EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Nasreen Ayoob	**v**	**The Cabinet Office** **Department for Health & Social Care**

Heard at: The London Central Employment Tribunal
(by Cloud Video Platform)

On: 13th – 15th and 18th – 19th December 2023
19th -20th February 2024 (in Chambers)

Before: Employment Judge Gidney
Ms Jones
Ms Craik

Appearances

Claimant: Ms Brooke-Ward (Counsel)
Respondents: Mr Duffy (Counsel)

RESERVED JUDGMENT

The Judgment

1. The Judgment of the Tribunal is that the Claimant's claim of direct race discrimination is dismissed.

REASONS

Introduction

2. On 11th June 2021 the Claimant notified ACAS of a dispute with the Cabinet Office ('CO') and the Department of Health and Social Care ('DHSC'). She received her Early Conciliation Certificate on 14th June 2022 **[8]**[1]. The single conciliation certificate referred to 'Cabinet Office/DHSC' at a time when the conciliation rules only permitted one Respondent to be named on an EC Certificate. By a Claim Form dated 14th June 2022 **[9]** the Claimant presented a claim of direct race discrimination against both Respondents. Although the Tribunal initially decided to reject the claim against DHSC, it nevertheless served a notice of claim citing both Respondents. There was a considerable delay in the Claim Form being served. This led the Claimant to complain to the Employment Tribunal service who apologised for having lost the relevant paperwork.

3. The Claimant's ET1 Claim Form, submitted when she was unrepresented, gave few details of her claims. On 24 November 2022, she applied successfully to amend her claim to add further and better particulars **[38]**. She has since obtained legal representation. The claim was case managed by Employment Judge Burns on 5th April 2023 **[48]**. The Judge identified the Issues to be determined at the final hearing as follows **[54]**:

The List of Issues

4. The Claimant is Asian, Muslim and British Pakistani. She brings a claim against the Respondents for direct race discrimination (s13 **Equality Act 2010** (**EqA**)).

5. Did the following occur:

   5.1. The Claimant was denied a temporary duties allowance on or around September 2020, despite performing two roles, Human Resources Business Partner ('HRBP') and Information Asset Manager;

[1] Refers to page numbers within the Open Hearing Bundle.

5.2. Helen Scothern intervened in the Claimant's loan extension by requiring a three-month review for further extensions of the loan. This contradicted the other DHSC employees, one of whom was Jo Liddy, the Claimant's counter- signing manager, who was also on temporary duty allowance and not subjected to a three-month review;

5.3. On 17 March 2021, the Claimant's loan agreement with DHSC was terminated in a way that was: a) not consistent with established HR policies; and b) unfair and arbitrary, based on reasons that were not communicated with Claimant, denying her the opportunity to respond.

6. If the events set out above occurred, did that constitute less favourable treatment because of the Claimant's race? The Claimant relies on an actual comparator, Ian Powling, Jo Liddy and/or a hypothetical comparator.

7. If the Claimant is successful in any of her claims, to what compensation (if any) is she entitled and from which Respondents?

The Documents and the Evidence.

8. We were provided with a Cast List, a Chronology from both sides, Opening Legal Submissions from the Respondent, Final Legal Submissions from both parties and a Trial Timetable. Both Counsel contributed to those documents and we were grateful to them for their work. The Claimant provided a Schedule of Loss in which she valued her financial losses in the sum of £4,213.26 and her injured feelings at £12,000.00 **[58]**. We were provided with an agreed trial bundle which ran to 805 pages. We were provided with the following witness statements:

8.1. The Claimant's witness statement running to 9 pages;
8.2. Mr Desmond Hoar's witness statement (Claimant's Union Representative) running to 4 pages;
8.3. Ms Helen Scothern's witness statement (Head of Civil Service Pay and Reward) running to 16 pages;
8.4. Ms Melanie Ashby's witness statement (HR staff member in Government People Group) running to 4 pages; and,
8.5. Ms Elizabeth Harrison's witness statement (Senior HR Business Partner for the

Community Testing Programme and Managed Quarantine Service) running to 6 pages.

9. Each of the witnesses gave evidence from a witness statement and was subject to cross examination.

Findings of Fact

10. We have not recited every fact in this case, or sought to resolve every dispute between the parties. We have limited our analysis to the facts that were relevant to the Issues that we were tasked to resolve. We made the following findings of fact on the basis of the material before us, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts.

11. The Claimant commenced employment with the 1st Respondent on 15th November 1995. The 2nd Respondent published a Pay Policy Document in 2006, which was updated in June 2011 **[94]**. It contained a Temporary Promotion section within its Pay Flexibilities chapter. The section stated:

> *'Temporary promotion will be available for up to a maximum of one year to allow managers to cover temporary pieces of work. Short term staff absence such as maternity leave, sickness, or to deal exceptionally with peaks of work on a temporary basis. A business case must be completed to be approved at branch head level. …. The manager should discuss and agree with the individual their starting salary before offering a temporary position on a higher grade. They should consult with the HR business partner, to ensure there are no major people implications. Managers must make it clear in writing to the individual for how long the temporary promotion will apply and if an end date is unknown, when the situation will be reviewed. There should be a formal review by the line manager at six months. Every effort should be made to fill a vacancy substantively as soon as possible.'*

12. In April 2018 the 2nd Respondent published a staff Loans Policy **[154]** and Loans Procedure **[158]**. They contained the following provisions:

> *'The following principles underpin the loan policy, let alone should only be used for an agreed period of up to two years, unless there is an exceptional business justification.*
> *Employees on loans are subject to the terms and conditions, policies and systems of the host apartment, including performance management, during the period of the loan.*

Ending the loan early: Loans were usually come to an end at the pre-agreed end date, however a loan may end earlier. If so, the notice periods will be those in the loan agreement.

The loan may need to end earlier for reasons such as …. the loan is not working successfully due to issues such as performance and steps taken to address the issue have not been successful. Either department can terminate the loan by giving the agreed notice.'

13. The 2nd Respondent's policy on Expressions of Interest (EOIs) as at July 2020 stated **[185]**:

'EOIs can used for level moves or temporary promotion (TP). The default is that there must be some form of competition for all TP opportunities, and TP should only be used to cover temporary opportunities or to temporarily fill a role pending a permanent recruitment. If there are exceptional reasons, why a competition is not used DG and HRD sign off will be required. Longer term opportunities (12 months plus) should be filled via recruitment or level transfer. It is not possible to permanently promote individuals through the EOI process.'

14. The 1st Respondent's intranet contained its policies on Temporary Duties Allowance (TDA) **[171]**. The policies stated:

'All roles to be offered on promotion (including temporary promotion) should go through an EOI process or be advertised.
If staff are appointed to a post at a higher grade without any form of competition, they will receive a temporary duties allowance for the period that they are acting at the higher grade.

TDAs are a way to appoint someone on a temporary promotion. Some of the benefits of this recruitment option include (i) it helps to develop staff and (ii) it can be timely.'

15. On 26th March 2020 the first national lockdown was imposed on the country by the Prime Minister in response to the Coronavirus pandemic. In May 2020 the 2nd Respondent set up the Joint Biosecurity Centre ('JBC'). The pandemic required a greater number of staff than the 2nd Respondent had at its disposal. This led to the 2nd Respondent seeking loan arrangements for staff from other Government departments to assist it in its response to the pandemic.

16. On 3rd August 2020, following an Expression of Interest ('EOI') from the Claimant, she was loaned from 1st Respondent on short-term assignment to the JBC which was part of the NHS Test and Trace ('NHSTT') function within the the 2nd Respondent **[447]**. She undertook the role of HR Assistant Business Partner at Senior Executive Officer ('SEO') grade 6 level. Her Loan Agreement was signed by Lorraine Wall, on behalf of the 1st Respondent and Helen Scothern, on behalf of the 2nd Respondent **[492]**. The loan arrangement was for a six month period (due to end on 2nd February 2021) and was on a level transfer (ie remained at SEO grade 6 level). Its

terms included the following:

> *'Thank you for volunteering to be part of the Joint BioSecurity Centre to work on DHSC Resourcing Hub Co-ordinator.*
> *This Agreement is between Cabinet Office, the Home Department, Joint BioSecurity Centre, DHSC, the host Department, and Nasreen Ayoub.*
> *You will undertake the role of resourcing Hub Coordinator on your current grade from the 3rd August 2020 to 2nd of February 2020.*
> *At the end of the assignment you will return to your home department.'*

17. On 17th August 2020 the Claimant took on some additional responsibilities after the Knowledge and Information Management (KIM) post holder Duncan Crow left the Department **[NA11]**. This involved the Claimant given the task of returning laptop computers to users. She assisted in this until the appointment of Ian Powling. The Claimant says she spoke to Majella Myers about being given a TDA to compensate her for the additional work in October **[NA12]**. In her oral evidence Helen Scothern did not accept that the additional KIM work that the Claimant was doing (returning laptops) amounted to performing duties at a higher grade, and was consistent with the Claimant's substantive grade, such that a TDA was not appropriate. This lead, in September 2020 to the Claimant asserting that she was denied a Temporary Duties Allowance ('TDA') by Ms Scothern, the Head of Civil Service Pay and Reward. Mis Scothern's rationale for denying the Claimant a TDA was that such an arrangement would have breached the 2nd Respondent's rule that anyone on a TDA would need a review of the arrangement at the 3 month mark, and if the TDA was extended, a second review 3 months later. By that time the employee should either return to their substantive post or apply for the role by way of open competition. This rule is referred to herein as the '3+3 TDA review' policy. When challenged by employees and line managers about the existence of the rule, Helen Scothern could not find a written copy of it, or any document of the 2nd Respondent's to suggest that it was a rule of the 2nd Respondent's.

18. We were troubled by the inability of the 2nd Respondent to produce a written copy of its '3+3 TDA review' policy. The absence of a written policy (i) undermines the assertion that it was the 2nd Respondent's at all policy and, (ii) makes the decision to impose it on employees or not a matter of judgment / discretion for managers that is susceptible to abuse, and/or possibly enabling a manager to apply it to Asian employees but not white ones in a discriminatory way. Our concerns were deepened when Ms Scothern accepted that there was an element of the '*tap on the shoulder*' about how TDAs and TPs were arranged. This creates a lack of transparency that is more susceptible to discriminatory abuse. In evidence, however, Ms Scothern insisted

that it was a policy of the 2nd Respondent and that she had applied it in good faith.

19. On 1st September 2020 Ian Powling was appointed to the KIM role on a 12 month TDA, without competition, in apparent breach of the 3+3 TDA review policy. He is relied on as a comparator by the Claimant. In her witness statement Helen Scothern sets out why his situation was different to the Claimant's **[HS25]**:

> *'Ian Powling was a Knowledge and Information Management professional who had been displaced by the Cabinet Office and was on a redeployment list (to be differentiated from an EOI list). At this time, the JBC was critical of KIM skills. The role in the JBC was at Grade 7. Because he was displaced there was no option to come in on a six month loan. Therefore, he would need to come on a longer term loan basis onto the DHSC payroll. The conflict was that the JBC policy did not permit TDA appointments for that duration without competition. The pragmatic approach was to bring him across to DHSC payroll and put him on a TDA. However, it was agreed that as a condition for so doing, the role had to be put out to competition so that he had the opportunity to apply for it. The roles advertised very quickly and he was successful in applying it. He was not treated differently than the Claimant because of his race, but because of the specific circumstances unique to him and his skill set outlined above.'*

20. Ms Scothern asserts that because Mr Powling had been displaced and was on a redeployment list, he, unlike the Claimant could not be returned to the Cabinet Office as his role no longer existed there, and as such he was not being loaned from one Respondent to another and had not signed any loan agreement. He was being redeployed. Furthermore, once in post he engaged in an open competition for the role. The 2nd Respondent was not able to produce any documentation regarding the competition that Ian Powling engaged in, and this troubled us. We were told that it was advertised, only Mr Powling applied, he was interviewed and the permanent grade 7 role was confirmed. On balance we have accepted that evidence despite the lack of documentation, because it appears that the Claimant had accepted that explanation as well. The Claimant's grievance interview notes **[425]** record the following:

> *'Nasreen acknowledged the Ian Powling's role had subsequently been advertised through open competition through which Ian had been re-appointed to that role.'*

21. At first glance we were not sure that the difference in circumstances relied on (being on a redeployment list instead of an EOI list) was a material difference. It was a difference, but we had to consider whether it was a material difference. Both had stepped up to grade 7 roles, one had faced a 3+3 month review and the other had not. On balance however we concluded that Ian Powling's situation was materially different to the Claimant's for two reasons. Firstly, we accept being displaced from the Cabinet Office rather than loaned from the Cabinet Office was

a material difference. There was no loan arrangement and the Loan TDA policies did not apply in a redeployment situation. Secondly, whilst there was no documentary evidence in support, we accepted that Ian Powling did engage in a competition of sorts for the role, because the Claimant accepts that he did. It remains to be seen how widely and for how long the role was advertised given that no-one else applied. The competition has the feel of a 'tick box' exercise to it, however given that it is not disputed by the Claimant and is circumstantially evidenced elsewhere (for example Claire Fradley's email on 3rd February 2021 **[693]**) we have accepted that a competition process was undertaken. There can be no question that engaging in a competition for the role was a material difference to the Claimant's circumstances and as such, Ian Powling cannot be relied on as a comparator.

22. On 4th October 2020 Jennie Cronin was given a three month extension to her TP. She had, like the Claimant, been loaned to the 2nd Respondent by the 1st Respondent. Also in October 2020 Harry Smith was given a 12 month TDA. This appears to have been given in breach of the '3+3 month TDA/TP review' and Mr Smith is also relied on by the Claimant as a white comparator. The Respondent asserts that this occurred in error and, once spotted, was corrected. This lead Mr Smith, on 24th March 2021 to complain about the imposition of the '3+3 month TDA/TP review' that had been applied to his long term TDA arrangement **[735]**. In the circumstances Mr Smith's position is different, as it appears that he was given his 12 month TDA in error, which was then corrected, to his clear annoyance. This suggests, either that his circumstances were materially different to the Claimants and/or the reason for his 12 month TDA was an error, which would appear to be a reason that had nothing whatsoever to do with the Claimant's race.

23. The Claimant's situation (of not being on a TDA) continued until November 2020. In October 2020 she requested a TDA to reflect her additional duties **[NA20]**. In November 2020 the Claimant did move teams within NHSTT, moving within the JBC to Managed Quarantine Services ('MQS') in a non-HR role, working under the line management of Samantha Ruddock **[437]**. This was a grade 7 role and the Claimant was awarded a Temporary Duty Allowance ('TDA') to reflect the increased duties and level out the pay differential between the two grades **[557]** and **[NA19]**. The Claimant did not go through an open competition to get this role. Ms Ruddock arranged with Andrew Butt, the Claimant's Cabinet Office Line Manager, for the Claimant to be put on a TDA on 30th November 2020, which was backdated to 16th November 2020 **[640]**. This arrangement was due to last for 12 months until the end of November 2021.

24. In December 2020 Lorraine Wall contacted Helen Scothern to tell her that the 1st Respondent

had received a 12 month TDA request for the Claimant from Samantha Ruddock. Ms Scothern told Ms Wall that the JBC policy on TDAs required a 3 month review with the possibility of extension for a further 3 months **[NA20]**. On 18th January 2021, Lorraine Wall, confirmed that the 2nd Respondent was applying a three month review to her TDA **[705]**.

25. In January 2021 Ms Scothern told Ms Ruddock of the '3+3 month TDA review' policy. Ms Scothern could not provide Ms Ruddock with a copy of the 2nd Respondent's '3+3 month TDA review' policy, but nonetheless told her that it was the policy applied by the 2nd Respondent. In mid-January 2021 the Claimant asked Ben Halliday of the Civil Service Resources Hub about the possibility of submitting an EOI for other grade 7 roles. She was told that EOIs needed to be made at the candidate's substantive grade (in this case grade 6) but that a case could be made to apply for a role on a Temporary Promotion. The Claimant asserts that Mr Halliday told her that she could put her TP grade 7 roll in the application. He recalls stating that the Claimant had to put her substantive grade 6 down, but state elsewhere in the application that she as applying for grade 7 rolls.

26. On 21st January 2021 Samantha Ruddock requested a TDA for Keenan Terjuman (non-white) on the grounds that he was a critical resource **[189]**. On 3rd February 2021 Claire Fradley confirmed that she had been given a 12 month TDA without competition **[693]**. She said:

> '*I think that HR's advice on three months temporary is really difficult and inconsistent. I was told six months Max TP when I joined, but negotiated it to 12.'*

27. When asked about Claire Fradley's 12 month TDA without competition Helen Scothern was unable to explain how or why that happened. She said in answer to a question on that point from the Judge '*I can't comment*'.

28. On 8th February 2021 Jo Liddy was provided with a 12 month 'no competition' TP **[795]**. She was loaned from the DHSC to HMRC on a temporary promotion acting up to the post of Director of MQS Landslide Operations. The Loan Agreement made no reference to the need to apply in an open competition for the role. In answer to the Judge Ms Scothern said she could not comment on Jo Liddy's case as it was in another part of the business.

29. All of these examples reveal a surprisingly lack of consistency in decision making on loan, loan extensions, TPs and TDAs. We conclude that this was in large part because the 2nd

Respondent had no written rule or policy on this. As a result different applications by different staff in different departments were considered separately with no clear policy and action only taken if the matter was escalated. This lack of consistency exposed the Respondents to enquiries by disappointed employees why their loan extension or TP or TDA had not been granted and/or revoked and, in some cases lead to legitimate and understandable concerns as to the motive of the decision makers and whether an employee's race (or indeed any other protected characteristic) may have played a part in the decision.

30. In February 2021 the Claimant discussed a possible move to the Community Testing Programme ('CTP') with Elizabeth Harrison. This was a grade 7 roll. In an email dated 5th February 2021, Ms Harrison stated **[570]**:

> *'Please see below. I'd be delighted to welcome you on board. I am away Monday but would a Tuesday start work for you and your line manager? If you're still keen to join we'd love to bring you onboard.'*

31. The '*please see below*' referred an email from Nasreen Ahmed, the Strategic Resourcing Partner for the 1st Respondent to Ms Harrison, which stated **[571]**:

> *'Yes, good news on this. I'd asked our matching team colleagues to move Nasreen Ayoob across to CTP HR role and have just got confirmation that they've now done so.'*

32. Upon confirmation that the Claimant could join CPT, Ms Harrison wrote to the Claimant and Samantha Ruddock, her line manager, on Monday 8th February 2021 asking **[568]**:

> '*This is wonderful news. Apologies I was not around today. Sam, how soon can I get Nasreen? Today would be ideal. Happy to have a call'*.

33. After the Claimant had indicated that she could move on Monday 15th February, after a handover process, Ms Harrison pressed to see if the Claimant to join her sooner. She said on Tuesday 9th February 2021 **[567]**:

> *'We can work towards Monday, but that is less than ideal as this is a surge roll. My understanding was that Nazreen could be released much faster than that. This is priority work and under extreme pressure. Please can we come to a middle ground?'*

34. The Claimant wrote to Ms Ruddock on the same day, in an email that she copied Ms Harrison

into. It said **[567]**:

> *'Samantha, To confirm that the role is a G7 Human Resources Business Partner role working in DHSC for approximately 6 months. As I am on loan to JBC from Cabinet Office my line manager Andy Butt in the Cabinet Office is aware that I am to be remaining in DHSC for a further six months. … Samantha if you could confirm the release date that would be great.'*

35. On 10th February 2021 Ms Harrison emailed Samantha Ruddock, copied to the Claimant, in the following terms **[196]**:

> *'The role is confirmed below in the chain G7 HRBP in DHSC to the Community Testing Programme and Managed Quarantine. Nasreen Ahmed … is the Cabinet Office senior resourcing partner on this and can also confirm that the surge rolls from the hub should be released at pace. This has been dragging for nearly a week and it is a critical time with the Prime Ministerial priority, so I'd appreciate expediency where possible and would welcome a call for help and block on the number below. Your support is much appreciated at this time.'*

36. We pause to note at this point that the evidence reveals that every email from Ms Harrison on the subject of the Claimant's move to her team, is positive. It is clear that Ms Harrison wanted the Claimant to join her as soon as possible and was frustrated by the delay in her move. Ms Harrison's emails are a very strong indicator that the Claimant's race was not considered to be a bar to the Claimant joining her team.

37. As a result, on 12th February 2021 the Claimant moved again into a new department, now under the line management of Elizabeth Harrison, a Senior HR Business Partner for the Community Testing Programme ('CPT') and Managed Quarantine Service ('MQS'). The Claimant's TDA to grade 7 continued at the point of the Claimant's move **[720]**. Once the Claimant had moved to the CPT it appears that she was put onto a separate Temporary Promotion ('TP') to grade 7 rather than a Temporary Duty Allowance ('TDA').

38. On 2nd March 2021 the Claimant, acting in her HR role, emailed Ms Harrison to ask about Jennie Cronin who was on loan to the DHSC from the CO and had just had her loan extended by her line manager, Karl, for 3 months (from March to June), **[242]**. Ms Cronin had been on a TDA. The Claimant asked if anything else needed to be done to facilitate Ms Cronin's TDA extension. This indicates that the extension was for a 3 month period, and thus not inconsistent with the '3+3 TDA' policy.

39. Unfortunately, and within two weeks of the Claimant joining the CTP, the Claimant felt that she

had been given an unduly heavy workload and was being treated unfairly. She asked if she could move to another department within the 2nd Respondent. The Claimant found a new grade 7 role in the MQS managed by Tracey Bridgett, which she started on 3rd March 2021. On 1st March 2021 Ms Harrison felt she was struggling to get information from the Claimant and suggested the Claimant was being evasive **[334]**. Ms Harrison was also concluding that the Claimant's new role was not suitable for her.

40. Ms Harrison began the process of not just terminating the Claimant's role at CPT, but actually terminating her loan agreement with the Cabinet Office. In paragraph 6 of her statement, Ms Harrison stated **[MS6]**:

> *'On 2nd March 2021 I wrote to Ms Ahmed to obtain details of the Claimant's line manager at the 1st Respondent so she could be returned to her home department by the end of the week. This was because I had concerns about her performance.'*

41. Ms Harrison's email to Ms Ahmed of 2nd March 2021 was short and to the point. It said **[266]**:

> *'Can I get the contact for Nas's line manager please. I need to have her returned to her home department by the end of the week.'*

42. On 2nd March 2023 the Claimant informed Ms Harrison that she was moving again. In an email of that date to her the team she had only just joined **[336]** the Claimant said:

> *'Just to let you know that it is my last day in the team today. I will be joining the MQS programme tomorrow. I spoke to Lizzie earlier and all my work has been handed to Laura / Georgia going forward.'*

43. In an email to Lorraine Wall on 3rd March **[543]** Ms Harrison discussed the Claimant's situation and stated that the Claimant was struggling and not performing in post and had asked to leave within a week to start a new Grade 7 role in MQS. She also raised her concern that she had just found out that the Claimant was grade 6, acting up to a grade 7 on a TDA, rather than a substantive grade 7.

44. On 10th March 2023 Ms Harrison emailed Nasreen Ahmed, the Cabinet Office's Strategic Resourcing Partner, to make two points, firstly that she would not have taken on the Claimant on a grade 7 TDA without an exercise (an open competition) and secondly that she already had significant concerns about the Claimant's performance **[263]**.

45. On 15th March 2021 Ms Harrison emailed the Claimant to inform her that her short-term assignment to the 2nd Respondent was being terminated **[249]**. The email set out Ms Harrison's rationale for so doing. It said:

> *'You did not make me aware you were on temporary promotion (TP) in writing or verbally and the Cabinet Office record, as discussed, had you showing as G7 under Samantha Roddick not your substantive grade as SEO under Andrew Butt. They had an inaccurate record of your grade and line manager. Helen Scovern … further confirmed your TP was awarded by your previous line manager in that post. There was no agreement for a TP to G7 in either of the DHSC roles you have done since the 12th of February as an Human Resources Business Partner in the CTP or within the MQS, the grade was based on the information you provided that said you were a substantive grade 7 which is now found to be factually incorrect. We are therefore ending the arrangement for you to do this work and it will now cease'.*

46. We were troubled by this explanation. We have no doubt that the confusion as to the Claimant's correct grade and TDA / TP status was a factor that Ms Harrison *also* relied on to justify ending the Claimant's loan agreement, but it was not *the* reason. We know this because Ms Harrison had already decided to end the Claimant's loan agreement as early as 2nd March 2021, which was before she knew about any issues over the Claimant's substantive grade and TDA/TP status **[266]**. The explanation given by Ms Harrison at the point she first made enquiries about ending the loan arrangement is set out in her witness statement at paragraph 6 (quoted above) namely performance concerns **[EH6]**. We find as a fact that the substantive grade and TDA/TP status was relied on by Ms Harrison after the event. It was not her original or main reason for terminating the Claimant's loan to the 2nd Respondent.

47. We were troubled by Ms Harrison's decision to terminate the Claimant's loan agreement on performance grounds. The DHSC's own policies require steps are taken to measure performance and time is allowed for an employee to improve. Ms Harrison took no meaningful steps to inform the Claimant of any performance concerns and gave her no opportunity for training or to otherwise improve. Had Ms Harrison dismissed the Claimant on grounds of her performance in these circumstances, we think it is likely that such a performance related capability dismissal would have been unfair. However, the Claimant was not dismissed. Her loan agreement was terminated and she was returned to her original department, the Cabinet Office. We think this was unreasonable treatment of the Claimant, particularly as both the Claimant and Ms Harrison had formed the view that it had not worked out for the Claimant and the Claimant had secured her own internal move with the DHSC aware from Ms Harrison. To

terminate the loan agreement of someone who had left Ms Harrison's line management does strike us as unnecessary and unreasonable. What we have to decide however is the motive of that behaviour. Was it race discrimination?

48. Ms Harrison did tell the Claimant that she could remain in her new MQS role, but that it would have to be on her substantive grade 6 salary. Despite this, the termination of the Claimant's loan agreement to work within the 2nd Respondent took effect on 17th March 2021, whereupon the Claimant returned to the 1st Respondent on her substantive SEO grade. The Claimant sent an email that day to Jenny Richardson at the 2nd Respondent and 7 other individuals headed 'Complaints about HR Bullying and Racial Discrimination and Breaches of Recruitment Policy' **[255]**. The grievance email, sent to both the CO and the DHSC raised broadly similar complaints (said to be race discrimination) to the matters raised by the Claimant in her Claim Form. Extracts from the email stated:

> *'I am writing that as I returned to the Cabinet Office, having been bullied out of the DHSC by a senior HR official, Elizabeth Harrison. As an Asian career civil servant who is also a qualified HR professional over 15 years and an experienced PCS representative I'm appalled at what I've had to contend with in just the past 48 hours in DHSC which can only constitute racist bullying, harassment and discrimination.*
>
> *I've had to deal with persistent bullying by white senior HR officials, first in the Cabinet Office, then in the Joint Biosecurity Centre, then at the Community Testing Programme and then in the Managed Quarantine Service.*
>
> *On Monday 15th March I was on leave. This was known, but I was sent an e-mail with no conversation that I would have my loan arrangement with the DHSC terminated abruptly and that my IT would have to be returned. This was done by Elizabeth Harrison with no conversation with my line manager or counter signing manager.'*

49. The Claimant remained an employee of the 1st Respondent, on its terms and conditions, during her short-term assignment to the 2nd Respondent. At all times the 1st Respondent remained her employer, liable, pursuant to its obligations under s109 **Equality Act 2010** ('**EqA**') for any discriminatory acts or omissions by its employees or agents in the course of their employment. The Claimant remains employed by the 1st Respondent.

50. On 18th February 2022 Emma Reid on behalf of the DHSC dismissed the Claimant's grievance regarding her treatment that had been raised against Elizabeth Harrison and Jo Liddy **[749]**. Ms Reed concluded that the Claimant's loan agreement had been terminated in a way that was consistent with the 2nd Respondent's loan policy and that accordingly Ms Harrison had not acted

in any way that was inconsistent with it. On the issue of how other employees on loan agreements had been treated, Ms Reid concluded that the Claimant had not shown that any other employee had been treated outside of their loan agreement and the policy relating to it. Ms Reid concluded that whilst Ms Harrison's communications had not been clear, and communications between the Respondents had been poor, this did not meet the threshold of requiring a case to answer. Ultimately, Ms Reid dismissed the Claimant's allegations of race discrimination.

51. On 16th May 2022 Emil Levendoglu responded on behalf of the CO, also dismissing the Claimant's grievance against Lorraine Wall and Helen Scothern **[788]**. The report rightly acknowledged the lack of clarity on the '3+3 TP/TDA' rules. It also acknowledged, whilst making a finding that there was no evidence of overt race discrimination, that the Claimant had felt race had played a part in the decisions and that this had had an impact on her.

52. The grievance appeal was heard, and partially upheld, by Gavin Larner on 27th September 2022 **[762]**. The decision apologised for the time that it had taken to complete. It stated:

> *'Your appeal was partially upheld on the basis that Elizabeth Harrison did not act in a way that was consistent with HR policy or good practise. I can see no operational or other reason why the concerns about your position at the time needed to be managed without following these processes.*
>
> *The normal HR approach would have been to await your return from leave, inform you in advance of the nature of the concerns, and then hold a meeting with you where those concerns could have been discussed and you would have had the opportunity to give your fair understanding of the position. This would have allowed sufficient time to discuss the relevant issues with your line manager at Cabinet Office. I believe that the failure to take time to follow proper process meant that it was left unclear whether your returned to Cabinet Office was because of the position of your grade, A performance issue, an issue of conduct, or a combination of these.*
>
> *I have looked closely at the evidence available to me to establish whether you were treated differently from people in similar circumstances. I have also look carefully for evidence that Elizabeth Harrison's handling of your case was motivated by race discrimination, and, as with the investigation report, have not found evidence that this was the case. I uphold the remaining findings of the deciding managers letter to you of 18th February 2022 and agree with her conclusions.'*

53. We now turn to the applicable law that is relevant to the issues in this case.

The Applicable Law - Direct race discrimination

54. Direct discrimination is defined in **EqA**, s13 (so far as relevant) 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.'*

55. This requires a comparative analysis to be undertaken by the Tribunal between the treatment of the Claimant and the treatment of another person that does not share his protected characteristic. That person may be an actual or hypothetical comparator. There must be no material difference between the circumstances relating to each case: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 HL at para 108 (Lord Scott) and s23(1) **EqA**10.

56. The circumstances which are material are those which are relevant to the decision or treatment in question. Whether a comparator in materially the same circumstances was treated more favourably is interlinked with the reason for the treatment in question. Whether there was less favourable treatment and whether it was because of race are aspects of a single question, not separate questions. Tribunals can focus primarily on the reasons for the treatment, from which the appropriate inference as to less favourable treatment will then naturally flow. **Shamoon** at paras 8-12, 53-54, 125 and 134-136.

57. If the Tribunal is satisfied, having heard all the evidence, including the explanations provided by the decision-makers, that race played no part whatsoever in the decision, then it is not necessary to have recourse to the burden of proof provisions: **Hewage v Grampian Health Board** [2012] ICR 1054, SC, para 32 Lord Hope. Otherwise, the Claimant bears an initial burden of proving facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondents directly discriminated against the Claimant because of race (**EqA**, s136). If the Claimant proves such facts the burden shifts to the Respondents to prove that they did not directly discriminate against him because of race.

58. In applying the shifting burden of proof, a two-stage approach is required. At the first stage, the burden is on the Claimant to establish facts from which, in the absence of another explanation, a finding of direct discrimination could be made. It is not sufficient for the Claimant to lead

evidence from which it might be possible to find direct discrimination, he must prove the primary facts from which the Tribunal could (in the absence of another explanation) find that discrimination has occurred: **Igen v Wong** [2005] ICR 931, CA, at paras 17, 25- 33 Peter Gibson LJ.

59. The Tribunal needs to consider all the evidence relevant to the discrimination complaint, ie (i) whether the act complained of occurred at all, (ii) evidence as to the actual comparators relied on by the Claimant to prove less favourable treatment, (iii) evidence as to whether the comparisons being made by the Claimant were of like with like, and (vi) available evidence of the reasons for the differential treatment: **Madarassy v Nomura International plc** [2007] ICR 867, CA para 65-72. This will include evidence as to the Respondent's knowledge or perception of the Claimant's race. It will be for Claimant to prove on the balance of probabilities that the discriminators did know or form a perception as to his race: **Efobi v Royal Mail Group Ltd** [2021] ICR 1263, SC para 45.

60. Having made relevant primary findings, the Tribunal should step back and consider all the relevant facts in the round in order to determine what inferences it could in the absence of another explanation: **Qureshi v Victoria University of Manchester & another** [2001] ICR 863, EAT, at paras 875F-876B. It is not sufficient to shift the burden of proof for the Claimant merely to prove a difference in race and a difference in treatment; he must also prove additional primary facts which could in the absence of another explanation support an inference that mental processes of the individual alleged discriminators were materially influenced by race: **Kohli v Department for International Trade** [2023] EAT 82, at para 71(d).

61. Unreasonable conduct would not be sufficient to support an inference of direct discrimination: **Glasgow City Council v Zafar** [1998] ICR 120, HL, at para 124A-E. Unreasonable behaviour is not necessarily discriminatory. A charge of discrimination is a very serious matter to find established against anyone: any such finding must have a proper evidential basis: **Bahl v The Law Society** [2003] IRLR 640, EAT at para 134. The Respondents' non-discriminatory explanation for its treatment does not have to be a good one in the sense of one that satisfies some objective standard of reasonableness. If the burden shifts, then to discharge that burden the Respondents must show that the treatment in question was *'in no sense whatsoever'* because of the protected characteristic: **Nagarajan v London Regional Transport** [1999] ICR 877, HL at para 510H-511H.

62. Cogent grounds are required to support a finding of subconscious bias. Such a conclusion cannot be reached on the basis of speculation, but only where there is clear evidence to support such an inference: **Bahl** at para 127. If the Tribunal accepts the decision-maker's assessment as honest and credible, that is an end of the matter unless there is a proper basis for a finding of subconscious discrimination: **Kohli** at paras 59-65.

63. When considering whether acts of discrimination are part of single continuing act guidance was provided by the Court of Appeal authority of **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 the question to be determined is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

64. On the question of a just and equitable extension of time, the onus is always on the Claimant to convince the Tribunal that it is just and equitable to extend time and the exercise of discretion is the exception rather than the rule (**Robertson v Bexley Community Centre** [2003] IRLR 434, para 25). The same considerations apply in considering 'just and equitable' as apply to consideration section 33 of the **Limitation Act 1980** for extending the time limit in personal injury cases (**British Coal Corporation v Keeble** [1997] IRLR 336).The considerations are as follows:

64.1. the length and reasons for the delay;
64.2. the extent to which the cogency of the evidence is affected;
64.3. the extent to which the Respondent has co-operated with requests for information;
64.4. the promptness of the Claimant once she knew of the facts giving rise to the cause of action;
64.5. the steps taken by the Claimant to obtain appropriate advice when she knew of the possibility of taking action.

Our Conclusions.

65. We have not sought to resolve every issue in dispute between the parties. We have set our conclusions on the issues that we have been tasked to determine, as follows:

Factual issue No.1

66. The first factual allegation is this: Was the Claimant denied a temporary duties allowance on or around September 2020, despite performing two roles, HRBP and information asset manager. The Claimant was denied a TDA in or around September 2020. She was undertaking a Human Resources Business Partner function and had been asked to assist with aspects of the Information Asset Manager's role. In paragraph 9 of the Claimant's Further and Better Particulars dated 24th November 2022 **[38]** she puts her case in this way:

> *'I was given additional work on top of my current workload as another team member was leaving, and it was agreed without my knowledge that I would take on his role as well as my current workload.'*

67. In the Claimant's witness statement **[NA5]**, she said that after a few days her induction it was apparent that Andrew Rashburn was leaving and I was due to take his roll. She went on to say **[NA11]** that she was nominated to take on the roll for IT destruction and Information Management. During her oral evidence Helen Scothern stated that the additional duties were not higher grade duties and were not consistent with grade 7 work. As the work was not grade 7 work it would not have attracted a TDA to grade 7.

68. It is factually accurate that the Claimant was denied a TDA for this period from September 2020. Such a denial would amount to a detriment. What was the reason for the treatment? We accept the evidence of Helen Scothern that the Claimant was undertaking aspects of another role, namely overseeing the return of laptop computers, which was not grade 7 work. We accept that this was the reason for the decision not to award the Claimant a TDA for that work. This reason had nothing whatsoever to do with the Claimant's race. We have found, in respect of Factual Issue No.1 that the Claimant has failed to prove facts from which we could conclude that race had played a part in Helen Scothern's decision to refuse a TDA for this period.

69. We have, within our analysis of the facts, discounted Ian Powling as a suitable comparator on the grounds that he was not in the same circumstances as the Claimant. The Claimant also suggested that she had been the victim of witchhunt following a presentation that she had conducted on race. However, we could find no evidential basis for reaching that conclusion. For these reasons Factual Issue No.1 fails.

70. If we were wrong on our primary conclusions on this issue, we would still have dismissed it time grounds. Both parties accepted at the outset of the case that all incidents prior to 12th March

2021 would be out of time, unless part of a single continuing act of discrimination, or unless it was just and equitable to extend time to allow the allegation to progress. The Claimant was awarded a TDA on 17th November 2020. In the circumstances the failure to put her on a TDA was a single continuing act for the period between September 2020 until it was rectified on 17th November 2020. This means that allegation was just under 4 months out of time, as at 12th March 2021. In determining whether to exercise our discretion we took on board that the Claimant was herself an experienced Human Resources Business Partner and was at all material times assisted by her Trade Union representative. The Claimant told us in evidence that she was aware of the time limit, but not aware that time expired three months less one day after the event. We do not accept that evidence. We conclude on the balance of probabilities that the Claimant was aware of the Tribunal time limits that applied to her case. In the circumstances we find that there was no good reason provided for the delay. Whilst the Respondent did not assert any prejudice (beyond having to defend a claim they otherwise might have avoided) we conclude that a 4 month delay, for a Claimant as knowledgeable in this area as she was, was too long.

Factual Issue No.2

71. The 2nd issue for our determination is whether Helen Scothern intervened in the Claimant's loan extension by requiring a three-month review for further extensions of the loan. This, the Claimant asserts, contradicted the other DHSC employees, one of whom was Jo Liddy, the Claimant's counter- signing manager, who was also on temporary duty allowance and not subjected to a three-month review.

72. On 2nd December 2020 Genevieve Gallichan (the HRBP for the business unit Samantha Ruddock's team was situated) emailed Helen Scothern observing that the Claimant now a grade 7 in the Programmes Team and asked if the appointment was an exception to the TP rules the arrangement was 'all above board' **[703]**. This is yet another indication that the rule was commonly understood to be waived on occasions and/or enforced with differing levels of enthusiasm. The matter next came on Ms Scothern's radar on 14th December 2020 when Lorraine Wall informed her that Samantha Ruddock had requested that the Claimant be moved onto a 12 month TDA, until November 2021. Ms Scothern emailed Ms Ruddock on 18th December 2021 **[708]**. In the email she explained to Ms Ruddock that whilst the Claimant could be placed on a TDA, it would have to be reviewed in 3 months (February 2021) with the potential for a further 3 month extension after that. As a matter of fact, therefore, the factual

allegation in Issue No.2 is made out. On 18th December 2020 Helen Scothern did intervene in the Claimant's loan extension by requiring a three-month review for further extensions of the loan. Understandably Ms Ruddock asked to see the policy explaining the 3+3 TDA/TP extension rule. On 18th January 2021 Ms Scothern reiterated the rule and its application to the Claimant, but conceded that she could not put her hand on the written policy **[736]**. We have to establish the reason why. The Claimant asserts that her TDA was not extended for 12 months because she was a black member of staff. She asserts that her comparator, Ian Powling, was not subject to a 3+3 month TDA review **[NA20-23]**.

73. We consider that this issue was raised by the Claimant in time. Whilst any discriminatory acts occurring before 12th March 2021 are out of time, and the decision to impose the 3+3 month review was made on 18th December 2020 and reiterated on 18th January 2020, as a state of affairs it continued past the point it became 'in time' through to the end of the Claimant's loan to DHSC. We consider that if the decision was discriminatory, it would have amounted to a single continuing act which lasted until at least a point that would have made it in time.

74. We have already discounted Ian Powling as a valid comparator. Henry Smith had a loan extension made in error, which was then corrected. Whilst we were told of other individuals that had also benefitted from loan extensions (for example Jo Liddy and Claire Fradley) we were not provided with any evidence as to the circumstances of either employee. As such, the Claimant failed to establish that their circumstances were the same, or not materially different, to hers.

75. Whilst Ms Scothern could not locate a DHSC 3+3 TDA review policy, the Cabinet Office, the Claimant's substantive employer, did have a TDA policy, albeit not one that made express reference to the 3 month plus 1 review **[177]**. The Claimant, had, at all material times, remained employed on her Cabinet Office terms and conditions.

76. However, given the lack of any written 3+3 month TDA review policy for DHSC and the lack of a detailed explanation from the Respondents for all of the employees that did receive a TDA extension beyond 3 months, we have concluded that the Claimant has done enough to prove facts from which discrimination could be the reason. We do therefore look to the Respondents for an explanation of the treatment.

77. As stated, we accept Ms Scothern's explanation regarding Ian Powling at **[HS25]**. We also accept that she, in good faith, believed that the 3+3 month review policy was in place and that

was why she applied it to the Claimant's situation. This explanation has nothing whatsoever to do with the Claimant's race **[HS51]**. Ms Scothern considered that as no competition had taken place, the Claimant's TDA could only be for 3 months, extended for a further 3 months after a review **[177]**. For this reason we conclude that Issue No.2 fails.

78. Whilst we have ultimately accepted that Ms Scothern's intervention to prevent a 12 month TDA was not influenced by the Claimant's race, we were troubled by the lack of a clear written policy and the seemingly ad hoc way longer TDAs had been granted to individuals, sometimes, as Ms Scothern herself admitted, by a 'tap on the shoulder'. This exposed the Respondents to real risk that disadvantaged employees would legitimately worry that race might have been a factor. This would have been avoided if a demonstrably transparent policy had been applied to every employee given a TDA.

Factual Issue No.3

79. The 3rd issue for our determination is whether, on 17 March 2021, the Claimant's loan agreement with DHSC was terminated in a way that was: a) not consistent with established HR policies; and b) unfair and arbitrary, based on reasons that were not communicated with Claimant, denying her the opportunity to respond. This incident, post-dating the cut off point for time, namely 12th March 2021, is in time.

80. Ms Harrison's evidence in Tribunal spanned a weekend. Her Counsel had asked for the start of her evidence to be pushed back on the Friday to accommodate her other commitments. We allowed that request. Ms Harrison's approach on that Friday afternoon when she did finally attend to give her evidence, was not professional. At one point, during cross examination, she referred to the Claimant's barrister by her first name. She was inappropriately familiar and did not appear to be treating the case, in which she was charged with race discrimination, very seriously. Her evidence on Monday was far more professional.

81. We find as a fact that all of the treatment complained of by the Claimant in Issue No3 is made out on the facts. Ms Harrison did terminate the Claimant's loan agreement. She did it in a way that was not consistent with established HR policies and, we conclude, unfair and arbitrary, and in circumstances in which the Claimant was denied her the opportunity to respond. The appeal hearing officer concluded that the termination, on performance grounds, had not followed any procedures for measuring and improving performance before the termination **[762-**

763]. This would have required waiting until the Claimant returned from leave, giving her advance notice of a meeting and then holding a meeting, at which the Claimant had her tasks clarified and time to improve. None of those steps were taken. Had the termination of the loan agreement amounted to a termination of the Claimant's employment, we would have found that it to have been unfair.

82. It is clear that during the two weeks that the Claimant worked for Ms Harison, both felt that the arrangement was not working. Both took steps to end the work relationship without telling the other. The Claimant had arranged another internal transfer within the DHSC, within two weeks. We know that Ms Harrison had performance concerns, stated as being (i) referring to NHSTT instead of DHSC, (ii) providing incorrect policy advice and (iii) typos in her work. All of these matters were minor in nature. We accept that Ms Harrison took on the Claimant believing her to be a substantive grade 7 only to discover she was acting up to a grade 7, but by then Ms Harrison had already set into motion the termination of the Claimant's loan agreement.

83. No actual comparator is relied for this issue. We are to consider a white individual, otherwise in the same circumstances as the Claimant. The Claimant is Asian, Muslim and British Pakistani. She did suffer detrimental treatment at the hands of Ms Harrison. Has the Claimant established the 'something more' from which we could deduce that race had been a factor in the treatment? The feeling that it had not worked out was mutual. The Claimant did seek her own exit. We conclude that neither individual felt the arrangement was going to work.

84. There is a particular difficulty however with the submission that Ms Harrison terminated the Claimant's loan agreement because of her race. It is this: Ms Harrison was demonstrably pleased to have the Claimant join her team just two weeks before, knowing her to be an Asian employee. Ms Harrison did all that she could to facilitate the Claimant's swift recruitment into her team **[564 + 566]**. In paragraph 51 of the Respondents' closing submissions the point was put in the following way:

> '*In summary, the Claimant's case in relation to the termination of her agreement relies on the tribunal accepting that within a few weeks Elizabeth Harrison morphed from someone who is especially keen to bring into her team a particular Asian employee to someone who wanted to expedite the same employees departure because of her race. There is nothing in the evidence to lend weight to this theory, let alone establish it as a reality on the balance of probabilities'*

85. We feel bound to agree with this analysis. Race was no bar to the Claimant's recruitment by Ms Harrison, some two weeks earlier. It is just too difficult, and plainly inconsistent with the recruitment, for race to have been the primary reason for the termination of the loan agreement. For this reason we reject the submission that race was the reason for the treatment, and accordingly Issue No.3 fails.

86. We understand why the Claimant has presented this claim. She was not treated consistently with everyone else on the application of the 3+3 month TDA review policy and her treatment at the hands of Ms Harrison was poor, unfair and did Ms Harrison no credit whatsoever. However we have accepted that Ms Scothern acted as she did in good faith, and whilst Mr Harrison's treatment of the Claimant fell below the standard that the Claimant was entitled to receive, we have not been able to conclude that her race was the reason for that treatment. We accept that Ms Harrison did have concerns with the Claimant's performance in the short time that she managed her, and that both the Claimant and Ms Harrison felt that the move had not been a good one for the Claimant. This had nothing whatsoever to do with the Claimant's race.

87. Accordingly, all of the Claimant's discrimination claims are dismissed.

Employment Judge Gidney

18th March 2024

Sent to the parties on:
28 March 2024

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For the Tribunal:

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