



# EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondents

Ms M Otieno

(1) Travelodge Hotels Ltd

(2) Ms R Gossage

(3) Ms K Elliott

## REASONS FOR THE RESERVED JUDGMENT SENT TO THE PARTIES ON 12 MAY 2017

### Introduction

1 The First Respondents (hereafter, for brevity, 'the Respondents') are the corporate vehicle for a chain of budget hotels. They operate at more than 500 locations across the UK. Their headcount stands at over 10,500 and their annual turnover is about £500m.

2 The Second Respondent, Ms Ruth Gossage (to whom we will refer by name), has been employed by the Respondents as District Manager for Lancashire and Cumbria since February 2016. Before that she was District Manager for Central London.

3 The Third Respondent, Ms Kiran Elliott (to whom we will refer by name), was employed by the First Respondents between September 2013 and April 2016 in HR Business Partner roles, with responsibility initially for the South and London and latterly London only.

4 The Claimant, Ms Millicent Otieno, who was born on 7 December 1970, describes herself as a black woman of African origin. She entered the employment of the Ramada Group in March 2001 and transferred under the TUPE Regulations to the First Respondents when they acquired it in March 2006. She is currently employed as Hotel Manager at their Tower Bridge site. It is not in question that she is a very capable HM. She has won a number of awards and accolades over her years with the Respondents and received Hotel Manager of the Year in January 2016.

5 By her claim form presented on 18 September 2015, the Claimant brought claims presented as complaints of direct racial discrimination and victimisation.<sup>1</sup>

6 In their response forms the Respondents resisted all claims, on a combination of jurisdictional and substantive grounds.

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<sup>1</sup> The sex discrimination box was also ticked but no such claim was ever pursued.

7 The matter came before Employment Judge Lewzey on 6 January 2016 in the form of a Preliminary Hearing (Case Management). Both sides were represented by counsel. The judge identified the central issues, refused an application on behalf of the Claimant to add fresh claims for discrimination and harassment, gave certain directions for the delivery of particulars and preparation of evidence and listed a six-day hearing to determine liability and (if applicable) remedy.

8 The final hearing came before us on 16 May 2016. The Claimant was represented by Ms Saara Idelbi and the Respondents by Ms Catherine Urquhart, both counsel. Unfortunately, having read into the case and heard full submissions, we concluded on day two that the hearing could not proceed because further disclosure was required, without which it would not be possible to do justice to the dispute. Accordingly, we adjourned, reserving the matter to ourselves, to 9 November, the first date convenient to all parties. Ms Idelbi asked for the case to be re-listed for eight days. We were persuaded to extend the allocation to that extent and to stipulate that the hearing would be confined to liability only, but we also directed, without complaint from any quarter, that the evidence and submissions must be complete by the end of day six, to enable the Tribunal to use the remaining time for its private deliberations and (if judgment was not reserved) an oral decision.

9 Before adjourning we resolved a dispute about the legal scope of the claims, holding, in the Claimant's favour, that she was entitled to pursue certain allegations (apparently put as 'discrimination' in the claim form) as acts of harassment. We ruled that the claim form alleged what amounted to harassment even though the word was not used, and that no amendment was required. We also gave directions for the preparation of further evidence and delivery of an agreed list of issues.

10 The matter duly came back before us on 9 November. The parties were represented as they had been on 16 May. We pay tribute to both counsel for their able advocacy and for the co-operative spirit in which the proceedings were conducted. Two preliminary matters were raised. First, the Respondents sought permission to put in a late witness statement in the name of Ms Debbie Husband (her third). Ms Idelbi opposed the application. We regretted the lateness of the evidence but were quite satisfied that the statement should nonetheless be admitted. If it were not, the Tribunal would be faced with a great deal of unscripted evidence-in-chief from Ms Husband and the proceedings would be substantially extended. Allowing the statement in would not entail any prejudice to the Claimant. Ms Idelbi did not suggest that it would.

11 Secondly, Ms Urquhart drew our attention to the fact that the parties had not managed to agree a list of issues as directed on 17 May. The draft handed up contained points which, in her view, were not properly seen as 'issues' between the parties. We agreed that it was over-long and included matters which did not belong in an agreed list of issues (in particular certain evidential and/or 'background' questions against which the claims proper were to be determined). But it seemed to us that nothing would be gained by debating the document

further. It served its central purpose of identifying the legal claims to be advanced and the factual allegations on which they depended. Ms Urquhart left her objection there. Towards the end of the hearing counsel produced an amended version of the list of issues (hereafter, 'the List'), a copy of which is attached as an appendix to these reasons.

12 We devoted day one to reading into the case afresh. Unfortunately, despite our efforts to hasten matters along, the evidence and submissions fully occupied days two to seven. We then reserved judgment. Not surprisingly, given the length and complexity of the evidence, we were unable to determine all matters in the one remaining day and it was necessary for us to convene again to complete our deliberations. As an insurance we allowed two days, 16 and 17 February, but one member of the Tribunal was unwell on both days and although the two other members could make some progress in assembling (on a provisional basis) certain uncontroversial findings, we were then compelled to set a further 'chambers' date, 18 April.

## The Legal Framework

### *Direct discrimination*

13 The 2010 Act protects employees and applicants for employment from discrimination based on certain 'protected characteristics'. These include race (s9).

14 Chapter 2 of the Act lists a number of forms of 'prohibited conduct', including direct discrimination which is defined by s13 in (so far as material) these terms:

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

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

15 In *Nagarajan-v-London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

**If racial grounds ... had a significant influence on the outcome, discrimination is made out.**

In line with *Onu-v-Akwivu* [2014] EWCA Civ 279, we proceed on the footing that the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

16 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

**(2) An employer (A) must not discriminate against an employee of A's (B) –**

- ...  
(d) by subjecting B to any ... detriment.

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: *Shamoon-v-Chief Constable of the RUC* [2003] IRLR 285 HL.

### *Harassment*

17 The 2010 Act defines harassment in s26, the material subsections being the following:

- (1) A person (A) harasses another (B) if –
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of –
- (i) violating B's dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- ...
- (3) In deciding whether conduct has the effect referred to in sub-section (1)(b), each of the following must be taken into account –
- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.
- (4) The relevant protected characteristics are –
- ...
- race ...

18 Protection from harassment in the workplace is governed by the 2010 Act, s40 which, so far as material, reads:

- (1) An employer (A) must not, in relation to employment by A, harass a person (B) –
- (a) who is an employee of A's ...

19 We have borne in mind *Richmond Pharmacology-v-Dhaliwal* [2009] ICR 724, in which the EAT (Underhill P and members) considered the law of harassment under the Race Relations Act 1976, s3A. The wording of that section differs from the 2010 Act, s26 but the EAT's guidance remains extremely valuable.

20 Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry-v-Grant* [2011] ICR 1390 CA (para 47):

**Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be**

described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset ... but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' ... is a distortion of language which brings discrimination law into disrepute.

At para 51, the Lord Justice added this:

**I do not think that a Tribunal is entitled to equate an uncomfortable reaction to humiliation.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

### *Victimisation*

21 By the 2010 Act, s27, victimisation is defined thus:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
  - (a) B does a protected act, or**
  - (b) A believes that B has done, or may do, a protected act.**
- (2) Each of the following is a protected act –**
  - ...
  - (b) giving evidence or information in connection with proceedings under this Act**
  - ...

22 Employees are protected against victimisation in the form of detrimental treatment by the 2010 Act, s39(4)(d).

### *Burden of proof*

23 The 2010 Act, by s136, provides:

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

24 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd-v-Wong* [2005] IRLR 258 CA, *Villalba-v-Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing-v-*

*Manchester City Council* [2006] IRLR 748 EAT, *Madarassy-v-Nomura International plc* [2007] IRLR 246 CA and *Hewage-v-Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions. Giving the only judgment in the Supreme Court, he said this<sup>2</sup>:

**[The burden of proof provisions] will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.**

In other words, our task in the ordinary case is simply to confront the ‘reason-why’ question<sup>3</sup> and decide it by reference to all the relevant evidence placed before us. But if and in so far as recourse must be had to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer’s explanation relied upon at the hearing, must be considered. In this regard we bear in mind the provisions governing codes of practice (see the Equality Act 2006, s15(4)) and questionnaires (the 2010 Act, s138) and the line of authority beginning with *King-v-Great Britain-China Centre* [1992] ICR 516 CA and ending with *Bahl-v-Law Society* [2004] IRLR 799 CA. We remind ourselves that s136 is designed to confront the inherent difficulty of proving discrimination and must be given a purposive interpretation.

#### *Time*

25 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. “Conduct extending over a period” is to be treated as done at the end of the period (s123(3)(a)). Failure to do something is treated as occurring when the person in question decides not to do it (s123(3)(b)). Absent evidence to the contrary, a person is treated as deciding not to do a thing when he does an act inconsistent with it or, if he does no inconsistent act, on the expiry of the period within which he might reasonably be expected to do the thing (s123(4)). The ‘just and equitable’ discretion is a power to be used with restraint: its exercise is the exception, not the rule (see *Robertson-v-Bexley Community Centre* [2003] IRLR 434 CA).

#### **Oral Evidence and Documents**

26 We heard oral evidence from the Claimant and her supporting witnesses, all current or former employees of the Respondents, namely Mrs Christine McFee, latterly Hotel Manager, Ms Meron Schiferaw, Hotel Manager, Mr Khurram Gouhar, Hotel Manager, Ms Ruby Chiwanza, Hotel Manager, Mr Mohamedmustafa, Hotel Manager and Mr Noel Burke, formerly Corporate Sales Advisor. For the Respondents, evidence was given by Ms Gossage and Ms Elliott (the individual Respondents already mentioned), Miss Debbie Husband, Operations Director, Ms

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<sup>2</sup> Para 32

<sup>3</sup> See eg *Nagarajan-v-London Regional Transport* [1999] IRLR 572 HL.

Alex Gibson, District Manager, Mr Mark Timmins, Head of Outsource Maintenance, Ms Tamara Mooney, District Manager, Ms Nichola Stevens, Regional Director, Mr Leigh McCarron, Director of Business Planning, and Mr Thomas Heier, Head of HR.

27 Besides witness evidence we read the documents to which we were referred in the two-volume trial bundle (to which certain additions were made in the course of the hearing) and the two-volume supplemental bundle.

28 We also had the benefit of certain documents prepared by counsel. These included (in addition to the agreed lists of issues) two chronologies, a cast list, a proposed trial timetable, Ms Idelbi's opening note and closing submissions and Ms Urquhart's closing submissions.

## **The Facts**

29 The evidence was exceedingly wide-ranging. We have had regard to everything put before us. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The essential facts, either agreed or proved on a balance of probabilities, we find as follows.

### *Setting the scene*

30 The Respondents' business began some 30 years ago with a few roadside, purpose-built hotels. Their portfolio now is very wide and includes a considerable range of properties, many acquired from other chains. The hotels are classified according to their 'complexity', which is assessed by reference to location, number of bedrooms, level of food and beverage sales, occupancy levels and certain risk factors, now limited to 'maintenance', 'customer complexity' and 'property format'. A scoring system is applied to these criteria and the resulting number will determine the ranking of each hotel. The range was initially A-D. A further category, E, was introduced in 2013 and a top category, A+, in 2015. London has always had a high proportion of 'complex' sites, including the 'Big Three', namely Covent Garden, Kings Cross Royal Scot and City Road. These, together with Gatwick airport, comprise the four A+ hotels.

31 Operational management is organised on a local basis. Each hotel is managed by a Hotel Manager ('HM'), to whom one or more Assistant Hotel Managers ('AHMs') report(s). The AHM exercises supervisory authority over hourly-paid staff. In certain large hotels provision has been made for an intermediate grade between HM and AHM, designated Operations Manager. The HM reports to a District Manager ('DM') who reports to a Regional Director who, in turn, reports to the Operations Director.

32 Broadly speaking, the more 'complex' hotels are also the most profitable. Running them is also, broadly speaking, seen as demanding greater skill of the HM and other operational staff. A manager's move from a lower category hotel to a higher category hotel is very likely to be accompanied by a rise in salary. Ambitious HMs look to develop their experience by obtaining moves to more complex locations.

33 Despite the essentially hierarchical structure which we have described, the importance of 'complexity' is evident from the fact that it may in some circumstances be seen as an upward move for a DM to take on an HM role. That may be the case where, for example, he or she moves to a complex hotel from a relatively less complex District.

34 The Respondents' policy is to encourage internal moves and promotions. The aim is to develop managers' experience so that they are able to fill gaps which will inevitably appear from time to time. We heard a considerable amount of evidence about the extent to which the Claimant and others have experienced mobility during their careers with the Respondents and will make some findings on that evidence below. One feature worthy of mention here is 'succession planning'. This involves a dialogue between DMs and the relevant Regional Director (with input from HR), designed to plan the organisation's response to HM vacancies as they arise. Such conversations occur frequently. They result in one or more 'successor(s)' being identified as potential candidates for moves to particular hotels. Typically, a period is identified within which the individual is expected to be ready to make such a move. Generally speaking, four requirements apply before a decision will be taken to identify a person as a potential successor. First, he<sup>4</sup> will have been in his current post for at least a year. Second, his aspirations must correspond with what is proposed. Third, he must have relevant experience. Fourth, he must have his DM's support. Any hotel may have several potential successors at any one time and any individual may, at any one time, be listed as a potential successor to more than one hotel. The fact that a hotel features in a succession plan does not entitle the person concerned to an appointment when a vacancy arises. We accept the evidence of Ms Husband that succession planning is not a recruitment tool; rather it is one aspect of risk planning. On the other hand she also acknowledged that, although succession plans did not in any way bind the Respondents, they are on occasions the subject of "robust" discussions between managers, which points to them being regarded by those involved as of importance.

35 Witnesses on behalf of the Respondents described the recruitment procedure in the case of HM vacancies. The Regional Director is approached by HR for authority to recruit. If authority is granted an advertisement is placed on 'Just the Job', the company's recruitment portal. Every candidate submits his CVs and a written plan outlining the steps which he would envisage taking in the early days following appointment, together with a covering message confirming that the application has been discussed with his line manager. Then an interview day or assessment centre is arranged. Apparently an assessment centre is seen as necessary only where the candidates number more than two. The interview or assessment centre is chaired by the appointing manager, who must be supported by at least one other manager and an HR representative. The Claimant maintained that this procedure is often ignored and posts are frequently filled by the traditional 'tap on the shoulder' method. The Respondents strongly denied that suggestion. It is common ground that certain appointments discussed in the evidence were made without a competition being held, the difference between the

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<sup>4</sup> Or she, but purely for brevity the masculine must be read as including the feminine.



parties being whether or not those were exceptional, and justified, departures from the procedure. We make findings below on this aspect.

36 The Respondents have a system of measuring the performance of each hotel against a set of criteria, which are adjusted by the senior management from time to time. Some of those criteria can be directly influenced by the HM and some cannot. Complex metrics convert the results into numerical scores. Monthly 'scorecards' present the data in the form of a pie chart, with the segments represented in green, amber or red according to how performance measures against the standards set. These are displayed in the hotels for staff to view. 'Dashboards' collect the scorecard results to enable the hotels to be ranked against one another by district.

37 The scorecard and dashboard data are used by HMs to identify strengths and weaknesses in the performance of their staff and inform managerial priorities. They may affect remuneration of HMs. And they will inevitably play an important part in the routine appraisals of HMs by their DMs and DMs by their Regional Directors.

*Career and pay progression - Claimant*

38 As we have stated, the Claimant joined the Respondents in 2006 by way of a TUPE transfer. At that point she held the position of Assistant Lodge Manager and was receiving a salary of £25,005 per annum. On 1 January 2007 her pay was increased to £25,630. On 10 January 2008 she became HM at the Marylebone site, on a salary of 28,000. On 1 May 2009 she moved to the Liverpool Street hotel and her annual pay was increased to £31,000. After about six months in post, she and her staff achieved 'Centre of Excellence' status for the hotel, which was rewarded by a monthly supplement to her pay of £200. That benefit lasted for so long as the status was preserved, namely about five months. In early 2010 she contemplated a move to another organisation but the Respondents persuaded her to stay, negotiating a rise in salary to £34,000, which took effect from May 2010. A further pay rise took her salary to £35,700 from July 2011 onwards. In March 2012 she was asked, while still running the Liverpool Street hotel, to manage the Tower Bridge site as well, on a secondment footing. This was to cover for the incumbent HM, Mr Herter do Carmo, who was seconded to Gatwick. For this extra duty, she received a pay supplement of £275 per month, raising her rate of annual earnings to £39,000. In September 2012 she was appointed as HM at Tower Bridge and her substantive salary was increased to £39,000. Not long afterwards, she was asked to cover Liverpool Street temporarily, pending appointment of a permanent HM there, for which she received an additional £200 per month, taking her annual salary for the duration of the Liverpool Street responsibilities (about five months) to £41,400, after which it reverted to £39,000. The Claimant next received pay rises in July 2015 (to £39,780) and 2016 (to £41,371).

39 The Claimant's case before us was that she made unsuccessful applications for HM jobs at Southwark, Waterloo and City Road. She did not put dates on the first two applications and the Respondents disputed that they were ever made. It was common ground that she competed for the City Road vacancy in 2015 and

that the other candidate was appointed. We will deal with that competition below. As to the alleged Southwark and Waterloo applications, we cannot accept the Claimant's recollection as correct. On these aspects we found her oral evidence confused and even contradictory in parts. Moreover, we were struck by the complete absence of any documentary evidence to support her assertions. For these reasons we are not persuaded that she applied for positions at Southwark or Waterloo.<sup>5</sup>

40 Under the heading of "failure to promote" (Ms Idelbi spoke of "holding back"), the Claimant also complained of being denied the opportunity of advancement for want of managerial support. She told us in her oral evidence (going beyond her witness statement) that, in early 2009, she discussed with Ms Lisa Oldroyd, then, she says, her line manager<sup>6</sup>, an HM vacancy at Farringdon but was advised that Ian Stott, apparently a DM, was of the view that she was not at that stage ready to make that move. We accept that part of her evidence. Her move to Liverpool Street followed in short order.

41 Next in the list of issues is a complaint concerning a vacancy at Euston in 2009. In fact, as we find, that vacancy was filled in late 2008, not 2009. In her witness statement, the Claimant told us (para 18) that she was never asked to consider this role. We accept that she was not asked or advised to consider applying for the Euston position.

42 We turn to the further complaint that the Claimant was "overlooked" for promotion to the Covent Garden hotel in 2012. We find that, in 2011, the hotel, albeit on two sites (one at Drury Lane and one at High Holborn), was run as a single entity. A vacancy for HM was advertised and a competition followed, which was won by Mr Guntis Uzarins. Ms Alex Gibson was an unsuccessful candidate. The Claimant was not a candidate (she told us that she did not see the advertisement). Soon afterwards, the decision was taken to run 'Covent Garden' as two separate hotels and, without any further selection process, management of the High Holborn site was entrusted to Ms Gibson. Because she was not aware of any opportunity, the Claimant did not discuss the possibility of a Covent Garden role with any of her superiors.

#### *The City Road application*

43 Although the List says otherwise, the only comparator relied upon by the Claimant on this part of the case is Ms Jennifer Fletcher, who is white. She joined the Respondents in July 2010 under its newly-introduced graduate recruitment programme and took up her first HM position a year later.

44 City Road was, as we have mentioned, one of the 'Big Three' central London complexity 'A' sites, soon, with Gatwick airport, to be classified as 'A+'.

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<sup>5</sup> We appreciate that Mr McCarron in the grievance appeal was prepared to accept that the Claimant had made an application to Southwark. Having reviewed the evidence with care, we are not so persuaded.

<sup>6</sup> The Respondents seem not to agree that Ms Oldroyd was managing her then, but nothing turns on that.

45 The City Road vacancy arose in December 2014, when the current HM, Mr Scot Everest, took up a fresh appointment at Head Office.

46 The List refers to an apparent dispute as to whether City Road featured on the Claimant's succession plan at the relevant time (para 6e(iii)). Given our findings above concerning succession plans, the point is probably insignificant but, for what it is worth, we find that City Road was not identified as a possible match for her in the succession plan which was current in January or February 2014. We were not shown any more recent iteration of that plan.

47 The vacancy was advertised and the Claimant and Ms Fletcher applied and were shortlisted.<sup>7</sup>

48 Ordinarily, the Respondents entrust selection exercises for any HM position to the DM responsible for the hotel in question. But since the DM for City Road, Mr Iain Goswell, had been the Claimant's line manager for two years, it was felt that the decision should pass to someone else. The person chosen was Ms Gossage, DM for Central London West. She had taken up that position only a few weeks before the City Road competition was launched. Ms Fletcher's hotel, Southwark, was within Ms Gossage's district and accordingly there was a fledgling line management relationship between the two. In cross-examination Ms Gossage accepted that, by the time of the interviews, she had managed Ms Fletcher for about three months, that she had briefly reviewed the current performance of the Southwark hotel and found that it was not a cause for concern<sup>8</sup>, and that Ms Fletcher had told her of her intention to apply for the City Road vacancy but that the conversation had gone no further. Ms Gossage told us that she felt she could approach her task impartially, having devoted very little time to date to managing Ms Fletcher. She did, however, also acknowledge in cross-examination, with the benefit of hindsight, that it might have been more prudent for someone who had no connection of any sort with either candidate to make the selection.

49 Each candidate invited for interview was required to give a presentation based on her '60-day plan' (which summarised, by reference to the year-to-date scorecard for City Road, the steps which she envisaged taking in her first two months as HM) and answer questions on it. Both candidates were invited for interview on 8 January 2015. Ms Fletcher's proceeded on that date; the Claimant's was postponed, owing to her being unwell, to 12 January. In each case, the interviews were conducted and assessed by Ms Gossage, who was supported by Ms Elliott.

50 It seems to have been envisaged that the decision between the two candidates might be referred upwards, to Mr Gary Steele, Regional Director. Ms Gossage told us, however, that she and Ms Elliott concluded that Ms Fletcher was the clear winner of the competition and that, in a conversation with Mr Steele, it was agreed that it was unnecessary to pass the decision to him or to involve him in the process in any other way.

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<sup>7</sup> If there were other applicants, they were excluded at the shortlisting stage.

<sup>8</sup> In her witness statement, para 6, she described the Southwark hotel as "performing really well".

51 On 14 January Ms Gossage and Mr Goswell met the Claimant and informed her that her application had not succeeded. Some brief feedback was offered, which seems to have focused largely on concerns about her ability to delegate effectively. There was also some discussion about the possibility of her taking on a project management role in order to develop her skills.

52 In response to a request for a fuller explanation of the outcome, Ms Gossage wrote to the Claimant on 22 January 2015. Under the heading of “feedback”, she said this:

- **Your 60 day plan demonstrated that a lot of preparation had gone into the plan and how you would manage City Road. Your plan also showed your understanding of how you would apply the day to running the hotel.**
- **The presentation of your plan was not as detailed as I would have expected for a candidate applying for a Complexity A hotel. We did not see throughout the assessment how you would develop your team through the leadership of your AHMs [Assistant Hotel Managers] so that the hotel consistently delivers the results needed.**
- **We did not see how you would maintain a highly motivated and engaged team at a larger and more complex hotel through delegation, follow-up and accountability.**
- **These areas demonstrated development needs that we would [not] expect a successful candidate to have for this level of complex hotel.**
- **You did put in a strong performance; however another candidate was stronger in the assessment process.**

Ms Gossage went on to express the view that, with “further coaching and support” the Claimant would be ready for her next upward move within 12 to 18 months and again touched on the possibility of her benefiting from a project role. She also repeated that she had shown herself to be a strong manager and that the organisation was committed to supporting her.

53 The Claimant understood at the meeting on 14 January that she was being offered a particular project management position. Indeed it was part of her case that the offer was itself an act of unlawful discrimination (List, para 6n). The evidence for the Respondents was that the topic was discussed but no firm offer was, or could have been, made. We do not regard it as necessary to resolve this disagreement. What is clear is that, in email correspondence, the Claimant rejected the idea of a move to a project management post.

54 The Respondents did not have a written recruitment procedure. Nor did they have a competency framework. Nor were the questions asked of the candidates the same. Ms Gossage told us that many more questions were asked of the Claimant because Ms Fletcher’s presentation was much fuller, but that does not explain why, for example, the Claimant was asked how long it had taken her to prepare her 60-day plan whereas Ms Fletcher’s question was directed to the research which she had carried out, or why Ms Fletcher was given the opportunity to describe training sessions which she had delivered to support performance but the Claimant (who was acknowledged before us to have particular strengths in the area of staff training) was given no such opportunity. Nor did the Respondents operate a scoring system. Nor was any note taken of the presentations. Nor were full notes taken of the answers to the interviewers’ questions. Nor is there any record of the discussion between Ms Gossage and Ms Elliott and the grounds on

which they concluded that Ms Fletcher had performed better. Nor of the subsequent conversation with Mr Steele.

55 At the heart of the Respondents' justification of their decision to prefer Ms Fletcher to the Claimant lay the contention that the former had demonstrated significantly stronger leadership and delegation skills than the latter. This difference was said to be manifest in the 60-day plans and in the answers at interview. In the 60-day plans, we do detect a difference in style and emphasis between the two candidates. Ms Fletcher placed a great deal of emphasis on the importance of fact-finding and observation with a view to setting expectations, assigning duties and responsibilities appropriately and "upskilling" staff, in particular AHMs. Her month one "outputs" included:

**Understanding of my AHMs current performance and mindset - begin the process of coaching them to become business leaders**

She also stressed the importance of "individual team development", effective communication between AHMs and subordinate staff, and involvement and "buy-in" of the entire team in her vision and plans for the hotel.

56 By contrast, the Claimant's plan appeared to place much more emphasis on the practical intervention of the HM and AHMs. Under "Leadership" she envisaged that after less than three weeks in post she would have HM and AHMs "working a mixture of late, early and night shifts supporting problem resolution." Although she acknowledged the need to avoid micro-managing, she also proposed her own "[a]vailability to the Team whenever" as a means of achieving "quick resolutions and customer satisfaction".

57 In the question and answer session following the presentation, Ms Fletcher is noted as having responded to a question about the "biggest challenge" of managing City Road thus:

**Busy site. Putting structure in place for review etc ... and being with the team. AHMs in right place making them business leaders. Take team to next level.**

Asked to state her three biggest achievements at Southwark, her reply included:

**AHMs really proud of them. Lead them to lead the hotel.**

Ms Fletcher was also asked how she would "maintain structure" when she was off site. Her answer was noted as follows:

**AHMs understand accountability ... Respect you through the way you lead. Following up on what's happened on your days off.**

58 Asked what she saw as the biggest challenge in managing City Road, the Claimant's reply was to this effect:

**First impression was really important. Team looked scruffy ... Presentation of team really important. Also rotas could be better ... More staff in reception whilst people wait in bar café. And also cleanliness of public areas. It's all about clean and fresh**

**and first impression for customer. Team engagement would support first impression and customer services.**

Asked about her strengths, she referred to development of the teams which she had managed at Marylebone, Liverpool Street and Tower Bridge. She remarked:

**If you have the right people in the right places they will achieve the results.**

Ms Elliott asked this question:

**You said you have been given feedback in past where you are not delegating. Can you give me an example of when you have given someone a task and they have done it really well but differently to you?**

The Claimant's reply is noted as follows:

**I am a perfectionist. I have learned a big lesson in last few months. Team did well without me in holidays and sickness.**

Ms Elliott remarked that, because of its size, City Road required an HM who could delegate. Ms Gossage asked why the Claimant felt that she could not delegate in the past, to which she responded:

**I have OCD about cleanliness and have worked on it and relaxed a bit. Not everyone is like me. I have to think about how my behaviour affects others.**

Next, Ms Elliott referred to a remark by the Claimant in her presentation about always being available to her team and asked whether the same would apply at City Road. The answer was:

**Yes. That's my job. For example if someone has an ... issue they would call me. Would take two minutes rather than ages next day. Team know I will always call them back.**

59 The City Road application was the Claimant's fourth and the first that failed.

60 It was alleged (List, para 6f, g, h and i) that Ms Fletcher performed poorly following her appointment at City Road and that the Respondents unlawfully "failed" to remove her from her position and substitute the Claimant for her. This part of her case did not feature in Ms Idelbi's closing submissions and the factual assertions (summarised in the List) were not made good in evidence or, so far as we are aware, put to any witness called on behalf of the Respondents. We find no basis for the assertion that any newly appointed HM is automatically placed on a three-month probationary period. Nor is there any evidence for the alleged practice of replacing poorly-performing new appointees with those whom they have very recently beaten to the relevant appointment. Nor, in any event, is it shown that Ms Fletcher's performance was judged unsatisfactory.

### *Grievance*

61 The Claimant alleged that the Respondents failed adequately to investigate and consider, at first instance and on appeal, the grievance which she submitted following her unsuccessful application for the City Road vacancy. This complaint

was said to make good claims for direct discrimination and victimisation (List, paras 6o and 15c and d).

62 The Claimant's grievance was received by the Respondents on 10 February 2015. It included allegations of direct discrimination and victimisation in respect of the City Road competition, pay, the events relied on for the purposes of the harassment claim (see below) and sundry other matters. The first-instance conduct of the grievance was entrusted to Ms Nichola Stevens (a witness before us). She held a grievance hearing with the Claimant, who was accompanied by Mr Mohamedmustafa, a work colleague (and a witness before us), over some four hours on 16 February 2015. She then interviewed Ms Gibson, Mr Goswell, Ms Gossage, Ms Elliott, Mr Phil Clarke, Mr Phil Lupton and Ms Emma Gillings.

63 By a letter running to nine pages dated 26 March 2015, Ms Stevens rejected the grievance. She broke the Claimant's complaints into 17 topics and made findings in relation to all. She concluded in particular that the selection decision relating to City Road did not call for any review. She did not accept that there was any racial discrimination in respect of pay but acknowledged some "anomalies" and accepted that there was some work for HR to do in relation to salary bandings. She supported a proposal from Ms Gossage for a development plan to be agreed providing for coaching and support for the Claimant. She recommended that she attend an Associate District Manager assessment day. She also paid tribute to the Claimant as an HM who was "incredibly well thought of" and wished her well for a speedy return (she was then on a period of sickness absence).

64 On 4 April 2015 the Claimant appealed against Ms Stevens's decision, setting out lengthy challenges to her conclusions. The appeal was initially passed to Ms Husband but when the Claimant objected Mr Leigh McCarron (a witness before us) took her place. An appeal meeting (at which, again, the Claimant was accompanied by Mr Mohamedmustafa) was held on 24 April. Mr McCarron then interviewed Ms Gossage, Mr Goswell and Mr Clarke and had further exchanges with Ms Gossage and Mr Clarke by email. He also instigated a study by ethnicity of pay figures for HMs and AHMs. In addition he discussed one aspect of the first-instance adjudication with Ms Stevens. These steps took time to complete and Mr McCarron was careful to keep the Claimant informed of the progress of the appeal.

65 On 12 June 2015 Mr McCarron wrote to the Claimant to convey the outcome of the appeal. His letter ran to 13 pages and addressed all points of substance raised in the appeal (some of which went beyond the scope of the first-instance decision). For reasons set out in detail, he upheld the decision of Ms Stevens. He added a suggestion that the Claimant might benefit from being assigned a mentor.

#### *Advancement to DM*

66 The Claimant complained (List, para 6k) that the Respondents "failed" to promote her to DM following her participation in a working group called 'Meeting Your Potential' ('MYP').<sup>9</sup>

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<sup>9</sup> Mr McCarron and Mr Goswell seem to have known it as 'Maximise Your Potential' (see notes of their telephone conversation of 8 May 2015).

67 The MYP group was set up in 2013 by Mr Phil Clarke, an HR Business Partner. It was conceived as a means of assisting talented HMs to progress to HM positions in more complex hotels or to Assistant DM (and ultimately DM) roles. DMs put forward names of promising individuals. The Claimant's was one. Membership of the group grew to 11, of whom five were non-white. Promotion to DM did not depend upon being a member. Ms Urquhart described MYP as a "damp squib". We do not think that that was unfair. Mr Clarke moved to another role and the group was disbanded.

68 The Claimant accepted in evidence that she never applied for a DM position but told us that she had always hoped to progress to that status (and higher).

69 On this part of the case the Claimant compared herself with five white individuals. It was not clear to us in the end whether all of those comparisons were persisted with. We will deal briefly with each.

70 Mr Scot Everest has never been appointed to a DM role.

71 Ms Gibson was appointed to a DM vacancy in Kent in 2016 following her application and an interview conducted by the Regional Director. That application was made about four or five years after she first told her line manager that she was interested in progressing to DM. In the interval she undertook an assessment day and two secondments through which she acquired experience in DM work. We have heard no evidence to link her membership of the MYP group with her promotion to DM several years later.

72 Mr Mark Crockett was at some stage appointed an Associate DM. It was not suggested that he acquired that position otherwise than through the conventional competitive recruitment procedure. He subsequently reverted to the role of HM, at the A+ Covent Garden site.

73 Ms Samantha Taylor held the role of DM before the MYP group was established. Again, it was not suggested that there was anything irregular about her appointment.

74 Mr Steve Glass has never been appointed a DM.

*Wider career progression evidence and comparisons*

75 The Claimant cites five further white individuals as comparators for the purposes of a more general complaint about career progression. We will consider them in turn.

76 The first is Ms Gossage. She was initially employed by the Respondents as a receptionist in Liverpool in 2004. She progressed to HM in 2006, at hotels in Manchester and, thereafter, Knutsford. In 2008 she took a project management role by way of a secondment, which ended after eight months with redundancy. She immediately transferred to Preston Central as HM after which, in April 2009, she moved to the East Midlands, initially as an Associate DM and subsequently as



a DM. Judging that working in London during the 2012 Olympics would be beneficial for her career, she applied for an HM vacancy at King's Cross Royal Scot, and was successful. Her next move was later the same year, when she reverted to DM, this time in Hertfordshire. She became DM for London West in 2013 and for London West Central in 2014. In 2016 she applied successfully for the role of DM for Cumbria and Lancashire.

77 Nataliya Ivanchenko's career with the Respondents began in 2007 when she joined as a cleaner at the Chessington hotel. She became an Assistant HM later the same year but did not achieve an HM appointment until 2012, when she transferred to Euston. In 2014 she took what might appear a retrograde step in becoming Operations Manager at Covent Garden (but that was, of course, a more complex and prestigious hotel).

78 Stacey Nicholls appears to have joined the Respondents in 2013 as an HM at Ilford (a Band C hotel). She was seconded to Aldgate East (a Band B hotel) in 2015, where she remained for four months, but her application for a permanent HM post there was unsuccessful. In 2015 she became Operations Manager at City Road. She remained there for about 10 months and then left on maternity leave. It will be necessary to return to Ms Nicholls below.

79 Hayley Adams entered the Respondents' employment in 2012 as a Management Apprentice at Uxbridge Central (Band C). Despite the job title, she started on cleaning duties and progressed through reception work before embarking on managerial training in late 2013. She became Assistant HM at the same location in 2014. A year later, she became HM, again at the Uxbridge Central hotel.

80 Alan Harfield's service with the Respondents began in 2008. He undertook HM roles at London Liverpool Street, London Farringdon and Cambridge Central, before becoming Associate DM in East Anglia in 2011 and DM, in the same location, in 2012.

81 More generally, the Claimant alleged that the Respondents tend to 'under-promote' black staff and/or to promote them more slowly than white staff (List, para 6c and d).

82 Ms Idelbi relied on the undisputed fact that, until recently, no black HM has been appointed to any of the 'Big Three' hotels or to the Respondents' Gatwick site. And no black employee has ever attained DM status or above. It is also an agreed fact that of the Respondents' four largest and most profitable hotels (City Road, Gatwick, Covent Garden and Kings Cross Royal Scot), all but one (Covent Garden) are now managed by black HMs. One, Ms Chiwanza (a witness called by the Claimant), is at Gatwick, having transferred there from Heathrow in 2016. The Heathrow hotel is itself a very important site and when there she was fourth in the HM salary rankings. Her transfer to Gatwick moved her up to second place. The Claimant made the point that all three appointments were made in or after the summer of 2016 and did not shrink from asserting that they were a tactical response to her Tribunal claim. That contention, which we will address in our conclusions below, did not appear to feature in Ms Idelbi's closing argument to us.

83 On the subject of the speed of career progression, we were presented with a great deal of evidence, much of it confusing. In written form, it is to be found principally in the third witness statements of the Claimant and Ms Husband. Ms Husband sought to correct some of the detail contained in the Claimant's statement. Although it appeared at one stage that no real challenge was raised to this part of Ms Husband's evidence, the Claimant ended up standing by her evidence, but for the most part we were not able to understand on what ground she did so. In her closing submissions, Ms Idelbi appeared to move closer to Ms Husband's evidence than the Claimant had been willing to do. We find the most helpful source of information to be the oral evidence of Ms Husband. Under cross-examination she appeared broadly to accept that the 14 white HMs to whom she was referred had spent the number of months per job which Ms Idelbi put to her. We have totalled those numbers and divided by 14, which gives an average period per post of about 21 months. One individual, Mr Everest, inflated the figure slightly because it was agreed that his average period in post was around 40 months.<sup>10</sup> The same exercise was performed in respect of the Claimant and three black HM colleagues, Ms Ruby Chiwanza, Ms Meron Shiferaw and Mr Mohamedmustafa. The average period in their cases was about 29 months. But here again, the figures were far from uniform. The average periods in the cases of Ms Chiwanza and Ms Shiferaw were 21 and 23 months respectively and in the cases of the Claimant and Mr Mohamedmustafa, 35 and 36 months respectively.

*The alleged 'tap on the shoulder'*

84 It was the Claimant's case that the Respondents routinely bypass formal recruitment processes in favour of the traditional 'tap on the shoulder' and that selection decisions made in this way operate to the disadvantage of black employees. She put before us five particular examples.

85 The first is the appointment of Ms Gibson as HM at Covent Garden's High Holborn site. We have made findings on that matter above.

86 Second, we heard evidence about the transfer of Mr Jeremy Muscat, an HM, from Farringdon to Southwark in 2011. Mr Timmins told us without challenge that Mr Muscat was away from work for a substantial period following serious surgery. On his return the decision was taken that he should fill a vacancy which had arisen at Southwark because it was felt that the Farringdon job was too complex and stressful for him at that time. Accordingly, no competition was held for the Southwark post and Mr Muscat was simply installed there.

87 Third, the Claimant relied on the case of Mr Andrew Frethey. He was appointed HM at Southwark in 2012, without any competition being held, about three months after he had lost to the Claimant in the competition for the Tower Bridge vacancy. Ms Mooney told us that, given the short interval and the fact that Southwark and Tower Bridge were similar hotels, the decision to appoint Mr Frethey without opening the vacancy up to competition had been appropriate.

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<sup>10</sup> This, said Ms Idelbi, was not surprising as he held HM positions at two of the 'Big Three' hotels.

88 Fourth, Ms Husband accepted that Ms Fletcher was appointed as HM at Southwark (we are unsure of the date) without an open competition. She told us that Ms Fletcher may have been treated as an exception to the general rule in that she was one of very few individuals (four in the country, one in London) who joined the organisation under the graduate recruitment scheme introduced in about 2010, which appears to have guaranteed those individuals such career progression opportunities as would enable them (subject to their own abilities and performance) to progress to DM level within four years.

89 Fifth, the Claimant relies on the appointment of Ms Nicholls as Operations Manager at City Road in 2015.<sup>11</sup> As we have already noted, that move followed a secondment to Aldgate East in the role of HM and an unsuccessful application for the permanent vacancy at that site. Contemporary emails appear to bear out the Claimant's contention that Ms Nicholls's last appointment, which constituted a demotion, was not the result of an open competition.

90 Although no other illustrations were presented to us of appointments being made without advertisement and without any selection process, it seems likely that there have been further instances. In particular, Ms Mooney gave evidence that it was the Respondents' 'practice' to make appointments in this way where a deserving candidate has failed in a recent competition for a comparable position. She did not accept that this amounted to legitimising a 'tap on the shoulder' approach to recruitment.

91 Our general finding is that the 'tap on the shoulder' is not routine and that in the ordinary case the Respondents conduct formal selection exercises to fill vacancies, but that there have been exceptions, not limited to those noted above.

#### *Pay comparisons - Claimant*

92 The Claimant alleged that the Respondents underpaid her and rewarded her white colleagues more generously (List, para 6p). She relied on three comparators: Ms Oldroyd, Mr Alan Harfield and Mr do Carmo, her immediate predecessors at, respectively, Marylebone, Liverpool Street and Tower Bridge. She purported to compare her salaries on taking up the substantive appointments with theirs on leaving. The figures which she originally put forward were, respectively, £28,000/£40,000; £31,000/£34,000, and £39,000/£41,000.

93 Ms Husband told us in her evidence that Ms Oldroyd had been paid £31,517 at the time of her departure from Marylebone. She was not challenged on that evidence and Ms Idelbi appeared to adopt it as correct in her closing submissions. Ms Husband further told us that she believed that Ms Oldroyd's pay had included a travel allowance of some £4,000 to cover the cost of commuting from Cambridgeshire. She explained that Mr Harfield, who lived in the same part of the country, received such an allowance and she understood that Ms Oldroyd did also. The somewhat opaque pay records which we have seen do not assist. Ms Husband made the further point that it appeared that Ms Oldroyd had been transferred to the Respondents under TUPE and that it was possible that she had

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<sup>11</sup> This matter is relied upon as 'background' only. The Claimant does not complain of having been personally disadvantaged.

arrived at Marylebone with a (protected) salary somewhat higher than the Respondents would otherwise have been willing to pay. We find on balance that it is more likely than not that Ms Oldroyd's salary at Marylebone is explained by one or both of these factors.

94 Mr Harfield was paid a salary of £35,000 in 2008/9 to manage the Liverpool Street hotel, but that included the £4,000 travel allowance to which we have just referred. As we have already stated, the Claimant's starting salary at that site in 2009 was £31,000.

95 Mr do Carmo's salary at Tower Bridge stood at £41,000 in 2012, when he handed over to the Claimant, whose salary on appointment in September of that year was set at £39,000. That represented a rise of more than 9% on the substantive salary of £35,700 paid to her from July 2011 onwards. It seems that Mr do Carmo's starting salary at Tower Bridge was £40,000.

96 When the Claimant left Marylebone in April 2009 her salary stood at £28,000, unchanged since her appointment 16 months earlier. Her replacement, Ms Thao Nguyen, was paid £28,500 on taking up the post. She in turn was replaced by Ms Fletcher in June 2011, who began on a salary of £23,000 rising the following month to £24,000.

97 The Claimant's successor at Liverpool Street, Mr Clive Tshabalala, took up his appointment in 2012 on a salary of £28,000, £7,700 less than she was earning on departure.

98 On 31 December 2011 the Claimant's salary was third highest among the B Complexity London HMs, about £1,000 below her best paid colleague and about £10,000 above the lowest paid individual in that group. Her pay was at the same level as that of Mr Steve Glass, a white HM of an A Complexity hotel. A year later she was the highest-paid of the B Complexity HMs, receiving about £3,300 more than Mr Glass. At the ends of the next three calendar years her pay (she was then an A Complexity HM) placed her, measured against her peers, at third out of seven, sixth out of 10 and fifth out of 10 respectively.

99 We heard some evidence about salary bands. We were told that these are set annually by managers with HR support. Ms Husband stated (second witness statement, para 16):

**The bandings are reviewed annually and are a culmination of the actual landscape of salaries within the appropriate complexity.**

This seems circular. It appears to mean that the band applicable to, say, Complexity B HMs can be ascertained simply by identifying the highest and lowest salary actually being paid to HMs within that particular cohort. If this is right, it may not assist very much to say (as Ms Husband repeatedly did) that the Claimant was at all points in her progression paid a salary which fell within the appropriate band since any award apparently outside the upper or lower limit would immediately stretch the band to accommodate it. Nonetheless, two observations are worth making. First, not surprisingly, the pay bands were very wide. Secondly, it was

not in dispute that for a substantial part of the time under review the Claimant received salary at or close to the top of the applicable band.

*Wider pay evidence and comparisons*

100 In support of her personal complaint of discrimination the Claimant again sought to rely on wider evidence, intended to make good her case that a culture of racially discriminatory pay practices pervades the entire organisation.

101 Statistics from 2015 published by the Respondents in a report of February 2016 show:

- of the 21 highest HM salaries nationwide, nine were paid to BAME staff;
- of those nine HMs, five were classified as black;
- those five included Mr Mohamedmustafa, whose salary was set by the Employment Tribunal<sup>12</sup>;
- of the other four, three (including the Claimant) were in the top 10;
- of the 21 highest HM salaries in London, 12 were paid to BAME staff;
- the five black employees from the nationwide list were among those 12;
- the report described the top-ranking HM, a white former DM, as an 'outlier';<sup>13</sup>
- among AHMs and HMs there was a pay gap of 2.21% favouring white British staff.<sup>14</sup>

102 Mr Heier gave evidence before us that a further pay audit, completed in October 2016, showed a pay gap among HMs *favouring* BAME staff of 4.7% nationwide and 4.4% in London.

103 EHRC guidance is to the effect that a pay gap of 3% or more calls for investigation and one of 5% or more is to be deemed significant and requiring action.

*The harassment and victimisation allegations*

104 The Claimant's harassment claims rested mainly on three acts or omissions said to have occurred at the Respondents' 'Big Event' annual gathering in January 2015. The first consisted of what was said to be the conscious act of seating her and Ms Fletcher at the same table in circumstances where Ms Fletcher had very recently defeated her in the City Road competition. The second and third took the form of comments allegedly made behind her back by Ms Gibson. A fourth alleged act of harassment included in the List (para 9d) was "overlooking" the Claimant for promotional opportunities such as the City Road job.

105 The 'Big Event' is, as its name suggests, a large operation. It brings together some 800 managers. The arrangements are made at Head Office. In her

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<sup>12</sup> We make brief findings below on Mr Mohamedmustafa's litigation.

<sup>13</sup> His salary was massively greater than anyone else's.

<sup>14</sup> Based on a sample of 653 individuals

long letter of 26 March 2015 setting out findings on the Claimant's grievances, Ms Stevens reported that she had spoken with Ms Gillings, a member of the Central Operations team located at Head Office, who had explained that she had been responsible for the seating plan and that she was not ordinarily made aware of "HR issues". She also said that seating had been organised by district as a response to feedback following previous years' events. City Road and Tower Bridge were in the same district. It seems to us much more likely than not that Ms Gillings's account was correct and that she was not aware of any reason why the seating arrangements might cause discomfort or embarrassment to the Claimant, Ms Fletcher or anyone else. There is no evidence to support the theory advanced by the Claimant that Mr Iain Goswell, DM for London East and the Claimant's line manager, devised the seating plan, let alone that he did so in order to cause her distress.

106 As to the comments of Ms Gibson, we make these findings. It was common ground that the Claimant gave evidence in support of the claim of Mr Mohamedmustafa against the First Respondents and others, which was heard before an Employment Tribunal at London South in September and December 2012 and January 2013 and that doing so amounted to a protected act for the purposes of the 2010 Act, s27(2)(b). The claim was successful and findings of direct racial discrimination and detrimental treatment on 'whistle-blowing' grounds were made.

107 Ms Gibson knew that Mr Mohamedmustafa had brought proceedings against the company some time before but did not know that the Claimant had given evidence on his behalf. She was aware that on the occasion of the 'Big Event' dinner the Claimant was making no attempt to disguise her anger and resentment over the outcome of the City Road competition and that Mr Mohamedmustafa was in her company and appeared supportive of her sense of grievance. When outside smoking a cigarette, Ms Gibson passed a comment to Mr Rahman Arshad, an HM currently in the process of applying for the position of HM at the Docklands hotel (an upwards move for him) that he should steer clear of the Claimant and focus on his career plans, not the concerns of others. It is likely that one or two other people were also present. We are not persuaded that she described the Claimant (or Mr Mohamedmustafa) as "trouble" but she may have commented to the effect that getting involved in her affairs could lead to trouble, or something similar. The Claimant and Mr Mohamedmustafa went outside to smoke at about the same time and overheard enough of the conversation to pick up its gist. Not long afterwards, Mr Arshad repeated to the Claimant what Ms Gibson had said to him in the earlier conversation. He may not have known that she had overheard part of it.

108 For the purposes of the victimisation complaint, the Claimant repeats her allegations of the "trouble" comment and of being "overlooked" for promotion. We do not need to add to our findings of fact on those matters. In addition, she alleges that she was victimised through the failure of the Respondents properly, fairly or impartially to investigate her grievance at first instance and on appeal. Again, we have made findings on those matters, which we do not need to repeat or expand.

## Secondary Findings and Conclusions

109 Having recited the facts in some detail, we are able to express our conclusions quite concisely.

### *Career progression*

110 The Claimant's case on career progression is largely defeated by our primary findings. Contrary to her recollection, she did not make any unsuccessful application for promotion before the City Road competition. Such applications as she made were successful. And her advancement as an HM compares very favourably with that of many of her peers. It is certainly true that she has not had a change of hotel for a relatively long time and she could point to others who had had much more frequent moves, but this evidence by itself establishes nothing of consequence. If she did not make applications, she cannot complain that she did not advance.

111 The crux of the case on career progression was the complaint about the outcome of the application for the vacancy at City Road. We have set out detailed findings on that aspect above. We entirely accept that the Claimant feels passionately that she deserved to be appointed to that job and that the selection of Ms Fletcher can only be explained by the difference in race between the two candidates. In fact she went further, contending that she ought to have been appointed without any selection process whatsoever. But that, on our findings, would have been a remarkable departure from the Respondents' ordinary practice and, self-evidently, from sound recruitment practice. What happened was that they adopted the conventional approach of shortlisting strong candidates and setting them a task (drafting the 60-day plan) and questions (at interview). In keeping with the conventional approach, they assessed the candidates on their performances in the task and in the answers at interview. The Claimant appeared to say that (if any selection exercise at all was appropriate) it should have taken the form of an assessment of the candidates against their performance throughout their time in the organisation. But that, again, would have been contrary to principle and would have invited strong and legitimate condemnation. Recruitment exercises conducted in that way are open to the obvious criticism that they invite decision-makers to rely on their own subjective opinions and perceptions (or those of others), rather than on an objective evaluation of the evidence generated by a task- and interview-based selection process. In the circumstances, we are very clear that the Respondents cannot be criticised for their basic approach to the recruitment of the City Road HM. That said, we should not be taken to suggest that the exercise was incapable of being improved upon. Far from it. We have already noted a degree of inconsistency in the questions asked, the absence of a scoring system and poor record-keeping. We will limit ourselves to three further critical comments. First, the essential skills and competencies were nowhere clearly formulated. Secondly, the candidates were not made aware of those skills and competencies. Thirdly, it was unsatisfactory that Ms Gossage, who had recently become Ms Fletcher's line manager, was involved in the process. We hope that the Respondents will reflect on these observations and on the importance in future of devising selection processes which do not open them to legitimate criticism.

112 Despite the flaws and imperfections to which we have referred, we are satisfied that the City Road application was determined on legitimate grounds which do not savour of any form of discrimination. Having reviewed all the relevant evidence, some of which we have set out above, we consider that it discloses proper grounds for the conclusion that, although the Claimant performed satisfactorily, Ms Fletcher did better. In particular, the panel was entitled, we think, to identify daylight between the candidates in relation to leadership and delegation and to harbour doubts (as we were told they did) as to whether the Claimant, who had not managed an hotel of the size and complexity of City Road, fully grasped that an ability and willingness to delegate many tasks and responsibilities to others were vitally important attributes for anyone taking on the management of that site.

113 We have not judged the City Road competition in a vacuum. We have had regard to the Claimant's complaints about the progress of her career prior to that competition. For reasons already stated, we do not find those complaints have validity. We have also looked at her wider allegations of a general tendency within the organisation to "hold back" black (or BAME) managers, but we do not find that those allegations are substantiated on the evidence. We have mentioned her statistical analysis which sought to show that three other black managers have taken much longer than their white peers to achieve promotion. But when the Claimant's own case is discounted on the basis of our finding that she did not make the job applications on which she relied, the figures become much less dramatic. Indeed, as we have recorded, the average "time in job" figures of two of those three, Ms Shiferaw and Ms Chiwanza were virtually indistinguishable from those of the white sample relied on by the Claimant. Without examining the career histories (including job applications made and the outcomes thereof) of the black and white groups identified by the Claimant, we are in no position to reach any view as to why any individual may appear to have achieved more rapid progress than any other. What we can say is that we have not been shown evidence establishing any recognisable pattern suggesting any link between career progression and any racial characteristic.

114 The weakness of the Claimant's position on career progression is illustrated by the somewhat desperate claim that recent appointments of black HMs to high-ranking hotels are tactical moves to influence the Tribunal against her case. That regrettable assertion we reject as wholly implausible and more than a little offensive to the very capable individuals concerned.

115 We have not overlooked the troubling fact that there is no black employee in the organisation above the level of HM. It does not assist us directly in our consideration of the Claimant's claims because rightly, the reasons for that state of affairs have not been explored before us. But whether or not it points to a 'glass ceiling', it certainly should be a matter of concern to the Respondents. They should be asking themselves what steps they have taken or intend to take to extend diversity across the entire company, including its highest echelons. That does not demand positive discrimination; it does demand positive and proactive steps to attract talent from the widest range of people.



116 Nonetheless, for the reasons stated, we conclude that the complaints relating to career progression are unfounded.

### *Pay*

117 We reach a very similar view on the matter of pay. There have been occasions when the Claimant has been paid less than a white colleague whom she is entitled to regard as a peer. But when one reviews the evidence as a whole it is just as easy to identify comparisons in which she is the more favourably treated. It seems to us that there is room for the view that the Respondents' pay arrangements are in need of being overhauled. They might be described as idiosyncratic. For the reasons explained in our primary findings, we are not greatly impressed by the so-called 'pay bands' which appear to expand and contract according to what the highest and lowest paid individual in the cohort is receiving, rather than serving as a tool to minimise pay discrepancies and anomalies and reduce the risk of legal challenges. But whether these remarks have validity or not, we find in the comparisons drawn between the Claimant's remuneration and that of colleagues and in the wider evidence no material pointing to discrimination operating to the disadvantage of the Claimant or black or BAME staff generally.

### *Grievance*

118 There is, in our view, nothing in the complaint about the grievance. We are quite satisfied that Ms Stevens and Mr McCarron conducted careful and conscientious investigations into the numerous complaints which the Claimant raised and gave detailed and thoughtful decisions upon them.

### *Miscellaneous*

119 Having reviewed our notes of evidence we believe that no case was put to any of the Respondents' witnesses that the suggestion offered in feedback following the City Road competition (see above) to the effect that the Claimant might benefit from taking on a project management role (List, para 6n)<sup>15</sup> was discriminatory or designed to cause any harm or disadvantage to the Claimant. In any event, we are very clear that no tenable claim could have been based on the innocuous and well-meant remarks of Ms Gossage and Ms Elliott.

### *Harassment*

120 The complaints of harassment are not well-founded. Here, we regret to say, it seems to us that the Claimant has allowed her feelings to dominate her judgement. The result is an overstated case. Of course she was very disappointed to have failed in her application for the City Road job and it was upsetting for her, in that frame of mind, to find herself seated at the same table as the successful candidate. As we have found, there was discomfort for both individuals. The timing was unfortunate. But it was simply an accident of the sort which is likely to happen in any large organisation from time to time. For the Claimant to describe the occasion as the worst day of her life was, we think,

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<sup>15</sup> Or, if the Claimant's recollection is right, the express offer of such a role

regrettable hyperbole. In our judgment, the events complained of did not come close to meeting the demanding language of the 2010 Act, s26.

121 Nor did the Claimant experience harassment by overhearing Ms Gibson's remark or having it (or something similar) repeated to her shortly afterwards. She may have thought that Ms Gibson was describing her as "trouble", but that is not, on our findings, what happened.

122 Even if, which appears highly dubious, the fourth matter could even theoretically stand as a complaint of harassment, it fails on our primary findings. The Claimant was not "overlooked" for opportunities to be promoted.

123 In any event there is simply no basis for the theory that the matters complained of were related in any way to the Claimant's race. The first (the seating arrangements) was simply an accident. (The accident was the unfortunate timing; the fact that seating was arranged by district was no accident but, of course, nothing whatsoever to do with race.) The second and third were comments (or the same comment repeated) which were prompted by Ms Gibson's perception of the Claimant's resentment arising out of the City Road decision. Again, there is nothing whatsoever suggestive of any racial element in her remarks. Nor, as we have found, did race play any part in the Claimant's career progression.

#### *Victimisation*

124 It may have been a detriment for the Claimant to hear (first hand or second hand) Ms Gibson's remarks. In the matter of the grievance there was no detriment. But in any event all victimisation claims fail because the matters complained of did not happen because of the protected act relied upon, namely the Claimant giving evidence in support of Mr Mohamedmustafa's Employment Tribunal claim. As we have found, Ms Gibson was not aware that she had done so.

#### *Time*

125 It follows from our findings above that was no unlawful 'conduct extending over a period' for the purposes of the 2010 Act, s123(3)(a). Accordingly, any claim brought outside the primary three-month period (as extended by the period of ACAS conciliation) fails for the further reason that it is out of time, unless we exercise our discretion to substitute a longer period. We have heard no evidence to justify doing so and the primary period therefore applies. It follows that all claims other than those relating to the grievance decisions at first instance and on appeal are outside the Tribunal's jurisdiction in any event.<sup>16</sup>

#### **Outcome and Postscript**

126 For the reasons we have given, all claims fail and the proceedings are dismissed.

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<sup>16</sup> In the Claimant's favour, we treat the grievance as a single process and time as running from its culmination with the delivery of the appeal outcome.

127 We would not wish to leave this case without saying that we regret this dispute. It is plain that the Claimant is a most dedicated and capable manager. Although she appears to doubt it, we are clear that she is very highly regarded within the organisation. We have every confidence that, if she is able to put this litigation behind her, she has every prospect of achieving the success to which she aspires and which in our view she richly deserves.

128 Although the claims have not succeeded, some valid concerns have been raised. We have noted the important evidence of Mr Heier concerning changes and improvements in the Respondents' systems, processes and culture resulting from the Mohamedmustafa litigation. We sincerely hope that that progress will be sustained and carried forward and that, if nothing else, this case may yield some further valuable lessons for all involved.

Employment Judge Snelson  
12 May 2017

APPENDIX TO REASONS

**IN THE CENTRAL LONDON EMPLOYMENT TRIBUNAL**      **CASE NUMBER: 3302768/2015**

**BETWEEN**

**MILLCENT OTIENO**

**Claimant**

**-and-**

**TRAVELODGE HOTELS LIMITED AND OTHERS**

**Respondent**

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**AMENDED AGREED LIST OF ISSUES**

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1. The Claimant's protected characteristic is race.

**PRELIMINARY ISSUES**

2. Pursuant to the time limits set out at section 123(1) Equality Act 2010, does the Tribunal have jurisdiction to consider each of the Claimant's complaints brought under the provisions of the Equality Act 2010?
3. Do the acts complained about amount to a continuing state of affairs?
4. If the answer to paragraph 3 above is "no", did the Claimant bring her complaint within 3 months starting with the date of the act to which the complaint relates?
5. If the answer to paragraph 4 above is "no", would it be just and equitable to extend time?

**DIRECT RACE DISCRIMINATION**

6. Did the following acts take place?
  - a. Did the First Respondent fail to promote the Claimant in line with her skills and success in particular:
    - i. In 2009, was the Claimant overlooked for a promotion to the First Respondent's London Farringdon hotel in favour of Andrew Frethey and/or Monica Hebel and/or a hypothetical comparator, if appropriate to consider?
    - ii. In 2009, was the Claimant overlooked for a promotion to the First Respondent's London Euston hotel in favour of Andrew Frethey and/or Guntis Uzarins and/or a hypothetical comparator, if appropriate to consider?
    - iii. In 2009, 2010, 2011 and 2013 was the Claimant overlooked for a promotion to the First Respondent's London Southwark hotel in favour of Mark Crockett,

Guntis Uzarins, Andrew Frethey and/or Jennifer Fletcher, respectively, and/or a hypothetical comparator, if appropriate to consider?

iv. In 2012, was the Claimant overlooked for a promotion to the First Respondent's Covent Garden hotel in favour of Guntis Uzarins and/or a hypothetical comparator, if appropriate to consider?

v. In 2011 or around 2012, was the Claimant overlooked for a promotion to the First Respondent's London Waterloo hotel in favour of Mark Crockett and Monica Hebel, respectively, and/or a hypothetical comparator, if appropriate to consider?

vi. Prior to 2015 and in 2015, was the Claimant overlooked for a promotion to the First Respondent's London City Road hotel ("City Road") in favour of Scott Everest and Jennifer Fletcher respectively and/or a hypothetical comparator, if appropriate to consider?

b. Was the Claimant a high performing manager?

c. Are Black staff promoted at a slower rate on average than the White staff?

d. Does the Respondent under promote and/or underpay Black managerial staff?

e. In relation to the Claimant's application for the position of Hotel Manager at City Road in 2015:

i. Did the First Respondent appoint a less-experienced and less-skilled white applicant?

ii. Did the First Respondent require the Claimant to interview for the role?

iii. Did the First Respondent fail to appoint the Claimant to the role in line with her succession plan?

iv. Did the First Respondent act in a manner so as to ensure that the Claimant did not obtain the post?

v. Was Ms Fletcher's line manager, the Second Respondent, unfairly permitted to be part of the recruitment process, where the Claimant's line manager was not part of the recruitment process?

f. Did City Road perform poorly under Ms Fletcher's management?

g. If so, did the First Respondent fail to remove Ms Fletcher from the role and appoint the Claimant?

h. Did the First Respondent have a practice where:

i. A new hotel manager would be on a three-month probationary period?; and

ii. If the new hotel manager was not performing well, the new hotel manager would be removed from the role?

i. Should the First Respondent have removed Ms Fletcher from the role of manager at City Road and appointed the Claimant to that post?

j. Did the Claimant at any time express a desire to become a District Manager?

- k. If so, did the First Respondent fail to promote the Claimant to the role of District Manager following her attendance at a "meeting your potential" working group? The Claimant relies on the following comparators:
- i) Scott Everest;
  - ii) Alex Gibson;
  - iii) Mark Crockett;
  - iv) Samantha Taylor;
  - v) Steve Glass; and/or
  - vi) A hypothetical comparator, if appropriate to consider.
- l. Did other employees progress or were they progressed more quickly in their careers at the First Respondent? The Claimant relies on the following comparators (in addition to those listed at a(i)-(vi) and j (i)-(v) above):
- i) The Second Respondent;
  - ii) Natalie Ivanchenko;
  - iii) Stacey Nicholls;
  - iv) Haley Adam;
  - v) Alan Harfield; and/or
  - vi) A hypothetical comparator, if appropriate to consider.
- m. Did the First Respondent fail to advertise the role of Operations Manager at City Road thus depriving other Assistant Managers of the opportunity to apply?
- n. Did the First Respondent offer the Claimant an alternative role, as implementation and sustainability manager, which was a high-risk role owing to it being a new role?
- o. Did the First Respondent fail to adequately investigate and consider the Claimant's grievance and appeal in relation to her failure to secure the role at City Road?
- p. Was the Claimant paid less than her white counterparts? The Claimant relies on:
- i. The previous manager at Marylebone (Lisa Oldroyd), who was on a salary of £40,000;
  - ii. The previous manager at Liverpool Street (Alan Harfield), who was on a salary of £34,000; and
  - iii. The previous manager at Tower Bridge (Herter Do Carmo), who was on a salary of £41,000.
- as comparators.
- q. Did the First Respondent fail to nominate the Claimant for an award at the Big Event 2015 where Ms Fletcher was nominated for three awards?
7. If the above acts took place, were any of them acts of less favourable treatment towards the Claimant?

8. If so, was the reason for the less favourable treatment the Claimant's race? Or was there another non-discriminatory explanation?

**HARASSMENT**

9. Did the following acts occur?
- a. At the 'Big Event' in January 2015, Alex Gibson telling other colleagues to avoid the Claimant;
  - b. At the 'Big Event' in January 2015, Alex Gibson telling other colleagues that the Claimant was "trouble", or words to that effect;
  - c. At the 'Big Event' in January 2015, the Claimant was consciously placed at the same table as Ms Fletcher, the white appointee to London City Road:
    - i. Was it known by the person arranging the seating plan that both Ms Fletcher and the Claimant had interviewed for the London City Road role?;
    - ii. Was it known by the person arranging the seating plan that Ms Fletcher had been appointed to the London City Road role?
    - iii. Was the Respondent able to place either the Claimant or Ms Fletcher on another table?
  - d. The Claimant was overlooked for promotional opportunities such as London City Road.

10. Were the acts in paragraph 9 above unwanted conduct related to a protected characteristic?

11. Did the acts in paragraph 9 above have the effect of:
- a. violating the Claimant's dignity, or
  - b. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

12. In deciding whether the alleged conduct has the effect referred to in paragraph 11 above, the Tribunal must take into account the perception of the Claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect, pursuant to s26(4) of the Equality Act 2010.

**VICTIMISATION**

13. The alleged protected act is the Claimant's giving of evidence against the First Respondent at a tribunal in 2012 on behalf of a fellow employee, Mr M Mohamedmustafa.

14. Does this amount to a protected act pursuant to section 27 Equality Act 2010?

15. Was the Claimant subject to any of the following detriments? Namely;

- a. Was the Claimant overlooked for the promotion to City Road in 2015?
- b. Did Alex Gibson of the First Respondent refer to the Claimant as "trouble", or words to that effect?
- c. Did the First Respondent fail to properly, fairly and/or impartially investigate and consider the Claimant's grievance?
- d. Did the First Respondent fail to properly, fairly and/or impartially investigate and consider the Claimant's grievance appeal?

16. If so, was the Claimant subjected to the above-mentioned detriments because she had done the protected act, as outlined at paragraph 13?