB/413–414]. That record shows how a person left; it does not show why. The MOD’s options paper said that dismissal “can be verified on defence systems”, but that it was “not able to verify records” for the other groups [PB/79]. GAD said that claimants would “probably need to present evidence that they resigned because of the policy, which might be difficult” [PB/92]. The Second Claimant’s refusal shows how the record operates: his service records “indicate that you were not administratively discharged or dismissed, but that you resigned” [PB/316].

Reply [8]: the fraud risk is “identical”

18. It is not. For the dismissed, the formal discharge is the recorded fact and the reverse burden goes to the reason [PB/101; PB/556]. For a resignation, the surviving record points the

other way: it records a PVR or a purchase. Entitlement would rest on the applicant's account of an unrecorded threat [PB/103]. The Reply's example of a dismissed applicant with lost records [PB/129] is a risk the Defendant accepted for the class whose removal was formal; it does not oblige him to accept a larger risk for a class whose removal was not. The fraud risk was expressly a matter to be weighed "when considering payment amounts" [PB/109]. The Scheme does exactly that. A fixed sum goes to the formally removed; an assessed sum, on testimony and "without the need for supporting evidence", goes to the rest [PB/328].

The Review's "cogent reason"

19. The Review said that arrangements for those who felt compelled to leave should "not slow down payment to those who were dismissed or discharged", and that it was "not aware of any cogent reason why that cannot be achieved" [PB/551]. The Scheme achieves it: those forced to resign are included through the Impact Payment, and 908 DD Payments had been made by 27th April 2026 [PB/69]. The passage concerns arrangements for the group; it says nothing about putting them into the DD Payment.

Ground 2: substantive irrationality

The Defendant submits that:

- (i) the gap is the DD Payment itself, because the Impact Payment is open to all;
- (ii) the DD Payment recognises a formal process and the particular dishonour associated with dismissal or discharge, which was not the Claimant's direct experience;
- (iii) the amount was fixed by the provision and the predicted numbers, and the Review gave no guidance on amount for this group;
- (iv) closing the gap is a demand for more public money.

The size of the gap

20. The Claimants say they receive "tens of thousands of pounds less" [PB/46–47]; the Reply says the resigned receive "one tenth" [PB/130]. The comparison is not correct. The Impact Payment of up to £20,000 "is open to all those impacted by the Ban, including those

dismissed or discharged” and applicants for the DD Payment can apply for both. A dismissed veteran and a resigned veteran with the same experiences receive the same Impact Payment, and the only difference is the £50,000 DD Payment [PB/382]. The Reply itself puts the disparity at “c.£50,000” [PB/130]. Ground 2 is therefore a challenge to whether a payment for formal dismissal or discharge can rationally exist.

The DD Payment

21. The DD Payment recognises “the harm caused by the dismissal/discharge process and the dishonour which veterans were burdened with as a result”; the dismissed were “often” left with dishonourable discharge reasons and demeaning wording which barred employment [PB/102]. It was “designed to recognise those who were dishonourably removed from Service and were left with exit papers that placed the fault with them” [PB/328]. Pressure to resign “was not part of a formal administrative process” [PB/102]. The use of discharge as leverage to resign “supports the idea that the impact of discharge was more severe than that of resignation” [PB/102]. The First Claimant resigned to avoid a court martial which, he was told, would “almost certainly result in a dishonourable discharge” [PB/219]. He avoided the very harm the DD Payment recognises.

Reply [9.3]: exit papers not clear-cut

22. The Reply relies on the words “not recommended for re-entry” [PB/130]. That entry appears on an “In Confidence” Army form, under a box for the Commanding Officer’s recommendation on employment “If recalled to the Colours on mobilization” [PB/283]. The First Claimant’s testimonial “with a view to civil employment” records that he “has now elected to leave HM Forces in order to pursue his career outside”, and states “I have no hesitation in recommending this most competent individual to any future employer” [PB/282]. His exit papers did not place the fault for his departure on him. Some discharge records may carry a neutral reason [PB/130]; that is a feature of any flat rate scheme award. The DD Payment is “often” and not always tied to a dishonourable reason [PB/102]; a line drawn by formal process need not track every individual case [PB/66].

Other measures

23. The payments are one part of a wider response, which includes apologies, restoration of rank, replacement discharge papers and the Etherton Ribbon [PB/72–73]. The level of awards falls squarely within the Defendant’s discretionary area of judgment [PB/73].

No guidance on amount for this group

24. The Lustig-Prean, Beckett, Smith and Grady cases “only concerned those who were administratively discharged” [PB/550]: *Lustig-Prean & Beckett v United Kingdom* (2000) 29 EHRR 548; (2001) 31 EHRR 23 [PB/72]. The Review’s guidance on amount “is directed specifically at the category of veterans who were dismissed or discharged” [PB/551], and its financial matters “are limited to those veterans who were dismissed or discharged” [PB/555]. For any wider class, the Government would “have to consider whether and, if so, to what extent the amount of any payment should differ” [PB/555]. The Review contemplated that the amount might differ. Choosing a different amount cannot be irrational. The Review adds that “the same approach or principles could apply by way of analogy” [PB/555]; that is permissive, not prescriptive, and it sits inside a passage that leaves the question to the Government.

Reply [9.2]: comparators

25. The Reply says no comparator supports “one tenth” [PB/130]. The Defendant’s Summary Grounds of Defence (“SGD”) did not say otherwise. The comparators informed the Impact Payment tariffs [PB/72; PB/95]; the £50,000 DD Payment was fixed by the provision and the predicted numbers [PB/111]. The comparators that exist draw the same line. The Canadian scheme paid \$50,000 for “Discharge or termination” and \$5,000 or \$20,000 for “Investigation and/or sanction” [PB/534]. The awards of the European Court of Human Rights were for “the intrusive and offensive investigation and then dismissal or discharge” [PB/553].

