EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110308/2021

5

Held in Glasgow on 1-3 August 2022

Employment Judge L Murphy
Tribunal Member E Farrell
10 **Tribunal Member J Haria**

Ms A Khan **Claimant**
In Person

Brook Street (UK) Ltd **Respondent**
15 **Represented by:**
Ms S Fallone
Advocate

20 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Tribunal is that:

(i) It is just and equitable to extend the time limit in which to lodge the claim under section 13 of the Equality Act 2010 (EA) in relation to the phone call on or about 4 November 2020 which the claimant alleges was a
25 discriminatory act designed to check her level of spoken English (the '4th November Call').

(ii) The respondent has unlawfully discriminated against the claimant by rejecting her birth certificate on 16 November 2020 and omitting to consider further her application for a role with HMRC (the '16th November
30 Rejection'), contrary to section 13 of EA. This complaint is well founded and succeeds.

(iii) The claimant's complaint that the 4th November call was directly discriminatory contrary to s.13 of EA is not well founded and is dismissed;

(iv) The respondent is ordered to pay to the claimant compensation in the sum of EIGHTEEN THOUSAND FOUR HUNDRED AND FIVE POUNDS AND EIGHTY PENCE (£18,405.80).

REASONS

Introduction

1. The claimant is British born of Pakistani ethnicity. In October 2020, she applied to the respondent for employment which would entail assignment to a role with HMRC. The claimant complains of direct race discrimination under section 13 of the Equality Act 2010 ("EA") in respect of her treatment by the respondent.

2. At a previous preliminary hearing ('PH') on 29 November 2021, EJ Sorrell determined that it was just and equitable to determine the time limit in which to lodge the claim and that the Tribunal, therefore had jurisdiction to hear the claim. That determination related only to a claim that the 16th November Rejection was a discriminatory act. At that time, although the claimant's ET1 contained averments regarding an earlier call, then identified to have taken place on 2 November 2020, it was not clarified that the call was asserted to be a discriminatory act.

3. At a subsequent PH on 22 April 2022, the claimant clarified that she also complained that the call, which she advised took place on 4 November 2020, was a discriminatory act, contravening section 13 of EA.

4. EJ McPherson in his CMO dated 22 April 2022 listed the issues for determination at the final hearing. That list did not include reference to the jurisdictional issue of time bar in relation to the 4th November Call. It was agreed with the parties during the preliminary discussion that the outstanding time bar issue would be reserved and would be added to the list of issues for determination.

5. The issues are, therefore, as follows:

   (i) The claimant accepts that the 4th November Call complaint was not lodged within the normal time limit in s.123 of EA in terms of which

Early Conciliation required to be initiated by 3 February 2021. The Tribunal will require to decide:

1. Was the claim made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

    i. why the complaint was not made to the Tribunal on time; and

    ii. in any event, is it just and equitable in all the circumstances to extend time?

(ii) Subject to an extension of time being granted in respect of the 4th November Call, the Tribunal will require to decide whether the respondent did the following things:

(a) On or about 16 November 2021, reject the claimant's birth certificate as evidence of her right to work in the UK and omit to consider further her application for a role with their client, HMRC?

(b) on or about 4 November 2021, telephone the claimant to assess the claimant's level of spoken English?

(iii) Were these acts or omissions less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant says she was treated worse than the white brother of Susan MacDonald in relation to the 16th November Rejection complaint. Alternatively, she relies on a hypothetical comparator in

relation to this complaint. The claimant relies on a hypothetical comparator in relation to the 4th November Call complaint.

(iv) If these acts or omissions were less favourable treatment, was it because of race?

(v) If so, what financial losses has the discrimination caused the claimant?

(vi) Has the claimant taken reasonable steps to replace any lost earnings, for example by seeking other work?

(vii) For what period of loss should the claimant be compensated?

(viii) What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

(ix) Should interest be awarded? In what sum?

6. The final hearing took place at the Glasgow Tribunal on 1-3 August 2022. The claimant gave evidence on her own behalf. The respondent led evidence from Shailesh Luximon, an HR Business Partner employed by the respondent who dealt with a complaint made by the claimant in June 2021, and Osma Khan, a Glasgow based Team Leader employed in the respondent's public sector business. Evidence was taken in the form of witness statements with some supplementary oral evidence in chief. A joint inventory of productions was referred to.

7. Both the claimant and Ms Fallone gave helpful oral submissions to the Tribunal at the conclusion of the evidence.

Findings in fact

8. Having heard the evidence, the Tribunal makes the following findings in fact, on the balance of probabilities:

Background

9. The claimant is of Pakistani ethnicity. She is a British national, was born in the UK. She is educated to Masters level. She has teaching experience and experience of working in public sector services. She also has customer facing experience in the retail sector.

10. As at September 2020, the claimant was unemployed and was seeking work. She was in receipt of Universal Credit and was in regular contact with her job coach at her local job centre in relation to her efforts. She used an online Universal Credit journal to keep her job coach updated on her search. She was, and is, a lone parent with four children. At the material time, the COVID-19 pandemic was continuing and certain Government restrictions were in force.

11. The respondent is an employment business (usually known in lay man's terms as an employment agency). It places candidates in work with its client companies and organisations. It is a UK wide operation, headquartered in Luton, and has a significant public sector practice. In or around October 2020, it had been tasked with providing 1,300 workers to be assigned to its client, HMRC, with start dates in November 2020.

HMRC Job Application

12. On 19 October 2020, the claimant's job coach emailed her the description and application form for the administrative role with HMRC offered through the respondent. The respondent would enter an employment relationship with successful candidates who would be assigned (at least initially) to work for HMRC.

13. The roles were described as temporary, full-time customer service jobs. They were home-working. The working pattern was 37 hours per week, working five days out of 7, covering various working patterns between 8 am and 8 pm. The job description stated that alternative working patterns "*may be considered subject to business need*." Successful candidates would be appointed on full-time temporary contracts "*with the possibility of extension*". The duration of

the assignments was not specified but the job description referred to them as "*long-term, temporary roles*". The notice confirmed that the purpose of the roles was to support customers claiming under the various Government schemes designed to help provide financial support through the COVID-19 pandemic. The notice confirmed that the pay would be *"£19,550 pro rata equivalent to £10.16 per hour*." It further specified that the start date would be 23 November 2020.

14. That same day, the claimant submitted an application form. As instructed on the form, she emailed it to the respondent. In the email subject heading, she was invited to indicate the nearest HMRC location for her, from 14 locations listed across Scotland, England and Wales. She entered Glasgow in the subject heading.

15. On the morning of 29 October 2020, the claimant received a telephone call before 9 am from an employee of the respondent named Lucie Ospalkova. Ms Ospalkova proved to be the claimant's primary point of contact at the respondent with regard to the application. Ms Ospalkova had only recently begun her employment with the respondent at the time. She started on 19 October 2020 and left the respondent's employment four months later on 29 January 2021.

16. Ms Ospalkova describes her role with the respondent on her public LinkedIn profile as having been to "*identify, screen and shortlist candidates for the recruitment process in conjunction with delivering a large project within public sector and government*". The profile states that her job involved: "*carrying out compliance checks through obtaining and verifying documents, interviewing candidates and setting up their files*" as well as being to *"support the compliance team with an inspection of all candidates' records and their documents, resolving various errors as well as assisting other team members with my compliance knowledge*." She was one of at least 9 consultants employed in the respondent's Central Resourcing team who were working on the HMRC project at the material time.

17. During the call, Ms Ospalkova discussed the HMRC job. She asked the claimant a number of questions based on the claimant's responses in her application form. They discussed the claimant's retail and local government employment experience. Ms Ospalkova spoke favourably about the claimant's responses during the call but said it was not up to her whether the claimant would get placed into work. She said that she would be happy to put forward to the claimant's application for consideration. She told the claimant she was putting her forward to the "next stage".

18. The claimant asked Ms Ospalkova about the possibility of being considered for other positions with the respondent if she was not successful in obtaining the role with HMRC. Ms Ospalkova said her role was limited to working on this particular project but that the claimant could contact a local branch of the respondent and register with them if she wished.

19. At 9 am that day, Ms Ospalkova sent the claimant an email. It began

> *"Hi Azma*
>
> *Thank you for your time today - great to speak with you - in order for us to be able to get you started in the role we need to get your file compliant to HMRC standards.*
>
> *Can you please complete and return the attached forms together with your CV to lilly.crawford@brookstreet.co.uk*
>
> *…"*

20. The email attached a number of items which were listed within it along with instructions for the claimant to complete or sign and return certain of the documents. These included a contract of employment between the claimant and the respondent and a Disclosure Application form to begin the process of obtaining a Disclosure and Barring Service check (DBS). The email invited the claimant to add her name and address at the top of this template contract and to sign the relevant section. It ended, "*one of the branch consultants will be in touch regarding the paperwork and to set up your ID checks.*"

21. The contract of employment was headed *"Terms and Conditions of Employment for Temporary Employees"*. It contained the following provisions, so far as material:

1 JOB TITLE AND DUTIES

5 *1.1 you are employed by Brook Street as a temporary employee (Associate). Brooke Street operates in the following sectors:*

1.1.1 administrative, secretarial, clerical and associated functions

1.1 .2 Care and public sector

1.1.3 Warehouse, factory, light industrial and manufacturing roles

10 *You may be offered assignments in either of these sectors unless you indicate you are not prepared to work on that specific sector (by listing it in the box below)...*

…

1.2 You will be assigned to carry out work for a clients from time to time in
15 *the capacity as detailed in the relevant Assignment letter. In carrying out that work, you agree to work under the direction and supervision of the Client, including anyone authorised by the Client to whom you are assigned. You will be expected to carry out the duties of the Assignment in a loyal and trustworthy manner and to observe and*
20 *comply with the Client's internal rules, policies and procedures. Failure to do so may result in disciplinary action being taken against you by Brook Street.*

…

1.5 You agree that you may be transferred to a new Assignment at any
25 *time, without restriction to location or clients, as directed by Brook Street.*

1.6 You agree that Brook Street or the Client may terminate an Assignment at any time, without prior notice or liability. Termination of an Assignment is not termination of your employment.

…

5 ***2 COMMENCEMENT OF EMPLOYMENT***

…

2.4 Your appointment is subject to the completion of pre-employment checks and the full disclosure by you of all information relevant to your appointment and subsequent Assignments.

10 *…*

4 HOURS OF WORK

4.1 Brook Street will, at all material times during your employment, use its reasonable endeavours to allocate you to suitable Assignments and, as a minimum, Brook Street guarantees (without prejudice to Brook Street's rights
15 *under section 6 hereof) that you will be offered at least 336 hours of work on Assignment over the course of any full 12 month period (commencing on the start date of your continuous employment) paid at a rate at least equivalent to the applicable National Living Wage / National Minimum Wage currently in force. For part time employees, the guaranteed hours will be prorated based*
20 *on a full-time working week of 35 hours. There is no entitlement to any particular number of hours of work on Assignment in any period shorter than 12 months.*

…

4.3 Save as provided for herein, Brook Street does not guarantee that there will
25 *always be a suitable Assignment to which you can be allocated, and there may be periods when no work is available to you. In these circumstances, Brook Street has no obligation to pay you when you are not carrying out work or not on Assignment.*

…

6 NOTICE

6.1 …

6.2 Subject to clause 6.5 and 6.6, Brook Street must give you the following periods of prior written notice to terminate your employment:

6.2.1 no notice if you have been continuously employed for less than four weeks;

6.2.2 two weeks' notice if you have been continuously employed for more than four weeks, but less than two years; or

6.2.3 three weeks' notice if you have been continuously employed for more than two years but less than three years, with an additional week for every additional year of continuous employment up to a maximum of 13 weeks' notice for 12 or more years of continuous employment.

6.3 There is no guarantee that Work will be available during any notice period.

6.4 You are not entitled to pay during any period of notice during which you are not working on assignment.

22. On 2 November 2020, the claimant submitted the relevant forms together with all additional documents required to Lilly Crawford's email address. She attached the completed registration form, her CV, the completed disclosure form, a scan of her driving license, her PVG and her birth certificate.

23. On 4 November 2020, the claimant was telephoned by an employee of the respondent. The female caller was not Lucie Ospalkova. The claimant did not catch the caller's name. The caller told the claimant she was calling about the claimant's application for a role with HMRC. She asked the claimant for confirmation of her date of birth and address. This had already been provided to the respondent in the initial application form and in subsequent documents provided. The claimant's impression was that the caller was young and nervous. The caller told the claimant that she had the claimant's CV before

her and wanted to go over a few things. She asked the claimant about where she went to school. This was stated in the claimant's CV which recorded she attended the Green School for Girls, London. The caller noted from the CV that this was in London and asked the claimant where exactly in London the school was.

24. The claimant confirmed it was in Isleworth and, at the caller's request spelled out the place name. The caller was taking notes. The caller asked how long the claimant had been at that school and the claimant told her she left in 1987 to do her A-levels at Richmond upon Thames College in Twickenham. This information was in the claimant's CV. The conversation lasted three or four minutes.

25. The claimant felt uneasy about the call. Its purpose was unclear to her, since the information requested had already been provided, other than the precise location in London of her school. She considered it odd to focus on her schooling at her stage in her career. She suspected the true purpose of the call was to check her level of spoken English. She referred to this suspicion in her online Universal Credit journal entry a couple of days later. She did not raise the matter with the respondent at the time. She was keen to secure the role.

26. The respondent's usual process for recruiting temporary employees to a client assignment in the Glasgow branch where Osma Khan worked as a Team Leader in the respondent's public sector business, was as follows:

- the individual applies for the role
- A consultant reviews the application and decides who they will interview.
- The consultant telephones the individual to discuss:
  - the role
  - the process

    - The candidate's skills matched to the role on reviewing the candidate's CV.

- The consultant sends out paperwork to the candidate for completion

5
- If there are any queries or issues, consultants are encouraged to contact candidates by telephone to resolve these.

- The consultant who conducted the telephone interview has the final say in whether the candidate is placed on the assignment

- If the consultant dealing with the application is a trainee, they
10 are supported by their team leader who should guide them and answer any questions.

27. Osma Khan did not work in the Central Resourcing Team which caried out the recruitment project for HMRC in October / November 2012.

