EMPLOYMENT TRIBUNALS

Claimant: Mr N Narli

Respondent: Babcock Integrated Technology Ltd

Heard at: By Video **On:** 8 – 11 April 2024

Before: Employment Judge Danvers
Mrs Monaghan
Mr Beese

Representation
Claimant: In person
Respondent: Mr Adjei, Counsel

JUDGMENT having been sent to the parties on 18 April 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Procedural background

1. By a claim form received at the Tribunal on 19 January 2023, the Claimant brought a claim against the Respondent for race discrimination. The Claimant also brought a claim against JSA Group Limited t/a Workwell Solutions. However, this claim was rejected by the Tribunal on 20 February 2023 because the Claimant had not complied with the requirement pursuant to rule 10(1)(c) of Employment Tribunals Rules of Procedure 2013, since the claim form did not contain an early conciliation number in respect of that Respondent.

2. A Preliminary Hearing took place in front of Regional Employment Judge Pirani on 31 August 2023 at which an initial discussion of the claims and

issues took place. The case was set down for a further Preliminary Hearing to determine whether the claim was in time.

3. This took place on 23 January 2024 in front of EJ Livesey who determined that although the claim was issued outside of the period of three months, it was just and equitable to extend time under s.123 EqA 2010 and to proceed to hear the claim.

4. At the Preliminary Hearing in front of Regional Employment Judge Pirani it was agreed at this time that no issues of national security arise such that the claim needed to be transferred to London Central Employment Tribunal and heard within a closed setting. The Respondent was instructed to raise the matter if that changed, and no such issue was raised prior to or at the final hearing.

Claims and Issues

5. The Claimant pursues a claim of direct nationality discrimination under s.13 Equality Act 2010.

6. The Claims and Issues were discussed and agreed at the Preliminary Hearing in front of EJ Livesey. At the outset of this hearing, we confirmed these with the parties. The Respondent was able to narrow some of the issues, such that the final list of issues was as follows:

    1. Employment status

    1.1 The Respondent concedes the Claimant was a contract worker within the meaning of s. 41 of the Equality Act and that the Respondent was a principal within the meaning of the same section.

    2. Direct race discrimination (Equality Act 2010 section 13)

    2.1 The Claimant describes himself as having dual nationality; British and Turkish.

    2.2 The Respondent accepts that it did the following things: terminated the Claimant's engagement on or about 11 August 2022.

    2.3 The Respondent accepts that amounted to less favourable treatment.

2.4 The Respondent accepts that the termination of the Claimant's engagement was at least in part due to him holding dual nationality.

2.5 Did the Respondent act for the purpose of safeguarding national security within the meaning of s. 192? If so, was the conduct proportionate within the meaning of that section?

2.6 Can the Respondent rely upon Schedule 9, paragraph 1 (a) of the Act? Did it have an occupational requirement and, if so, was the requirement a proportionate means of achieving a legitimate aim, that being national security and compliance with its contractual obligations.

2.7 Did the Respondent act in order to comply with a condition imposed by a Minister of the Crown, within the meaning of paragraph 1 (e) of Schedule 23 of the Act?

7. It was agreed that we would deal with remedy separately, if required, save for the issue of whether there was a likelihood that the Claimant's engagement would have been terminated in any event because he did not have 'Security Check' Clearance.

8. In the course of giving his evidence on Day 1, the Claimant indicated that there may be two separate ways he was seeking to advance his case. First, that he was discriminated against because of his dual nationality. Second, that he was discriminated against because he was Turkish. This was not the way the Respondent had understood the case to be put. It was agreed that the Respondent's counsel would finish his cross examination on the basis it had been prepared, then the question of whether the Claimant was seeking to argue his case in a way that was not pleaded and whether, if necessary, he should be allowed to amend his claim, would be considered the next morning along with any consequential amendments to the process.

9. However, the next day after discussion with the Claimant, it became clear that he was not seeking to argue that he was discriminated because he was Turkish. Rather, our understanding, which he confirmed, was that he believed that his dual-nationality may have been a smoke screen for terminating the engagement and the real reason is that Jay Bartholomew

had a personal grudge against him from when they worked together previously and did not like him for reasons unconnected to his nationality.

10. We agreed with the Respondent that in the circumstances of the Claimant not having sufficient service for an unfair dismissal claim, a claim based on him being dismissed because Jay Bartholomew did not like him did not amount to a claim in law that we could consider. Further, the Claimant was not able to identify a separate valid legal framework for this claim either in our discussions, or on his account, in discussions with EJ Livesey at the Preliminary Hearing. Accordingly, we did not consider there was an application to amend to include a claim that could proceed in law before us.

11. In closing submissions, Mr Adjei, submitted that the Claimant's 'real' case was that the Respondent terminated his assignment using his dual nationality as a smoke screen for another reason not connected to a protected characteristic. In those circumstances he said the Claimant does not have a case under the Equality Act 2010. However, the note of the Tribunal is that when the Claimant was asked whether his case was that Ms Bartholomew had said things that were untrue, he responded: "that is not my only claim, but that is true'. He reiterated later on that it was not his 'only claim' relating to his concerns about Ms Bartholomew and that there 'lots of things ongoing'. Later he again reiterated that he had two claims: first that the Respondent said the reason was dual nationality and on the papers it did not look like that was a requirement of the contract, and second, that the dual nationality may have been a smoke screen.

12. In those circumstances, we are of the view that the Claimant was advancing the two potential reasons for dismissal as *alternatives* and we have therefore gone on to consider the issues above.

Procedure, documents and evidence heard

13. We were provided with a bundle paginated to 229 pages (although the PDF itself was 256 pages due to insertions). In addition we were sent the witness statements of Mr Driscoll and Mr Kelley from the Preliminary Hearing in front of EJ Livesey and an 8 page article entitled 'Vanguard-class submarine'.