Reply [9.1]: “closer in value”

26. The Reply says the Scheme could have been delivered with the same speed, efficiency and protection against fraud “were the awards available closer in value” [PB/130]. There are only two ways to close the gap. The first is to reduce the DD Payment. The Claimants do not ask for that [PB/44], and it cannot now be done: 908 DD Payments had been made by 27th April 2026 [PB/69], and the Rules permit recovery only for duplication, withdrawal or false representation [PB/355–356, rules 114, 119–120 and 124]. The second is to raise awards to the

resigned. That costs money, and it raises fraud exposure on testimony-based awards in proportion to their value [PB/109]. The Minister was told, under the earlier design, that raising all tariffs significantly, including the payment to the dismissed and discharged from £25,000 to £40,000, and doubling or removing the cap, would cost up to £107.5m against £56m, was "not based on any comparators", and "may also not stand up to scrutiny under the Managing Public Money guidance due to the low burden of proof" [PB/95; PB/96 [9]]. Any change to the tariffs would have required reworking of the business case, the Rules and HM Treasury ("HMT") approvals, with delay [PB/97 [12]; PB/100]. Speed, efficiency and fraud all provide positive support for the rationality of the Defendant's actions.

The cost of the remedy

27. A financial provision of £50M was set aside for DD Payments and £25M for Impact Payments [PB/337, rule 20]. The DD Payment of £50,000 equals the £50M provision divided by GAD's central estimate of 1,000 dismissed or discharged applicants [PB/337; PB/111 [4]]. The Review recommended that the Government's "overall exposure should be capped at £50 million", in a passage concerned only with the dismissed and discharged [PB/555]. The Scheme already exceeds that figure by half [PB/337]. GAD estimated 1,100 "resignation and other claims", including "forced resignations after detection", within a range of 440 to 2,640 [PB/90]. A DD Payment for that group would cost about £55m more at the central estimate (range about £22m to £132m). The Claimants' narrower class is a subset of it; the bundle does not size that subset. The Treasury required all funding to come from within existing MOD budgets [PB/100]; "any increase in the scheme's funding would likely require reductions elsewhere, which may impact other critical programmes and capabilities" [PB/114 [13]].

28. Cost does not make the claim non-justiciable. It goes to the intensity of review and to the justification required. The allocation of a fixed sum of public money, under common law powers, to a scheme that is expressly not compensatory [PB/335], narrows the scope for a rationality challenge further still [PB/65–66]. The Claimants ask the Court to direct a revision whose only possible content is a larger and more expensive scheme [PB/49]. How much public money to commit to an ex gratia scheme, and to whom, is a judgment for the Defendant. An argument that the line could have been drawn more generously does not show that the line actually drawn was irrational.

29. The Claimants do not contend that the DD Payment of £50,000 is excessive. They accept it as "the payment intended for those who were 'dismissed'" [SFG [70], PB/44], and their complaint is that they, and others "forced out of HM Armed Forces under the Ban in similar circumstances" [SFG [84], PB/48], were not treated as falling within that class. The disparity of which they complain cannot be removed without either reducing a payment already made to 908 veterans, which the Rules do not permit, or increasing the sums paid to those forced to resign. On any revision of the Scheme which met the Claimants' grounds, therefore, the Scheme would cost significantly more. The claim is in substance a challenge to the Defendant's judgment as to the scope of, and the public money to be committed to, an ex gratia, non-statutory scheme. Decisions of that kind attract the most limited review, and an argument that the line could have been drawn more generously does not establish that the line actually drawn was irrational.

30. The DD provision derives from the Independent Review. Lord Etherton recommended that "the government's overall exposure should be capped at £50 million" [R28, PB/555, PB/646]. He recorded that all the matters to which he had drawn the government's attention "as to the amount of any financial payment are limited to those veterans who were dismissed or discharged". He added that, if the government decided to include those who felt compelled to resign, it "will have to consider whether and, if so, to what extent the amount of any payment should differ from that paid to those who were dismissed or discharged" [PB/555]. The Defendant committed the whole of that recommended overall cap to DD Payments [rule 20(a), PB/337; rule 34, PB/339], and made a further £25 million available for Impact Payments [rule 20(b), PB/337]. The Scheme's total provision of £75 million therefore already exceeds by half the overall exposure the Review recommended. Extending the DD Payment to those who resigned would take the cost of the Scheme further beyond that recommendation.

31. No saving in the Impact Payment provision would offset that expenditure. The Impact Payment is open to all those affected by the Ban, "including those dismissed or discharged" [PB/328]. A veteran who became eligible for the DD Payment would keep his entitlement to an Impact Payment, so the £50,000 would be added to what he has already received rather than substituted for it. Whatever line the Defendant drew on reconsideration, every veteran placed on the eligible side of it would have to be paid £50,000. Any other means of narrowing the disparity, such as an increased payment to those forced to resign, would equally require funds

which have not been provided. A quashing order would leave the Defendant no cost-neutral means of complying with the Court's judgment, and the relief sought would require the Defendant to increase public expenditure on an ex gratia scheme beyond the level the Minister determined.

32. There are significant, competing budgetary pressures for the Defendant (which are widely-known) owing to global events and the geopolitical landscape. The public interest in the Defendant's ensuring a form of restorative justice for historic wrongs is not the only important interest that falls to be balanced, particularly for a Department that is confronting national security risks and considerations as part of its core function. The total expenditure on the Scheme as a result of such competing public interests is fundamentally a matter for the Defendant, not the Court.

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