28. As part of their recruitment process, all the respondent's consultants, whether
15 operating from their branches or their Central Resourcing Team were required to complete a template form called a CRT Screening Form when speaking with candidates for the first time. The template is prescriptive. It lists a detailed series of questions the consultant should ask the candidate regarding their right to work in the UK and other compliance issues as well as questions
20 regarding evidence they can provide of their work and education history. It also includes practical questions about the candidate's notice period, criminal convictions, and arrangements for future contact by way of a video call.

29. Although the form did not include a field for the consultant to complete on this, the respondent's consultants routinely assessed, as part of the screening call,
25 a candidate's spoken English and telephone manner where the position being recruited was telephone based.

30. No CRT form was produced to the Tribunal for the call between the claimant and Lucy Ospalkova on 29 October 2020 or the call between the claimant and the unidentified caller on 4 November 2020. The respondent does not have

any CRT forms or other notes of these calls. The questions asked by the 4th November caller did not correspond to the questions listed in the respondent's CRT template.

31. On 5 November 2020, Ms Ospalkova sent a further email to the claimant. It began:

"*Hi Azma, we are currently in the process of moving candidates onto the next stage of compliance, which involves a video call, during which I will verify a few documents to make sure you comply with HMRC standards. Before this video call, however, I need you to send me via email photos or PDF/scanned images of the following documents:*

1 ***Proof of Right to work in the UK*** *which may be:*

1 passport (British or EU) (Picture of both pages containing an image of your face)

2 biometric residence permit

3 national identity card (both sides)

4 long version of birth certificate (you will need to combine this with evidence of national insurance to prove your right to work in the UK)

2 ***Proof of NI - National Insurance - which may be:***

1 *a payslip*

2 *on your P60 or P45*

3 *on letters about your tax, pension or benefits*

4 *in the National Insurance* of *your personal tax account*

5 *a letter from HMRC*

6 *a residence permit*

N.b. any of these documents that has an address on may also be used as proof of address, e.g. a P 45 form can function as both your NI proof and your proof of address

3 ***Proof of Address** which must be a combination of two of the following (or those listed above that is suitable):*

1 *utility bill (gas, electric) issued within the last three months*

2 *current UK driving license or UK provisional driving license*

3 *bank statements*

…

I am also trying to organise a suitable time for a video call, so the compliance team or myself should be in contact soon.…

Bear in mind that you will need all of these documents to hand for a video call, so that we can verify the images/photos you sent me via email with those you show me on the call.

…

32. On 6 November 2020, the claimant emailed Miss Ospalkova the requested documents. She sent a scan of the long version of her birth certificate (which had already been sent to Lilly Crawford on 2 November 2020) as well as an HMRC letter with her National Insurance number. She attached a copy of her latest gas bill, dated 18 August 2020.

33. On 10 November 2020, Ms Ospalkova emailed the claimant again. She indicated she would carry out a video call with her the following day. She made no comment on the documentation the claimant had sent.

34. On 11 November 2020, Ms Ospalkova video called the claimant. She asked the claimant to show her copies of the documents the claimant had emailed on 6th November. Ms Ospalkova asked if the claimant had better proof of her NI number. The claimant had sent a downloaded document from her online HMRC account. Ms Ospalkova waited on the video call while the claimant

located her P45 with her NI on it, and showed her this document. The claimant emailed to the respondent a scan of the P45 after the video call. The claimant was impressed by Ms Ospalkova's thoroughness during their interactions.

35. On 12 November 2020, there was a further email exchange between the claimant and Ms Ospalkova. Ms Ospalkova explained the claimant's scan of her P45 and birth certificate were displaying upside down. She couldn't rotate them and asked the claimant to re-send them. She gave a deadline of "today / tomorrow latest" (i.e 12 or 13 November) The claimant re-sent the scans that day.

36. The claimant believed that she would shortly begin work with HMRC. She told her children and friends about the job. She and her children were excited that she would soon be earning a wage.

37. On Monday 16 November 2020, Ms Ospalkova emailed the claimant in the following terms:

"Sorry Azma, but I was told that the birth certificate needs to be the original one which would have been issued right after your birth so dated 1969 year.

We can't accept this unfortunately.

Kind regards,

Lucie"

38. It was not Ms Ospalkova who made the decision to reject the claimant's birth certificate, but another employee of the respondent. It is not possible to make a finding as to the identity of this individual. We find, however, that it was a more senior employee, probably Ms Ospalkova's Team Leader. The individual who instructed Ms Oslpalkova to reject the birth certificate also told Ms Ospalkova that the claimant's birth certificate required to be issued right after her birth, and dated in the year 1969.

39. We do not find that the individual who instructed Ms Ospalkova to reject the birth certificate was the same individual who called the claimant on 4

November 2020. Though the identity of neither individual is known, it is unlikely they were the same individual.

40. The claimant felt disappointed, angry, sad and tired on receiving this email. She was upset for making her children believe that she was going to have a job soon and letting them be excited. She thought it was ridiculous to expect candidates to have their original birth certificate, but she thought that perhaps working for a Government department meant there were higher standards for compliance than she'd experienced in other workplaces. She wondered if she might have been successful if she'd possessed a passport.

41. On or about 17 November 2020, the claimant received a further telephone call from the respondent. The caller was not Ms Ospalkova. The claimant was uncertain of her identity but believed it may have been the same employee who telephoned her on 4 November 2020. It was a female voice. The caller began the conversation by asking the claimant what her availability was for the contract with HMRC.

42. The claimant explained she had heard back from Ms Ospalkova that the respondent wasn't proceeding with her application because they were not accepting her birth certificate. She told the caller she had been advised it needed to be issued in the 1969 year of her birth. The claimant ended the call saying she was available for work but that there was nothing she could do because she didn't have the birth certificate originally issued to her parents in the year of her birth. The caller didn't respond to this.

43. The claimant's birth certificate which she scanned and sent to the respondent on 2, 6 and 12 November 2020 and which she displayed to Ms Ospalkova during the video call on 11 November 2020 was not a photocopy. It was a certified copy of an entry in the Register of Births, Deaths and Marriages, certified and issued by the Deputy Superintendent Registrar on 16 November 2018. It showed on the face of the document that the claimant's place of birth was in a hospital in London and that the birth was registered in the relevant London Borough six days later, in the month of December 1969. It recorded that the claimant's parents were born in Pakistan.

44. The respondent provides all its temporary and permanent members of staff involved in the processing of temporary employee applications with guidance on the ID which is required to complete a DBS check and with separate guidance on the documents which are acceptable for proof of the right to work in the UK (PORTW).

45. The DBS guidance categorises three different Groups of documents.

46. Group 1 is "***Primary Trusted identity documents***". these are listed as:

*"Current valid passport (UK or EU) *** **cannot accept expired documents****

*Biometric Residents permit (UK) *** **cannot accept expired documents******

*Birth/Adoption Certificate – (issued within 12 months of birth) **Short and Long birth certificates are acceptable***

*Current driving license photocard – full or provisional **photocard only***

47. Group 2a is "***Trusted Government documents***". these are listed as:

*"Current driving license photocard – full or provisional photocard paper version if issued before 1998) *** **cannot accept expired documents******

*Birth/Adoption Certificate – (issued after time of birth) **Short and Long birth certificates are acceptable***

EU National ID Card – Must be current and valid

48. Group 2b is "***Financial / Social History documents***". these are listed as:

***Must be less than 3 months old**

****Must be less than 12 months old**

*"Mortgage Statement (UK or EEA)** (Non EEA statements are not acceptable)*

*Bank/Building Society Statement (UK or EEA) *(Non EEA statements are not acceptable)*

Bank / Building Society Account opening Confirmation Letter (UK)

*Credit Card Statement (UK or EEA) * (Non EEA statements are not acceptable)*

*Financial statement** for example pension, endowment, ISA (UK)*

5 *P45/P60** (UK and Channel Islands)*

*Council Tax Statement ***

*Utility bill (mobile bill not included)**

Benefit Statement (Child Allowance, Pension)*

49. It prescribed three possible routes to compliance for candidates. The first is
10 as follows:

Route 1

the applicant must be able to show (At least one of the documents must show the applicant's current address):

- *One document from Group 1*
- 15 *2 further documents from Group 1, or Group 2a or 2b*

Route 2

If the applicant doesn't have any of the documents in Group 1, then they must be able to show:

- *One document from Group 2a*
- 20 *2 further documents from either Group 2a or 2b*

At least one of the documents must show the applicant's current address. The organization conducting their ID check must then also use an appropriate external ID validation service to check the application.

Route 3

Route 3 can only be used if it's impossible to process the application through Routes 1 or 2. For Route 3, the applicant must be able to show:

- *A birth certificate issued after the time of birth*
- *One document from Group 2a*
- *3 further documents from Group 2a or 2b*

At least one of the documents must show the applicant's current address.

50. Even if her birth certificate were ignored, the claimant had complied with the DBS guidance. She had satisfied the requirements of Route 1. She had provided her driver's license, a Group 1 document, plus 2 documents from Group 2b (namely her P45 and gas bill). Ignoring her birth certificate, she had also complied with Route 2 through the provision of her driving license and two documents from Group 2b.

51. The rejection of the claimant's birth certificate and the decision not to consider further her application was not in accordance with the DBS guidance the respondent supplied to its consultants.

52. The respondent also provides its employees involved in processing temp applications with guidance on PORTW. The copy of the guidance supplied by the respondent in the bundle was in illegibly small font. So far as material, that guidance is in the following terms:

LEGAL REQUIREMENT

All UK employers are required to sight copy and retain appropriate right to work for all job applicants.

Failure to carry out our legal obligations can result in a £20,000 plus fine. (per offence) and/or disciplinary action.

UK Criteria (including the Republic of Ireland)

Permitted documents

British passport

UK birth certificate (long or short birth certificates are permitted) with National Insurance Number (P45, P60, NI Card or document from a government agency/previous employer with the applicant's name and NI number on it).

Expired British passports are permitted providing the names haven't been cut off and the applicant still looks like the photo on the passport. You are required to write on the passport copy 'this is a true likeness of the individual'

53. The PORTW guidance nowhere states that a birth certificate requires to have been issued in the same calendar year or the same calendar month as the candidate's birth. It nowhere states a birth certificate requires to have been issued "right after birth". The decision to reject the claimant's birth certificate was not in accordance with the PORTW guidance issued to the respondent's employees involved in compliance checks.

54. The respondent's Central Resourcing Team processed 831 successful candidates who commenced assignment with HMRC on 23 November 2020 and 396 candidates who commenced with HMRC on 30 November 2020. The total number the respondent placed with HMRC in November 2020 was 1,227. Those candidates were located UK wide.

55. Of the 831 successful candidates who began on 23 November, Ms Ospalkova is recorded as having processed 95. Of those 95 candidates, 33 were from an ethnic minority background (35%). Three of those individuals had the same surname as the claimant. Those three individuals supplied a passport as evidence for their compliance checks, as opposed to a birth certificate. Of the total 831 successful candidates who started with HMRC on 23 November 2020, 28% were from an ethnic minority background.

56. Of the 396 candidates who began their assignment with HMRC on 30 November, 22% were from an ethnic minority background. The data produced does not disclose whether Ms Ospalkova was responsible for processing any of the candidates who began on 30 November 2020.

57. No data was produced regarding the number of unsuccessful candidates processed by Mr Ospalkova or the respondent's other consultants in October / November 2020. The breakdown of the ethnicities of unsuccessful candidates is unknown.

5 58. Of the successful applicants applying for the HMRC temp role in October / November 2020, only one provided a birth certificate as evidence of the right to work. It is not known how many unsuccessful candidates, other than the claimant, did so. It is not known which consultant processed the successful candidate who used a birth certificate. No finding is made that it was Ms
10 Ospalkova. There were at least 8 other consultants working on the processing of candidates for the HMRC roles due to begin in November 2020.

59. The identity and ethnicity of the successful HMRC candidate who tendered a birth certificate for PORTW in October / November 2020 is not known.

60. The birth certificate of an individual with the surname Fazakerley was
15 produced in the hearing bundle. Fazakerley was not one of the 1,227 successful candidates placed on assignment with HMRC in November 2020. S/he was placed on an assignment with some client through the respondent at some time following the provision of a certified birth certificate issued by the Registrar but not with HMRC in November 2020. Fazakerley's ethnicity is
20 not known. It is within judicial knowledge that Fazakerley is the name of a place in the United Kingdom. It is a suburb of Liverpool, England.

Events of 26 May 2021 and thereafter

61. In May 2021, the claimant had a change of a job coach at the Job Centre. Her new coach was named Susan MacDonald. She was white. On 26 May 2021,
25 the claimant had a lengthy phone call with Ms McDonald. They discussed the claimant's efforts to get back into teaching and her job search. The claimant raised the issue of whether the Job Centre could provide funds for her to obtain a passport, something which had been discussed with her previous job coach. The claimant then narrated to Ms McDonald her experience with the
30 respondent the preceding November and described how she was rejected for

the role with HMRC because the birth certificate she tendered was not accepted.

62. She explained to Ms MacDonald that the birth certificate was an official copy from the local authority where she was born but had not been acceptable. Ms MacDonald shared with the claimant that she herself had secured her job with the Job Centre through the respondent. She said she tendered her passport by way of compliance documentation. She told the claimant that when she started her job, she encouraged her brother to apply and that he had done so and been accepted by the respondent. He had progressed through the compliance stage on tendering a certified copy of his birth certificate, like the claimant's, issued by the local registrar, not at the time of his birth's registration, but subsequently.

63. We find Ms MacDonald's brother was white and that he successfully tendered to the respondent a certified copy of his birth certificate, issued by the local registrar, on an occasion subsequent to his birth's registration. He did not tender a passport. His name is not known. It is not known when this occurred. It is not known which client he was placed with. No finding is made that Ms Ospalkova or the individual instructing her had any involvement in Ms MacDonald's brother's application.

64. The claimant was shocked. She felt sad and angry. She suspected her ethnicity had played a part in being refused work by the respondent. She undertook some online research the same day regarding her rights and options. On 27 May 2021, she spoke to an advisor at the Equality and Advisory Support Service (EASS). The advisor signposted her to template letters on their website that the claimant could use to write to the respondent. The claimant conducted further research on discrimination law. She struggled to find the templates on the site and struggled to get back through to an EASS advisor on the phone.