14. We read witness statements by and heard evidence from:

a. the Claimant (Day 1);

b. For the Respondent:

i. Mr Kevin Driscoll, who was the Respondent's Head of the Engineering Discipline at the time of the events we were concerned with and took the decision to terminate the engagement; (Day 2); and

ii. Mr Christopher Cunningham, Security Director for the Respondent (Day 2).

15. The Respondent's counsel provided written submissions and supplemented them orally (end of Day 2).

16. The Claimant made oral submissions on the morning of Day 3.

17. We were grateful for the clear and helpful submissions from both parties and for the professional and courteous manner in which everyone who participated in the hearing conducted themselves.

FINDINGS OF FACT

The Respondent

15. The Respondent is a company within the Babcock International Group, which is an aerospace, defence and nuclear engineering services company. The principal activity of the Respondent is the design, supply, manufacture, installation, support and management of specialist mechanical handling equipment projects and systems engineering, particularly within the defence industry.

16. The Respondent has offices at Ashton House, Bristol. These comprise various buildings including a building housing a Design and Engineering Facility and a separate building which contains a 'Production Facility' which is similar to a big hangar / factory. The building in which the Production Facility is contained also has a small engineering office it in it.

The Claimant

17. The Claimant is a Mechanical Engineer he has dual British and Turkish nationality.

The Dreadnought (D0) Contract

18. In 2020, the Respondent entered into a contract relating to the supply of UK Submarine Weapon Handling and Launch Systems (in respect of the UK's future nuclear submarine, Dreadnought) ('the D0 Contract').

19. The D0 Contract was with a separate company (the 'Customer'), who themselves had a contract with the Ministry of Defence (the 'MOD'). The company in the direct relationship with the MOD (in this case the Customer), was known as the 'Tier 1 contractor'. The company who was subcontracted to the Tier 1 contractor (in this case the Respondent), was known as the Tier 2 contractor.

20. It was not challenged that on other projects the Respondent is sometimes the Tier 1 contractor, contracting directly with the MOD.

BPSS / SC

21. There are three levels of information security classification which could apply to material produced or provided as part of defence contracts: official, secret and top secret. In addition, sometimes handling instructions were given for material that it should be 'UK Eyes Only'. There are also three different types of security clearance that may be needed to work on aspects of defence projects. The lowest form of clearance is Baseline Personnel Security Standard ('BPSS'), then Security Check ('SC') and, finally Developed Vetting.

22. All employees of the Respondent had to pass a BPSS check, regardless of the project they were working on or location of their work.

23. The Respondent's evidence is that there are two trade control regulations that apply to other contracts that the Respondent was engaged on (i.e., not that which the Claimant was working on). These are the International Traffic in Arms Regulations ('ITAR') and the Polaris Sales Agreement ('PSA'). Under these Regulations, the normal position is that anyone with access to the Production Facility, regardless of what contract / project they were working on, required SC clearance.

24. Mr Cunningham's evidence was that to obtain SC clearance someone would need to apply to UK Vetting and it takes approximately 1-2 months for the application to be processed. He also said in limited circumstances the

Respondent can permit someone with only BPSS, but who is applying to SC, to have access to the Production Facility. However, this had to be approved by the security team first and was generally only agreed for permanent employees who were in the process of applying for SC. His evidence was that otherwise someone without SC clearance would not be allowed unescorted access to the Production Facility.

25. We accept, and it was not actively challenged by the Claimant, that due to the Regulations governing other contracts on which the Respondent was engaged, the normal requirement for unescorted access to the Production Facility was to have SC clearance and we also accept Mr Cunningham's evidence as to the process for getting that clearance, how long it would take and when exceptions were normally approved.

Security Aspects Letter ('SAL') in respect of the D0 Contract

26. On 23 July 2020, the Respondent was sent a 'Security Aspects Letter' ('SAL') by the Customer in relation to the D0 Contract. This letter was not disclosed to the Claimant until 25 March 2024; he only had the annexe prior to that date. The Claimant did not assert that the letter itself was fabricated but he objected to the letter's late disclosure in particular saying that had it been provided earlier he could have got expert evidence or input from the MOD on how the provisions in the SAL should be interpreted.

27. The SAL specified that the D0 Contract arose 'from a United Kingdom Government contract and will involve [the Respondent] holding UK Classified material'. Further, that: it is a condition of the D0 Contract that the classified material is protected; material passed to the Respondent would bear the Classification appropriate to it; and, the material in the letter provides advice as to how to classify material which the Respondent may produce. The SAL also provided that the SAL formed part of the terms of the D0 Contract.

28. A summary of requirements and risk assessment outputs was provided in Table 1 and the SAL also refers to a 'SAL Response Form (Annexe A)'.

29. Section 2 of the Letter has the title 'Government Security Classifications'. At (b) it states:

> The following aspects are designated 'UK EYES ONLY': Before granting access, you must verify that the individual concerned has a need to know, is trustworthy and holds the correct level of security clearance. You must not permit anyone who is not a UK National, to access such information or assets. Due to the government to government conditions detailed within contracts on the site, Non-UK nationals will not be allowed access to the shipyard or its associated facilities.
>
> Security cleared UK nationals of your company will be given escorted access where deemed appropriate by the UK Programme Security Management Team. On occasion, UK Security Cleared nationals may be given unescorted access to the site.

30. Mr Driscoll's evidence, which was not challenged was that the 'shipyard or its associated facilities' included the Respondent's Production Facility.

31. Section 4 states:

> 4. Security Clearance Requirements
>
> The clearance levels required will be dependent on the scope of work. The minimum security clearance level personnel working on this contract, including information subcontracted, is shown in Table 1. Further information can be found in relation to Security Clearances at section 3 of The Security Guidance Handbook.

32. At 6 it states:

> 6. Aggregation
>
> Aggregation: Your Company site(s) may have access to a range of information/material
>
> available as a result of more than one Government Security Aspects Letters (SALs),
>
> Invitation to Tender (ITT), contract or task etc. It is possible that the Classification of such information/material may become greater that the highest specified to you in the individual SAL, ITT, contract or task as a result of aggregation.

> Aggregation may occur as a result of associating discrete elements, which, when combined, reveal information of a higher Classification, or by accumulation of significant quantities of information at OFFICIAL - SENSITIVE or above. If you believe that the aggregate Classification of such information or material may exceed that currently allowed for your company site(s), please contact the undersigned immediately.

33. Section 9 provides that if the Respondent engages a sub-contractor the Security Conditions must be incorporated into any document with that sub-contractor and all such sub-contracted work must comply with the requirements of the SAL.

34. Annex A is a SAL Response and Assurance Form. It includes questions from the Customer with responses from the Respondent. It includes the following questions and responses:

> Personnel (as defined within the contract) who require access to Project Information have been briefed on the security requirements in this SAL and meet all the security and access requirements, including need to know, clearance and nationality: Yes.
>
> …
>
> 2.5: Are there any employees who are non-UK or dual nationals? (Please detail): Not engaged on this contract.

The Claimant's engagement

35. At some point in the first half of 2022, the Respondent identified a need for additional engineering resource to help them deal with an increase in demand in their UK Submarine in-build support team.

36. The Respondent engaged a third-party provider, Expleo Engineering UK Limited ('Expleo'), to supply suitable candidates.

37. Expleo provided a Proposal dated 17 May 2022 to the Respondent setting out the scope of an offer by them to provide 3 mechanical design engineers for an initial period of 26 weeks to provide support to the 'Dreadnought In Build Team'.

38. The proposal included the following:

> 1.2 Security
>
> It is understood that SC level clearance is preferred to work on this contract and that nationality is limited to UK only to give flexibility on project tasking. It is understood that engineers are able to start with BPPS in advance of receiving their SC clearance at the discretion of the Babcock project team.
>
> 1.3 Location & IT
>
> The engineer will be expected to work remotely in support of this project with occasional trips to the Babcock sites in Bristol. The engineer will be issued with Babcock IT equipment in order to carry out this role and will be provided with all the necessary access within the Babcock IT system as needed to perform the tasks required.
>
> 2.4 Exclusions
>
> The technical approach and work-scope contained within this proposal is offered to Babcock with the following exclusions:.. Any regular & continuous requirement to travel to Babcock site for delivery of this work package. The engineer is expected to work remotely.

39. The Expleo Job Advert / Description explained that the role could be carried out on a 'hybrid basis between the client's facility in Bristol and working remotely' and that candidates must be in possession of full Security Clearance or 'be eligible to obtaining [sic] SC'.

40. Expleo identified the Claimant as a candidate and he was interviewed. Expleo undertook some security checks, in which the Claimant identified his nationality as 'British-Naturalised (Turkish)' and stated that he possessed both British and Turkish nationality.

41. The Claimant was to be employed by an agency, JSA Services Limited (JSA). A contract assignment letter between JSA and Expleo lists that the Claimant's location of work would be Ashton House, Ashton Gate, Bristol and Remote and that when he attended, he should ask for Christopher Notley.

42. The Claimant completed a Baseline Personnel Security Standard (BPSS) form and a nationality and Immigration Status Form provided by the

Respondent, on which he indicated his nationality at birth was Turkish, he signed these on 15 July 2022.

43. On 18 July 2022, Emma Moore of Expleo certified that all necessary checks had been completed. In the Roles Specific Details section of that form it says that the location was to be Babcock Bristol / Remote WFH and the Security Clearance required was 'BPSS'. The Role Specific Details section says 'HR to complete', however Mr Cunningham's oral evidence was that he would expect some input from the line manager for the role. He said he did not know why the form said BPSS only and considered that was inconsistent with other information included in the bundle. We find that the form must have been filled in with some input from the Respondent either HR or the line manager or both together.

44. On 19 July 2022 an email was sent from Brian Maddrell, Expleo, to various employees of the Respondent confirming who was due to be joining the Drednought team. He wrote:

> The team we have been asked to provide is as per:
>
> 2 x mechanical engineers (Engineer grade) and 1 x Lead Mechanical engineer– to support our Dreadnought In-Build team getting on top of a backlog of drawing changes, concession processing and general task work.
>
> For role we'd like SC clearance and UK nationality to give flexibility on what work is assigned with a starting date of ASAP and a duration of 6 months initially with the potential to extend being reviewed towards the end of the 6 months…
>
> …
>
> Location & IT
>
> The engineer will be expected to work remotely in support of this project with occasional trips to the Babcock sites in Bristol. The engineer will be issued with Babcock IT equipment in order to carry out this role and will be provided with all the necessary access within the Babcock IT system as needed to perform the tasks required.

We have assumed week 1 the first 3 days on site at Babcock and then as required.

Expleo Statement of Work submitted and accepted by Babcock: Q94053 Issue 2.

45. The email also included a table indicating that the Claimant's 'Babcock Security forms' had been submitted. Under a heading 'Security' it said in respect of the Claimant 'BPSS to go SC in first 6 months'. In respect of 'Babcock security cleared' it said 'Not yet estimate 1st Aug'. On 28 July 2022 Mr Madrell sent an email to two Respondent employees saying that the Claimant was now 'Babcock security cleared'.

46. There were some further exchanges about start dates, which included the Respondent pushing back the Claimant's start date back by a week, and on 3 August 2022, Mr Christopher Notley of the Respondent was copied into the email chain (which further down included the 19 July 2022 email set out above).

47. The Claimant started his engagement with the Respondent on 8 August 2022 and attended at Ashton House. On 8 August 2022 he met Tom Kelley, Engineering Lead for NCR Delivery Team, and was introduced to various members of the team. It is not in dispute that he was shown the Production Facility by Mr Kelley during his induction period.

Location of the Claimant's work

48. The parties agree that the intention was that the Claimant would mainly work remotely. The Claimant's evidence was he expected to only go to the Respondent's offices occasionally after his induction and that he had made it clear that because he lived in Gloucester, he would not be able to do regular trips, and that it was confirmed this was OK and that the role would be remote with only occasional trips to the office. In closing submissions, the Respondent's counsel suggested that the evidence supported an understanding that there would be regular visits to the Respondent's offices, more like once a week, which had been the oral evidence of Mr Driscoll.

