EMPLOYMENT TRIBUNALS

Claimant: Mrs S Caine

Respondents: Defence Equipment & Support (1),
Ministry of Defence (2)

Heard at: East Midlands **On:** 5 May 2022

Before: Employment Judge S Pinder (sitting alone)

Representation
Claimant: In-person.
Respondent: Mr T Kirk, Counsel.

RESERVED JUDGMENT

1. The First Respondent, Defence Equipment & Support, is hereby removed as a respondent to this claim. The Ministry of Defence remains the only Respondent.

2. The Second Respondent's application to strike out the claim, pursuant to Rule 37(1)(a) Employment Tribunals Rules of Procedure 2013, on the grounds that it has no reasonable prospects of success, is granted.

3. The Claimant's application to amend her claim to include a claim of direct race discrimination is refused.

REASONS

Introduction

1. The Claimant is an American citizen, with Indefinite Leave to Remain ('ILR') in the UK. She was made an offer of employment with the First Respondent and started work on 6th January 2020. The Second Respondent's case is that the offer of employment to the Claimant was in error, without it being realised at the time that the Claimant's appointment would be in breach of the nationality requirements of the Civil Service Nationality Rules ('CSNRs'). This was later discovered and the Second Respondent wrote to the Claimant on 18th October 2021 confirming that her purported contract of employment was void from the outset and could not continue.

2. The Claimant claims that the First and Second Respondents are in breach of contract and/or that she was wrongfully dismissed. She has subsequently applied to amend her claim to include a claim of racial discrimination. The Second Respondent contests the claim, citing the CSNRs and relevant statutory provisions, which they argue renders void the contract of employment.

3. On 21st February 2022, a Case Management Preliminary Hearing was held before Employment Judge Welch. As part of this hearing, the issue of whether the Claimant sought to amend her claim was identified together with whether the First Respondent should be removed from the claim. These matters were listed for an Open Preliminary Hearing on 5th May 2022 to be heard together with the Second Respondent's application (on notice) to strike out the Claimant's claim on the basis that it has no reasonable prospects of success and in the alternative, for there to be a deposit order under Rule 39 in respect of all or part of the Claimant's claim on the basis that it also raises little reasonable prospects of success.

The Hearing

4. The Claimant appeared before me in-person and the Second Respondent was represented by Mr T Kirk of Counsel. The Claimant gave sworn evidence and Mr Kirk called Ms R Smith, HR Projects Lead in the Submarine Delivery Agency employed by the Second Respondent, who also gave sworn evidence. The Claimant had wished to call Ms Howarth, but she was not in the end available and the Claimant wished to proceed in the absence of Ms Howarth.

5. I considered witness statements from the Claimant, Ms Smith and Ms Howarth as well as the bundle of documents comprising of 136 pages, which the parties introduced in evidence. I also considered an authorities bundle and an exchange of e-mail correspondence, which was duly admitted in evidence during the hearing by consent. Unless I stipulate otherwise, references to page numbers are to the Trial Bundle of Documents.

6. A draft list of issues dated 17th February 2022 had been previously filed and served by the Second Respondent. The parties agreed that the issues for me to determine are as follows:

Respondent to the claim

(i) Should DE&S be removed as a Respondent ?

Amendment of Claim

(i) Is the Claimant entitled to amend her claim to bring a claim of direct race discrimination ? If so, the issues raised by that claim and any consequential case-management would need to be set down for a further case-management hearing.

Strike Out /Deposit Order Application

(i) Should the Tribunal strike out all or part of the Claimant's claim under Rule 37(1)(a) Employment Tribunals Rules of Procedure 2013 on the grounds that it has no reasonable prospects of success because:

a. The Claimant was not an employee under Article 3 Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 because any contract of employment that she held was rendered void from the outset and unenforceable because of a breach of the statutory nationality

requirements set out s.6 Aliens Restriction (Amendment) Act 1919, s.1 Aliens' Employment Act 1955 and the CSNRs.

b. The Claimant has suffered no actionable loss since her only remedy for wrongful dismissal is payment of 5-weeks' payment in lieu of notice and that loss has been alleviated by an ex-gratia payment of £7,423.26 net made to the Claimant, which is equivalent to three months' pay.

c. The Claimant's claim for reinstatement / specific performance of her contract of employment is not a remedy the Tribunal has jurisdiction to award under the 1994 Order or at all.

(ii) If not, should the Tribunal make a deposit order under Rule 39 in respect of all or part of the Claimant's claim because the claim (or part of it) has little reasonable prospects of success ?

7. Out of the two contested applications, the parties also agreed that I would consider the strike out claim first since the issues that this turned on, namely whether the Claimant's contract was void for the reasons relied upon by the Second Respondent, would also impact on the Claimant's application for amendment of her claim. All three applications proceeded on evidence and submissions.