65. Shortly after, she contacted ACAS to take further advice. She did not initiate the early conciliation process at that point. She remained unsure whether she should pursue a claim. She still felt in the dark about what exactly had

happened with her application. She remained concerned that HMRC may have had different compliance criteria to that of the client with whom Ms MacDonald's brother was placed. The ACAS advisor helped her to find the template letters on the EASS site.

5 66. On 4 June 2021, she wrote to the respondent a letter of complaint. She set out the events the previous October/November. She also enclosed copies of her email correspondence with Lucie Ospalkova and Lilly Crawford at the material time. She explained the conversation that she'd subsequently had with Susan McDonald and Ms MacDonald's account that her brother had a 10 different experience with the respondent on tendering a birth certificate. She did not identify Ms MacDonald by name in the letter. She asked the respondent to investigate her complaint with a view to explaining / resolving the issue. In her letter, the claimant described her birth certificate as a "certified copy". That is the heading on the birth certificate which was issued 15 to her by the deputy superintendent registrar.

67. Shaleish Luximon, HR Business Partner for the respondent, replied to the claimant by email on 11th June 2021. He told her that Ms Ospalkova had left the respondent's employment in January 2021 so that he was unable to speak to her in relation to the decision not to pursue her application. He said 20 "*however from the information you have provided it is clear that we were unable to proceed with your registration as we could not complete our on boarding and compliance formalities, in particular, to obtain acceptable documentation as proof of your right to work in the UK (PORTW)".*

68. He continued, "*As I understand it, you provided a certified copy of your birth* 25 *certificate and not the original or a replacement obtained directly from the relevant authority. You may be aware that a passport is not mandatory to evidence PORTW and there are other documents as a combination that can be used. In your case, this was your birth certificate and evidence of your NI number. We are unable to accept a certified copy of a birth certificate as we* 30 *are obligated under the Immigration, Asylum and Nationality Act 2006 and the Home Office's guide for employers on preventing illegal working in the UK to only accept original documents. I acknowledge that in certain circumstances*

a certified document by a professional person, like a Solicitor for example, as a true copy of the original may be acceptable however not for the purposes of its evidencing PORTW."

69. Mr Luximon went on to explain that without further particulars of the other applicant being allowed to produce a certified copy birth certificate, he could not investigate this. He assured the claimant that the respondent does not adopt any discriminatory practices in the attraction and selection of applicants. He repeated that her application could not be progressed because they required an original birth certificate and not a certified copy. He refuted the allegation that the claimant was given less favourable treatment on the grounds of her ethnicity. Mr Luxton ended his email explaining how the claimant could obtain a replacement birth certificate from the General Registrar office. He suggested that the respondent would revisit her application once this was done.

70. The claimant was upset by Mr Luximon's response. She considered that he had not investigated adequately. She felt that if Mr Luximon had looked at the respondent's records, he would have discovered that she had, in fact, submitted the very document that he was now recommending she obtain. The claimant was aware that recruitment records required to be retained for a certain length of time and, on researching the matter, she discovered that employment businesses were legally required to keep records for at least a year from the date of her application.

71. On 11 June 2021, the claimant replied by email, clarifying that her birth certificate was provided by the General Register office of the local authority where she was born. She wrote again on the 14th of June 2021. She requested a copy of the respondent's complaints procedure and explained her disappointment at Mr Luximon's email. She noted that the heading on her birth certificate in capital letters was "CERTIFIED COPY OF AN ENTRY". She advised that she found it hurtful and upsetting that Mr Laxman had failed to investigate her complaints fully. She repeated the following sentence from her original complaint:

"I believe that whoever made the decision to reject my application, was unfair and this decision was unacceptable as I believe my application was given less favourable treatment because of my ethnicity …"

72. On 15 June 2021, the claimant commenced the ACAS early conciliation process.

73. On 25 June 2021, Mr Luximon emailed the claimant. He posted a link to a webpage where he advised the complaints procedure could be found. He said the following:

"*I did not expressly state that you had supplied a certified copy by a solicitor but I use this to explain what I understood a certified copy to mean given your assertion that you did not have your original birth certificate.*

From your recent submissions it appears that you have a birth certificate supplied by your local registry office in its original format. If this is the case then this document will be acceptable. I hope the above helps in clarifying my original response to you. At this stage, I would request that you share a copy of the birth certificate you have so we can confirm its suitability. In the absence of this I am mindful not to make any further assumptions as to why your application was not progressed in October/November 2020."

74. On 27 June 2021, the claimant responded, attaching a copy of her birth certificate. She advised that her complaint wasn't about her wanting to be assisted in finding suitable temporary work, but about how the previous year the respondent had not treated her application fairly like other applicants. She repeated that she believed this was because of her ethnicity and added "or perhaps her age."

75. On 1 July 2021, ACAS issued an Early Conciliation Certificate and the claimant lodged an ET1 with the employment tribunal, complaining of race discrimination.

76. At some stage between 11 June and 1 July 2021, Mr Luximon had a telephone conversation with Ms Ospalkova's Team Leader. The Team Leader remained employed by the respondent at that time. It is unknown

whether they remain so now. Mr Luximon was aware of the Team Leader's identity and was aware whether they had left or remained in the respondent's employment by the time of the Tribunal hearing. The Team Leader told Mr Luximon that Ms Ospalkova was new to the business and was still undergoing training. The Team Leader said Ms Ospalkova was "effective and very good". We are not able to make findings about all that was discussed between Mr Luximon and the Team Leader in that conversation. We are unable to make findings about any discussion about the specific events surrounding the rejection of the claimant's birth certificate.

77. On 1 July 2021, Mr Luximon replied to the claimant by email in the following terms:

"*Dear Ms Khan*

Thank you for coming back to me.

The birth certificate you have provided is an acceptable document and Lucie was incorrect in her decision when she dealt with your application last year. I have made further enquiries with the Resourcing Team and can confirm that Lucie was new to our business at the time, having joined us on 19 October 2020 and was still undergoing training. This, we believe, explains why she would have sought guidance when dealing with your application. We also believe that she would have spoken to her Team Leader at the time whom is an experienced member of the team and therefore Lucie's submission to you may have been as a result of her own misunderstanding, either arising from her interpretation of the guidance received or the information she had provided to her Team Leader initially.

We accept that your application was incorrectly declined at the time and had you escalated the matter then it will have provided us with an opportunity to rectify this and proceed with your application. Irrespective of Lucie's failure, we have not identified any evidence to suggest that she was motivated in any way by discriminatory practices in the manner in which she dealt with your application.

As I had mentioned previously, Lucie left her employment in January 2021 so we cannot address this further with her, however, we are taking actions to ensure appropriate re-training is provided to prevent such a re-occurrence.

5 *Please accept our sincere apologies for this situation. As a resolution and to move forward, I can put you in direct contact with our Recruitment Team in Scotland (based in Edinburgh) to assist you in completing your registration and find suitable work for you. Let me know if you wish for this to happen.*

Best regards

…"

10 78. The respondent did not attempt to contact Ms Ospalkova following receipt of the claimant's complaint or after the claimant raised the Tribunal proceedings.

79. The respondent did not contact Lilly Crawford to establish following receipt of the claimant's complaint or after the claimant raised the Tribunal proceedings. Ms Crawford left the respondent's employment in late April 2022.

15 On 12 April 2022, the claimant wrote to Mr Luximon. She asked him to respond to various questions. These included questions about Ms Ospalkova's employment dates, her ethnicity and training record as well as about the respondent's equal opportunities policy and their diversity and monitoring data. Among other matters, she asked him:

20 *"   …*

5. Please state if anyone else was consulted about my application.

6. Please provide details for your employee, Lilly Crawford. What is / was her job title? What was her role in the recruitment process? What is her ethnicity?

25 *… "*

80. On the same date, the respondent's solicitor refused this request. He said:

"You will note from our email dated 8th April that we consider that you have failed to properly set out your claims. We have, to assist, set out what we understand to be the factual and legal basis your claims [sic]*. We have however asked for confirmation from you of whether our understanding is correct. This has not been provided to date. You will no doubt appreciate that it is difficult for us to consider wider issues relating to this case (including the reasonableness of request for further information) unless we understand the factual and legal basis of the claims.*

We are therefore concerned that your requests for further information may be vexatious and not in accordance with the overriding objective. In respect of each piece of information / document sought can you please explain to which claim this relates and why it is relevant…"

In view of the above we consider your request is disproportionate and unreasonable. We do not intend to respond until you provide the above information… "

81. The respondent did not keep all records of the claimant's unsuccessful application process. It did not retain the CRT Screening form which was or ought to have been completed by Ms Ospalkova. It did not retain the notes the 4th November caller made of her conversation with the claimant. If any other internal notes, emails or memos existed in connection with the claimant's application, these were not retained. The respondent had, at the time of the Tribunal hearing, retrieved from its archive copies of the email correspondence between the claimant and Ms Ospalkova and between the claimant and Lilly Crawford. It had also retrieved from its archives the compliance documents the claimant had attached to some of those emails. Mr Luximon did not access this archived material in the period between 4 June 2021 and 1 July 2021 when investigating the claimant's complaint. It was produced by the respondent in 2022 when the bundle was being prepared. It is unknown when Mr Luximon first viewed it.

82. The respondent called an employee called Osma Khan as a witness. Ms O Khan was not involved with the claimant's application and was not working on

the HMRC project in October / November 2020. Ms O Khan gave evidence in her witness statement regarding a document which had been produced in the bundle. The document was a list of temps supplied by the respondent to HMRC, purportedly as at July 2022. It listed 35 employees. Ms O Khan's witness statement indicated that she knew six of these to be from a BAME background. We find that, contrary to her evidence to the Tribunal, Ms O Khan did not compile this document herself. Someone else collated the list and the information about ethnicities from the respondent's records. It is not known who did so or when they did so.

The claimant's efforts to find work after 16 November 2020

83. After the news that the claimant would not be considered for a role with HMRC in November 2020, she remained out of work and claimed Universal Credit. She secured work with Marks & Spencer's from the beginning of September 2021. She makes no claim for financial losses from this date.

84. The claimant's average monthly Universal Credit income in the period from October 2020 to August 2021 was £1,284.08. In the three-month period after the claimant secured her role with Marks and Spencer, the claimant's average monthly Universal Credit income reduced to £655.

85. From November 2020, the claimant continued to seek an administrative role that would fit with her parenting responsibilities while she was trying to work her way back into teaching. She had been searching for such a role since before her application to the respondent. She undertook a 10-week "Return to Teaching" course between September and December 2020 to learn about teaching in Scotland in order to apply for teacher registration in Scotland.

86. In November 2020, while applying for jobs, she worked part time for a charity.

87. On 8 December 2020, the claimant completed the course. She completed her online teacher registration with the General Teaching Council of Scotland (GTCS) in December 2020. On or about 4 December 2020, the claimant made an application for supply teaching with East Renfrewshire Council. Throughout the month of December 2020, she was in regular contact with

GTCS to sort her PVG. On or about 15 December 2020, she applied for a post as a school liaison worker in Glasgow.

88. The claimant used a variety of jobs searching sites including myjobScotland, Indeed, Total jobs. She also applied directly to other employment agencies.

5 89. On 4 January 2021, a “stay at home order” was re-introduced. Schools closed and the claimants four children had to stay at home with her. Certain roles that were advertised during this period did not offer flexible hours compatible with parenting responsibilities. During this period, many businesses were closed, and many employees were furloughed. Job opportunities were limited. 10 Schools reopened on 15 March 2021.

90. Between April and September 2021, the claimant applied for various teaching and non-teaching posts. She obtained an interview with South Lanarkshire Council for supply teaching but was unsuccessful.

91. At the start of September 2021, the claimant began work with Marks & 15 Spencer, working night shifts from 10 pm to 6 am. She finished there in December 2021 and took a position as a temporary teaching assistant in January 2022.

Statistical Evidence and the Respondent’s Equality, Diversity and Inclusion Policy

92. The claimant produced statistics regarding the ethnicities of HMRC 20 employees. As at 31 March 2020, it had a total headcount of 63,839. As at that date, 77.9% of its employees made an ethnicity declaration. 10.2% declared themselves Black, Asian and Minority Ethnic (BAME). 63.4% declared themselves white. 4.4% chose not to declare their ethnicity. The Scottish headcount as at 31 March 2020 was 5,703. 73% made a positive 25 declaration. 3.4% declared themselves BAME. 96.6% declared themselves white.

93. It is not known from the data produced whether the HMRC headcount figures included workers who were on assignment with them but employed by the respondent or through other employment agencies. It is not known from the

HMRC data what percentage (if any) of the employees included in their headcount as at 31 March 2020 was recruited through the respondent.

94. The respondent produced a data snapshot as at 15 July 2021 of its employees on assignment with HMRC on that date. There were 1,845 employees in total. No declaration of ethnicity was available for 1,777 of them (96%). Of the small sample of 72 for whom a declaration was available, 47 were white British (68%) of those who declared. 20 were BAME (28% of those who declared).

95. The respondent has published an Equality Diversity and Inclusion Policy. It is not known whether Lucie Ospalkova received a copy or whether she received training on the policy. It is not known whether the individual who instructed Ms Ospalkova to reject the birth certificate did so. It is not known whether the 4th November Caller or the 17th November caller did so.

96. The policy states, among other matters, that "*Brook Street maintains records of the age, race, gender, marital status, sexual orientation and religion and belief and disability of applicants and existing employees* ..." The respondent maintained no such record for the claimant's application. The policy states "*Employees and job applicants will be asked to complete a form denoting their sex, sexual orientation, marital status, ethnic origin, religion and belief and disabilities*." The respondent did not send such a form to the claimant when she applied for a role with the respondent.

Relevant law

Time limits

97. Section 123 of the EA deals with time limits for bringing discrimination claims and provides:

"s.123 ***Time limits***

(1) subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable…

(3) for the purposes of this section -

(a) conduct extending over a period is to be treated as done at the end of the period;

5

(b) failure to do something is to be treated as occurring when the person in question decided on it.”

98. Where a complaint is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (**Roberson v Bexley Community Centre** [2003] IRLR 434). Parliament has chosen to give the Tribunal wide discretion in determining whether it is just and equitable to extend time, having regard to the language of the provisions (**Adeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23.)

10

15

Direct discrimination - liability

99. Section 13 EA is concerned with direct discrimination and provides as follows:

“13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

20

100. Section 9 EA deals with the protected characteristic of race. It provides:

“9 Race

Race includes

(a) colour

25

(b) nationality;

(c) ethnic or national origins.”

101. According to section 23 EA, “on a comparison for the purposes of section 13, … there must be no material difference between the circumstances relating to each case”. The relevant “circumstances” are those factors which the respondent has taken into account in deciding to treat the claimant as it did, with the exception of the element of race (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11). A person can be an appropriate comparator even if the situations compared are not precisely the same (**Hewage v Grampian Health Board** [2012] UKSC 37). The claimant does not need to point to an actual comparator at all and may rely only on a hypothetical comparison. Very little direct discrimination today is overt and it is necessary to look for indicators from a time before or after a particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias (**Anya v University of Oxford** [2001] IRLT 377, CA). Sometimes evidence is led of so-called ‘evidential comparators’. These are actual comparators but whose material circumstances in some way differ from those of the claimant. Their evidential value is variable and is inevitably weakened by differences in material circumstances from the claimant’s (**Shamoon**).

102. For a direct race discrimination complaint to succeed, it must be found that any less favourable treatment was because of the claimant’s race, though the discriminatory reason need not be the sole or even the principal reason for the respondent’s treatment. In **JP Morgan Europe Ltd v Chweidan** [2011] IRLR 673, CA, LJ Elias summarised the position as follows:

“5 direct disability discrimination occurs where a person is treated less favourably than a similarly placed nondisabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial - must be the claimants disability. …”

103. Section 136 of EA deals with the burden of proof. It provides, so far as material, as follows:

“**136 Burden of proof**

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
>
> *…*
>
> *(6) A reference to the court includes a reference to—*
>
> *(a) an employment tribunal;*
>
> *…"*

104. The effect of section 136 is that, if the claimant makes out a *prima facie* case of discrimination, it will be for the respondent to show a non-discriminatory explanation.

105. There are two stages. Under Stage 1, the claimant must show facts from which the Tribunal could decide there was discrimination. This means a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination (**Madarassy v Nomura International plc** [2007] IRLR 246, CA). The Tribunal should take into account all facts and evidence available to it at Stage 1, not only those which the claimant has adduced or proved. If there are disputed facts, the burden of proof is on the claimant to prove those facts. The respondent's explanation is to be left out of account in applying Stage 1. However, merely showing a protected characteristic plus less favourable treatment is not generally sufficient to shift the burden and progress to Stage 2. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed un unlawful act of discrimination. 'Something more' is required (**Madarassy**).

106. Direct evidence of direct discrimination is rare. Depending on the facts and circumstances, various types of evidence have been held in different cases to have supplied that 'something more' which has allowed an inference of discrimination to be drawn.

5 107. Statistical evidence has been acknowledged to be potentially relevant by the Courts in direct as well as indirect discrimination cases. In **West Midlands Passenger Transport Executive v Singh** 1988 ICR 614, CA, the Court recognised that data showing numbers of white and non-white applicants to a post might be something from which the employment tribunal could infer
10 discrimination if it revealed a pattern of treatment towards persons of the claimant's racial group, and might also be used to rebut the respondent's contention that it operated an effective equal opportunities policy.

108. In some circumstances an employer's evasiveness or refusal to provide information has been found to be relevant. Under the previous Discrimination
15 Questionnaire Procedure, questions asked and any answers provided were admissible in evidence before an employment tribunal (S.138(3) EqA). The Tribunal was allowed to draw an inference of discrimination from a failure to answer questions within eight weeks or from an evasive or equivocal answer (s.138(4)). This statutory procedure was abolished in 2014. The explanatory
20 notes to section 66 of the Enterprise and Regulatory Reform Act 2013 (which implemented the repeal) stated that a potential claimant may still seek information from a potential respondent without the statutory procedure, and that a court or tribunal may consider any relevant questions and answers as part of the evidence in a case. Acas has produced non-statutory guidance on
25 how employers and workers should go about asking and responding to questions relating to a workplace equality dispute.

109. The extent to which an employer's failure to provide information may be used to establish a *prima facie* case of discrimination was considered by the ECJ in **Kelly v National University of Ireland (University College, Dublin)**
30 [2012] ICR, 322 ECJ. The case involved an unsuccessful application for a place on a University course. The tribunal concluded that the applicant had failed to establish a *prima facie* case of discrimination to shift the burden. He

appealed a refusal of the Circuit Court to disclose the applications and scoring sheets. The High Court sought a preliminary ruling from the European Court of Justice as to whether the Burden of Proof Directive (No.97/80) (now incorporated into the recast Equal Treatment Directive (No.2006/54)) entitled him to this information. In answer, the ECJ stated that although the Burden of Proof Directive does not specifically entitle claimants in discrimination cases to information from the employer in order that they may adduce facts establishing a *prima facie* case of discrimination, it could 'not be ruled out' in the instant case that the refusal to disclose documents, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by the Directive and thus depriving it of effectiveness.

110. Advocate General Mengozzi gave an opinion in **Meister v Speech Design Carrier Systems GmbH** [2012] ICR 1006 which specifically considered the position of external job applicants and the provision of information. His opinion endorsed the ECJ's decision in **Kelly**. Advocate General Mengozzi discussed how a job applicant can enforce observance of the principle of equal treatment when his or her application for a job is rejected by the putative employer, who fails to provide any information whatsoever as to why the application was unsuccessful or in respect of the recruitment procedure and its outcome. He observed that an employer that refuses to disclose such information could 'make his decisions virtually unchallengeable', thereby jeopardising the attainment of the objective pursued by the EU rule regarding the shifting burden of proof. The job applicant is entirely dependent on the goodwill of the potential employer with regard to obtaining information capable of constituting facts from which it may be presumed that there has been discrimination, and he or she may experience genuine difficulty in obtaining such information.

111. The ECJ in **Meister** did not adopt the same in-depth analysis of the shifting burden of proof but it referred to the Advocate General's Opinion and came to a similar conclusion. It concluded that 'a [respondent's] refusal to grant any access to information may be one of the factors to be taken into account' in the context of establishing a *prima facie* case of discrimination if the national court decides, taking into account all the circumstances of the case, that that

refusal risks compromising the achievement of the objectives pursed by EU law.

112. Although, at Stage 1, a tribunal must exclude the substance of the employer's explanation, it is not excluded from drawing inferences from the fact that there are inconsistencies in an employer's explanation (**Veolia Environmental Services UK v Gumbs** EAT/0487/12/BA).

113. If the claimant shows facts from which the Tribunal could decide a discriminatory act has occurred, then, under Stage 2, the respondent must prove on the balance of probabilities that the treatment was 'in no sense whatsoever' because of the protected characteristic or protected act (**Igen v Wong** [2005] IRLR 258).

114. There are cases where it is unnecessary to apply the burden of proof provisions. These provisions will require careful attention where there is room for doubt as to the facts necessary to prove discrimination but they have nothing to offer where the Tribunal is in a position to make positive findings one way or the other (**Hewage**).

Direct discrimination – remedy (compensation)

115. Where there is a breach of the EA, compensation is considered under s.124 which refers in turn to into section 119. That section includes provision for injury to feelings. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (**Komeng v Creative Support Ltd** UKEAT/0275/18/JOJ). For an injury to feelings award to be made, it is not required that the claimant's injured feelings are caused by his knowledge that he has been discriminated against. The EAT in **Taylor v XLN Telecom Ltd** [2010] IRLR 49 held that the calculation of the remedy for discrimination is the same as in other torts, and that knowledge of the discriminator's motives was not necessary for recovery of injury to feelings. The EAT observed, however, that the distress and humiliation suffered by a claimant will generally be greater where the discrimination has been overt or the claimant appreciates at the time that the motivation was discriminatory.

116. Three bands were set out for injury to feelings in **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] IRLR 102 in which the Court of Appeal give guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

"1) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award made for injury to feelings exceed £25,000.

2) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

3) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

117. In **De Souza v Vinci Construction (UK) Ltd** [2017] IRLR 844, the Court of Appeal suggested guidance be provided by the President of Employment Tribunals as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint presidential guidance updating the **Vento** bands for awards for injury to feelings. In respect of claims presented on or after 6 April 2021, the Vento bands include a lower band of £900 - £9,100; a middle band of £9,100 - £27,400; and a higher band of £27,400 - £45,600.

118. An award may also be made for financial losses sustained as a result of discrimination. Where loss has occurred as a result of the discrimination, tribunals are expected to award compensation that is both adequate to compensate for the loss and proportionate to it (**Wisbey v Commissioner of the City of London Police** [2021] EWCA Civ 650). The aim is to put the

claimant in the position, so far as is reasonable, that he or she would have been had the tort not occurred (**Ministry of Defence v Wheeler** [1998] IRLR 23)

119. The question is “what would have occurred if there had been no discriminatory dismissal… If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss“ (**Abbey National plc and anr v Chagger** [2010] ICR 397). In **Chief Constable of Northumbria Police v Erichsen** 2015 WL 5202327, it was ruled that what was required of the Tribunal was an assessment of realistic changes, not every imaginable possibility, however remote, and doing so “taking into account any material and plausible evidence it has from any source.“

120. There is a duty of mitigation, namely to take reasonable steps to keep losses sustained by a dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof where a failure to mitigate is asserted (**Ministry of Defence v Hunt and ors** [1996] ICR 554). It is insufficient for a respondent merely to show that the claimant failed to take a step that it was reasonable for them to take: rather, the respondent has to prove that the claimant acted unreasonably.

121. It may not be unreasonable for an employee to take himself out of the job market to pursue training or study. It will be appropriate for the Tribunal to consider whether that is a matter of personal choice and whether the loss may be considered to be too remote a consequence of the dismissal (**Simrad Ltd v Scott** [1997] IRLR 147, EAT, **Hibiscus Housing Association Ltd v McIntosh** UKEAT/0534/08).

122. The Tribunal may include interest on the sums awarded and should consider whether to do so without the need for any application by a party in the proceedings. If it does so, it shall apply a prescribed rate. The rate of interest in Scotland is prescribed by legislation and is currently 8% (The Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996).

123. The Regulations on recoupment of social security benefits do not apply to compensation for discrimination. Credit should, therefore, be given, where appropriate, for certain state benefits received during the period of financial loss.

5 *Recordkeeping (Employment Businesses)*

124. The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (CEAEBR) provides that employment agencies and employment businesses shall keep records for the period of at least one year from the date on which they last provide services to the applicant to whom the
10 records relate which are sufficient to show compliance with the Employment Agencies Act 1973 and CEAEBR (Regulation 29). Such records require to include certain prescribed information listed at Schedule 4 to CEAEBR.

Submissions

125. The claimant and Ms Fallone gave oral submissions. There was no material
15 dispute as to the applicable statutory provisions and legal tests. No authorities were cited by either party.

126. Many of the submissions made related to the evidence and the facts the tribunal was invited to find. These are summarized and discussed in the 'Observations on the Evidence' section.

20 127. Other submissions concerned with how the law should be applied to this case are summarized in the section discussing the relevant issue for determination.

Observations on the evidence

Credibility and reliability of witnesses

25 128. We found the claimant's evidence to be both credible and reliable. She gave her evidence in a straightforward way and offered a clear and detailed account of the sequence of events. Her evidence was consistent with any available contemporaneous documents to which we were referred, including emails and journal entries. Much of her evidence was not disputed by the

respondent, though the claimant's interpretation of events and the inferences she drew were strongly contested.

129. The respondent's principal witness, Mr Luximon, is employed by the respondent as an HR Business Partner. He had no direct involvement in events surrounding the claimant's application and its rejection on the basis of her birth certificate. He was given responsibility for investigating her complaint some six months after the events took place.

130. We had concerns both about the reliability of Mr Luximon's evidence and the credibility of certain aspects. One example which cast doubt on the reliability of his account related to his review of relevant documents in his investigation. Mr Luximon initially maintained in evidence that he had not received a copy of the email correspondence between the claimant and Ms Ospalkova and Lilly Crawford with the claimant's initial letter of complaint to the respondent dated 4 June 2021. He subsequently accepted this was incorrect. He similarly instructed Ms Fallone that the respondent had not retained the claimant's compliance documents, including but not limited to her birth certificate, and that these were not available to him during his investigation. The Tribunal accepted the claimant's evidence that, in fact, it was the respondent who produced these items for inclusion in the bundle. Ms Fallone had the opportunity to obtain instructions on the claimant's contention during an adjournment and we noted she did not pursue any challenge to the claimant's position when the hearing resumed the following morning.

131. Other aspects of Mr Luximon's evidence which gave concerns are discussed below under the sub-headings '*Who made the decision to reject the birth certificate?*', '*Mr Luximon's discussions with Ms Ospalkova's Team Leader*', and '*Evidence about other acceptances and rejections of birth certificates*'.

132. Ms Ozma Khan was also called by the respondent as a witness. She was a Team Leader in the respondent's Glasgow branch. It was the Central Resourcing function, as opposed to the respondent's branches, who managed the HMRC recruitment drive at the material time and Ms O Khan had no direct knowledge of the events surrounding the claimant's application

or the rejection of the birth certificate. As she put it, she had been asked to attend as a “character witness” for the respondent.

133. We had concerns about the credibility of Ms O Khan’s evidence in relation to one particular issue. Osma Khan gave evidence about the temps supplied through the respondent to HMRC from the Glasgow branch where she was based. A list of 35 individuals’ surnames had been lodged in the bundle. She said she knew six of them to be from a BAME background. During cross examination, Osma Khan said that she herself had sought out the evidence in relation to the ethnicities of the 35 employees. She was clear that she compiled the list and that she identified the 6 employees of non-white background. She said this was not information she would normally have had knowledge of in her mind in the course of her job.

134. The claimant noted that the list had been supplied by the respondent on 1 April and asked how Ms Khan knew that the information remained correct as at 1 July 2022, as she had asserted in her witness statement. Ms O Khan froze. She appeared taken aback by the question. After hesitation, she said, “*I don’t know the exact date or time I looked up this information*”. She was questioned further by the panel on the information she said she compiled. She appeared paralysed by basic questions. She was unable to answer when, even approximately within a margin of months, she had carried out the task. She hesitated for a long time during which she looked over to Mr Luximon, as though hoping for assistance. A similar response was elicited when the Employment Judge asked how long it took to compile the information. Ms O Khan said she was “trying to recall” but if she was honest, she could not remember.

135. We did not believe Ms O Khan’s evidence regarding her involvement in compiling the document. We concluded someone else within the respondent provided the data to which she referred in her witness statement. The data in question was of limited materiality, and it was of little materiality whether Ms O Khan prepared it herself as long as she could speak to the reliability of its source. Nevertheless, Ms O Khan’s overall credibility was undermined by her evidence on this issue.

Who made the decision to reject the birth certificate?

136. It was the claimant's case that Ms Ospalkova did not make the decision to reject her birth certificate.

137. Ms Fallone said it was for the claimant to supply relevant evidence that some unknown employee behind-the-scenes may have been the person who made the decision to reject her birth certificate. Ms Fallone noted that the claimant refutes the respondent's suggestion that Miss Ospalkova simply made a mistake. She said that the claimant founds on Ms Ospalkova's LinkedIn CV but asserts there is no other evidence that Miss Ospalkova couldn't have made the mistake.

138. Ms Fallone asked the tribunal to accept that a mistake by Ms Ospalkova (acting alone) was the more plausible and the more likely.

139. She referred to the witness evidence and said that Mr Luximon didn't say for certain that it was Ms Ospalkova who concluded the birth certificate was unacceptable, but he had spoken in evidence to the normal application process which was that the consultant who started the process saw it through to the end. She referred to the fact that most of the emails regarding the claimant's application were between the claimant and Ms Ospalkova. Ms Ospalkova owned the case, in Ms Fallone's submission. For Mr Luximon, there was no evidence that there was any other hand at work. As far as his evidence was concerned, there was no additional step; once Miss Ospalkova had accepted the applicant, she would just go straight onto assignment.

140. She submitted Mr Luximon's evidence has been consistent. She submitted he has supplied documents and given oral evidence. She suggested the Tribunal should give credence to the view he came to that Ms Ospalkova simply became confused because most applicants used passports.

141. We readily accepted that Ms Ospalkova did not make the decision to reject the claimant's birth certificate and that the reason given in her email for the decision was supplied to her by another, more senior member of the respondent's staff, most likely Ms Ospalkova's Team Leader.

142. The email of 16th November 2020 from Ms Ospalkova was quite clear: "*I was told that the birth certificate needs to be the original one which would have been issued right after your birth so dated the 1969 year.*" We did not accept that a plausible interpretation of those words was that Ms Ospalkova meant she had 'been told' by written guidance which she had herself consulted.

143. As well as the plain meaning of Ms Ospalkova's email, we considered there was other evidence which tended to support the conclusion that Ms Ospalkova followed the instruction of someone else in rejecting the birth certificate. We accepted the claimant's evidence that Ms Ospalkova told the claimant that it would not be up to her *whether* the claimant was going to succeed in eventually getting work early in the call on 29 October 2020. At the time of that call, Ms Ospalkova had been working with the respondent for only 10 days. It would be surprising if someone was not exercising supervision and oversight over her work. We accepted, broadly, the respondent's evidence that it was relatively rare for candidates to tender birth certificates as opposed to passports (though that evidence had limitations as discussed later). It was plausible and perhaps likely in those circumstances that Ms Ospalkova would seek the advice of a more senior colleague when such a document was provided if she had any doubts. We noted that Ms Ospalkova received the claimant's birth certificate on Thursday 12 November but did not return to the claimant until Monday 16th November 2020 in relation to the certificate tendered, despite having emphasized the urgency of the deadline which was: '*today/tomorrow latest*'. It would be consistent with her email to the claimant on 16 November that she had spent time in the intervening period obtaining guidance / instruction.

144. We noted that Mr Luximon, when he responded to the claimant's complaint on 1 July 2021 said this:

"…*Lucie was new to our business at the time, having joined us on 19 October 2020 and was still undergoing training. This, we believe, explains why she would have sought guidance when dealing with your application. We also believe that she would have spoken to her Team Leader at the time who is an experienced member of the team* …"

145. He and the respondent subsequently changed their position on this. In Mr Luximon's witness statement, no mention is made of the likelihood of consultation with a Team Leader and likewise this possibility is not mentioned by the respondent in its response on 8 April 2022 to a question about the reason for the rejection in EJ McManus's CMO dated 10 March 2022. We consider Mr Luximon's initial response in July 2021 is the more natural and candid interpretation of the evidence he had reviewed.

Mr Luximon's discussions with Ms Ospalkova's Team Leader

146. We had significant concerns about Mr Luximon's evidence to the Tribunal in relation to his interactions or otherwise with Ms Ospalkova's Team Leader. In his evidence in chief, Mr Luximon said little about what witness evidence he had gathered internally and from whom. He said only this, after discussing his final response to the claimant dated 1 July 2021:

"*I confirmed that following an investigation (telephone discussions with the Central Resourcing Function senior management) there was no evidence to suggest that Ms Ospalkova's rejection of the claimant's application was in any way motivated by discriminatory factors or practices*."

147. In response to a question from a panel member, he told us he had spoken to the head of the Central Resourcing Function and to the Team Leader. He said he became aware that Ms Ospalkova was no longer employed and he asked a few questions at the point when he became aware that the claimant's birth certificate was not, as he had erroneously imagined, a photocopy certified by a solicitor, but was issued by the general register office of the local authority where she was born. The claimant's email clarifying this was sent on 11 June 2021. During re-examination, he was asked if he knew of any disciplinary action against Ms Ospalkova and he told the Tribunal that he asked had asked the Team Leader and the Operations Manager about her and was told that "*she was effective and very good*".

148. When the Employment Judge asked who Ms Ospalkova's Team Leader was at the material time, he said that the name escaped him; that a couple of Team Leaders left, and that there was only one left. The impression given

was that it was not simply that someone's name had slipped his mind but that he purported to be confused as to which of three Team Leaders employed, or possibly no longer employed, in the Central Resourcing Team had been Team Leader to Ms Ospalkova.

5 149. We reviewed the contemporaneous correspondence. Mr Luximon's next email to the claimant after her email of 11 June clarifying the type of birth certificate was sent on 25 June 2021. It made no mention of speaking to anyone but commented only that he had been unable to speak to Ms Ospalkova.

10 150. In his subsequent email of 1 July 202, Mr Luximon said this:

"*I have made further enquiries with our Resourcing Team and can confirm that Lucie was new … and was still undergoing training. This we believe explains why she would have sought guidance when dealing with your application. We also believe that she would have spoken to her Team Leader*
15 *at the time who is an experienced member of the team* and *therefore Lucie's submission to you may have been as a result of her own misunderstanding, either arising from her interpretation of the guidance received or the information she had provided to her Team Leader initially"*

151. It is not readily apparent from this email whether Mr Luximon had, as at the
20 1 July 2021 (his final investigation response), spoken to Ms Ospalkova's Team Leader. That email suggests, by the use of the present tense, that Ms Ospalkova's Team Leader remained in the respondent's employment at that date. In contrast to his remarks in his investigation response of 1 July 2021, Mr Luximon's witness statement distances himself from the suggestion that
25 Ms Ospalkova would have consulted her Team Leader. He said this: "*In the event that the word "told" in Ms Ospalkova's email* [which said she was told the birth certificate was unacceptable] *relates to an oral discussion there is no indication as to who told her and whether this was a peer (who would also have been an inexperienced temp) or a line manager*."

152. Overall, we found Mr Luximon's evidence on his investigations with Ms Ospalkova's Team Leader to be sparse and confusing. We were concerned there was a deliberate lack of forthcomingness.

153. On the evidence before us, we concluded, on balance that Mr Luximon did have a conversation with Ms Ospalkova's Team Leader in the course of investigating the claimant's complaint at some stage after 11 June 2021. It is probable that he would do so, in circumstances where Ms Ospalkova had left employment and it appears her Team Leader remained employed. He told the Tribunal (eventually, during panel questions) that he did so though he purported not to know the individual's name. We do not accept Mr Luximon was unsure of the individual's identity. We do not accept that the brief evidence provided about the content of the conversation offered a full account of it.

Evidence about other acceptances and rejections of birth certificates

154. The evidence regarding other instances of the respondent rejecting or accepting birth certificates of the type tendered by the claimant (that is a certified copy issued by the Registrar) was very limited. Other than the claimant's own experience, we heard evidence about certain individuals who were said to have tendered certificates of this kind. One was an individual with the surname Fazakerley. Another was an individual whose name is unknown but who was the brother of the claimant's job coach, Susan MacDonald. We also heard from Mr Luximon that one of the successful applicants applying for the HMRC temp roles to start in November 2020 provided a birth certificate as evidence of the right to work.

155. In her submissions, Ms Fallone discussed the question of other applicants tendering birth certificates and said "*only a couple of other applicants had used birth certificates.*" She suggested that one of these was produced in evidence of another candidate with a name suggesting non-white ethnicity had been successful in using a birth certificate of the same type that the claimant tendered. It is understood Ms Fallone was referring here to the birth certificate of Fazakerely which the respondent had included in the bundle. It

is within judicial knowledge that Fazakerley is an English place name and we were not at all persuaded we could draw a conclusion of non-white ethnicity from that name alone.

156. Mr Luximon, in his evidence in chief, did not refer to Fazakerely's birth certificate which was included in the bundle by the respondent. On the subject of other certificates from different candidates, he said, "*of the successful applicants applying for the HMRC role [219-244] the Respondent's records indicate that only one other applicant provided a birth certificate as evidence of right to work*." He did not give details of that individual's identity or ethnicity.

157. During cross examination, the claimant asked Mr Luximon a series of questions about the list of successful applicants for the November start dates contained in the bundle. In that context, she then asked, '*Did you count ethnic minority birth certificates*?' When answering, Mr Luximon referred to Fazakerley's birth certificate and noted it was a birth certificate dated not in the year of birth which had been accepted and which was "*probably for an ethnic minority applicant*". From this answer and he context of the question, the Tribunal may have been forgiven for forming an impression that Fazakerley was a successful applicant appointed specifically in November 2020 to the HMRC contract.

158. However, it was notable that Mr Luximon had not named Fazakerley as being the birth certificate individual from hat recruitment drive to whom he referred in his witness statement. On reviewing the list produced of successful applicants for HMRC in November 2020, we noted Fazakerley was not among them.

159. It was not elucidated why Fazakerley's certificate came to be before us in circumstances where the certificate of the successful individual in the HMRC November 2020 drive was not. Fazakerley's certificate was included in the bundle and had previously been sent to the Tribunal by the respondent along with a response to a Case Management Order on 1 April 2021. The Order did not require the respondent to produce any birth certificate. With reference to Fazakerley's certificate, the respondent's solicitor said "*Brook Street have*

provided an example of where a birth certificate was accepted for a candidate where the certificate was a certified copy (i.e. was not from their date of birth)". He did not suggest this certificate belonged to a successful candidate placed with HMRC in November 2020. He described it as "an example", perhaps implying there were others. In a subsequent email to the Tribunal dated 8 April 2021, however, he said, "*Aside from the applicant (Fazakerley) who applied with a birth certificate … the respondent's checks have indicated that all other applicants have provided either a passport or biometric ID card*". The context of the paragraph seemed to suggest Fazakerely was an applicant for the HMRC November vacancy. If such was indeed the respondent's solicitor's understanding, the evidence before us at the hearing did not support this.

160. Mr Luximon and Ms Fallone posited that the name Fazakerley is suggestive of an ethnic minority background, though no direct evidence has been adduced of the individual's ethnicity. We reject the proposition that the name in and of itself is suggestive of a non-white ethnicity as it is within judicial knowledge this is an English place name. It would be less than ideal to infer the individual's ethnicity from their name alone. We have, therefore, been unable to make a finding, on the evidence before us, about the ethnicity of Fazakerley.

161. We accept on the balance of probabilities that Fazakerley was successfully placed on an assignment with some client through the respondent at some time following the provision of a certified birth certificate issued by the Registrar as opposed to a passport. Fazakerley was not, however, placed with HMRC in November 2020. There is no basis for any finding that Fazakeley was placed by Ms Ospalkova or on the instruction of the senior employee who instructed Ms Ospalkova to reject the claimant's birth certificate.

162. The birth certificate of the successful candidate to whom Mr Luximon referred in his witness statement among the 1,227 appointed who were placed with HMRC in November 2020 was not produced in evidence and nor was he or she named. We are not able to make any findings as to that individual's ethnicity or which consultant processed their application.

163. Turning to Susan MacDonald's brother, the evidence regarding this candidate's experience was also limited.

164. Ms Fallone made a number of criticisms of it. She pointed out the claimant did not see Ms McDonald's brother's birth certificate or speak to Ms McDonald's brother. She only had, said Ms Fallone, third-hand evidence. Such evidence, filtered through others was inherently unreliable. It was not possible to test the comparison or to identify if there was any material difference in their circumstances. No witness statement had been tendered by Ms McDonald or by her brother.

165. We accept the claimant's evidence that Susan MacDonald was white and find on the balance of probabilities that her brother was white. We further find on the balance of probabilities that the respondent accepted his birth certificate which was issued as a certified copy by the registrar sometime after the original registration as PORTW. It is less than ideal that we do not have a witness statement from this individual or a copy of the accepted certificate and associated correspondence between him and the respondent. However, we note that the respondent itself accepts that a birth certificate of the type he is said to have tendered is a valid document for PORTW. Such documents ought to be accepted. The respondent is a large employment agency which processes thousands of applications. It is highly probable that it has accepted valid birth certificates which accord with its guidance. We accept the claimant's account of her conversation with Ms MacDonald which was detailed and specific as to the type of birth certificate her brother provided. On the balance of probabilities, we accept Ms MacDonald represented the position correctly to the claimant and that the respondent accepted her brother's birth certificate which was a certified copy issued by the registrar.

166. There is no basis to find that Ms MacDonald's brother was one of the applicants for the HMRC roles due to start in November 2020. It is not possible to identify to which client he was assigned or applied to be assigned. There is no basis for a finding that Ms MacDonald's brother's application was processed by Ms Ospalkova or on the instruction of the senior employee who instructed Ms Ospalkova to reject the claimant's birth certificate.

167. There was no evidence before us about birth certificates which may have been tendered by unsuccessful applicants for the HMRC roles starting in November 2020 or their ethnicities, other than the claimant.

Statistical evidence

168. Certain statistics were adduced to the Tribunal by both the claimant and the respondent.

169. Ms Fallone disputed the relevance of at least some of the statistical material. She observed that the proceedings had been protracted and it had been difficult to get to the point now reached in terms of the pleadings. The bundlewas, she said, reflective of that process. She contended it was compiled when it was thought that the claim included a complaint of indirect race discrimination which was subsequently withdrawn. Consequently, she submitted, many of the documents in the bundle were not relevant to the claim as it now stands.

170. She refuted, in particular, the relevance of the claimant's HMRC statistics and of the claimant's evidence criticising the respondent's monitoring and data collection. She said the claimant had made direct and oblique references to observations about the respondent's data. Ms Fallone observed that statistics don't speak the truth of themselves and need to be seen in context. If they were to be used, she argued, the claimant had to identify the relevance. She said the claimant had made no causal link between the respondent's alleged discriminately acts and its failure supply a diversity monitoring form to the claimant. In the respondent's submission, any failure to do so did not make it any more or less likely that it committed the two alleged of discrimination. The claimant, for her part, pointed out that the respondent had sought to introduce statistics about its ethnic breakdown and EOP and she considered it was relevant to challenge the statistics and the respondent's practices. With regard to the HMRC data, she pointed out its Scottish workforce was very non-diverse. She believed the statistical data may assist the Tribunal to draw an inference of discriminatory treatment.

171. We considered that there would be a danger of excluding the material before having heard all the evidence in the case. Having done so, we considered it necessary to make clear findings of facts about circumstantial evidence raised by the claimant so as to have material from which we could properly determine whether any inference is capable of being drawn (**Anya**). It is true that the use of statistical evidence to establish a presumption of discrimination is most common in claims of indirect discrimination. Nevertheless, it has the potential to be relevant in direct discrimination cases (**Singh**). Having made findings of fact in relation to the data, the probative value of those statistics is analysed later in the decision when Ms Fallone's crticisms of their evidential value are considered further.

172. The exception is the data spoken to by Osma Khan. We did not accept her evidence regarding how or when that data was produced. We did not feel able to make meaningful findings in fact in circumstances where we did have credible and reliable evidence before us regarding its source, date of collation, or the date at which the data was said to be accurate.

Respondent's compliance with EJ McManus' CMO

173. The claimant criticised in her submissions certain evidence which was produced by the respondent in response to an Order made by EJ McManus dated 10 March 2022. The relevant part of the Order was in the following terms:

Documents

By 1 April 2022 *the respondent shall provide to the claimant and to the Tribunal their Diversity and Monitoring Information in respect of the application process for the vacancy of HMRC administrator based in Glasgow, that vacancy having been advertised in October 2020.*

174. The respondent by email of 1 April 2022 supplied what it described as "*Brook Street HMRC Supply Spreadsheets (one for Nov 23rd Start Date and one for November 30th Start Date) (redacted)*". This comprised two lists of surnames, one of individuals starting on 23 November and one of individuals starting on

30 November 2020. In the covering email, the respondent's solicitor stated "*Brook Street have reviewed the named temps onboarding documents and have indicated where this individual is from an ethnic minority background*." A column was included for both lists with the word "Yes" inserted for those identified as being from an ethnic minority background. No further details of the individual's ethnicity (including whether they were BAME) was supplied. The total number of employees listed was 1,227.

175. Mr Luximon referenced the lists in his witness statement, though he did not explain who had collated the document, what geographical areas it included or how the data on ethnicities had been obtained. During cross examination, Mr Luximon gave evidence that the lists supplied related to candidates recruited across the UK and was not limited to Glasgow as the call in the Order had specified.

176. The claimant complains that the respondent could have provided the data for applicants allocated to Glasgow. She noted that as part of the process, all applicants required to submit their closest HMRC location in the subject heading of their email application. She also referred to two sample CRT forms the respondents had produced which showed a question and response about the candidate's preferred HMRC location. The respondent had access to the data and, in the claimant's submission, had a duty to produce the statistics for Glasgow specifically, but had failed to do so.

177. She also criticised the respondent's approach to collating the data. Mr Luximon admitted in his evidence that not all of the employees from ethnic minority backgrounds were identified through the voluntary return of diversity monitoring forms. Some were identified because of the respondent's knowledge or belief regarding the individuals' ethnicities which the claimant complained was poor practice. She further criticised the failure to anonymise the data which she argued was contrary to the Equality and Human Rights Commission Code of Practice on Employment.

178. Ms Fallone hoped that the tribunal was satisfied that the respondent had attempted as best it could to comply. There had, she said, been voluminous

exchanges between the respondent's solicitor and the claimant and that they had tried to meet her expectations in providing relevant evidence.

179. We agree with the claimant that it is unsatisfactory that the respondent did not, when responding to the Order in April, make clear in its response that the data provided was not limited to the application process for the HMRC Administrator based in Glasgow as the Order had called for and that this was not clarified until Mr Luximon's cross examination. Whether this evidence has any probative force in the drawing of an adverse inference is discussed later in the decision.

180. With respect to the claimant's other criticisms, we consider it important to bear in mind that the information / documentation was supplied in response to an Order as opposed to being voluntarily disclosed by the respondent to a third party. The Order called for "*their* [i.e. the respondent's] *Diversity and Monitoring Information in respect of the application process for the vacancy … with due start date in November 2020*". It did not invite (or, arguably, permit) the respondent to restrict the information covered by the call by anonymisation or by limiting it to information derived from voluntarily returned monitoring forms.

Evidence about the claimant's past experience

181. Ms Fallone argued that much of the claimant's evidence referred to past experience of racism generally and struggles in trying to obtain work. She submitted that the respondent is only accountable for its own behaviour.

182. We accept this submission. The claimant's past experiences prior to her application to the respondent are not relevant to the issues which the Tribunal requires to determine. We make no criticism of the claimant in this regard. She is a litigant in person. However, we have made no findings in fact in relation to those parts of her evidence on the basis that they are not relevant.

Lilly Crawford

183. The claimant criticized the respondent's failure to investigate the matter with Lilly Crawford or to obtain a witness statement from her. She argued they had ample opportunity to do so before Ms Crawford left their employment.

5 184. Relevant correspondent was exchanged between the parties on this issue on 12 April 2022 and is narrated in the 'Findings in Fact' section at para **[80-81]**.

185. Ms Fallone asserted the respondent was not put on notice of Lilly Crawford's involvement until a late stage. While the respondent is not insisting on arguing the time bar point in relation to the telephone call on the 4th of November 10 2020, she refuted the criticisms about the failure to investigate with or call Lilly Crawford. She noted that there was an oblique reference in the ET1 about a call on 2 November but no mention of Lilly Crawford.

186. No issue involving Lilly Crawford was pleaded, said Ms Fallone, until the preliminary hearing on Case management on 22 March 2022 when the 15 claimant supplied further and better particulars. However, it was the claimant's witness statement, supplied in July 2022, which gave the first opportunity for the respondent to have a full understanding of Lilly Crawford's alleged involvement. The respondent was not, said Ms Fallone, put on notice that there was a concern that another employee may be behind the acts of 20 discrimination. By the time this was realised, Lilly Crawford had left the respondent's employment.

187. We acknowledge Ms Fallone's points about the pleadings and their evolution, but we don't accept the underlying proposition that a claimant requires to have reached the stage of pleading an alleged perpetrator's involvement in a 25 discriminatory act before they are entitled to ask a respondent or putative respondent for more information about the circumstances of their rejection for a vacancy. The statutory Discrimination Questionnaire procedure no longer exists, but a claimant may still seek information from a respondent or potential respondent and the Tribunal may still consider any relevant questions and 30 answers as part of the evidence in a case. Depending on the facts and circumstances, a putative employer's refusal to grant access to information

about a recruitment process may be one of the factors to be taken into account in the context of establishing a *prima facie* case of discrimination (**Meister**, **Kelly**).

188. Before her correspondence on 12 April 2022, the claimant had on 4 and 14 June 2021 written to the respondent saying "*I believe that whoever made the decision to reject my application was unfair and this was unacceptable and I believe my application was given less favourable treatment because of my ethnicity*…" It was manifest that the claimant did not accept Ms Ospalkova was the decision-maker and her subsequent questions on 12 April were asked against that backdrop. Whether the respondent's omission to respond lends any probative value to her case is considered in the coming sections in relation to each of the alleged acts of discrimination.

Discussion and decision

Time bar – 4 November 2020 Call

Was the claimant made within a further period (beyond the normal time limit) that the Tribunal thinks is just and equitable?

189. The claimant submitted that the tribunal has a wide discretion to extend the time limit and can take account of anything relevant. She accepted that the time limit was not met. She explained that the conversation with Susan McDonald in May 2021 was fundamental in influencing her thinking that she had a complaint to make. She submitted that she did not delay in making a complaint once she found out that she had a comparator. In the claimant's submission, the phone call on the 4th of November 2020 and the subsequent rejection of her birth certificate on the 16th of November 2020 were intertwined, both forming part and parcel of the same application process

190. The claimant said that the knowledge she obtained from Susan McDonald about her brother's treatment pointed to the "something more" that led her to seek a declaration in terms of her rights. She argued that, having explained the reason for the delay, the cogency of the evidence would not be affected

by the delay if the matter were allowed to proceed. The respondent was placed on notice of the claims six months after the events took place.

191. The claimant pointed out that the records ought to have been retained for one year. She had taken advice promptly and contacted ACAS promptly.

5 192. The respondent declined to make any submissions on the time bar issue and recorded only that the evidence had been heard and it would be for the tribunal to decide, using its discretion, whether it was just and equitable to extend time.

193. The normal time limit expired on 3 February 2021. The claimant initiated the 10 Early Conciliation process on 15 June 2021, a little over four months late. She lodged her ET1 on 1 July 2021. The original ET1 did not identify the statutory provisions relied upon but did narrate the alleged call, albeit with the erroneous date of 2 November 2020. It was clarified at a PH on 22 April 2022 that the claimant asserted this was a discriminatory act of itself.

15 194. We accepted the claimant's unchallenged evidence that her conversation with Susan MacDonald on 26 May 2021 caused her to revisit and reframe events of November 2020 and that she regarded the call on 4 November 2020 as part and parcel of the same recruitment process about which she developed concerns following Ms MacDonald's disclosures. We accepted 20 that the claimant acted promptly thereafter in taking advice and in seeking to obtain an explanation of her treatment with respect to the birth certificate.

195. We considered whether the cogency of the evidence was likely to be affected by the delay. The respondent was on notice of that the claimant was complaining about the early November call from 1 July 2021 when she 25 submitted her ET1. It was on notice from that date that she was complaining that she felt the caller was calling to check up on her level of English and that she was concerned that candidates with less foreign sounding names may not have received such calls.

196. If this particular complaint were not allowed to proceed, the claimant would be deprived of the opportunity to have the matter litigated and judicially determined. The respondent, on the other hand, would suffer relatively little prejudice if the claim were allowed to proceed. It required in any event to defend a claim arising from the rejection of the birth certificate for which time had previously been extended by EJ Sorrell. It had already had to prepare for and attend a final hearing in that regard. The hearing was not substantially extended by the inclusion of evidence and submissions on the 4th November Call. The claimant would be entitled to lead such evidence in any event as pleaded background the other act of discrimination she alleged.

197. Having weighed all relevant factors, we were satisfied that it is just and equitable to extend the time to lodge the complaint concerning the 4th November Call. The Tribunal, therefore, has jurisdiction to hear that complaint.

16th November Rejection of birth certificate and omission to consider her further for role

On 16 November 2021, did the respondent reject the claimant's birth certificate as evidence of her right to work in the UK and omit to consider further her application for a role with their client, HMRC?

198. The respondent did so. This is not in dispute.

Were these acts or omissions less favourable treatment because of the claimant's Pakistani ethnicity?

Claimant's submissions

199. The claimant invites the Tribunal to draw an inference of discrimination and relies on the following matters:

(i) Conduct she said was equivocal or evasive by the respondent, including Mr Luximon's failure to interview Ms Ospalkova and the respondent's failure to obtain a witness statement from Ms Ospalkova's Team Leader;

(ii) The respondent's failure to implement aspects of its diversity policy;

(iii) The respondent's failure to comply with EJ McManus's call for diversity and monitoring information in Glasgow;

(iv) The respondent's failure to interview Lilly Crawford and obtain a witness statement from her;

(v) The respondent's omission to provide, when requested, information about Ms Crawford's role in her application process

(vi) The respondent's failure to retain records

Respondent's submissions

200. Ms Fallone noted that the burden initially sat with the claimant to prove facts from which the Tribunal could properly conclude discrimination occurred. She said that the 4th November Call and the 16th November Rejection involved, to the respondent's knowledge, two separate employees and should be analysed separately and dealt with on an individual basis for each allegation.

201. Ms Fallone said most facts were agreed with respect to the birth certificate. The respondent did not accept the certificate. It also accepts that Ms Ospalkova's reason did not meet the required standard. She noted the claimant's evidence that she thought it was ridiculous that her birth certificate was refused and that had not been refused for any other job application. She noted her evidence that she did not consider it discriminatory at the time but wondered if compliance for HMRC was higher than that required for other employers. It was only from a later conversation with her job coach that she suspected discrimination.

202. Ms Fallone made criticisms of the claimant's evidence regarding Ms MacDonald's brother as a comparator and invited the Tribunal to reject this. She further invited the Tribunal to find that Ms Ospalkova herself, without other intervention by anyone else at the respondent, made the decision to reject the birth certificate. These submissions have been discussed in the 'Observations on the Evidence'.

203. Ms Fallone said that when the claimant first complained to Mr Luximon, it was not immediately apparent that the birth certificate she had sent to Ms Ospalkova was an original certificate. He thought she was referring to a copy certified by a solicitor. Once it became apparent that the claimant's birth certificate was indeed acceptable, Mr Luximon said he was sorry; it shouldn't have happened.

204. Ms Fallone noted that the claimant had been clear that she did not suggest that Ms Ospalkova had acted out of any racist motivation. The respondent's position is that this claim is unsubstantiated and should be accorded little weight.

Discussion and decision – Was the 16th November Rejection discriminatory?

205. We do not accept that we ought to analyse the two alleged acts and background evidence involving different individuals in isolation of each other. We reminded ourselves that a fragmented approach can have the effect of 'diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds'.

206. In respect of the 16th November Rejection, we do not consider this to be a case where we were in a position to make positive findings that discrimination has been proved or disproved without resort to the provisions of section 136 on burden of proof.

207. Under Stage 1, the claimant must show facts from which a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was a discriminatory act. We should take into account all facts and evidence available at this stage; not only those which the claimant has adduced or proved. Inferences may be drawn not only from the specific incidents and acts detailed in the claimant's claim taken in isolation but also from the full factual background of the claim, including evidence about the conduct of the respondent. The respondent's explanation is, however, to be left out of account.

208. Only if we conclude that such facts are proved do we move to the second stage to consider whether the respondent has proved there was no discrimination whatsoever in relation to this act.

209. Having carefully considered all relevant facts, we conclude that the claimant has succeeded in surmounting Stage 1. We consider we could properly draw an inference that the rejection of the certificate and failure to consider the claimant's application further was discriminatory from the following matters:

(i) The claimant is of Pakistani ethnicity. Her ethnicity was known to Lucie Ospalkova. It is apparent on inspection of her birth certificate and likely to be inferred from her name alone.

(ii) The respondent rejected her birth certificate, which was tendered to Ms Ospalkova as PORTW and to Lilly Crawford to support of her DBS application.

(iii) The claimant was well qualified by the role and Ms Ospalkova had commented favourably on her responses during the screening call.

(iv) The respondent knew the claimant had a history of working in the UK, including for public sector employers

(v) Ms Ospalkova invested not an inconsiderable commitment of time and effort in taking forward the claimant's application between 29 October and 16 November 2020.

(vi) Ms Ospalkova had told the claimant she was putting her forward to "the next stage of compliance".

(vii) The decision to reject the birth certificate was not taken by Ms Ospalkova but by another, more senior employee of the respondent, most likely her Team Leader The reason for the rejection stated by Ms Ospalkova in her email (that it had to be issued in the calendar year of the claimant's birth) was told to Ms Ospalkova by that individual.

(viii) The rejection of the birth certificate was wrong. The stated reason for it was not in accordance with the respondent's internal guidance issued to employees who processed PORTW and DBS. The birth certificate tendered was valid for PORTW and DBS compliance.

5 (ix) In any case, the PORTW guidance allowed the possibility of using an expired passport instead. Ignoring the birth certificate, the claimant had already satisfied the requirements of the DBS guidance with other documentation tendered.

(x) At least three employees of the respondent knew of the decision to
10 reject the claimant's birth certificate and the reason given to the claimant for it. These were the person who instructed Ms Ospalkova, Ms Ospalkova herself, and the 17th November caller. None of them identified the incorrectness of the decision.

(xi) Ms Opalkova's email on 16 November 2022 was strangely cursory
15 and final, having regard to the time she had invested in the claimant's application. It did not explore alternative documents the claimant could provide when alternative routes to compliance existed. The 17th November Caller did not explore this either when the claimant narrated the birth certificate's rejection to her.

20 (xii) There were inconsistencies in Mr Luximon's evidence regarding whether he believed the claimant's Team Leader was consulted.

(xiii) The only individual who had a similar type of birth certificate accepted by the respondent and whose ethnicity is known (S MacDonald's brother) was white, albeit it is not known what role he
25 applied for or what consultant processed his application.

(xiv) Mr Luximon's evidence's regarding his discussions with Ms Ospalkova's Team Leader was not found to be clear and his professed lack of certainty over the individual's identity was not found credible.

(xv) We had other concerns about certain aspects of the respondent's evidence, as listed below. Any of these, viewed in isolation, may have been unlikely to have contributed towards our drawing an adverse inference. Cumulatively, however, we were concerned they pointed to a pattern or an approach which was neither forthcoming nor straightforward.

(a) The asserted failure to retain records of the claimant's application in apparent breach of legal obligations under the CEAEBR 2003.

(b) The lack of specificity in Mr Luximon's evidence regarding which documents were, in fact, retained and when they were first accessed.

(c) The opaqueness of the respondent's evidence surrounding other birth certificates of the same type which had been accepted and ethnicity information in relation to the applicants who tendered them.

(d) The production of a significant document, the respondent's PORTW guidance, in an illegibly small font.

(e) The respondent's refusal to respond to the claimant's questions, asked on 12 April 2022, about whether anyone else at the respondent was consulted about her application and about Lilly Crawford's role in processing her application.

(f) Ms O Khan's provision of evidence to the Tribunal which was found not to be credible about her involvement in the collation of certain data.

210. From the above facts, we concluded the Tribunal could properly infer, ignoring the respondent's explanation, that the decision maker who instructed the rejection of the birth certificate and who, like Ms Ospalkova, put forward no alternative compliance options, was motivated consciously or unconsciously,

by the claimant's ethnicity. It is not necessary that it can be inferred this was the sole reason as long as it can be inferred it was a significant cause of the treatment. We consider it could be inferred that the decision maker treated the claimant less favourably than they would have treated a white candidate in the approach to assessing her birth certificate against the requirements of the guidance and in their failure to explore alternatives.

211. The evidence regarding the other individuals who had birth certificates accepted is sparse. The claimant has referred to Ms MacDonald's brother but has invited us to construct a hypothetical comparator in the event he is not suitable. We consider the correct hypothetical comparator is an individual:

(i) of white British ethnicity

(ii) who tendered a birth certificate issued as a certified copy by the General Registrar, showing they were born in the UK, as PORTW.

(iii) who applied for the same role

(iv) who was equivalently qualified for the role

(v) in whose application a similar amount of time had been invested by the consultant dealing with the process

(vi) who similarly had a CV showing experience of working in the UK, including for public sector bodies

212. There was no evidence regarding whether Susan MacDonald's brother had the characteristics listed, other than (i) and (ii). Neither is the evidence regarding the two other individuals who had birth certificates accepted of assistance since we do not have evidence of the circumstances of their applications or of their ethnic backgrounds.

213. We consider the Tribunal could, ignoring the respondent's explanation, infer that a hypothetical comparator, constructed as described, would have been treated more favourably from the factors identified at paragraph **[210]**. We do not infer this from the unreasonableness of the respondent's conduct alone,

though we do observe that the respondent's decision was surprising having regard to its own guidance. The respondent's solicitor describes it as an "*unusual request from Lucy Ospalkova" and* argues (in the context of remedy) that the failure to query it or raise a complaint was an unreasonable failure by the claimant. It was unreasonable for the respondent's employees whose job job roles were concerned with the processing of compliance documentation or the overseeing of that processing to reject the birth certificate and not to explore alternatives. We do not, however, infer discrimination from that alone. It is the cumulative effect of the primary facts we have identified which leads us to such an inference.

214. There a number of matters to which the claimant invited us to give weight which did not prove material, in all the circumstances of the case, to the inference drawn. The respondent's failure to call Ms Opalkova and Lilly Crawford as witnesses did not contribute to the adverse inference drawn. We noted their employment had ended before the claim was lodged.

215. We did not ultimately find the respondent's failures with respect to the sending out of diversity monitoring forms as envisaged by its Diversity Policy to have probative value, on the facts here. We agreed with Ms Fallone that this did not make it more or less likely that the discrimination took place, having regard to all the facts found. This was not a case where the totality of those facts pointed to a systemic rejection of BAME applicants or their documents at a company-wide or project-wide level, or even at the level of the individual consultant. We accepted that between 22 and 28% of candidates recruited for the HMRC posts were from a BAME background and that the percentage was higher for Ms Ospalkova's recruits. There was no meaningful evidence before us to indicate those percentages were concerningly low. We accepted Ms Fallone's concerns about the dangers of reading too much into statistical material without appropriate context.

216. Similarly, we did not ultimately find the HMRC statistics to have evidential value in the overall context of the case. It was not clear that those statistics included employees of the respondent assigned to HMRC at all and the other

evidence in the case did not support any finding that HMRC had involvement in the decision to reject the claimant.

217. Although we agree it was unsatisfactory that the respondent did not clarify the data provided in response to EJ McManus's Order was not limited to Glasgow as the Order had required, we did not consider this was a matter which tended towards the inference of *prima facie* discrimination in all the circumstances.

218. Turning to Stage 2, we require to determine whether the respondent has shown that the claimant's treatment was 'in no sense whatsoever' because of the claimant's ethnicity. Mr Luximon has explained his assessment of events that it was a genuine mistake, likely at by Ms Ospalkova's instance alone, likely based on a poor reading of the guidance. We have found as a matter of fact that the rejection was not Ms Ospalkova's decision but was on the instruction of another more senior employee.

219. We have not heard the evidence of either Ms Ospalkova or the individual who instructed her to reject the certificate. We do not know the identity of that individual. The claimant's evidence was that she found Ms Ospalkova to be "*thorough*". Ms Ospalkova described herself in her LinkedIn as including "*resolving various errors and assisting other team members with her compliance knowledge*". The respondent's evidence is that her Team Leader said she was "*effective and very good*".

220. We are not satisfied that the respondent has shown, on the balance of probabilities, that the reason for the rejection was Ms Ospalkova's (or anyone else's error), or, even if it was, that the approach taken to the matter was free from unconscious racial bias.

221. We find, in those circumstances, that the rejection of the claimant's birth certificate and omission to consider further her application was less favourable treatment because of the claimant's race, contrary to section 13 EA.

Was 4th November Call discriminatory?

Did the respondent, on or about 4 November 2020, telephone the claimant to assess her spoken level of English?

222. The Tribunal has accepted the claimant's evidence that the call took place on 4 November 2020 as the claimant described. The claimant's job search journal supported her account of the call. She has consistently referred to the call in her pleadings, further particulars and witness statement. Her description to the Tribunal of the conversation was detailed.

223. The call was short and the caller only made enquiries about information already provided on the claimant's CV and about the precise whereabouts in London of the claimant's school, and the spelling of the place name. The caller did not elucidate the relevance of this geography to the claimant's application. Given the call's content and the absence of any other apparent purpose, we accept, on the balance of probabilities, that the purpose was to assess the claimant's telephone communication skills which entails an assessment of her spoken English.

Was this act less favourable treatment because of the claimant's Pakistani ethnicity?

Claimant's submissions

224. The claimant relied on her own evidence and invited the Tribunal to draw adverse inferences from the same matters to which she referred in relation to the allegation concerning the 16th November Rejection which are listed at paragraph **[200].**

Respondent's submissions

225. Mrs Fallone noted the call was short and the claimant's evidence was unclear as to the caller's identity. The respondent says its practice was to assess candidates to check on their standard of telephone conversation skills and that this is not discriminatory. The claimant knew the job was homeworking and would involve telephone work. It was undisputed by the claimant that this was perfectly appropriate. It was the claimant herself who had put her school

details on her CV, so it was not unreasonable for the respondent to ask her about her school.

226. Ms Fallone noted the claimant relies upon a hypothetical comparison and does not accept that the process was the same for all applicants. She submitted that this should be treated as a bare assertion. She suggested that Mr Luximon's evidence was that all applicants were treated the same. The respondent was under pressure on that particular contract, and had a substantial number of applicants to process in a tight time scale. The claimant was almost good to go, according to Ms Fallone. She referred the Tribunal to Osma Khan's evidence that her consultants normally saw their applicants through from the beginning to the end of the process but that it could involve more than one call. She also referred to Ms O Khan's evidence that it was the consultants who were responsible for deciding if compliance was met.

227. The claimant has not made out a *prima facie* case, in Ms Fallone's submission, but, in any event, the respondent has supplied an explanation for the act.

Discussion and decision – Was the 4th November Call discriminatory?

228. We accept that the purpose of the call was to assess the claimant's spoken English as part of her telephone communication skills. The claimant has accepted that, for a telephone-based role like the one for which she had applied, this was in order. She does not assert, as we understand it, that other candidates of white ethnicity were not subjected to a screening call, part of the purpose of which was to assess their telephone communication skills. The claimant's case, we understand, is that she was treated less favourably by being subjected to an *extra* screening call, over and above her initial call with Ms Ospalkova on 29 October 2021 for this purpose. We require to determine if the 4 November Call was an additional step in the because of the claimant's ethnicity.

229. We are not in a position to make positive findings that the reason for the alleged ‘extra’ call was discriminatory or that it was not and we, therefore, require to apply the burden of proof provisions.

230. Under Stage 1, we should take into account all facts and evidence available leaving out the respondent’s explanation.

231. We considered the totality of the facts established, not just those adduced by the claimant or those which she invited us to give weight to in her submissions. We did not analyse this allegation in isolation of the facts relating to the 16th November allegation. That said, we do consider relevant Ms Fallone’s submission that there was nothing to suggest that the individual who instructed Ms Ospalkova in relation to 16th November rejection of the birth certificate was the same individual who called the claimant on 4th November.

232. We considered the correct hypothetical comparator to be an individual:

(i) of white British ethnicity

(ii) who applied for the same role

(iii) who was equivalently qualified for the role

(iv) in whose application a similar amount of time had been invested by the consultant dealing with the process

(v) who had already had, and successfully progressed beyond, a screening call by one of the respondent’s consultants

233. In relation to the call, there was no evidence before us regarding treatment of any actual or an ‘evidential’ comparator whose material circumstances might differ, but whose treatment could assist in providing an indication of how a hypothetical candidate, constructed as described, would have been treated.

234. We considered whether we could infer this from all the facts and evidence. We noted that the call on 4th November 2020 appeared to sit outside the respondent’s usual process as described by Ms O Khan and Mr Luximon. Ms

O Khan's evidence, however, related to the practice working under her in the branch, not in the Central Resourcing Team. The other evidence we have heard and accepted showed, however, regardless of the respondent's standard process in their Glasgow branch, the claimant's application was not processed by a single consultant. This was not only manifest from the 4 November Call. There was a division of labour in the process followed in relation to the application which was dealt with remotely by the Central Resourcing Team. Some documents were to be sent to Ms Ospalkova and others to Ms Lilly Crawford (with resulting duplication in relation to the claimant's provision of her birth certificate). There were calls from Ms Ospalkova and at least one, possibly two, other employees.

235. Where tasks are divided up in this way, there may be scope for efficiencies but also for duplication or for 'balls to be dropped'. We make no finding that the involvement of multiple actors provides a non-discriminatory explanation for the call, but we consider that the way in which the work for this high-volume project was organised provides relevant context. It is against this backdrop that the claimant must establish facts from which we could infer she was treated differently.

236. Having regard to the facts in the round, once again, we were not persuaded that the statistical data or the respondent's practices regarding its Diversity and Inclusion Policy provided indicators that the claimant had been treated differently in being subjected to an additional screening call. Nor did we consider the non-compliance with EJ McManus's Order in respect of the failure to restrict the data produced to Glasgow candidates had any probative value with regard to the 4 November allegation. We were also not persuaded any inference could be drawn from the failure to call Ms Ospalkova or Ms Crawford, who had left when the claim was lodged, as witnesses.

237. We recognise that direct evidence will be rare. We considered carefully the respondent's asserted failure to retain records of the claimant's application including the notes of the 4 November call itself, as well as the respondent's refusal to answer questions put by the claimant on 12 April 2022 regarding whether anyone else was involved in the process and the role of Lilly

Crawford. We considered these matters within the overall context of all the other established facts including the concerns about aspects of the respondent's evidence identified in the discussion relating to the 16th November allegation. However, on assessing the totality of the evidence, we did not conclude that the 'something more' has been established from which we could infer that the 4th November call was different treatment because of the claimant's protected characteristic.

238. A *prima facie* case of discrimination with respect to the 4 November Call has not been established. As such, the burden of proof does not shift to the respondent to prove the absence of any discrimination in relation to it. This complaint does not succeed and is dismissed.

Remedy

Financial Losses

239. The claimant claims financial losses between November 2020 and 1 September 2021 when she obtained alternative employment. She claims the earnings she would have received ha she been appointed by the respondent to the HMRC assignment. She maintains that she has discharged her duty to mitigate her losses. In this regard, she points out that, she was in receipt of Universal Credit and her work coach at the Job Centre was satisfied with her job search efforts. She referred to her schedule of loss and documentation in the bundle supporting the applications made and her endeavours with regard to securing a return to the teaching profession.

240. She addressed the period of the lockdown between January and March 2021, when schools closed, and her children were at home. She considers her employment with HMRC would have been maintained during this time. She explained her children had always pulled together to help her manage life around work. She noted the HMRC post was home-based and that those appointed were supplied with technology for the job. She envisaged this would have assisted with the demand for devices in her household required during the period of home schooling.

241. With respect to the applications she made, she explained that she was not simply sending out the standard template application but in every case was getting her applications to the job description the in the notices.

242. Ms Fallone sought to adopt the arguments put forward by her instructing solicitor said to be in an email at page 112 of the bundle. That particular email (dated 12 April 2022) did not deal substantively with mitigation issues. We identified that two other emails produced in the bundle dated 8 April 2022 and dated 20 May 2022 which set out arguments on mitigation. These can be summarised as follows:

   (i) The respondent contends the number of jobs the claimant applied for in the 12-month period was low. This was suggested to average two applications per month.

   (ii) The claimant failed to query what the respondent's solicitor described as an "unusual request from Lucy Ospalkova" or to "raise a complaint". He said it would have been reasonable for her to do so and the omission was a failure to mitigate.

   (iii) The claimant ought to have applied for a passport as she was aware one would be accepted;

   (iv) The claimant's failure to apply to the respondent's local branch to be registered with them as a jobseeker when she discussed this with Ms Ospalkova was a failure to mitigate.

   (v) The respondent's solicitor referred to documents produced showing vacancies available via the respondent in the period between 16 November 2020 and the end of September 2021. He suggested the roles were comparable and the failure to apply was a failure in the duty to mitigate.

243. As to the period of loss, Ms Fallone said the respondent does not accept ten months is reasonable in the claimant's circumstances. She noted that she applied for a temporary role and contended that it was not a full-time contract. She pointed out it could be ended on little notice by either HMRC or the

respondent, or could be subject to some other frustration. The claimant may not ultimately have been on assignment for as much as 10 months and an award for this period would be betterment.

244. Ms Fallone referred to Mr Luximon's offer to the claimant to help her register with them for temporary work. This was a reasonable offer according to Ms Fallone. Although there are some situations where an employer's conduct is so reprehensible that an employee should not be expected to accept employment with them, this was not such a case. If the Tribunal finds against the respondent, there were only one or two discrete incidents of discrimination and the refusal of the offer of help with job searching was unreasonable. She refuted the claimant's argument that she did not wish to work with an employer with no integrity and pointed out supervision would not have been by the respondent but by the client with whom she was placed on assignment.

245. The duty to mitigate is not onerous and is to take reasonable steps to mitigate the loss. Before the discriminatory act, the claimant had begun a 10-week course to assist her back into teaching and her strategy was to find administrative work which would allow her to continue her efforts towards such a return. After the discriminatory act, she continued to pursue her strategy and continued her endeavours towards a teaching career in Scotland.

246. The onus to show a mitigation failure is on the respondent and it must show on the balance of probabilities that the claimant acted unreasonably in failing to take a step. We do not accept that the respondent has shown that the claimant unreasonably applied for too few roles in the relevant period. We accepted her evidence that she applied for roles additional to those which are documented in the bundle but that certain records have been lost. We accepted she worked on tailored applications. We accepted that there were limitations on the roles for which she could apply because of her family circumstances, particularly between January and March 2021 and that she was looking specifically for roles offering the flexibility to manage her working time around care for her children. We also accept her evidence that opportunities were reduced in the job market due to the pandemic.

247. We don't accept that the claimant failed to mitigate her own losses by failing to query Ms Ospalkova's rejection of her birth certificate. The claimant acted reasonably in accepting the respondent's stated position on the matter. Their business is to vet candidates and deal with compliance documentation for PORTW and she acted reasonably in deferring to their decision.

248. We do not accept the claimant acted unreasonably in failing to apply for a passport as a step to mitigate. The claimant did discuss this with the Job Centre to see if funding could be obtained. She had no plans to go abroad. Her birth certificate was or ought to have been acceptable for PORTW.

249. The claimant's conversation with Ms Ospalkova about applying to the respondent's local branch took place on 29 October 2021 before the discriminatory act. The duty to mitigate only arises after the discrimination has occurred. In the period after the discriminatory act, we do not accept it was unreasonable of the claimant to decline to register with the respondent as part of her job seeking efforts when this was proposed by Mr Luximon or otherwise. Regardless of whether she was immediately aware of the discriminatory nature of her treatment, she had expended significant effort in applying for a position with them to be rejected in perfunctory fashion. Come May 2021, she suspected discrimination. If she applied and was recruited to a temp role via the respondent, she would enter an employment relationship with them regardless of who supervised her. In all the circumstances, it was not unreasonable for the claimant to continue to use other channels in her job search including the Job Centre and the various sites with which she was registered.

250. With respect to the list of vacancies which the respondent suggests were suitable for the claimant, we do not find it has discharged the onus to establish with respect to any vacancy on the list that applying was a reasonable step for the claimant to take or that any failure to do so was unreasonable. There was no indication when each of the vacancies arose and whether it was advertised outside the respondent or only via the respondent. The list didn't indicate whether jobs were based in Glasgow or home working, what the hours offered were, what the pay was, or what essential criteria and

qualifications were required from applicants. We accepted the claimant's evidence that she was aware of some of the jobs mentioned on the list because they were advertised through sources and that certain of them were incompatible with her parenting responsibilities.

5 251. We therefore do not find that the claimant has failed in her duty to mitigate her losses.

252. As to the period of loss, there was no evidence adduced as to the average length of assignment to HMRC for candidates recruited by the respondent in November 2020. We noted that the duration of the assignments was not
10 specified in the advert but the job description referred to them as "*long-term, temporary roles*". The notice confirmed that the purpose of the roles was to support customers claiming under the various Government schemes designed to help provide financial support through the COVID-19 pandemic. It is within judicial knowledge that the various Government schemes to help
15 with financial support through Covid including furlough continued beyond September 2021.

253. We find on the balance of probabilities, that, if appointed, the claimant would have begun her employment with the respondent on 23 November 2021 and would have continued to be employed full time as at 31 August 2021. This,
20 we find, would most likely have been on the HMRC assignment, given its continuing purpose through those months and the description of the roles as '*long term, temporary*". If not, we find on balance, the respondent would have managed to place the claimant on another assignment in that period on comparable hours and pay. It would have had a contractual obligation under
25 clause 4.1 of the contract to "*use its reasonable endeavours to allocate* [the claimant] *to suitable Assignments"* in the event the HMRC assignment ended. Osma Khan displayed considerable confidence that she would have been able to find the claimant a comparable role.

254. We were unpersuaded by Ms Fallone's submission that he claimant's
30 employment could have been ended by the respondent at any time on little notice or might otherwise have been frustrated.

255. What is required is an assessment of realistic changes, not every imaginable possibility, however remote, "*taking into account any material and plausible evidence* [the Tribunal] *has from any source*" (**Erichsen**). There is no reason to suspect that the respondent or HMRC would have ended the claimant's contract or assignment prematurely. We accept that the period of January to March 2021 would have been particularly challenging for the claimant as it was for many working parents up and down the country. However, we note the advertised hours were 37 hours per week, working five days out of 7, covering various working patterns between 8 am and 8 pm. The job description stated that alternative working patterns "*may be considered subject to business need.*" There was therefore a degree of flexibility within the advertised arrangements including the possibility of weekend working and scope to minimise overlap with school hours in the week. We accepted the claimant's evidence her children would pull together to support her work.

256. We, therefore, find that the period of loss was 23 November 2020 to 31 August 2021 (9 months and one week, equating to 40 weeks approximately). The lost earnings are 40 weeks x 37 hours x £10.16 per hour, equating to £15,036.80.

257. Recoupment does not apply to discrimination awards. It is necessary, when calculating the loss, to give credit for social security benefits which would not have been received if the claimant had been appointed to the respondent's employment to work for HMRC, thus experiencing an increase in income. Identifying the amount of benefit which requires to be offset poses particular challenges when it comes to Universal Credit. The calculation of this consolidatory benefit is complex because it subsumes various other benefits including housing benefit and child tax credit. The amount received depends on an individual's circumstances including whether they have a partner who lives with them, whether they receive child maintenance, the number of dependent children they have, their income and any capital, and any sickness or disability. Employed people on low incomes can receive the benefit and there is no limit on the number of hours they can work, though their earnings will reduce the amount of UC available.

258. We do not have the evidence or the formula to calculate with precision what the claimant's Universal Credit entitlement would have been had she been appointed to the HMRC assignment.

259. We have, therefore, compared the evidence we have of the average Universal Credit which the claimant received while she was unemployed in the period from October 2020 to August 2021 and that which she received after securing employment with Marks and Spencer in September 2021. We acknowledge this is a crude approach, but it is the only one available on the evidence.

260. While unemployed, the average monthly payment of UC was £1,284.08. After she began earning with M&S, the average monthly payment of UC was £655. The claimant has not claimed for the period after she began work with M&S in September 2021 and it may, therefore, be inferred her earnings in that role matched, if not exceeded the earnings she would have achieved if she had been appointed by the respondent. We find that she would have remained entitled to at least the same level of UC if she had been appointed by the respondent to the HMRC role as she was entitled to when working at M&S. On that basis, the amount of benefit which falls to be set off during the period of loss is the monthly difference between the UC received out of work and that received in work. This figure is £621.08 per month (£1,284.08 minus £655). The period of loss runs from 23 November 2020 to 31 August 2021, i.e. 9.23 months. The total amount of UC which therefore falls to be offset from the claimant's losses is £5,731 (9.23 x £655).

261. The total financial loss is therefore **£9,305.80** (£15,036.80 minus £5,731).

Injury to feelings

262. With respect to injury to feelings, the claimant advised that she had taken advice and had been told about the **Vento** bands. She said she had been advised that she should fall within the middle band.

263. Ms Fallone submitted that the tribunal should consider factors including the seriousness of the treatment, the impact on the claimant, any underlying

medical conditions, the degree of upset, and the employment role of the person who committed the prohibited acts. She argued that the incidents were by low-level employees within the respondent. She pointed out that the claimant was not aware at the time that the conduct was discriminatory in nature and only became so aware six months later. It was, she said, ameliorated by the passage of time and was not a high level of upset. The claimant was not in employment relationship with the respondent and there was not a long history of involvement between them. It was a short-lived episode. She argued for a lower band **Vento** award, if any award at all.

264. The claimant responded that the impact on her was significant and, as she discussed in her evidence, she became withdrawn from her children, spending much time alone in her bedroom. She acknowledged that her disappointment was perhaps less enormous in November 2020, but that it was very significant in May 2021 when she discovered a white man's birth certificate had been accepted and when she received Mr Luximon's response to her complaint. In relation to how the impact on her manifested, she pointed out she has four children and she holds herself together for them, as she cannot afford to fall apart.

265. We focused on the actual injury suffered. The rejection in November left the claimant feeling sad, angry and weary. We acknowledge it was a one-off event and that, at the time, the claimant did not have knowledge that discrimination was relevant to her treatment. Nevertheless, it is not necessary for an injury to feelings award to be made that the claimant's injured feelings are caused by an employee's knowledge that they have been discriminated against (**Taylor**). As observed in that case, however, the immediate distress and humiliation may be greater in cases where the discrimination is overt. We have taken into account the claimant's reaction in May 2021 on learning that she was treated differently to a white man, and accept that the injury to feeling experienced then was evoked by the original discriminatory act. We also took into account Ms Fallone's point that this was not a case where the claimant suffered clinical psychiatric injury, though we don't doubt her evidence that she became withdrawn. We have not found, as

Ms Fallone invited us to do, that the discriminatory act was perpetrated by a low-level employee.

266. Taking all relevant factors into account, we determined that this case falls at the top end of the lower **Vento** band and we award the sum of **£9,100** in respect of injury to feelings.

Interest

267. Neither party addressed the issue of interest in their submissions. We considered whether we should use our discretion to award interest on the claimant's losses and injury to feelings award. We have discretion as to whether to award interest but if we choose to award it, we are constrained to do so at the prescribed rate of 8%.

268. We determined not to award interest in this case. It is within judicial knowledge that the Bank of England base rate between September 2020 and September 2021 was 0.1%. If the claimant had been in receipt of the compensation at the time she incurred the losses and the injury to feelings, and if she had been able to invest it, it is unlikely she would have achieved a return of 8% on the monies or anything close to that rate.

269. We reminded ourselves that the aim is to put the claimant in the position, so far as is reasonable, that she would have been had the discriminatory act not occurred (**Wheeler**). We considered that to award interest on the sums would not be proportionate and would place the claimant in a better position (financially) than she would have been if the discrimination had not occurred. No interest is included on either element of the compensation.

Employment Judge: **L Murphy**
Date of Judgment: **7 September 2022**
Entered in register: **7 September 2022**
and copied to parties