49. We find that as per the Proposal for the role provided by Expleo, the Claimant's role was to be predominantly remote with occasional visits to

Ashton House. What was meant by 'occasional visits' was not specified, we accept that sometimes that might have been as frequent as once a week, but sometimes it would be less frequent as required.

Access to the production facility

50. A dispute arose as to what areas of the Respondent's premises the Claimant would be required to enter when he did attend.

51. The Claimant's evidence was that the occasional trips to Ashton House would have been to visit the Design Engineering Office, where he said he was shown a cubicle when he was inducted that he would be working from. He said that he never expected to go into the Production Facility and on his first day Mr Kelley said that he could take him to see the Production Facility, so he can see it and have an idea of how it looks, but that he would work on his computer (in the Design Engineering Office) going forward.

52. Mr Driscoll's evidence was that the team that the Claimant was part of required access to the Production Facility to inspect non-conformities on components / equipment in manufacture and that they would have largely unrestricted access to the Production Facility. In oral evidence Mr Driscoll explained that the Claimant's role would be around assessing if there was an error in manufacturing components and assessing suitability which would require access to the physical production area where they were manufactured (in the Production Facility). He said the frequency would be driven by the quantity of material being processed, but he anticipated attendance would be once a week, sometimes more. He said that whoever performed the role would have free unrestricted access to look at components with errors and that thereafter, once they understood the error from visual observation, they would then be able to undertake the engineering work remotely to design the solution.

53. We find that the Claimant believed that he would not have had to go into the Production Facility based on what he was told and knew from other jobs. However, he had not fully started in the role, and we accept Mr Driscoll's oral evidence as credible that in the Respondent's organisation, someone in the Claimant's role would have been expected to occasionally access the Production Facility in order to liaise with the Production Team in person and

see the relevant component and errors, which he would then go back and work on remotely.

What would the Claimant have to work on?

54. Mr Driscoll's evidence, which was not challenged and which we in any event accept, was that in his role, the Claimant would have had access to and undertaken work on the data, information and / or actual asset that was being worked on under the D0 Contract.

Termination of engagement

55. At some point on 8 August 2022 Jay Bartholomew, who was the Respondent's Head of Production Facility at the time, informed Mr Kelley and (on the same day or later) Mr Driscoll, that she recognised the Claimant from her previous employment at Rolls Royce and said that he had been dismissed and escorted off site.

56. This prompted Mr Kelley to request the Claimant's CV to confirm if he had worked at Rolls Royce. Mr Kelley and Mr Driscoll checked the CV and noted that the Claimant had studied in Turkey which prompted Mr Driscoll to check the Claimant's nationality with the security team who confirmed he held dual nationality.

57. We note that the Claimant denies that he was dismissed from Rolls Royce and escorted off site and that he believes Jay Bartholomew had a personal grudge against him. However, in light of the Respondent's concession as to the reason for the termination of engagement and given that the Claimant did not challenge that it was Mr Driscoll who made that decision (not Ms Bartholomew), we do not consider this to be material to the matters we have to decide. We find that Ms Bartholomew's assertion was simply the *context* in which Mr Kelley and Mr Driscoll became aware of the Claimant's dual nationality and therefore whether that assertion was correct or not has no bearing on the legal issues we must decide.

58. At Mr Driscoll's request on 9 or 10 August 2022, Mr Kelley asked the Claimant to work from home. The Claimant's evidence was that Mr Kelley told him that someone had said he was not British and that when the Claimant showed him his passport he seemed surprised and said he did not understand what

the problem was and that he should not have an issue working there, but said he would have to speak with his manager to see what was happening. The Tribunal did not hear from Mr Kelley and we accept this evidence from the Claimant as to Mr Kelley's surprise and confusion.

59. On 11 August 2022, Mr Driscoll called Expleo and informed them that as the Claimant was not a sole-UK national, he could not work on the D0 Contract and Expleo said they would source an alternative candidate and explain to the Claimant.

60. On 11 August 2022 at 10:50, Mr Kelley sent the Claimant an email saying that he had spoken to the engineering manager the day before to see if there was anything they could do, but that there was not and that the Claimant needed to go through Expleo.

61. The same day Expleo called the Claimant and informed him that the Respondent had terminated the engagement because of his Turkish nationality.

62. Mr Driscoll said that the entire reason the Claimant's engagement was terminated was the Claimant's dual nationality, which he considered was inconsistent with the requirements of the SAL for the Contract. We find that this was the complete reason for the termination. Although the Claimant was concerned about the involvement of Jay Bartholomew in raising what he considered were false reports about his former employment, we have not seen any evidence to refute the credible account of events put forward by Mr Driscoll explaining those reports were just the context for him being made aware of the Claimant's dual-nationality. We accept his evidence as to why and in what context the engagement was terminated.

63. The Claimant went through JSA's grievance and appeal process; his grievance was not upheld.

Dual nationality and the rules under the SAL

64. The Respondent's case is that the requirement in the SAL in section 2(b) that the Respondent not permit anyone who is 'not a UK National' to access 'such information or assets' and that 'non UK nationals' not be allowed access to the shipyard (i.e., Production Facility) amounted to a requirement that an

employee with access to such information / the Production Facility must be a *sole* UK National (i.e., not of dual nationality) unless there was pre-authorisation from the Customer.

65. The Claimant's position is that he *is* a UK national and that neither the SAL nor anything else says that the requirement is for someone to be a *sole* UK National.

66. We find that the requirement in the SAL was that employees such as the Claimant who would be accessing the relevant information / assets and Production Facility must be a UK National. However, that there was no requirement that they have *sole* UK Nationality or, put it another way, that they not have another nationality.