Findings of Fact

8. For the purpose of this open preliminary hearing, there was very little if any factual dispute between the parties. The disagreements between the parties lie in the interpretation of the CSNRs and how these impact on the Claimant's contract of employment with the Respondents, which is relevant to the Second Respondent's application to strike out/for a deposit order and to the Claimant's application to amend her claim. The Claimant essentially argues that she is married to a British Citizen and the UK was, at the relevant times, a Member State of the European Union. This, she submits, places her within the exceptions to the CSNRs. The Second Respondent sets out that this is incorrect and it is only *'other EEA nationals'*, namely from Member States other than the UK, who are residing and exercising their Free Movement rights in the UK, who qualify as such.

9. The Claimant's alternative case is that she has ILR and therefore there is no restriction on her rights to work in the UK. Thus, she argues that she was entitled to work for the First Respondent upon her being offered employment as ILR is no different to being a British citizen, where work rights are concerned, even – she submitted - in the context of the Civil Service. The Second Respondent submits that immigration laws regulating a person's status in the UK, their rights to work and the Second Respondent's obligations thereunder stand separately to the Second Respondent's obligations under the CSNRs. I consider this contested area in the section below *'relevant law and conclusions – application to strike-out'*.

10. For context, I record some of the relevant facts here and consider the legal issues in dispute further below in my judgment. In addition, I consider that there are a number of matters that the Claimant pursued as part of this hearing, which are not necessary for me to determine for the purposes of the applications before me, and I record my reasons in this section below.

11. I have already recorded the Claimant's history of employment with the Respondents at §1 above. The Claimant pursued through her evidence that the First Respondent, to her knowledge, had not enquired whether her husband, a British Citizen, had exercised his Free Movement rights prior to or during the Claimant's work for the First Respondent, namely by working or otherwise undertaking a qualifying activity under the European Council Directive 2004/38/EEC [Authorities Bundle Item 7] in another Member State of the European Union other than the UK. This is known as the

Surinder Singh route [authorities bundle item 13], subsequently codified in Regulation 9 Immigration (EEA) Regulations 2016 [authorities bundle item 10]. This is relevant because as I have set out below in my judgment, British Citizens who exercise their Free Movement Rights, as they were then prior to 31st December 2020, in another Member State can subsequently return to the UK and acquire the same rights of residence as other EEA nationals hold whilst working or otherwise exercising their Treaty Rights in the UK. As I have addressed below at §56, this is expressly provided for in the CSNRs.

12. The Claimant accepts that her husband has never exercised his Free Movements in the manner described above and I consider therefore that it is not necessary for me to determine whether the First Respondent made the enquiries at the time and if not, whether they should have. In addition, the Claimant on my findings below does not benefit from those exceptions to the CSNRs.

13. In her cross-examination of Ms Ruth, the Claimant asked why she was not provided a copy of the 2007 CSNRs, the version in force at the relevant times, until she requested a copy of the same. The Second Respondent accepted that they referred to the 2021 CSNRs in their letter of 18th October 2021 not by date but through the link that was provided in the footnote [103-104]. I do note that the Second Respondent did refer to the 2021 CSNRs in their ET3 Form [40] but whilst noting that it was the 2007 Rules that applied and that the 2021 amendments did not have any bearing on the Claimant's case.

14. In any event, I do not consider that it is necessary for me to resolve this. The Claimant did accept during cross-examination that the job advertisement for her position contained a hyper-link to the CSNRs, when this was posted and when she applied for the position in September 2019. Neither party could confirm that this link took applicants or anyone accessing this web-page to the version of the CSNRs as it was in force at the time of the advertisement, namely the 2007 CSNRs. The Claimant could not recall whether she had clicked on this link and the Second Respondent has not retrieved this web-page as it appeared then including the live links it contained. In any event, both parties agreed that the link would have led to the 2007 Rules since the CSNRs were not updated thereafter until 2021.

15. Both parties agreed that, if the Second Respondent's interpretation of the CSNRs is correct, the Claimant was not at fault in any way as she had fully disclosed her nationality and immigration status to the First Respondent and the responsibility under the CSNRs, as set out in those Rules, lies with *"government departments and other bodies within the Home Civil Service and the Diplomatic Service"* [127], including therefore both Respondents. Through her evidence and cross-examination of Ms Ruth, the Claimant sought to demonstrate that the First Respondent's recruitment process, together with perhaps their interpretation of the CSNRs, has led to systematic failures and mistakes being committed with the Second Respondent, and its various departments, in relation to applying and enforcing the CSNRs. In this respect, the Claimant also relied on the letter from her proposed witness Ms Howarth, who gave details of similar experiences to the Claimant. I do not however consider that this is for me to determine. Firstly, it is only the Claimant's claim and the parties' applications before me and there are no other claims linked to this matter. Secondly, for reasons that I have addressed in more detail below at §36, whether the First or Second Respondents were at fault cannot be a relevant consideration in my assessment of the Second Respondent's application to strike out/deposit order.

16. The Claimant also raised that she should have been made aware of the difficulties surrounding her contract of employment, when these issues came to light in July 2021 instead of when the Second Respondent did on 18th October 2021. The Second Respondent accepts that it only formally notified the Claimant on 18th October 2021 [103-104], having conducted enquiries prior to that but without making the context or

the purpose of these enquiries known to the Claimant. Similarly to the issue at §15 above, I do not find that any failure to notify the Claimant any earlier is a relevant consideration.

17. Lastly, the Claimant raised that when she was offered by the First Respondent to continue in her position via an agency contract, this offer was contingent on her applying to naturalise as a British Citizen. Whilst I did not deem this issue to necessarily impact on those that are before me to determine, I nonetheless gave permission to both parties to retrieve e-mail exchanges following in-person meeting(s) between them. The Claimant also accepted, when cross-examined, that the Respondents' letter of 5th November 2021 [107-108] confirmed that the offer to employ the Claimant as a contract worker was not made on the proviso that she had to apply for British nationality. The e-mail exchange dated from 15th-20th December 2021 [filed separately on the day of the hearing] also confirmed that the parties' agreement that the Claimant's work as a contractor for the First Respondent would continue beyond the initial period of six months, providing she applied to naturalise.

18. With regards to the Claimant's application to amend her claim, the Claimant applied in her letter to the Tribunal dated 11th February 2022 [49-50] to amend her claim to include a discrimination claim. It is clear that this application stems from the same factual matrix as that raised as part of her initial claim form [2-13]: the Claimant states that she has been subject to less favourable treatment, in being dismissed, due to her race – in this case her nationality. She also states that the removal of her employer pension contributions was also an act of less favourable treatment due to her race/nationality. In the same letter, the Claimant confirmed that she was no longer pursuing her claim for unfair dismissal, now understanding that she could not raise this not having been employed for at least two years.

19. In her claim form [2-13], the Claimant had not ticked the box at 8.1 to indicate discrimination and expressly referred to claiming a breach of contract [7]. The Claimant did however tick the 'recommendation' box in relation to claiming discrimination at 9.1 [9]. At 8.2, the Claimant sets out the relevant chronology of her employment with the First Respondent and her interpretation of the CSNRs [8].

Application to remove the First Respondent, Defence Equipment & Support

20. As part of their application to remove Defence Equipment & Support ('DE&S') as a respondent to this claim, the Second Respondent set out that DE&S is a bespoke trading entity and an "arm's-length body" of the Ministry of Defence ('MoD'). The Second Respondent submits that whilst at all relevant times, the Claimant was (in error) employed by DE&S, the First Respondent, the correct respondent in all and any legal actions against DE&S is the relevant Ministerial Department to which it reports, i.e. the MoD.

21. The Second Respondent referred me to the following evidence to demonstrate this:

    (i) The Claimant's job description, in her role as DE&S HR Business Partner, was headed 'Ministry of Defence' and set out on Ministry of Defence headed paper [66]. The same job description informs potential employees that they would be joining DE&S, *"a highly specialised, branch of the MOD"* [69].
    (ii) When the Claimant was offered her job, her offer letter and appointment letter were both on MoD headed paper [74], [86]. The Claimant's appointment letter described her appointment as being *"in Defence Equipment & Support (DE&S), a bespoke trading entity of the Ministry of Defence"* [86]. The Claimant's contract of employment identified her employer in similar terms at clause 1.1 [88].
    (iii) The Claimant and colleagues within DE&S used MoD email addresses [94] and the Claimant was emailed with requests for documents "*as part of the onboarding process prior to commencing employment with the MOD"* [94].

22. At the start of the hearing and through her cross-examination of Ms Smith, the Claimant appeared to contest this application, maintaining that DE&S was separate and distinct from the MoD and referring to her and other employees being 'TUPE' back and forth between DE&S and the MoD. In submissions, the Claimant asked me to consider the issue for myself and expressed having included DE&S as a respondent in order to make sure that the correct respondent was included against the claim.

23. In my judgment, it is clear from the evidence that I was referred to by the Second Respondent and which I have summarised at §21 above that the MoD is the correct respondent to this claim. DE&S is a bespoke trading entity of the MoD and I accept, for the reasons given by the Second Respondent, that the correct legal entity for any claim against the MoD and its trading entities is the MoD.

Relevant Law and Conclusions - Application to Strike Out

24. Rule 37 Employment Tribunal Rules of Procedure 2013 confers on the Employment Tribunal the power either on its own initiative or on the application of a party, to strike out all or part of the claim or response on any of the following grounds:

> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
> *(c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued;*
> *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

25. The Second Respondent has pursued their application on the ground that the Claimant's claim has no reasonable prospect of success. The Second Respondent submits that on a plain and simple reading and interpretation of the CSNRs and the relevant statutory provisions, considered in more detail below, the Claimant's purported employment breached statutory civil service nationality requirements. Thus, this rendered her employment contract void from the beginning and unenforceable. For the same reasons, the Second Respondent submits that any claim against the Second Respondent, through no fault of the Claimant, has no reasonable prospects of success and the Tribunal determining the strike-out/deposit order application is in no better position than a trial judge since the issues turn on the statutory provisions cited and relied upon by both parties.

26. As recorded at §8-9 above, the Claimant disagrees and submits that the CSNRs and the relevant statutory provisions are open to interpretation and if there is room for interpretation, there are prospects of success.

27. A decision to strike out the claim is a summary determination of the claim based on an assessment of the case advanced taken at its highest. This involves a two-stage process: first are the grounds made out and second should the claim or response be struck out - *Allan v Wandsworth LBC* UKEAT/0049/13 EAT.

Relevant law to strike out application on grounds of no reasonable prospects of success

28. I have firmly in mind that the power to strike out a claim on the ground that it has no reasonable prospect of success is one which should be exercised sparingly. The Tribunal needs to be satisfied that, notwithstanding the assessment of a claimant's case at its highest, it is plain and obvious that the claim has 'no reasonable prospects of success', which is a high threshold - *Anyanwu v South Bank University* [2001] IRLR

305 HL, in the context of a discrimination case. Lady Smith added in an unfair dismissal - *Balls v Downham Market High School & College* [2011] IRLR 217 EAT the following guidance (my emphasis):

> *"the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the First Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."*

29. A more recent summary of the applicable principles is set out by the EAT President in *Malik v Birmingham City Council & Anor (STRIKING-OUT : DISMISSAL)* [2019] UKEAT 0027_19_2105 (21 May 2019), [29-33]. Again, this is in the context of a discrimination claim and I distil this guidance as follows – some of which, I consider, has wider application than discrimination cases:

> (1) Only in the clearest case should a discrimination claim be struck out;
> (2) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
> (3) A claimant's case must ordinarily be taken at its highest;
> (4) If a claimant's case is 'conclusively disproved by' or is 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it may be struck out;
> (5) A Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts;
> (6) If a case has indeed no reasonable prospect of success, it ought to be struck out;
> (7) Any decision to strike out needs to be compliant with the principles in *Meek v City of Birmingham District Council* [1987] IRLR 250 and should adequately explain to the affected party why their claims were or were not struck out.

30. The importance in taking reasonable steps to identify the claims and the issues in the claims was reiterated in *Cox v Adecco (WHISTLEBLOWING, PROTECTED DISCLOSURES, PRACTICE AND PROCEDURE) (Rev 1)* [2021] UKEAT 0339_19_0904 (9 April 2021) and where proceedings involve litigants in person, this may entail consideration of documents other than the claim form and to whether an amendment should be permitted.

31. As can be seen from my summary above, much of the guiding authorities on the test of 'no reasonable prospects of success' arise from cases where there was considerable factual dispute between the parties, which, as I have set out at §8 above, I do not consider was the case before me.

Relevant law relating to a contract of employment being illegal/void and my conclusions

32. I agree with the Second Respondent that the effect of an appointment being illegal is that any contract of employment that is entered into as a consequence of the decision to appoint the individual is similarly illegal. If the contract of employment is *ultra vires* - in other words, it has been agreed to without legal power or authority, because it was in breach of statute, it is void.

33. I have taken into consideration the authority of *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, in which Peter Gibson LJ said the following [Para 30 authorities bundle item 12]:

> *"In two types of case it is well established that illegality renders a contract*

unenforceable from the outset. One is where the contract is entered into with the intention of committing an illegal act; the other is where the contract is expressly or implicitly prohibited by statute: St John Shipping Corporation v Joseph Rank Ltd [1957] 1 QB 267, 283 per Devlin J."

34. If the Second Respondent's interpretation of the CSNRs and the relevant statutory provisions is correct, the second category referred to by Gibson LJ would in my view apply.

35. I also agree with the Second Respondent that in law, the intentions of the parties are irrelevant to the analysis of whether a contract of employment might be void for being prohibited by statute/other relevant provisions. I also consider that this applies to whether a particular party is at fault. As Devlin J noted in *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 at 283 [authorities bundle item 12]:

> *"the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not".*

36. The Second Respondent referred me to this principle being applied to the case of civil service employment in *Secretary of State for Justice v Betts* [2017] ICR 1130, where the EAT considered the effect of individuals being appointed in breach of the requirement for fair and open competition under section 10 Constitutional Reform and Governance Act 2010. It was held that the mandatory language used in this provision operated as a statutory limitation on appointing civil servants otherwise than in accordance with its provisions and a breach of those statutory requirements operated to render the contracts void for illegality [per Simler P at Para 52 – authorities bundle item 17].

37. If I find that the contract of employment which was purportedly entered into by both parties in this claim is in fact void, there can be no contractual claim before me - Article 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and s.3(2) Employment Tribunals Act 1996.

Relevant law relating to the nationality rules raised in this claim and my conclusions

38. I now turn to the statutory nationality requirements relevant to this claim and the Second Respondent's application for strike-out/deposit order.

39. The starting point in understanding these nationality requirements is a very old piece of legislation referred to me by the Second Respondent: s.3 Act of Settlement 1700. This states that no person born outside of England, Scotland or Ireland can work in the civil service [authorities bundle item 1]. This position was later reiterated by s.6 Aliens Restriction (Amendment) Act 1919, which provides that, *"no alien shall be appointed to any (...) place in the Civil Service of the State".* Under section 13(1) of the 1919 Act, a person who contravenes this rule is guilty of a criminal offence [authorities bundle item 2].

40. "*Alien"* is defined in s.50 British Nationality Act 1981 as a person who is neither a Commonwealth citizen nor a British protected person nor a Citizen of the Republic of Ireland [authorities bundle item 4]. I also note that s.2(1) of the 1955 Act provides that "alien" has the same meaning as under the 1981 Act.

41. From the above statutory provisions, the Second Respondent therefore submits that American citizens are in this context "aliens". The Second Respondent also notes that European Economic Area ("EEA") nationals and their family members are also "aliens" but adds that the general position set out in the 1919 Act is qualified by s.1 Aliens' Employment Act 1955.

42. S.1(1) of the 1955 Act (also referring to the 1700 Act and 1919 Act) says that an "alien" may be appointed in a civil capacity under the Crown in certain limited circumstances, which I summarise below [authorities bundle item 3]:

    (a) If he is appointed to work in territory outside the UK;
    (b) If he is granted an alien certificate by a Minister;
    (c) If he is a "relevant European" and is not employed in a "reserved post".

43. The version of s.1(5) of the 1955 Act, which applied at the time of the Claimant commencing her purported employment provided that a "relevant European" is:

    "(a) A national of an EEA State or a person who is entitled to take up any activity as an employed person in the UK by virtue of Article 23 of Council Directive 2004/38/EEC (right of family members of nationals of EEA States to take up employment where that national is employed);
    (b) A Swiss national or a person who is entitled to take up any activity as an employed person in the UK by virtue of Article 7e and Article 3(5) of Annex 1 of the Agreement between the European Community and its member states and the Swiss Confederation, on the free movement of persons signed at Luxembourg on 21st June 1999 (right of spouses and certain family members of Swiss nationals to take up economic activity, whatever their nationality); or
    (c) A person who is entitled to take up any activity as an employed person in the UK by virtue of Article 6(1) or 7 (rights of certain Turkish nationals and their family members to take up any economic activity, whatever their nationality)) of Decision 1/80 of 19 September18-of the Association Council set up by the Agreement establishing an Association between the EEC and Turkey, signed at Ankara on 12 September 1963."

44. From the above-cited statutory provisions, I agree with the Second Respondent that it is clear that, as an American citizen, the Claimant is an "alien" for the purposes of the 1919 and 1955 Acts and she could only have been lawfully employed in the civil service by bringing herself within one of the three limited exceptions to the rule on employing aliens set out in s.1(1) of the 1955 Act, as summarised above at §43. The first two exceptions do not apply to the Claimant's case and neither does the Claimant seek to show otherwise. The Claimant was appointed to work in the UK and she was not issued with a 'certificate' by a Minister. This was also confirmed by Ms Smith in her witness statement at §8. Neither has the Second Respondent's assessment of the exceptions under the 1919 Act been disputed by the Claimant.

45. The Claimant then does not fall within the definition of a 'relevant European' under s.1(5)(b) and (c) of the 1955 Act (as it was then in force at the relevant time) since neither she nor her husband are Swiss or Turkish nationals. The area in dispute between the parties is whether the Claimant is capable of falling within the definition at s.1(5)(a), namely as a family member of a national of an EEA State, who is entitled to take up any activity as an employed person in the UK by virtue of Article 23 of Council Directive 2004/38/EEC [authorities bundle item 7].

46. As I have recorded above, neither the Claimant nor her husband are citizens of *another* EEA Member State. The Claimant also accepts that her husband, as a British citizen, has never sought to exercise his Free Movement rights by, for example, working or otherwise undertaking another qualifying activity in another EEA Member State, other than the UK.

47. The contested area lies in the definition of 'EEA national', which the Claimant argues includes British Citizens, since prior to the date of the UK's exit from the European Union, the UK was such a Member State. I turn to this now.

Definition of EEA National

48. I first consider that the definition is clear from s.1(5)(a) of the 1955 Act. Adopting a simple interpretation of the words used in this section - *"a national of an EEA State who is entitled to take up any activity as an employed person in the UK"* - I find that it is clear that this means *other* EEA nationals. This is demonstrated by the use of the determiner *'an'* and the premise that such a person is entitled to take up any activity in the UK by virtue of Article 23 of Council Directive 2004/38/EEC.

49. The express reference to Article 23 reiterates the context of the rights of residence of EEA nationals in a Member State:

> *"**Article 23 Related rights***
>
> *Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there."*

50. The UK was at the relevant time a Member State but if the focus was on UK nationals living in the UK (and who had not previously exercised their Free Movement rights within another Member State), there would be no need to refer to such a person's rights of residence or their right of permanent residence. I find that the express references to these rights has to be because the focus is on *other* EEA or, as is stated in Article 23, other Union citizens. For the avoidance of doubt, the Council Directive in question regulates the right of citizens of the Union and their family members to move and reside freely within the territory of 'host' Member States. It is also relevant to note the definitions contained in Article 2, which I re-produce in their entirety below and, which I find support my assessment that 'EEA national' means 'other EEA nationals' and does not include UK nationals living in the UK, since the premise entails Union citizens, who move to 'host' Member States:

> *"Article 2*
> ***Definitions***
> *For the purposes of this Directive:*
> *1) "Union citizen" means any person having the nationality of a Member State;*
> *2) "Family member" means:*
> *(a) the spouse;*
> *(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;*
> *(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);*
> *(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);*
> *3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence."*

51. I now turn to the CSNRs themselves [127-135] and the accompanying Eligibility Guidance [113-121]. I find that these in effect mirror the domestic primary and European Directive legislation cited above. Furthermore, it is well-established that any published guidance needs to be read with the Rules themselves. I also agree with the Second Respondent that in cases of ambiguity within the guidance, of even the Rules, I should defer to the wording used in primary and secondary legislation, together with the relevant EU law contained in the Directive as considered above.

52. There is no dispute between the parties that departments and agencies are required to follow the Rules in their recruitment and appointment decisions and practises.

53. Paragraphs 9 and 11 summarise the statutory exemption for 'relevant Europeans' contained in s.1(5) of the 1955 Act. Paragraph 10 refers to the context of free movement rights provided by the EC Treaty. Paragraph 17 summarises the exception as it relates to certain family members of EEA nationals, who are not themselves EEA nationals, and their rights to take up employment in the Member State where that national is employed.

54. Paragraph 28-29 reiterate that non-aliens, that is UK nationals, British protected persons and Irish and Commonwealth citizens are not prohibited by statute from employment in the Civil Service and the rules and restrictions that follow on from Paragraph 29 apply to non-aliens. Paragraphs 30-33 very clearly address the rules in relation UK nationals and family members of UK nationals. In particular, it is stated at Paragraph 31 that *"family members of UK nationals, who are not themselves UK nationals and do not otherwise satisfy the civil service nationality rules and not generally eligible to join civil service".*

55. Thus, I find that this express reference and section addressing UK nationals and family members of UK nationals also supports the Second's Respondent's interpretation, and my assessment above, that the definition of 'EEA national' in the statutory provisions considered above and the CSNRs do not also include UK nationals. This is qualified with the exception, which is provided in footnote 22 to Paragraph 31 (also in footnote 14 to Paragraph 17):

> Exceptionally, the family members of a UK national who do not themselves meet the Nationality Rules may be eligible to join the Civil Service if the UK national has triggered his or her freedom of movement rights under European Community law (normally by working for a period elsewhere in the EEA). Where a department believes that an individual may be eligible on these grounds, the Cabinet Office must be consulted in the first instance.

56. As I have recorded previously, the Claimant accepts that her husband as a UK national has not *"triggered his freedom of movement rights under European Community law"* in the way that is provided for in this exception.

57. The only provisions that the Claimant relies upon in support of her interpretation of the CSNRs and in response to the Second Respondent's strike-out/deposit order application are Paragraphs 1.18-1.19 and 1.34-1.35 of the Eligibility Guidance to the Rules [Claimant Witness statement §5-6; 117]. These provide as follows:

> *Irish and other EEA Nationals*
>
> *(…)*
> *1.18. The family members of Irish nationals are also eligible for employment in non-reserved posts in the Civil Service in the same way as family members of other EEA nationals (see paragraphs 1.34 and 1.35 concerning EEA family members).*
>
> *1.19. An EEA national is a national of the European Economic Area (EEA). The EEA comprises the Member States of the European Union and Norway, Iceland and Liechtenstein. The current members of the EU are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.*
> *(…)*
>
> *Family Members of EEA, Swiss, and qualifying Turkish Nationals*
>
> *1.34 Certain family members of EEA nationals irrespective of their nationality are eligible to take up employment in the Member State where that national is employed. This means that family members of EEA nationals employed in the*

United Kingdom would also be eligible to be employed in the United Kingdom and therefore to be employed in non-reserved posts in the Civil Service (even if they do not themselves otherwise satisfy the Civil Service Nationality Rules).

1.35 The family members concerned are the spouse or civil partner of the EEA national, and the direct descendants of the EEA national or their spouse or civil partner (e.g., children and grandchildren). Direct descendants only qualify if they are under the age of 21 or are dependants. Dependent direct relatives in the ascending line of the EEA national or their spouse or civil partner (e.g. parents and grandparents) are also included.

58. The Claimant specifically relied upon Paragraphs 1.34-1.35, which state that the spouse of an EEA national may be employed by the Civil Service and Paragraph 1.19, which states that the United Kingdom is an EEA member state. The Claimant asserted therefore that since she was married to a UK national and the UK was an EEA member state, she was eligible to be employed by the Civil Service in 2019/2020 under the CSNRs.

59. For the reasons that I have set out above, I find that the Claimant's interpretation is incorrect. I find that the Claimant has failed to note the context of these exceptions, provided for in both the statutory provisions considered above and the CSNRs: when reference is made to EU or EEA/Swiss nationals, this is by virtue of and in the context of the freedom of movement rights, which stem from Union/EEA/Swiss nationality and moving to *another* Member State, not of their own nationality. The only exception to this, as I have covered already, is when a UK national returns to the UK having exercised their rights in another Member State, which has no application in this claim.

60. The Claimant also queried as part of her submissions why it could be that she, as an American citizen with ILR (and therefore no restriction attached to her status) who is married to a UK national, might be in a worse-off position when civil service employment is concerned than a 'alien' (to use the term in the 1955 Act) family member of a Spanish or French citizen (by way of example) working in the UK. It is not for me to determine this and I do not consider that this displaces any of the restrictions on the Second Respondent, and their interpretation, relating to nationality and employment in the Civil Service.

61. The nationality requirements are mandatory statutory requirements, which apply to the recruitment of civil servants. I agree with the Second Respondent that the effect of those statutory requirements being breached is analogous to the reasoning of the EAT in *Betts (§37 above)*: any purported contract would be void from the outset. I also agree with the Second Respondent that the fact that the Claimant holds ILR does not displace these requirements since ILR is not a nationality. At the relevant times, the Claimant was an American national and did not hold any other nationality.

62. The Second Respondent also referred me to a first instance case in the Employment Tribunal where similar, if not identical issues were considered: *Khalaf v Cabinet Office v HMRC Case No. 2406143/2019*. A Syrian national, who had similarly been offered a job as a civil servant, had that offer taken away because the appointment was said to be contrary to the statutory nationality requirements and the CSNRs. The ET held that the proposed employment contract was void for illegality and could not be enforced either through a contract claim or a claim for wrongful dismissal (see Paragraph 17 of that judgment – authorities bundle item 18). *Khalaf* also concerned an application to strike out, which was granted.

63. For all of the reasons above, I find that the Second Respondent's interpretation of the mandatory statutory nationality provisions referred to above and the CSNRs is correct. I do not find that the Claimant's interpretation, taken at its highest, is correct.

64. In light of the legal principles and mandatory statutory provisions considered above,

and the fact that these nationality requirements are central the Claimant's claim, I do find that the grounds for the Second Respondent's application to strike out are made out and I find that the Claimant's claim has no reasonable prospect of success. Taking the Claimant's case at its highest, any fault of the First or Second Respondents or any conduct of the First or Second Respondents do not 'make good' the contract of employment. I find that the Claimant has no reasonable prospect of success in showing that the contract of employment is indeed enforceable.

65. I now consider whether to strike out the Claimant's claim or to make a deposit order. I do not consider that the trial judge would be in any better position to assess the relevant issues. I also consider, as I have recorded above, that the Claimant has had a full and fair opportunity to defend her claim and to oppose the Second Respondent's application at the hearing before me. The Claimant was fully prepared and fully able to participate in the hearing. I do not consider that the issues before a trial judge would be any different to those before me as part of this open preliminary hearing and for the reasons that I have set out above, I agree with the Second Respondent. The nationality requirements clearly apply and for the purposes of the relevant legislation and rules, the Claimant is an 'alien' who does not hold or did not hold a 'certificate'. She does not otherwise come within any other exception to these provisions and rules. Thus, her claim has no reasonable prospect of success and I consider that this claim ought to be struck out.

66. I pause to record my sympathies for the Claimant and the regret that the Second Respondent has expressed throughout the hearing before me, noting the upset and inconvenience that this unfortunate situation will have caused the Claimant. The Second Respondent accepted that this arose through no fault of the Claimant. Ultimately however, the issues raised in this claim and the Second Respondent's strike-out application concern issues of law, which cannot be interpreted in the Claimant's favour.

Relevant Law and Conclusions – Claimant's application to Amend

67. I note that the mandatory nationality requirements already considered would provide a defence to any discrimination claim brought under the Equality Act 2010: the claim would be covered by the exemption within Paragraph 5 of Schedule 22 the 2010 Act since it relates to the Civil Service Nationality Rules, which are "*rules restricting to persons of particular birth, nationality, descent or residence – (a) employment in the service of the Crown"* (Paragraph 5(2)).

68. The judgment of the Employment Tribunal in *Khalaf* also confirmed that this statutory defence meant that "*a discrimination claim could not succeed against an organisation where its decision not to employ somebody in the service of the Crown is due to restrictions on nationality included in such rules"* (para 12).

69. I do not understand the Claimant to allege discrimination or less-favourable treatment on the part of the Second Respondent for other or separate reasons than those raised through her initial contract claim, as I have recorded above at §18-19.

70. Nonetheless, I go on to consider the Claimant's application against the Presidential Guidance on amendments and the primary case authority of *Selkent Bus Company Ltd v Moore* [1996] ICR 836. Both the Presidential Guidance and the *Selkent* case direct that regard should be had to all the circumstances, and in particular any injustice or hardship, which would result from the amendment or the refusal to amend.

71. *Selkent* sets out the following approach and a non-exhaustive list of factors to be considered, namely:

    (a) In the case of substantial (as opposed to minor amendments), regard must be had to all of the circumstances, in particular any injustice or hardship, which would

result from the amendment or a refusal to make it (Paragraph 3);

(b) In deciding whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all of the relevant factors, having regard to the interests of justice and relative hardship that will be caused to the parties by granting or refusing the amendment (Paragraph 4);

(c) Relevant factors include:

(i) The amendment to be made. The Tribunal must decide whether the amendment applied for is a minor matter or a substantial alteration, describing a new complaint (Paragraph 5.1);

(ii) Time Limits. If a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended (Paragraph 5.2).

(iii) The timing and manner of the application. An application can be made at any time, but a party will need to show why the application was not made earlier and why it is being made at this time (Paragraph 5.3).

72. Applying the *Selkent* principles and the guidance set out above, I come to the following conclusions:

(a) The amendment sought by the Claimant is a substantial amendment since it adds a new cause of action, namely discrimination. I do not consider that it was pleaded in the Claimant's original ET1 claim form but I do note that the Claimant effectively seeks to rely on the same factual matrix that she has raised in relation to her contract claim. The Claimant said in her evidence and submissions that the crux of the issues is her nationality and race. I can understand therefore the Claimant's evidence that she thought that she had addressed this in sufficient detail.

(b) The proposed amendment would be out of time. Under s.123 Equality Act 2010, a race discrimination claim would have to be presented within 3 months of the act complained of (here an alleged dismissal with effect from 18th October 2021) or within such further period as the Tribunal thinks just and equitable. Any such claim, even by way of amendment, should have been presented by no later than 17th January 2022 (three months from the alleged dismissal). The Claimant's amendment application was presented on 11th February 2022.

(c) In relation to timing and manner of the amendment, I accept the Claimant's evidence that she thought that she had sufficiently raised the issue of discrimination in her original claim form. Objectively, since the issues under her contract claim and those that under-pin her amendment application are inextricably linked, I do not place much weight on any issues that arise from the timing and manner of the amendment.

(d) I have already addressed the merits of the Claimant's proposed claim for race discrimination. The Claimant does not allege that the purported contract of employment came to an end for different or separate reasons than those relating to the CSNRs. The Claimant has sought to argue throughout these proceedings that the Second Respondent has been mistaken in their application of those Rules. It follows, as I have found above, that any discrimination claim would be covered by the exemption, which I have addressed at §67-69 above. I consider that this weighs heavily against the Claimant.

73. I have also considered the recent authority of *Vaughan v Modality Partnership* [2021] I.C.R. 535 EAT, which provides a reminder that *"..the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequence of allowing or refusing the amendment. If they do not do so, it will be much more difficult for them to criticise the Employment Judge for failing to conduct the balancing exercise properly. The balancing exercise is*

fundamental. The Selkent factors should not be treated as if they are a list to be checked off." Having weighed in the balance all of the factors above and noting, in particular, the absence of merits in any discrimination claim due to the statutory defence applying, I find that the balance of injustice and hardship to the Second Respondent in granting the amendment is not justified, reasonable and proportionate.

74. For these reasons, I do not consider that the Claimant should be permitted to amend her claim.

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Employment Judge **S Pinder**

Date: 23 June 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS