Case No: 2200371/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms R Gibbons	**v**	The Walt Disney Company Limited

Heard at: Central London Employment Tribunal On: 17 August 2020
Before: Employment Judge Norris, sitting alone (via CVP)

Appearances
For the Claimant: Mr R O'Dair, Counsel
For the Respondent: Mr P Halliday, Counsel

RESERVED JUDGMENT

1. The complaints of direct race discrimination between July 2014 and February 2018 (items 1.2.1 a) to i) on the list of issues) are out of time, and it would not be just and equitable to extend time; they are accordingly struck out because the Tribunal does not have jurisdiction to hear them.
2. The complaints of direct race discrimination between June and September 2019 (items 1.2.2 a) to e) on the list of issues) are out of time but time is extended.
3. The complaints of direct race discrimination between June and September 2019 have little reasonable prospects of success and the Claimant is ordered to pay a deposit of £50 for each of these five complaints as a condition of proceeding with them.
4. The Claimant's application to add a complaint that her dismissal was an act of direct race discrimination is allowed and is added to the list of issues for consideration at the Hearing, but as this complaint stands little reasonable prospect of success, she is ordered to pay a further deposit of £50 as a condition of proceeding with it.
5. The remainder of the application to amend the claim/list of issues is refused.
6. The Claimant's application for an order for information is refused.
7. The remaining complaint under the Trade Union and Labour Relations (Consolidation) Act 1992 is dismissed on withdrawal.

REASONS

Background

1. The Claimant was employed by the Respondent, which she describes as a globally-recognised multinational mass media and entertainment conglomerate, between 1 June 2012 and 27 September 2019, initially as a Contract Administrator, thereafter as (Assistant) Paralegal and finally as Contracts Manager. She qualified as a solicitor in April 2019. The Claimant describes herself as being of black Afro-Caribbean origin.

2. On 31 January 2020, the Claimant lodged an ET1 in which she claimed direct race

discrimination, unfair dismissal, a failure to arrange the election of employee representatives in a collective redundancy exercise and a breach of section 188(4)(e) Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A).

3. By response lodged on 6 March 2020, the Respondent denied the claim in its entirety and contended that the complaints of direct race discrimination were (in some instances, substantially) out of time and stood no reasonable prospects of success, as well as the assertion that the Claimant was relying on clearly inappropriate comparators. The Respondent argued that complaints of unfair dismissal and direct race discrimination between June and September 2019 also had no reasonable prospect of success. The Claimant was not an employee representative and the Respondent argued that in the circumstances none of her complaints fell within the tribunal's jurisdiction. It applied for strike out or in the alternative a deposit order (or more than one) to be paid as a condition of the Claimant proceeding with her claim. This application was resisted by the Claimant's representatives on her behalf.

Case Management prior to 17 August

4. On 3 June 2020, the case was listed before me for a telephone Preliminary Hearing (Case Management) (PHCM). The Claimant was at the time pregnant and expecting to give birth in July. She was represented at the PHCM by her solicitor, while the Respondent was represented by its solicitor. There was a list of issues that had been prepared by and agreed between the parties, dated 27 May 2020. During the discussion, it was agreed that the Claimant was withdrawing her complaint under s.188(4)(e) TULR(C)A which was subsequently dismissed on withdrawal.

5. The Tribunal's provisional listing for a liability Hearing between 21 and 27 October 2020 was retained and a half-day open preliminary hearing (PH) listed for the morning of 17 August 2020. The issues to be considered at the PH are set out below. The agreed list of issues for the Hearing was appended to my Case Management Summary and Orders.

6. On 10 August 2020, the Claimant's skeleton argument was forwarded to the tribunal. On opening this transpired to be a draft, apparently produced by the Claimant's barrister but marked up by her solicitor. On perceiving this, I set it aside and did not read it in advance. In order to maintain parity between the parties, nor did I read any skeleton argument provided by the Respondent.

7. An agreed bundle of documents for use at the PH was forwarded by email from the solicitors for the Respondent on 11 August 2020 but this could not be accessed and it was re-sent as a PDF on the morning of Friday 14th August. Additional documents were sent in by the Claimant's solicitors late on Sunday, 16 August 2020 and forwarded to me the following morning shortly before the start of the PH, with an additional virtual bundle of supplemental authorities from the Respondent.

Conduct of the PH and subsequent correspondence

8. The PH started on time at 10.00. I noted that I had listed it to consider three issues:

   a) whether the Claimant's complaints, or any of them, are out of time; and
   b) whether any complaints that are, or are deemed to be, in time stand any reasonable prospect of success and whether they, or any of them, should be struck out pursuant to Rule 37(1)(a) (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) ("Rules"); or
   c) whether the Claimant should be required to pay a deposit in relation to any of

the complaints that stand little prospect of success, pursuant to Rule 39(1).

9. I noted that since the PHCM, there had also been an application for further information to be supplied and an application by the Claimant to amend the list of issues, which it was confirmed was opposed by the Respondent. There was also a further issue of dismissing a complaint on withdrawal pursuant to a letter from the Claimant's representatives on 6 July 2020.

10. I explained that I had been able to do little preparation for the PH because of the late receipt of an accessible copy of the bundle and because of the apparently privileged marking up of the Claimant's skeleton argument. I had only limited time (i.e. the three hours for which it had been listed) for the PH because I had another hearing commencing at 2 PM. I therefore proposed to take the issues in the order set out above before coming on to hear argument about the other issues and potentially reserving my decision.

11. I set out below a summary of the arguments put forward by Counsel for the parties. Notwithstanding sitting until 13.20, we did not have time to deal with all the issues, including hearing any evidence as to the Claimant's means, as to which I invited her to send in a written statement. She did so, on 19 August.

12. Also on the afternoon of 19 August, the Claimant's solicitors sent in two further emails. One purported to revise the request for further information. The other dealt with the application for an amendment to the list of issues/claim.

13. On 24 August, the Respondent's solicitors sent in the Respondent's submissions on the new applications and a further small bundle of authorities.

14. On 27 August, the Claimant's solicitors asked the Tribunal not to give judgment on the PH issues until they had had a chance to respond to the Respondent's submissions. The Respondent objected to this on the basis of the tightness of the timetable in advance of the listed Hearing, and also because it was not what had been agreed at the PH. On 28 August, the Claimant's solicitors were given until 4 pm to make any such response; nothing was received from them by that time or at all. However, other professional commitments have prevented me from addressing the issues until the date of this decision and reasons.

Argument before me at the PH

15. Counsel addressed me in turn by reference to their written skeleton arguments, which I do not repeat here but which I considered in addition to the arguments advanced orally at the PH. In summary, in oral argument, the Claimant's Counsel Mr O'Dair indicated that the Claimant had been seeking further information since 20 June 2020 (albeit a formal application had not been made to the Tribunal until 7 August) and he contended that this application should be addressed first, since it had an impact on the sustainability of the Respondent's application to strike out the claim or complaints within it. Indeed, he contended that without addressing this application first, I could not deal fairly and objectively with the strikeout application. Whilst he anticipated the Respondent's Counsel would say that the application has been made late, he asserted that the Claimant has been seeking this information as part of her grievance appeal since 13 October 2019, and a request was made formally to the Respondent on 20 June 2020.

16. Mr O'Dair also noted that there is no dispute that a complaint about anything occurring after early September 2019 is within time, and that the question is whether matters prior to that could be rendered in time by the "continuing act" doctrine or by the Tribunal exercising its just and equitable extension. The continuing act on which the Claimant relies in the case is, he said, contained in a key document that not been before me on the last occasion: the further and better

particulars of claim which was contained in the agreed bundle. After the Claimant was given notice and her employment terminated, her grievance was heard and a decision given. Both those events are in time and the Claimant says that they form a continuing act with other acts of discrimination which are said to be out of time.

17. The Claimant was asked in the Respondent's request for further and better particulars to set out the nature of the alleged continuing act(s) and that is what she did. It was not, Mr O'Dair said, merely the failure to promote the Claimant on which she relies, but the failure sufficiently to progress her career which carried over into the redundancy process during July and August 2019 and concluding in September of that year.

18. Even on the Respondent's own documentation, there was nothing incredible about the idea that people could be promoted during the redundancy process. Earlier on the morning of the PH, documents had been provided by the Claimant within which were the minutes of the second consultation meeting which took place in August 2019. There was a discussion without demur during that meeting about the possibility of promotion during the redundancy process; but this did not happen to the Claimant. It was also noted that in the grievance outcome, there was recognition that employees could be placed in what would be for them a promoted role. It was suggested that "at risk" employees would normally be pooled at their own level, save in unusual circumstances. In other words, it was possible effectively to be moved up the ladder during redundancy.

19. Mr O'Dair said that the sequence set out in his skeleton argument ending in September 2019 with the failure to allow the Claimant's redundancy appeal constituted an ongoing failure by the Respondent to promote the only black lawyer in the organisation and therefore should be regarded as a continuing act. Additionally, he relied on the Tribunal's just and equitable extension. He acknowledged that the Claimant is a lawyer but noted that she is not an employment lawyer and submitted that she had not realised until she looked back, after her dismissal, that what had happened to her could be explained by discrimination. She had given the Respondent the benefit of the doubt until she was finally dismissed. She then immediately put in a grievance on 30 September 2019 and acted promptly, once she realised what had "gone on".

20. Mr Halliday, whilst acknowledging that the way in which the documents had reached me was not ideal, asked me to consider the skeleton arguments. He took me to a document showing the Respondent's legal department hierarchy which was contained in the bundle (reproduced at Appendix One to this document). There were different tracks of promotion available to lawyers and non-lawyers. The Claimant had initially moved between the non-lawyer career tracks. She qualified as a solicitor in April 2019, the Respondent having acquired 21st-Century Fox a month earlier, and with a thousand or so others she was then placed at risk of redundancy. The Claimant was pooled for three roles in the post-reorganisation structure, two of which were at her current level as a Contracts Manager and one was an Attorney, a step above her in the qualified lawyer track.

21. Separately, the Claimant was offered a new Contracts Manager role in the travel business, which she refused because it was not a promotion. As at 13 August 2019 she had withdrawn herself from consideration for all three of the roles for which she was pooled; consequently, having withdrawn herself, there was no role for her and she was given notice of dismissal for redundancy. Following termination, the Claimant's grievance was submitted, the nub of which was her lack of career progression prior to her redundancy which the Claimant said disadvantaged her because she was not pooled for more senior roles; she says this was linked to race. The Respondent treated that as an appeal against redundancy.

22. Mr Halliday argued that so far as limitation is concerned, the Claimant's argument that she was not progressed between 2014 and 2018 is out of time, as is her complaint not to have been considered for more senior roles during the redundancy process. As to the remainder of her discrimination complaints, while there were no limitation issues involved, the only part that was in time was that it was discriminatory to treat her grievance as an appeal against dismissal. That was the full extent of the pleaded case which was set out in the list of issues that I had endorsed at the PHCM.

23. Mr Halliday reminded me that the further and better particulars document on which the Claimant now relies did not, in fact, postdate that previous PHCM (at which Mr O'Dair had not been present). It had already been served by that date, and the list of issues was compiled from it. The complaint was that the Respondent had failed to support the Claimant's career progression in or before February 2018. Crucially there was no complaint of any failure to progress her career between February 2018 and the redundancy process in June 2019. This made sense, he said, against the factual background because of course the Claimant had been promoted, to Contracts Manager, in February 2018. In the ET1, so far as that 18-month period was concerned, there was nothing at all said about the non-promotion of the Claimant.

24. Mr Halliday relied on the authorities of *Amies v Inner London Education Authority*[1] and *Barclays Bank plc v Kapur*[2] (approving *Amies*) for the proposition that a failure for discriminatory reasons to make an appointment was an act with continuing consequences, rather than a continuing act of discrimination, save where there was a continuing rule preventing the appointment because of a protected characteristic. In this case, there is not said to be a rule against the promotion of black employees, but rather a series of decisions not to progress the Claimant, which she says were informed by stereotypical assumptions.

25. Mr Halliday further objected to the Claimant's application to amend the list of issues to argue that her dismissal itself was an act of discrimination. This would constitute a departure from her pleaded case and from the list of issues that had been agreed at the previous hearing.

26. Mr O'Dair responded, contending that there was indeed, on the Claimant's case, a discriminatory state of affairs. It would be unsafe and unfair, he said, to make a fine distinction between the consequences of a failure to promote and the reasons for a lack of advancement, without having heard full evidence. He accepted that there was some ambiguity in the list of issues but asserted that there was sufficient clarity that the Claimant's dismissal was an act of discrimination. She does not accept that the reason for her dismissal was redundancy but alleges race discrimination. She is unable to say who took the decision and was thereby responsible for the discrimination, because that is not clear.

27. Mr O'Dair asserted that the Respondent's submissions fail to grapple fully with the nature of the continuing act relied on, namely the failure to promote the Claimant and advance her career. He suggested that possibly the Respondent would be able to show at the full hearing that there was no policy of refusing to promote people of colour, and indeed it may be able to show that it has policies designed to produce exactly the opposite result, but that is why the Claimant was requesting information. In the absence of even an equal opportunities or monitoring policy, he asserted, I was not in a position to make a finding that the Respondent's policies and practices were compliant. The Claimant's claim should be taken at its highest

[1] *[1977] ICR 308*
[2] *[1991] ICR 208*

and it would be unfair to do anything other than to give her the opportunity to call witnesses at the Hearing. He strongly relied on the requirement, when considering strike out or deposit, to take the Claimant's case at its highest. If she had put forward a credible pleading, then the Respondent would have to show that it was not worthy of belief or taking forward.

28. Mr Halliday suggested that it was outrageous to assert that there was a policy not to promote black people with no evidential basis for that. It was one thing to say that people may have been subconsciously influenced by stereotypical assumptions, but another to say that there was such a secret policy or rule.

29. Mr O'Dair suggested that given there had now been debate at the PH for nearly 90 minutes, this showed that there was a reasonably arguable basis for the Claimant's claims. He asserted that the Respondent has not advanced detailed arguments as to why a policy of the nature discussed could not be inferred. This has been a detailed request made, including a request for evidence about promotion prospects for white and black employees, but the information has not been provided. The Claimant can only argue using information and documents that are provided. There does not need to be a rule or policy of not promoting black people; the situation is much more subtle than that. There is instead a discriminatory state of affairs in which consciously or subconsciously, the merits of people of colour are not evaluated in the same way.

30. Following a short comfort break, I heard argument about the Respondent's application to strike out or for the Claimant to pay a deposit.

31. The comparator relied on in the question of progression up to February 2018 is a Ms Cutfield, who the Respondent says is obviously not comparable to the Claimant; there was a gulf between them in terms of their experience and qualifications. Mr Halliday submitted that the uncontroversial facts show while there is an allegation that the Respondent failed to consider the Claimant for more senior roles, in fact the Respondent did consider her for the more senior Attorney role but the Claimant said she was not interested and hence she did not get it.

32. The Claimant also said she should have been considered for the Counsel role that a Ms Kounopa was given. However, Ms Kounopa was four rungs above the Claimant in the hierarchy (with more than eight years' post-qualification experience (PQE)) and it was implausible that the Claimant, who in the summer of 2019 was newly qualified, was not promoted four rungs up the ladder because of race. It is not enough to say that there is a difference in status and difference in treatment. The Claimant has pointed to nothing that indicates the way she was treated was because of race.

33. The Respondent has not answered the Claimant's wide-ranging requests about information because it does not have the information requested (relating to a period of over a decade) in a form that can be produced. It would require the Respondent to spend time and money compiling the information from individual records and in any event would not cast light on the mental processes of the decision-makers. Manual compilation would be disproportionately expensive and time-consuming, and would shed no light on whether the decision-makers declined to promote or appropriately pool the Claimant because of race.

34. In response, Mr O'Dair said that it would be wrong to make a deposit order rather than striking out simply because it appears to be a much less serious option. He asserted that it would be no less chilling in respect of access to justice, and it carries the implication that if the Claimant fails at trial on that issue, she would be at peril on costs. The Claimant names four non-black comparators and whilst it is not the case that they have the same qualifications as the Claimant, they are white

and were promoted very swiftly through the Respondent's organisation. The Claimant says it took her a long time as a black person to be promoted whereas white colleagues seemed to experience no difficulty or were promoted much more quickly.

35. Mr O'Dair argued that it is not solely a matter of looking at a person with the same qualifications but a different race, but rather how there has been a failure to promote people of colour. He contended that much of the Respondent's argument simply misses the point. He accepted of course that a Claimant cannot just complain about treatment and status and say that it is because of race that she was not promoted. But that is not what she seeks to do here. The Claimant has cited further significant factors, such as her outstanding performance reviews. One might look at those and be astonished at the praise lavished on her when looking at the failure to promote her at all until 2018.

36. The changes in role to which the Respondent points were not promotions. Others were promoted twice at a time when the Claimant was being told all promotions were on hold. The EHRC code sets out the importance of companies generating and keeping equal opportunities monitoring information; the fact that the Respondent has not done so in respect of the most basic of information is a matter that the Employment Tribunal would be able to consider at the full trial. It is clear that it would be wrong to concentrate only on the mental processes of the decision-maker because discrimination may be semi-conscious or indeed unconscious.

37. It is also false to suggest that the Claimant was seeking to be promoted by as many as four rungs. The job description had been written after the post was allocated. During her redundancy appeal meeting, the Claimant had indicated that over a number of years she had seen Counsel roles available where the responsibilities with the same as her own. This was not a case where roles were rigid and firmly defined.

38. In the notes of 30 October 2019, the Claimant's manager, Ms Kiernan, was interviewed; she acknowledged that there might be an inference that the Respondent had failed intentionally to promote and support the Claimant. The promotions process was opaque and Ms Kiernan clearly says that the Claimant's complaint was justified. This is evidence from a very senior figure in the Respondent's organisation which requires an explanation going above and beyond what is provided by Counsel in an application for strikeout.

The law relating to the preliminary issues

The following is a very brief summary of the provisions relevant to the issues before me, though I have considered the authorities referred to by both Counsel in their submissions.

39. The Tribunal may extend time in discrimination cases if it considers it just and equitable to do so; and in non-discrimination cases, broadly speaking, it may do so only where it is satisfied that it was not reasonably practicable for the Claimant to comply with the time limit (taking into account the applicable ACAS early conciliation extension) **and** the claim was submitted within a reasonable time thereafter.

40. I remind myself that the authorities are clear that the time limits are not merely guidelines for when claims must be lodged, but deadlines which are to be applied unless there is an exception to the rule (see e.g. *Robertson v Bexley Community Centre*[3]*),* even in discrimination claims. There is no presumption in favour of

[3] *[2003] EWCA Civ 576*

extending time, and the burden is on the Claimant to show that it would be just and equitable to do so, with consideration of multiple factors under section 33 Limitation Act 1980, including the length of and reasons for the delay and respective prejudice to the parties.

41. For any claims that proceed, either because they were in time in the first place or because time has been extended under any of the provisions above, if the Tribunal considers that all or any part of the claim has no reasonable prospect of success, it may strike out that part of the claim under Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. I remind myself that it might be premature to determine prospects of success without hearing the evidence[4].

42. Where the Tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring the Claimant to pay deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument, having first made reasonable enquiries into their ability to pay the deposit and having regard to such information when setting the amount (Rule 39).

43. When considering the prospects of success, it must be recognised that direct evidence of a decision to discriminate on racial grounds is rare and the reality is often far more nuanced (*Swiggs v Nagarajan* (Nicolls LJ))[5]:

"*All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. …*

Thus, in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances."

44. Browne Wilkinson LJ remarked in the same case:

"*What is quite clear is that Parliament has, in introducing legislation to outlaw discrimination on grounds of sex or race, expressly required the court to investigate the reasons which have led the alleged discriminator to take the steps which he did. This is not surprising since this was pioneering legislation designed to produce a social, as much as a legal, change. The only yardstick (in the field of direct discrimination) must be the mental state of the alleged discriminator. To dismiss somebody who comes from an ethnic minority is not, per se, unlawful. Only if what*

[4] *Morgan v Royal Mencap Society UK EAT 0272/15*
[5] *[1999] IRLR 572 HL*

lies within the mind of the employer is the race of the employee and it is that factor which provides the reason why the employee is dismissed does one come into the field of race discrimination at all. There is no escape from the difficulties inherent in examining the minds of the parties."

45. A leading authorities on the question of strike out in discrimination cases remains *Anyanwu v South Bank Students' Union*[6], which makes it clear that discrimination cases are often fact-sensitive and should, as a general rule, only be decided after hearing all the evidence. I must take for these purposes the Claimant's case (where based on undisputed facts) at its highest[7]. If I conclude that any part of the claim cannot succeed on that basis, I may decide to strike out that part.

46. As was held however by the Court of Appeal (Mummery LJ) in *Ma v Merck Sharp & Dohme Limited*[8], it is not sufficient merely to make an assertion of a continuing act:

> *"I have no difficulty in agreeing with Mr Gailbraith-Marten's submission or with the decisions of the tribunals below that it is not enough for Dr Ma simply to assert that the acts are continuing acts or that they evidence a state of affairs extending over a period. The complainant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs."*

nor (also per the Court of Appeal, in *Madarassy v Nomura International PLC*[9]) to rely, without more, on a difference in status and a difference in treatment.

Findings of fact on the preliminary issues

47. I make the following findings of fact relevant to the preliminary issues of whether the claim (or any part of it) was presented in time and, if not, whether time should be extended, whether an amendment application is necessary to add the dismissal as an act of direct race discrimination and if so, whether to allow it and whether to strike out any part of the claim or require the Claimant to pay a deposit and if so, in what amount.

48. I proceed on the basis that the Claimant entered Early Conciliation on 3 December 2019, so that anything occurring on or before 3 September 2019 is on the face of it out of time, subject to it taking place as part of a continuing act.

49. It is a matter of common knowledge to those working in the legal profession that the achievement of professional qualifications generally leads to greater recognition, both in status and financial terms, whether the holder works in a "conventional" role (as a legal executive or solicitor in a law firm or as a barrister) or as an in-house lawyer. This is evidently reflected in the Respondent's legal department, or at least (on the evidence before me) it was so reflected at the time the Claimant worked there. The routes to qualification as a solicitor, historically limited, with a mandatory period served beforehand as an "articled clerk", are now many and varied: to name but a few, lawyers can graduate with a non-law degree before converting; they may not need a degree at all but instead can complete a blended programme of studies and work via legal secretarial or legal executive routes; they may or may not need to complete a training contract (the successor to articles of clerkship); legal apprenticeships are available at many UK firms.

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[6] *[2001] IRLR 305*
[7] *Mechkarov v Citibank NV [2016] ICR 1121*
[8] *[2008] EWCA Civ 1426*
[9] *[2007] EWCA Civ 33*

50. In the bundle before me the Respondent had produced a document entitled "Legal/United Kingdom Salary Ranges 2017", with a sub-heading "Overview of Legal Roles". I reproduce it at Appendix One for convenience. It will be seen from that document that, as Mr Halliday submitted, there were in effect three "tracks" within the Respondent's legal department: a group referred to as "non-lawyers" (within which there were two tracks) for whom the lowest grade was paralegal on a salary between £30,000 and £40,000, rising to Senior Contract Manager with a salary range of £58,000 to £73,000. The single "lawyer" track started at Attorney with a salary of £65,000 to £75,000.

51. In other words, the basic salary for the most junior "lawyer" was more than the basic salary available to the most senior "non-lawyer". In addition, a Senior Contract Manager could reach the level of SMGR, which I infer is Senior Management level; but this is the level of the second most junior lawyer ("Senior Attorney") by contrast with the most senior legal role ("Deputy Regional Counsel") who could earn up to £190,000 and is at the level of VP (assumed to be Vice President). I infer from this that in common with other legal departments and law firms across the UK, the Respondent considered and recognised the obtaining of legal qualifications as significant to the advancement of its employees in that department, both in terms of their salary and their highest potential status level in the organisation.

52. The Claimant began working for the Respondent in 2012. In 2013 she was made Assistant Paralegal and Team Assistant (roles not on the chart at all) and then in August of that year became a Paralegal with a salary between the low- and mid-points of the range. With effect from 1 February 2018, she became a Contracts Manager, by which time her salary was between the low- and mid-points for a Senior Paralegal, but was, with her promotion, enhanced to the starting point for the Contracts Manager role, itself equivalent to a high Senior Paralegal role or the low point for a Paralegal Specialist. It is clear therefore that the Claimant was given pay rises and did achieve at least one promotion prior to and between 2014 and 2018.

<u>Allegations at 1.2.1 of the list of issues</u>

53. There are nine discreet allegations concerning the almost four-year period between July 2014 and February 2018. I note at the outset that while I take the Claimant's case at its highest, the Claimant advances no discernible nexus between the alleged conduct and race. The Claimant herself indeed did not assert that there was, either at the time or subsequently, until she was placed at risk of redundancy, although I understand that she raised "informal grievances" about her failure to progress. She was therefore alive to the issue of a lack of progress (or slow progress) but not to the possible significance by reference to a protected characteristic.

54. In each instance contained in the original list of issues agreed at the earlier PHCM, the comparator relied on by the Claimant is either a hypothetical one or her former colleague Ms Cutfield, a solicitor qualified in more than one jurisdiction (in England and Wales since March 2008).

55. Ms Cutfield was promoted to Senior Contracts Manager in March 2014, but the Claimant was told by her manager Ms Kiernan in July 2014 (when she asked for her own salary and job title to be reviewed) that "promotions were on hold in the legal team". There is no specific assertion that race had any influence over Ms Kiernan when she said this four months after Ms Cutfield's promotion (nor that Ms Kiernan was influenced by anyone else's racist conduct or stereotyping) and it was a one-off act. Leaving aside the requirement for the comparator to be in not materially different circumstances from the Claimant (which, both in qualification terms and on the chronology, Ms Cutfield was), the Claimant cannot show that this

was part of a continuing act of failing to review her salary and/or job title that continued until 3 September 2019.

56. While I take the Claimant's case at its highest and assume that Ms Kiernan will come up to proof in saying that there is an inference that the Claimant's complaint about the slowness of her promotion is "clearly justified" and that the process was "opaque", Ms Kiernan does not lend support to the inference that race played any part in the process. As I note above, Mr O'Dair submitted that such evidence by "a really senior figure in the Respondent's organisation" requires an explanation beyond the submissions put forward by the Respondent's Counsel in a strike out application. However, in the documents to which I was taken, the following extract appears in the interview with Ms Kiernan (who was responding to questions, "Rae" being the Claimant) on 30 October 2019:

> Knowing where we are with Rae, do you think, and independently having more information about the history, do you think at any stage, intentionally or unintentionally, there was any discrimination against her?
>
> No, I don't
>
> In terms of her claim - alleged claim, that she was treated unfairly versus anybody else in the legal team, was she treated less fairly for the promotion process?
>
> She was treated as unfairly as all other non-qualified lawyers are, we are not a diverse tem when it comes to qualifications.

57. Clearly, then, Ms Kiernan's evidence would not support the Claimant's case that the speed and/or opacity of the process for her promotions was related in any way to race. The misspelling ("tem" for team) notwithstanding, it is clear that Ms Kiernan believed that there was unfairness but that it was down to qualification status not racial status. Not being qualified as a solicitor is, self-evidently, not a protected characteristic and for Ms Kiernan, that was the operative factor.

58. In December 2015, the Claimant alleges she was told by Mr Wiley that he had decided not to submit the paperwork for her promotion because of "what was going on in the team at the time". Again, I do not know whether Mr Wiley agrees that he said this, but I accept the Claimant's case at its highest and assume for this purpose that she can show he did. It appears from the Further Particulars of Claim that Mr Wiley further explained the "issues" were to do with the manager covering Ms Kiernan's maternity and this explanation appears to have been accepted by the Claimant at the time at face value, albeit with reluctance due to what she saw as the unfairness of that position and notwithstanding that she now says but for her race, he would have investigated these "issues" more promptly.

59. The comparator in this instance is hypothetical and the alleged protagonist was Mr Wiley. There is no assertion that Mr Wiley and others were conspiring together or working to an express policy of the slow or non-promotion of certain employees because of race. Nor can the Claimant show that there was any connection to race (e.g. stereotyping) in Mr Wiley's comment(s) or a continuing act of failing to submit paperwork for her promotion until September 2019 - she was promoted in February 2018. If there was such an act at all and for whatever reason, by Mr Wiley refusing to promote the Claimant or to allow someone else to promote her, again, it ended at that point in February 2018.

60. The same points must be made about the alleged comment by Ms Haines in February 2016, in asking the Claimant to wait until Ms Kiernan's return from maternity leave to be considered for promotion, whereas Ms Cutfield was promoted to Senior Attorney in March 2016 (or the Claimant relies on a hypothetical comparator). I have set out above why I do not consider Ms Cutfield to be an

appropriate comparator, and similarly, even if Ms Haines was acting because of race in asking the Claimant to await Ms Kiernan's return (as to which it seems highly unlikely the Claimant will be able to advance any evidence) this allegation is more than three years out of time and is not part of a continuing refusal to consider the Claimant for promotion, given that the Claimant was subsequently promoted.

61. The next complaint is that in April 2016, the Claimant "reported her disappointment" (rather, it appears, than raising a grievance as such) to HR at not being promoted; they made a written note but conducted no further investigations. There is no individual specified in the HR department, but it is clear that this will be neither Mr Wiley, Ms Kiernan nor Ms Haines.

62. The same considerations apply to a further alleged failure by "HR" to investigate the Claimant's concerns more than a year later in May 2017: no individual is associated with this alleged failure, which also took place over three years ago. The particulars of claim show that the Claimant in fact did not raise a formal grievance until after her redundancy had been confirmed in September 2019; it was progressed as an appeal against redundancy within three weeks, albeit the decision was not communicated until 3 December 2019. It was not heard by Mr Wiley, Ms Kiernan or Ms Haines.

63. There has been a substantial delay in raising these issues and I consider it likely that the quality of the evidence will have been adversely affected, particularly in light of the fact that it appears the Claimant's initial document expressing her concerns was later "misplaced".

64. In June 2016, it is alleged, Ms Haines significantly delayed responding to the Claimant in connection with her application to the SRA to become qualified. The Claimant says that she had informed Ms Kiernan of her intention to be pro-active and qualify as a solicitor independently of the Respondent. She asked Ms Kiernan for a reference to corroborate the work experience she had, which she says Ms Kiernan supported and said she would be happy to provide. Ms Kiernan also asked the Claimant to copy in Ms Haines to a document explaining her proposed route to qualification, which the Claimant did at the end of June 2016. The allegation is that Ms Haines "significantly delayed her response", thereby denying the Claimant "the opportunity to qualify at the earliest possible stage in her career".

65. In the first place, it is not clear to me why it was Ms Haines's delay that had that effect, when it was Ms Kiernan who had been asked to be the Claimant's referee, but in any case, there is no specific assertion that any delay by Ms Haines was because of race. The Claimant further complains that in late 2017, Ms Haines and Mr Wiley failed to take her litigation experience into account in opining that she did not have sufficient experience to satisfy Solicitors Regulation Authority ("SRA") requirements. The Claimant is similarly unable to point to any evidence that would support the assertion that this was because of race, e.g. as Mr O'Dair suggested, the stereotyping of people who share her colour or ethnic origin, rather than (for instance) a lack of familiarity with and/or enthusiasm for her proposed route to qualification.

66. The remaining two complaints about events prior to February 2018 are alleged delays by an unspecified person in supplying the Claimant with a reference, again (she claims) causing her to be delayed in achieving qualification and in her promotion. Her comparator for the former is hypothetical, while for the latter it is Ms Cutfield.

67. The lack of specificity in the generalised delay complaint about the reference and the extensive delay in raising it compromises the availability and cogency of any

evidence there might have been as to the reason. In any event, it appears implausible that it would have been because of racial motives that were so well concealed that the Claimant was wholly unaware of them at the time.

68. The complaint about the delay in promotion claims, in the Further Particulars of claim, is that Ms Cutfield had been promoted to Counsel in or around February 2017. Again, in my view Ms Cutfield is wholly inapposite as a comparator here. Ms Cutfield was on the qualified "lawyer" track at this stage, with nearly nine years' PQE in England and Wales alone (in addition to PQE in other jurisdictions), while the Claimant, without being qualified as a solicitor, had to remain on the "non-lawyer" track. Her responsibilities may have been the same (although I make no findings as to that), but until April 2019, she was not a qualified lawyer. The Claimant is complaining about the speed of promotions generally of those who do not share her race when compared to the speed of her own; but I find this to be an over-generalisation given that the requirement in a direct discrimination case is with someone in not materially different circumstances from the complainant. Mr Halliday is right to point out for instance that Ms Cutfield required no assistance or support from the Respondent in qualifying as a solicitor. She had been a solicitor for many years in more than one jurisdiction before even joining the Respondent.

Allegations at 1.2.2 of the list of issues

69. There are no specific complaints by the Claimant about events between her promotion in February 2018 and the period June to September 2019, which culminated in her dismissal following a redundancy exercise. I return to this point below, in that the Claimant now seeks to argue that her dismissal itself was an act of direct race discrimination, but for these purposes in summary her complaints are: she was not considered for more senior roles in the redundancy exercise (her comparator being Ms Kounoupa); the Respondent refused to change the job title or salary for a role in Paris which it had offered to the Claimant, and subsequently failed to place her in the appropriate pool or offer suitable alternative employment; and the Respondent failed to address her grievance properly, instead dealing with it as an appeal against her dismissal for redundancy.

Application to amend the list of issues

70. Despite having agreed the list of issues on the previous occasion (and having been represented throughout by solicitors), the Claimant supplied a new list to the Respondent in July and sought before me in August to revise the agreed list to add further complaints and/or comparators, producing what has been described as a "final edit". The Respondent opposed this saying that it was "an attempt to expand and amend the Claimant's claims". The Claimant's lawyers wrote on 7 August:

> Whilst the Claimant does not wish to expand her claims, the updated list of issues does relabel and expand on the Claimant's existing claims, which is her right to do so following the judgment in Reuters Ltd v Cole UKEAT/0258/17/BA.

71. The "final edit" seeks to add a complaint about an opportunity given to a different comparator (Mr Rowan-Robinson) in January 2015, add that same comparator and another new comparator (Ms Pashley) to the argument as to the delay until February 2018 in promoting the Claimant (and the consequent impact on roles available to the Claimant during the redundancy process), add a complaint that a new protagonist, Ms Mason, failed to act in June 2019 when the Claimant raised an "informal grievance" about the disparity in her job title and salary compared to her actual duties and to add that a "material issue" in the case is "slower career progression for those of Afro-Caribbean origin at different levels of the organisation". In response to the Respondent's response that the delays were

engendered because the Claimant's proposed route to qualification was unfamiliar, she seeks to add a new comparator, Ms Pashley, who the Claimant says was promoted twice, in 2016 and 2018. The Claimant, who had previously conceded that the reason for her dismissal was redundancy, now withdraws that concession and seeks to replace it with an argument that her dismissal was an act of direct race discrimination.

72. The Respondent objects to the amendments. It observes, among other points, that Mr Rowan-Robinson already had 12 years' PQE by the time the Claimant qualified as a solicitor (indeed, he qualified five years before she joined the Respondent) and Ms Pashley is a specialist in data protection matters, working in compliance. According to her LinkedIn profile as supplied by the Respondent, she left her role as a Senior Paralegal in February 2016 and has not been working within the legal team structure since that date (and it is not apparent that she has ever qualified as a solicitor).

Conclusions on the preliminary issues

Application for an Order for further information

73. Dealing with the application for an Order to supply further information, I do not accept Mr O'Dair's submission that it is necessary to grant the Claimant's application and that without the information sought, it would be unfair or even impossible to determine the preliminary issues. No such submission was made before me at the earlier PHCM, in my view with good reason.

74. The questions posed range over a number of topics, including: potential non-compliance with the EHRC's Employment Code; the hierarchy of roles within the legal team over an eight-year period (and specific questions about the post of Contracts Administrator over that time) and the racial origins of those in post in the six years between 2012 and 2018; any steps taken by the Respondent (not confined to the legal department) to ensure job descriptions match work actually undertaken; promotion prospects (and how vacancies are advertised) in the legal department, with a focus on Ms Cutfield in 2014 and Ms Kounoupa in 2019; personal details, including as to race, of Ms Pashley and Mr Rowan-Robinson; and questions about pooling.

75. No doubt some of the issues raised (for example, the assertion that those of black African racial origins are underrepresented both in the wider legal team and in its hierarchy specifically, and the assertion that the Respondent has failed to comply with best practice according to the EHRC Employment Code in terms of reviewing and monitoring promotions) can be put to the Respondent's witnesses and/or in submissions at the Hearing if the Claimant's Counsel considers them relevant. The Respondent is alerted to the questions that may be asked of it and indeed has at least partially answered some of them. If the remaining information requested is relevant to the issues that remain live and if there is disclosure to be provided in support, to the extent it has not already supplied it, the Respondent will be aware of its obligations in this regard. My determinations below will in any event reduce the scope of what could be relevant to the issues remaining for the panel to decide at the Hearing.

76. I have concerns that the Claimant's representatives are seeking to shift the parameters of the issues in the "final edit" and in the application for "information" to be disclosed, rather than merely relabelling or clarifying what has previously been agreed. This claim is one of direct race discrimination against the Claimant, whereas Mr O'Dair appeared to be arguing at the PH that it was about a policy not to promote – or perhaps, put another way, a lack of a policy actively to promote – operating subconsciously and more widely against those of Afro-Caribbean origin,

which he suggested the Respondent might be able to disprove at trial.

77. I accept that the information sought is not readily to hand and would have to be manually compiled by the Respondent. This is, in effect, an Equality Act questionnaire/questions and answers document via the back door, and it comes too late in the day for the Respondent to be ordered to respond. To the extent that the Claimant maintains it should have been answered, she may of course invite the Hearing panel to draw inferences from any such failures.

78. However, and in any event, I consider that the questions being asked about the racial profile of those within the team, particularly those who have been promoted, over a number of years, suggest that the Claimant is now seeking to argue either that there was a failure actively to encourage the promotion of those who share her protected characteristic or that there was a policy operating across the Respondent (from the reference to "different levels of the organisation") which had the effect of suppressing those of Afro-Caribbean origin generally.

79. If it is the former, then I would have significant concerns as to the extensive delay in bringing such a claim as it would require an investigation into the mindset of those making decisions as long ago as 2014 or even 2012, and is apparently suggestive of an assertion that it would be discriminatory not to be proactive in the promotion of under-represented groups, the legal basis for which assertion is unclear. I repeat that there has been no assertion, let alone supporting evidence, suggesting that race itself or associated stereotypes played any conscious part in the decisions taken by any of the individuals about whose conduct the Claimant complains. To try to recreate and analyse for the first time the mindset of several of an employer's managers for their subconscious views up to eight years after the event would be extremely difficult and would place the burden of proof inappropriately on the Respondent.

80. If it is the latter, the breadth of the allegation is being widened very considerably. Absent any express allegation that decision-making was motivated by race in the different individuals over the years in which it was said to apply, such a policy would have to be one that was applied to everyone but disadvantaged those who share the Claimant's race, i.e. one that indirectly discriminated; but this is not an indirect race discrimination claim. I agree with Mr Halliday that no such express allegation has been made (hence the Claimant appears to be asking the tribunal to make a finding of a continuing act across multiple decision-makers) and it is hard to see how it could be argued that there was such an overarching policy in place. It would only be for the Respondent to disprove anything if the burden of proof shifted, and when what is being put forward is apparently solely a difference in status and a difference in treatment with accompanying speculation for the reason, that would be very unlikely to happen.

81. In the circumstances, I refuse the application for an Order for further information.

<u>Application to amend the list of issues</u>

82. I also refuse the application to amend the list of issues, save in one respect. I allow the Claimant to argue that her dismissal was itself an act of direct race discrimination (new issue 1.2.3). This was not expressly set out on the earlier agreed list of issues and, contrary to Mr O'Dair's submission, nor do I consider that it was implied. However, the Tribunal will need to make findings as to the reason for dismissal when determining the complaint of unfair dismissal. It concerns an incident that took place only a year ago, so memories are less likely to have faded, and will require little or no additional evidence, so will therefore add little time to the Hearing. The Respondent will not be greatly prejudiced by its inclusion.

83. Nonetheless, as I have noted above, the Claimant had previously conceded that the reason for her dismissal was redundancy. The factual matrix pleaded by the Respondent is such that if it shows that in a wide-ranging redundancy exercise, the Claimant did indeed withdraw from consideration for all the alternative roles that were potentially available to her, the Claimant's assertion that her dismissal was for anything other than redundancy is unlikely to succeed. In the circumstances, I order her to pay a deposit as a condition of proceeding with this complaint. I return to this below.

84. So far as the remainder of the amendment application is concerned, other than in relation to the act of dismissal, I refuse the application to amend the list of issues to introduce new complaints which are both out of time and stand little reasonable prospect of success.

85. I also consider that the proposed addition at 1.2.1(j) is a further example of the fact that the allegation of delay in the Claimant's promotion up to February 2018, whether or not it was an act of race discrimination, was an act with continuing consequences and not a continuing act (in line with the conclusion in *Kapur)*.

86. The introduction of a new allegation regarding the Claimant's treatment in June 2019 would require new evidence to be adduced and in any event it is unlikely that the Claimant would be able to show that a person who did not share her race would have been treated differently following the raising of such an "informal grievance" because of that protected characteristic. I also do not permit the addition of further comparators, who from their LinkedIn and/or Law Society profiles are in materially different circumstances from the Claimant.

Jurisdiction – time limits – complaints at 1.2.1

87. Turning to the time issue and whether the Tribunal has jurisdiction to hear complaints that are on the face of it out of time, I deal first with the complaints at 1.2.1 (direct race discrimination, relating to the period July 2014 to February 2018). I find that these complaints are out of time and conclude that time should not be extended.

88. I have dealt with the individual issues above. I appreciate that the Claimant says these are the substantive examples of her broader complaint that the Respondent failed to support her career progression and qualification as a solicitor. Overall, however, as I have found, there was no hint of any behaviour because of race by any of those named (Mr Wiley, Ms Kiernan, the HR department, and Ms Haines), and, significantly in my view, nor did the Claimant understand any of the alleged conduct to have been because of race at the time when it was done. Whether the allegation is, as summarised by Mr Halliday, that the managers in question made stereotypical assumptions about the Claimant because of race or, as Mr O'Dair submitted, that her "merits were not evaluated in the same way", there is not even any detail behind the allegation that this was done, by each of these people as part of a continuing act, because of race, let alone evidence to support such an allegation if there were.

89. Of course, I make no criticism of the Claimant here, but it would be very difficult for the Tribunal to draw inferences, between three and six years later, when no such correlation was appreciated contemporaneously. The Claimant herself still makes no explicit connection between the alleged acts, save (possibly) to speculate that there may have been a policy not to promote people who shared her race. I have accepted the Respondent's submission that in *Kapur* terms, there is no continuing act.

90. It is now apparently argued by Mr O'Dair that the Claimant was not in fact promoted

in February 2018, but instead her job title was changed. I do not accept that, because it is clear from the table reproduced at Appendix One that Contracts Manager is a higher-level role (with commensurately higher salary) than those previously filled by the Claimant. That promotion ended any continuing course of conduct by the Respondent that may have been taking place.

91. In this case, it would be prejudicial to the Respondent to extend time for the Claimant to advance complaints that are so far out of time. While it is prejudicial to the Claimant that she is hence unable to have this part of her claim heard, she does have other complaints which proceed to a Hearing. The prejudice to the Respondent would be greater in allowing her to pursue these complaints as well.

92. Had I not so concluded, I should have required the Claimant to pay a deposit for each of the complaints pursued under section 1.2.1 of the list of issues, because, for the reasons I have given above, they stand (very) little reasonable prospect of success. It is difficult, if not impossible to see how the Claimant could find evidence to support her complaints (and it is for her in the first place to show facts from which the Tribunal could conclude there has been a contravention) and move beyond mere assertion even to shift the burden of proof. I do not accept that the length of Counsel's arguments in support of their client's case is necessarily linked to the merits thereof, but I would have reminded myself of the desirability of having evidence heard in discrimination cases and not struck out the complaints in their entirety, had they been in time.

Jurisdiction – time limits – complaints at 1.2.2

93. Of the events alleged at 1.2.2 of the list of issues, occurring in the period leading up to the Claimant's dismissal in September 2019, it is fair to say that they are also all (save d)) on the face of it out of time.

94. So far as Ms Kounoupa is concerned, according to the response, she has 12 years' more PQE than the Claimant and was hired in October 2017 at the level of Counsel; it is asserted by the Respondent that she remained at this level following the redundancy exercise. Her suitability as a comparator and/or the factual matrix on which the Claimant relies is therefore highly questionable, and if the Respondent comes up to proof in this regard, it will not support the Claimant's assertion that she was not offered promotions during redundancy consultation because of race. It is also difficult to see the nexus between race and the refusal to change a job title or salary of a vacancy.

95. Nonetheless, in the broadest sense, the redundancy consultation exercise and the decision-making around it could be considered to be part of a continuing act. As I have noted above, findings will have to be made about the fairness or lack thereof in the redundancy process. It will require little additional evidence and will not substantially extend time in the Hearing for the panel to consider whether the parts of the process about which the Claimant has raised complaints of direct race discrimination were in fact influenced in any way by that protected characteristic.

Strike out/deposit order

96. However, given my conclusions about the appropriateness of Ms Kounoupa as a comparator and the lack of any obvious connection between the treatment complained of and status, I order that the Claimant must pay a deposit as a condition of proceeding with each separate allegation, of which there are five ((a) to (e)), in addition to the deposit for the allegation of dismissal as an act of direct race discrimination.

97. In light of a) the shortness of time between now and the Hearing and b) the

unchallenged evidence of the Claimant's means, and taking into account the authorities on the making of deposit orders, I have determined that the amount of the deposit in each case shall be £50.

98. The Claimant is therefore ordered to pay a total deposit amount of £300.

Dismissal on withdrawal - TULR(C)A complaint

99. For completeness, I note that the Claimant withdrew the remaining complaint under TULR(C)A by letter to the Tribunal dated 6 July 2020, and it is accordingly dismissed on withdrawal.

100. The final list of issues to be considered at the Hearing taking into account my findings and conclusions above (and assuming the Claimant pays each of the deposits ordered) is attached at Appendix Two.

Employment Judge Norris
Date: 30 September 2020

JUDGMENT SENT TO THE PARTIES ON

01/10/2020.

FOR THE TRIBUNAL OFFICE

APPENDIX ONE

Lawyers		Base Salary		
Role	Level	Low	Mid	High
Deputy Regional Counsel	VP	161,000	170,000	190,000
Assistant Regional Counsel	VP	140,000	150,000	160,000
Principal Counsel	DIRE	121,000	128,000	135,000
Associate Principal Counsel	DIRE	111,000	115,000	120,000
Counsel	DIRE	91,000	100,000	110,000
Senior Attorney	SMGR	76,000	80,000	85,000
Attorney	MGR	65,000	70,000	75,000

Non-Lawyers		Base Salary		
Role	Level	Low	Mid	High
Senior Contract Manager	SMGR	58,000	64,000	73,000
Contract Manager	MGR	46,000	52,000	57,000
Contract Administrator / Sr. Contract Adm.*	ADMI	32,000	38,000	45,000
Paralegal Specialist	PROF	46,000	51,000	56,000
Senior Paralegal	PROF	40,000	43,000	46,000
Paralegal	PROF	30,000	35,000	40,000
Manager, Legal [TBC]**	MGR	46,000	52,000	64,000

APPENDIX TWO – LIST OF ISSUES

1 Direct discrimination on the grounds of race

1.1 Has C brought her claims of discrimination within time and, if not, would it be just and equitable to extend the time limit for C to do so?

R contends that C's allegations of discrimination in or before February 2018 (see 1.2.1 a) to h)) are more than 18 months out of time.

C contends that her allegations of discrimination establish conduct extending over a period of time and in the alternative contends that for her claims in or before February 2018 it would be just and equitable to extend the time limit.

1.2 Has R treated C less favourably than it treated or would treat others?

1.2.1 In or before February 2018 - C alleges that R failed to support C's career progression and qualification as a solicitor (paras 4-26 and 46a-d of claim and para 4 of the Further Particulars). Specifically, C alleges:

a) July 2014 - C requested that R review her salary and job title, Ms Kiernan confirmed that "promotions were on hold in the legal team" (paras 12-13 claim). Comparator - Anna Cutfield, who C says was promoted to the position of senior contracts manager in March 2014.

b) December 2015 - Mr Wiley confirmed to C that although he knew she was expecting a promotion he "decided not to submit the paperwork" for C's promotion "because of what was going on in the team at the time" (para 15 claim and para 4(a) (ii) of the Further Particulars).
Comparator - hypothetical

c) February 2016 - during a meeting between C and Ms Haines, Ms Haines dismissed C's request for a promotion stating that it should wait until Ms Kiernan was back from maternity leave (para 17 claim).
Comparator - Anna Cutfield, who was promoted from Contracts Manager to Senior Attorney in March 2016. In the alternative, a hypothetical comparator is relied upon (para 4(a) (iv) of the Further Particulars)

d) April 2016 - when C reported her disappointment at not being promoted to HR, HR made a written note

~~for her employment file but did nothing further to investigate (para 20 claim and (para 4(a) (v) of the Further Particulars)).~~
~~Comparator - hypothetical~~

~~e) June 2016 - Ms Haines significantly delayed her response to C in respect of C's application to the SRA to be qualified, denying C the opportunity to qualify at the earliest stage (paras 21 claim and (para 4(a) (vi) of the Further Particulars)).~~
~~Comparator - hypothetical.~~

~~f) May 2017 - HR failed to investigate C's concerns about a lack of promotion and delay after C went to them (para 23 claim and para 4(a) (vii) of the Further Particulars)).~~
~~Comparator - hypothetical.~~

~~g) Late 2017 - Ms Haines and Mr Wiley failed to take into account litigation experience which C had brought to their attention when giving the view that C did not have sufficient litigation experience for the SRA which the C alleges delayed her application to qualify at the earliest possible stage in her career (para 24 claim and para 4(a) (viii) of the Further Particulars).~~
~~Comparator - hypothetical.~~

~~h) In Feb 2018, R delayed in providing C with a reference in support of her SRA application to qualify as a Solicitor and so C qualified much later then she would have qualified (para 23 and 26 claim and para 4(a) (ix) and (x) of the Further Particulars)~~
~~Comparator - hypothetical~~

~~i) Until February 2018 - C's promotion was delayed (para 28 claim and para 4(a) (x) of the Further Particulars).~~
~~Comparator - Anna Cutfield.~~

~~*R denies that it failed to support C's career progression and qualification as a solicitor. R supported C to achieve this, assisting her with her application, providing references and agreeing to fund her professional skills course fees. R did not delay significantly but took her application seriously and researched the routes available. C did not chase R or rush to submit her application (paras 10-13 response).*~~

1.2.2 June 2019 to September 2019 - C alleges that R, after announcing a redundancy consultation, failed to consider C for more senior roles. Specifically, C alleges:

a) June 2019 - Ms Haines confirmed to Chrisoula Kounoupa that she would be confirmed in her role as Counsel without considering C for the role (para 29 claim and paras 4(a) (xi) and (xii) of the Further Particulars)
Comparator - Chrisoula Kounoupa

b) 3 July 2019 - C was offered a role within the Paris legal team but the R refused to change the job title and/or salary for this role (para 34 claim and para 4(a) (xv) of the Further Particulars).
Comparator - hypothetical

c) End of July 2019 – the R failed to consider the C for the most suitable pool despite the C's experience and job duties with the R (para 46(e) claim, para 4(a) (xiv) and (d) of the Further Particulars)
Comparator – hypothetical

d) September 2019 - R failed to properly address C's grievance of race discrimination throughout her employment, the disregard to C's progression and that the C's promotion had been delayed. Instead, R dealt with these issues in an appeal hearing against the redundancy rather than in a separate grievance process. (paras 41-45 claim and para 4(f) of the Further Particulars)
Comparator – hypothetical

e) End of July 2019 - The R failed to provide the C with suitable alternative employment (para 46(f) claim, and para 4(e) of the Further Particulars
Comparator – hypothetical

R contends that it did, in fact, exceptionally agree to pool C for more senior Attorney roles, but that C withdrew from those pools. C also declined an offer of a suitable alternative role at her level with opportunities for progression and based in the same location (notwithstanding that C refers to it as the "Paris" legal team role"). So far as C expected to be pooled for or offered more senior roles such as Counsel (promotion by more than one levels of seniority), any failure to do so by R was self-evidently not discriminatory (paras 23-26 and 41-42 response). R contends that it addressed C's grievance through an appeal process (paras 30-31 response).

1.2.3 September 2019 – R dismissed C.

1.3 If so, are there facts from which the Tribunal could decide, in the absence of any other explanation, that the less favourable treatment was due to C's race?

C alleges that she was treated less favourably because she is of black Afro-Caribbean origin.

R denies there is any basis for connecting C's treatment to race. C's actual comparators are inappropriate as they have relevant material differences in their circumstances, namely their legal qualifications and experience (paras 32-36 response).

1.4 If so, can R show reasons that are not in fact discriminatory, for the less favourable treatment?

R contends that:

- *C's lack of career progression before February 2018 was due to her lack of qualification and that any delay in her qualification was due to lack of familiarity with the process as this was the first time anyone at R had qualified via this route and time taken to support C's application (para 12 response).*
- *R's failure to consider C for more senior roles after June 2019 was due to the redundancy situation, the fact that C withdrew from selection pools for roles and failed to express an interest in any available roles, the fact this would have been unfair to other more senior employees, and the fact that C had far less post-qualification experience than others occupying the roles C sought (paras 23-27, 35 and 42 response).*

2 Unfair Dismissal

2.1 It is agreed that C was dismissed on 27 September 2019.

2.2 Did R have a fair reason to dismiss C? It is agreed that C was dismissed by reason of redundancy.

2.3 Did R follow a fair procedure in dismissing C?

C alleges that the redundancy consultation was unfair, that selection processes were unfair and that R failed to adequately consider alternative employment (paras 48-54 claim).

R contends that it followed a fair redundancy consultation and process (para 44 response).

2.4 Was dismissal within the reasonable band of responses available to R and was the dismissal fair in all the circumstances?

C alleges that R acted unreasonably in treating redundancy as a sufficient reason to dismiss (para 47 claim)

R contends that in circumstances where R was consulting with over 1,000 employees and staff representatives and C chose to withdraw from selection pools for roles, refused an offer of alternative employment and failed to express an interest in any available roles, dismissal was clearly fair (paras 44-45 response).

~~**3 Failures to Collectively Consult**~~

~~**3.1** Did R fail to inform or allow C to participate in the appointment or election of employee representatives?~~
~~C claims that R failed to inform or allow C to participate in the appointment or election of the employee representative (para 50(a) claim)~~

~~*R denies this and contends that C and her colleagues were invited and given a reasonable and fair opportunity to nominate representatives. Three representatives were required and when only two were nominated and a third agreed to stand, there was no requirement for an election.*~~

4 Remedies (not to be considered at the Hearing on 21-27 October)

Unfair Dismissal

4.1 Is C entitled to a basic award and if so, how much?

4.2 Is C entitled to a compensatory award and, if so, what level of award it would be just and equitable for C to receive? In particular:

4.2.1 Did C mitigate her losses following dismissal?

4.2.2 Did C receive any monies from R?
It is agreed that C received £39,468.07 as an enhanced redundancy payment.

4.2.3 Would C have been dismissed in any event?
R contends that C would have been dismissed by reason of redundancy in any event (para 46 response).

4.2.4 Did C contribute to the dismissal?
R contends that C voluntarily removed herself from selection pools, gave every indication that she wished to be made redundant and failed to accept an offer of alternative employment or express interest in other available roles (paras 23-27 and 47 response)

Discrimination

4.3 Is C entitled to an award for injury to feelings and, if so, at what level?

~~*Collective Consultation*~~

~~**4.4** Is C entitled to a protective award and, if so, at what level?~~

~~*R contends that any breach (which is denied) was de minimis and denies that there was a wholesale absence of consultation, the consultation was not meaningful or that the breaches were deliberate (para 50 response).*~~