67. In reaching that conclusion we carefully considered the arguments and evidence of the Respondent.

68. We note that the Expleo proposal for the role said that 'nationality is to UK only to give flexibility on project tasking', but that is the only place in the documents where the expression 'UK only' is used and in any event it is a document produced by Expleo, rather than the Customer. In the email of 19 July 2022, Expleo says 'UK nationality' rather than 'UK only' and no one from the Respondent responds to say the requirement is 'UK only nationality' or non-dual national.

69. In their witness statements, Mr Driscoll and Mr Cunningham both say that the provision in Section 2(b) of the SAL precludes dual nationals.

70. In oral evidence, when asked by the Judge where that understanding came from, Mr Driscoll said it was his working knowledge. When questioned further on what he meant, he said it was information he had been told by colleagues over time, but that he could not reference a location for where that information came from. Mr Driscoll said, and we accept, that he did check at the time with the Respondent's Security Team who also told him that the provision meant no dual nationals.

71. Mr Cunningham, who is the Respondent's Security Director, when also asked by the Judge where his understanding came from as to the meaning of the provision, said that the D0 Contract was one of approximately 150+ within his

part of the Respondent. He said that across all those contracts they used terms of 'nationality' in different ways for example, 'sole UK' or 'non-UK'. He said that what experience had taught him was that when they were talking about nationality, he would clarify on a case by case basis with the contracting entity if there was confusion. He said there was not a consistent approach, which is why they could clarify. He said that in this case he did not believe they had clarified due to the immediate need for the work to be done. In his experience it would take around 2-3 weeks to get a response on clarification. When asked whether the response in the past on what 'UK nationality' means was different, he said that each contract would be quite different and it depended on the nature of the contract: *some* contracting authorities say absolutely no dual nationals and no foreign nationals.

72. In closing submissions, the Respondent put emphasis on question 2.5 of the annexe to the SAL, which is part of a section asking questions about 'Supplier Employees'. As set out above, 2.5 says: 'Are there any employees who are Non-UK or Dual nationals?', to which the Respondent answered 'Not engaged on this contract'. Mr Adjei invited the Tribunal to conclude that this question was asked to ensure that 'R was complying with the contractual requirements'. We do not accept this follows. Mr Cunningham in evidence said he thought the question at 2.5 provided some clarity in the absence of a formal response explaining what 'non UK nationals' means in this SAL. However, he went on to say that he thought the form was for the purpose of the Customer building a risk picture of working with the Respondent so they can understand where the risks are in the supply chain. The question itself is not specific as to whether there are any dual nationals working in the shipyard or on the relevant assets (so as to mirror the contractual provision), it is a more general question about the entire workforce, which would be consistent with it being to build a risk picture rather than confirm contractual compliance. A secondary point is there is also a separate question asking for confirmation that personnel meet nationality requirements, which supports our conclusion that is not the purpose of asking 2.5.

73. Mr Adjei also argued that only the Respondent's interpretation of 'UK nationality' (i.e., excluding dual nationals) was credible because otherwise it would mean that a dual national whose second nationality was that of a nation with whom UK had difficult or hostile relations such as Russia, China or Iran

would be able to have access to the assets or classified documents. We recognise the point being made, but are of the view that if the MOD considered that the security risk of *any* dual nationals having access to the material was in and of itself so high it could have simply stated in the Tier 1 SAL (which we accept would be mirrored by the Tier 2 SAL) i.e., that only those with sole UK nationality or non-dual nationality could have access. We also note that employees were required to have BPSS clearance to access 'Official-Sensitive' material and a minimum of 'SC' to access 'Secret' material, so nationality was not the only requirement restricting access. Dual nationals, as the Claimant pointed out, have to go through an extensive process to obtain UK citizenship and can in many instances, relinquish their other nationality fairly easily. On the Respondent's interpretation someone who had Russian / British dual nationality and relinquished the former just before starting with the Respondent could fulfil the condition. We do not consider it is self-evident, and the Respondent has not offered any evidence to support the proposition, that dual nationals pose a greater risk to national security than people who are, for example, now sole UK nationals. We also note that the Respondent has taken on two foreign nationals to work on the contract, albeit with pre-authorisation, which also suggests that in and of itself holding a none-UK nationality will not always create a security risk. We therefore do not consider it is self-evident that for reasons of national security the words 'UK national' in the SAL should be read as 'sole UK national'.

74. Further we are of the view that the following supports the Claimant's interpretation of the requirement.

75. First, on a plain English interpretation of the provision i.e., restricting 'non UK nationals' and people who are 'not a UK national', the requirement in our view is to be a *UK national*, which the Claimant was. It does not say UK nationality need be 'sole' or 'non-dual'. If such a restriction was important for reasons of national security, we consider it is very surprising that it would not be explicitly included.

76. Second, no documents were put before the Tribunal to support the Respondent's interpretation. For example, a Governmental policy supporting the interpretation or a letter from the Customer (obtained at the time or afterwards) confirming that dual nationals were barred by those words.

77. Third, Mr Cunningham accepted that the meaning varied from contract to contract and so although Mr Driscoll's evidence was that he had understood from others that 'UK national' means 'sole UK nationals' it was not the case that there was an established industry standard way of understanding those terms which excludes dual nationals.

78. For completeness we should note that we were taken by the Respondent to a Guardian article dated 15 June 2023 which referred to the chief executive of Rolls Royce, Tufan Erginbilgic, being unable to access 'top secret' UK government documents relating to its submarines because he holds British and Turkish citizenship (according to sources). It reports that Rolls Royce works on Vanguard submarine vessels. It says that 'UK eyes only' documents are typically marked 'UK secret'. It also reports that 'It is understood Erginbilgic has clearance to access the site, which is only open to UK citizens'. We did not consider this took us much further. We do not have access to the SAL in place in respect of the relevant contract or to the 'Whitehall security protocols' referred to and do not know if they use the same expressions i.e., non-UK nationals or if the refer explicitly to 'sole UK nationals' or 'non-dual UK nationals'. Or what definition is given therein to 'UK eyes only', we note that he could apparently access the site which was apparently only open to 'UK citizens'.

79. Similarly, we were taken by the Claimant to a job advertisement for a 'Contingent Senior Mechanical Engineer' to work on various submarines for the Respondent, which the recruiter confirmed could be applied for by someone who is a dual national. The Respondent's witnesses were not taken to this advertisement and we do not have the SAL for that role available to us. We do not consider that the fact that a different role allowed dual nationals took us further in interpreting the provisions of the SAL in the Contract with which we were concerned.

Provisions in the Tier 1 / Tier 2 SAL

80. We were not provided with the Tier 1 SAL for the Contract (between the MOD and the Customer), which the Respondent said it did not have access to. However, we accept the Respondent's evidence that the access requirements in the Tier 2 SAL would mirror those in the Tier 1 SAL. We note that the Respondent has produced a Tier 1 SAL which they are a party to on

a different contract with the MOD which refers to 'UK Eyes Only' information and says that anyone who is 'not a UK National' must not be permitted to access such information or assets. We note the Tier 2 SAL provides that sub-contractors must be bound by the same terms and we consider that it would make sense for the Tier 1 SAL to require that Tier 2 contractors have the same security obligations as Tier 1 contractors. Therefore, we accept that the provision in the Respondent's SAL for the Contract is, on the balance of probabilities, a requirement that ultimately comes from the MOD via the Tier 1 SAL.

Authorisation for non-dual nationals

81. Mr Cunningham's evidence was that if the Respondent were to engage a foreign / dual-national on the D0 Contract they would need to try to obtain pre-authorisation from the Customer. For the reasons given above, we do not accept that dual-national British citizens were precluded from working on the contract. However, we have also considered the authorisation process.

82. We accept Mr Cunningham's evidence that the Respondent would normally only consider authorisation for permanent employees and that whether the Respondent was willing to go the "extra yard" (in his words) and make the request would depend on the nature of the job, the timeline to delivery and the criticality of the work involved.

83. In oral evidence Mr Cunningham explained there was no internal policy about when to make those requests and there was no 'easy answer' as to when a Customer would be likely to authorise or not. He indicated that in the application to the Customer they would raise the 'risk balance case' and normally identify the urgent need and the unique skillset that the employee has. He said it would then normally take 2-3 weeks for a decision to be made by the contracting authority (i.e., the Tier 1 contractor), unless the questions had to be referred to the MOD. He said that in respect of the Claimant he would have expected the Customer to make the decision, rather than it being referred on. This evidence was not challenged and we accept it.

Alternative work

84. The Respondent's evidence, which was not challenged and we accept, was that at the time the engagement was terminated, there were no alternative roles that the Claimant could have undertaken.

SC clearance and the Claimant's role

85. The evidence of Mr Driscoll and Mr Cunningham is that even if the Claimant's engagement had not been terminated when it was, he would not have been able to continue in role, because he did not have SC clearance.

86. As set out above, we have found that the Claimant would have been required to attend the Production Facility occasionally as part of his role and that normally SC clearance is a requirement for unescorted access to the Production Facility.

87. However, as already explained, the Respondent's evidence is that the Security Team *could* give permission for someone awaiting SC clearance to access the Production Facility albeit that normally only happened for permanent employees. It was also possible for someone without SC clearance to be given escorted access. Mr Cunningham's oral evidence is that the normal requirement for SC clearance to access the Production Facility unescorted was well known within the organisation.

88. In the recruitment proposal by Expleo for the Claimant's role, it said that 'SC level clearance is *preferred*' not mandatory and the job description says candidates must be in possession of full SC or 'be eligible to obtaining SC' [sic]. Further, in the email to various Respondent employees from Brian Maddrell, Expleo, on 19 July 2022 although it records the request was 'we'd like SC clearance… to give flexibility on what work is assigned' the table below that statement clearly indicates that in respect of the Claimant he had BPSS clearance 'to go SC in first 6 months' and there is no response to that email indicating it will be a problem despite, on Mr Cunningham's evidence, it being well known within the organisation that SC was normally required to access the Production Facility. Further the Claimant's lack of SC clearance was not identified in the first few days of his engagement. Mr Driscoll initially in oral evidence found it difficult to explain how it would have become apparent if the Claimant had continued in his role. However, then he

explained that workers are issued with passes which are colour coded with their level of clearance, so it would become visually obvious. This was not challenged and we accept it.

89. Our conclusions in respect of the likelihood that the Claimant's role would have been terminated when his lack of SC clearance became apparent are set out below.

LEGAL FRAMEWORK

90. Pursuant to Part 5 (s.41(1)(b)) Equality Act 2010 it is unlawful for a Principal (i.e., the Respondent) to discriminate against a contract worker (i.e., the Claimant) by not allowing them to continue to do work.

91. Pursuant to s.13 Equality Act 2010, a person discriminates against another if because of a protected characteristic they treat the other person less favourably than they treat or would treat others. Nationality is a protected characteristic.

92. In this case the Respondent admits that it treated the Claimant less favourably than it would treat others because of his dual nationality in terminating his engagement. Accordingly, we have not rehearsed the law on direct discrimination here.

93. In those circumstances the termination of the Claimant's engagement would be unlawful under the Equality Act 2010 unless it falls within an exception.

94. The Respondent's counsel position (following a question from the Judge) is that all exceptions to the Equality Act 2010 should be read restrictively, which we consider must be right in light of the approach taken by the courts in respect of other specific exceptions (for example ***Hampson v Department of Education and Science*** [1991] 1 AC 171 in which the House of Lords pointed out that a wide interpretation of exceptions would run contrary to the general purpose of the predecessor legislation to the Equality Act, of outlawing discrimination).

<u>National security</u>

95. S.192 provides for a 'national security exception':

> 192 National security

> A person does not contravene this Act only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose.

96. 'For the purpose of' was considered by the Court of Appeal in ***Pemberton v Inwood*** [2018] ICR 1291 in the context of an exception where the 'employment is for the purposes of an organised religion under Schedule 9(1)'. The Court of Appeal concluded that there being more than one purpose (in that case, the purpose of the Trust being to provide medical services) did not prevent the purpose or focus of the employment of a chaplain within that trust being that of organised religion.

97. In our view determining 'the purpose of' an act in this context, involves consideration of the subjective reasons on the part of the decision maker (as it does in other contexts under the Equality Act 2010 when considering whether an act was, for example, 'because of' a protected characteristic).

98. However, when it comes to considering whether the act is 'proportionate' this involves, as it does where a proportionality assessment is required in other parts of the Equality Act 2010, objective consideration of whether the act was appropriate and necessary in all the circumstances (i.e., could not be achieved by less discriminatory means). We take account of the EHRC Equality Act 2010 Employment Statutory Code of Practice guidance on the meaning of 'proportionate' in the context of indirect discrimination at 4.30-4.32 and note that a balancing exercise is involved.

<u>Occupational requirement</u>

99. Pursuant to Schedule 9(1) EqA 2010:

> Schedule 9 (1) General
>
> (1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work—
>
> (a) it is an occupational requirement,

(b) the application of the requirement is a proportionate means of achieving a legitimate aim, and

(c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

(2) The provisions are—

(b) section 41(1)(b);

100. Where Schedule 9(1) applies, an act that would otherwise constitute direct discrimination is rendered lawful.

101. The question of proportionality is approached in the same way as set out above.

Condition imposed by a Minister

102. Pursuant to Schedule 23:

1 Acts authorised by statute or the executive

(1) This paragraph applies to anything done—

…

(e) to comply with a condition imposed (whether before or after the passing of this Act) by a Minister of the Crown.

(2) A person does not contravene Part 3, 4, 5 or 6 by doing anything to which this paragraph applies which discriminates against another because of the other's nationality.

…

103. We note that the language is that the 'anything' must be done 'to comply with a condition *imposed'* rather than for the purpose of such compliance or with the intention of complying with a condition which the Respondent reasonably believes to be imposed.

104. In ***R. (on the application of Amicus) v Secretary of State for Trade and Industry*** [2007] ICR 1176 Richards J gave guidance on the interpretation of exceptions in the Employment Equality (Sexual Orientation) Regulations

2003. In respect of the requirement under Regulation 7(3)(b)(i) that the employer must apply a requirement 'so as to comply with the doctrines of the religion' he held that it was:

> …to be read not as a subjective test concerning the motivation of the employer, but as an objective test whereby it must be shown that employment of a person not meeting the requirement would be incompatible with the doctrines of the religion. That is very narrow in scope.

105. We consider the same approach applies in relation to the exception under Schedule 9(1)(e): it must be shown that the action would be incompatible with an actual condition imposed by a Minister of the Crown, rather than showing a subjective belief that was the case. This is particularly so given the absence of a requirement that the action must be proportionate and the risk this exception would be very wide if an employer could simply rely on a belief that the action complied with a condition imposed by a Minister of the Crown.

Dismissal in any event

106. It is open to the tribunal to consider whether there would have been a non-discriminatory dismissal or termination at some definable point even if there had not been a discriminatory dismissal or termination.

107. If there was a chance that, apart from the discrimination, the Claimant would have been dismissed in any event, that possibility should be reflected in the measure of loss in accordance with ***Abbey National plc and anor v Chagger*** [2010] ICR 397, CA. 478.

108. In ***Shittu v South London and Maudsley NHS Foundation Trust*** [2022] ICR D1, EAT, Mrs Justice Stacey confirmed that a 'loss of a chance' assessed in terms of percentages was the correct approach when assessing both unfair dismissal and discrimination compensation, as opposed to an all or nothing 'balance of probabilities' approach by which, based on the evidence before it, the tribunal determines whether or not an event would have occurred.

109. Stacey J held at para 95:

> There can therefore be an "all or nothing" result, but it will be because the tribunal is 100% satisfied that a future chance would or would not have happened. In practice there are a number of possibilities, three of which

> were identified in Software 2000 at [54(7)]: (1) there was a less than 100% chance of indefinite continued employment in which case the tribunal must assess the percentage chance and apply that percentage reduction; (2) the tribunal is satisfied on the evidence there was a 100% chance that the employment would have ended anyway by a certain time or at the same time as the dismissal, in which case compensation is limited to that period and the claimant is awarded 100% of whatever that period is (or receives nothing for loss of earnings if it was the same date as the dismissal occurred); (3) employment would have continued indefinitely in which case there is no percentage reduction applied. There is a fourth possibility identified in Zebrowski and O'Donoghue where there was a 100% chance that the employment would have continued for a certain period followed by a lesser percentage chance thereafter. There may be other possible categories. But in each category the exercise is the same - the assessment from 0 to 100 of the percentage chance of what might have been or what will be.

110. In order to limit compensation to a period up to the date when a non-discriminatory dismissal would have occurred, the evidence must establish that the dismissal by the particular employer would inevitably have occurred. In consequence, it is only open to a tribunal to decline to award any compensation for loss of earnings, or to limit compensation to a period (as opposed to making a percentage deduction) where the tribunal is confident that a non-discriminatory dismissal or resignation would have occurred either on the same date as the dismissal or an identified later date or period.

111. Otherwise, the correct approach is for the tribunal to make the assessment on a percentage basis reflecting the degree of chance that non-discriminatory dismissal or resignation would have occurred.

112. In undertaking this task, we take into account the relevant parts of guidance set out in ***Software 2000 Ltd v Andrews and ors*** [2007] ICR 825, including the guidance that:

> [The tribunal] must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an

inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

CONCLUSIONS

Issue 2.5 Did the Respondent act for the purpose of safeguarding national security within the meaning of s. 192? If so, was the conduct proportionate within the meaning of that section?

113. We conclude that the Claimant's engagement *was* terminated 'for the purpose of safeguarding national security' in that Mr Driscoll believed, based on what he confirmed with the Security Team, that non-dual nationals were not able to be employed in the Claimant's role on the D0 project due to the requirements of the SAL and that those requirements were to safeguard national security.

114. However, as set out above, we have concluded that the provisions of the SAL did not, in fact, prevent engagement of a dual national in the Claimant's role provided that one of their nationalities was British.

115. Accordingly, when looking at whether the conduct was 'proportionate' we have concluded that it was not: in terminating the engagement the Respondent went beyond that which was required by the MOD. We do not consider that the Respondent has established, or really sought to establish, that notwithstanding what the MOD required, it was appropriate and necessary for the Claimant's engagement to be terminated to safeguard national security.

116. Further, even if we are wrong on that, we are of the view that the action taken was not proportionate in circumstances where the Respondent could have:

    a. Sought clarification from the Customer as to whether the SAL prevented engaging dual citizens, and / or

    b. Sought authorisation from the Customer for the Claimant's engagement.

117. We note that the Respondent normally only took the latter step for permanent employees with specific skills. However, there was no policy that those were the only circumstances in which authorisation could be sought. We do not see a good reason for only taking steps to seek to avoid discrimination against permanent but not fixed-term employees or those with specific skills. We were not taken to any documents that suggested that the Customer themselves would only make an exception in such circumstances. Mr Cunningham estimated that the process would most likely take 2-3 weeks, which we consider is a reasonable time to wait in the circumstances of a recruitment process that had started in May 2022, the Respondent having pushed the Claimant's start date back by a week themselves by an email dated 28 July 2022, a period of employment of at least six months and given it would have taken some time to find a replacement in any event.

Issue 2.6 Can the Respondent rely upon Schedule 9, paragraph 1 (a) of the Act? Did it have an occupational requirement within the meaning of s. 41 (1)(b) and, if so, was the requirement a proportionate means of achieving a legitimate aim, that being national security and compliance with its contractual obligations.

118. We find that the Respondent did apply a requirement to the Claimant to have a particular protected characteristic (i.e., sole British nationality). We find, as accepted by the Claimant, that he did not comply with that requirement at the relevant time because he has dual nationality.

119. However, having regard to the nature and to the context of the work, we do not consider that this was an occupational requirement. The Respondent relied on it being a requirement of the SAL to establish that it was an occupational requirement which, for the reasons set out above, we do not accept. We do not accept that notwithstanding the proper interpretation of the SAL it was nonetheless an occupational requirement. We have rejected, above, the argument that it *must* be necessary as a matter of logic not to employ dual nationals on the kinds of work that the Claimant was engaged to do simply to avoid individuals with certain nationalities working on it.

120. Further, we do not find that the requirement was a proportionate means of achieving the aims of national security and complying with contractual obligations.

121. We accept safeguarding national security is a legitimate aim. We do not accept that 'compliance with contractual obligations' is necessarily a legitimate aim, the contractual obligation itself may be discriminatory which would involve a degree of circularity. We would think it would have to be shown that compliance with the specific contractual obligation relied on is legitimate and given the contractual provision relied on in this case and the reasons for that provision provided by the Respondent, we are of the view that it ultimately comes to the same thing: which is safeguarding national security.

122. Was the application a proportionate means of achieving a legitimate aim, namely safeguarding national security? For the same reasons as given above in respect of s.192, we conclude it was not. For the avoidance of doubt had we accepted that 'compliance with contractual obligations' was a legitimate aim we also would not have found the termination of the engagement to be proportionate because we have concluded the Respondent was not contractually obliged not to engage the Claimant.

Issue 2.7 Did the Respondent act in order to comply with a condition imposed by a Minister of the Crown, within the meaning of paragraph 1 (e) of Schedule 23 of the Act?

123. We accept, for the reasons given above, that the conditions in the Tier 2 SAL are effectively conditions imposed by a Minister of the Crown (via mirror provisions in the Tier 1 SAL). However, as already explained, we have concluded that the SAL did not provide a condition that those engaged on the contract working on the assets or with access to the Production Facility had to be *sole* UK nationals (or non-dual nationals).

124. Therefore, the Respondent's action in terminating the Claimant's engagement was not in order to comply with a condition *imposed* by a Minister of the Crown and we have concluded that this exception does not apply.

Conclusion on exceptions

125. We have therefore concluded that the exceptions to the Equality Act 2010 advanced by the Respondent do not apply and the Claimant was subjected to unlawful direct discrimination because of his dual nationality.

Dismissal in any event:

126. We accept that there is evidence as set out above, indicating that SC clearance was a normal requirement for those working in the Production Facility where the Claimant, as part of his role, would have had to occasionally work. We also accept Mr Driscoll's evidence that the Claimant's lack of SC clearance would have become clear when he got a colour-coded pass. Doing the best we can with limited evidence, we are of the view that he would have got his pass, and that Mr Driscoll/ the Respondent would have had to consider how to respond to the lack of SC clearance which had been overlooked before then, two weeks after the Claimant's engagement was in fact terminated.

127. However, we do not conclude that there was a 100% likelihood that the Claimant's engagement would have been ended at that point. We have set out in our findings of fact that: the Respondent was able to make exceptions; that the Claimant's engagement had started notwithstanding a clear indication he only had BPSS clearance; and, despite knowledge of the need for SC clearance within the Respondent, several Respondent employees (copied into the relevant email) appeared not to consider a potential delay in obtaining that clearance to be a problem. We conclude there is a reasonable chance the Respondent, having engaged the Claimant on that basis, would have facilitated an exception to the rule or escorted visits (given those visits would have only been occasional), while the Claimant sought SC clearance over a period of 1-2 months. However, in light of the evidence of Mr Cunningham on when exceptions were *normally* made, we also do not consider there was a 100% likelihood an exception would have been made by this employer and there is also an unknown as to whether SC clearance would have been granted.

128. Having carefully considered all the reliable material and evidence put before us, we have concluded that there is a 40% likelihood that the Claimant's engagement would have been terminated 2 weeks after it was because he did not have SC clearance.

Employment Judge Danvers

10 June 2024

REASONS SENT TO THE PARTIES ON
02 July 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE