EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Chevalier - Firescu**

Respondent: **HSBC Bank Plc**

Heard at: **East London Employment Tribunal**

On: **22 June 2021 and 7 September 2021**

Before: **Employment Judge Burgher**

Appearances

For the Claimant: **Ms S Aly (Counsel) (on 22 June 2021); In person on 7 September 2021**

For the Respondent: **Ms D Sen Gupta QC (Queens Counsel)**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

1. **The Claimant was being considered for a specific GCB3 vacancy at the Respondent between May to July 2018. The Claimant was not appointed to this vacancy. The Claimant's claim in this regard has been presented out of time.**

2. **This specific role GCB3 role was not part of a continuing act of alleged continued recruitment arrangements and non-appointment of the Claimant. It is not just and equitable to extend time. The Tribunal therefore does not have jurisdiction to consider this claim pursuant to section 123 of the Equality Act 2010.**

3. **The Claimant's claims in respect of alleged actions, events, comments, discussions, lunches, meetings, texts, emails and correspondence with or by specified employees of the Respondent between February 2019 to March**

2021:

3.1 Were not arrangements for deciding who to offer employment; and

3.2 Were not refusals to offer employment to the Claimant.

4. Specifically, for the purposes of section 39 of the Equality Act 2010, in respect of the allegations the Claimant makes between February 2019 to March 2021:

4.1 There was no authorised employment or opportunity to offer for arrangements to attach to; and

4.2 There was no authorised employment or opportunity to offer.

5. The Employment Tribunal therefore has no jurisdiction to adjudicate on what the Respondent's individual employees are alleged to have done or failed to do between February 2019 and March 2021. Consequently, the Claimant's claims in this regard have no reasonable prospects of success and are struck out pursuant to rule 37 of the Employment Tribunal Rules.

6. All of the Claimant's claims are therefore dismissed.

REASONS

1. This open preliminary hearing was listed to consider striking out the Claimant's claims on the basis that they had no reasonable prospect of success; or that they have been presented out of time.

2. The Respondent contended that:

2.1 in respect of the Claimant's allegations relating to events after mid-July 2018 she was not a job applicant for the Respondent and was therefore not within the scope of sections s.39(1) or 39(3) of the Equality Act 2010 ("**the EqA 2010**"); and

2.2 The Claimant's claim in respect of matters prior to mid July 2018 have been presented out of time and it would not be just and equitable for the Tribunal to extend time, therefore the Tribunal has no jurisdiction to hear the Claimant's claim.

Hearings

3. Ms Aly, the Claimant's counsel was not at the resumed hearing on 7 September 2021 despite the relisting being specifically delayed to accommodate her prior professional commitments. The Claimant attended the resumed hearing in person and was assisted by Ms Davis. Concerns were raised after the Claimant stated when searching for words that English was her third language, however she confirmed that

she was happy to proceed. The Claimant was able to question Ms Collett and make closing submissions clearly and coherently.

4. The judgment in this matter was regrettably, but inevitably, delayed following the need to allocate time to consider the Claimant's 49-page written submissions submitted after the hearing, outside the expected timetable that was set. The Respondent's representatives did not send submissions in response.

5. Before the applications could be properly determined it was necessary to identify the relevant claims and issues. In the absence of confirmed agreement, I used the Claimant's second draft agreed list of issues dated 4 June 2021 which are set out at Schedule A to this judgment.

Evidence and witnesses

6. All witnesses gave evidence under oath and were subject to cross examination and questions from the Tribunal.

7. The Claimant prepared a lengthy witness statement permeated with arguments, her opinions and her conclusions drawn from documents that she had reviewed following her numerous Data Subject Access Requests (DSAR) and the snippets of the covert telephone recordings she had made with unwitting individuals. The Claimant is deeply suspicions that the Respondent has withheld documents, specifically relating to the Respondent's Global Compensation Approval System (GCAS) and alternative roles that may have helped her to establish the basis for her claims.

8. The Claimant called Mr Richard Longmore. He attested to his extensive experience of recruitment within Investment Banking. His evidence was credible insofar as it provided a generic overview of the head-hunting process in the sector. Mr Longmore stated that hiring processes vary and that there could be informational gathering with no serious hiring intentions which may extend to a coffee meeting, or possibly two. Beyond that he would consider it a hiring process. His view was that it depended on how long the coffee meeting was, how senior the manager who attends was and what was discussed. He continued that, generally, a senior manager at MD level or above will not take a coffee meeting, or suggest that a role is available, or ask for a CV from someone without an interest in hiring.

9. Mr Longmore stated that once a desired candidate has been identified the broad terms and conditions will be outlined and then the hiring manager will then typically seek approval for those terms from their manager if it is a meaningful role. When the more political and nuanced elements are resolved, the offer is made and then it will typically be given over to HR for final steps. He continued that the arrangements for hiring can also take a long time to conclude where the preferred hire is an employee of a competitor, or becomes political, or requires the displacement of an existing team member, or could disrupt team dynamics/harmony negatively on the efficiency of the team.

10. I accept the implication by Mr Longmore that hiring managers could seek to use any influence they had to try and create a role whether by submitting business cases seeking to lobby for an increase budget to increase headcount; or seek to dismiss poor performing employees to create a vacancy. However, Mr Longmore did not address the

position of what his view was if the 'political and nuanced' elements could not be resolved. Further, his opinions of head hunting in investment banking are necessarily based on his own, albeit extensive, experience. He frankly conceded that he was not involved in any recruitment for the Respondent and does not know how their processes operate. He has had no direct knowledge or dealings with the Respondent and does not know how its recruitment procedures operate from an operational or regulatory perspective.

11. I also accept that in the Respondent there is flexibility, once headcount has been agreed, for a hiring manager to deploy a person to get the most from their skills and experience. As such the grading for a role, as opposed to specific job title, was an operative consideration. However, to be authorised any appointment had to be compliant with the Respondent's recruitment process.

12. I conclude that Mr Longmore erroneously equates an interest in hiring someone with an organisation having a role available. It is obvious that there could not be a role available if the internal politics could not be resolved; if there was no budget for a role; or if it was not possible to displace an existing team member to create a role. There would be no available identifiable role or opportunity. Without an available role, there could not be an interest in hiring and any discussions expressing interest in retaining an individual's experience and knowledge in these circumstances would necessarily be informal, in the context of consideration for hire should a role or opportunity subsequently arise in future. Simply put an interest in an individual's skills and experience is not the same as having a role available to hire to. Organisational, financial, and regulatory authority is required to create such a role.

13. The Respondent called Ms Lauren Collett, Leader Recruitment for GBM and Private Bank, UK and Europe. She shared her first hand review of the vacancies in the Respondent's Equities and Derivatives team throughout the period. Ms Collett had analysed the Respondent's recruitment and computerised records which are required to be held for its regulatory purposes.

14. A central point of the Claimant's claim is that she had been placed through the Respondent's GCAS system confirming her for a role. Ms Collett's evidence is that no GCAS had taken place for the Claimant as there was no record on the Respondent's computerised system showing this. The Claimant does not accept this and refers to an email from Frank Lacour (Global Head of Equities) dated 15 June 2018 that the Claimant's GCAS is being processed as per Mr Zaimi's request.

15. I accept Ms Collett's evidence that there was no GCAS documentation for the Respondent to disclose. It would have been necessary to confirm the grade the Claimant's GCAS to be processed but this had still not been resolved by 29 June 2018 as the Claimant was insisting on appointment to a GCB3 Director level band, whereas the Respondent's policy of no promotion on hire precluded this. Therefore, the Claimant was not, as she alleges, in the Respondent's system to be placed in some future unidentifiable role.

16. I also accept Ms Collett's evidence that in the Respondent, if a candidate for a role is unsuccessful or chose not to proceed with a recruitment process, that recruitment process is treated as concluded and unless the candidate is then re-introduced to the process before the existing process draws to a close, any further recruitment activity

involving that candidate would need to start afresh. The Respondent's processes require that candidates are fairly assessed based on their up-to-date experience and qualifications and it is necessary for them to be benchmarked against the wider market at the point in time when they are being considered for employment. Therefore, the Claimant's was not, as she contends, in a recruitment exercise for a possible role in the Respondent's Equity Derivatives Sales team throughout the period 2019 to 2021. This is not consistent with the Respondent's records or processes.

17. Finally, I accept Ms Collett's evidence that the Respondent's internal recruitment systems show that there was a headcount reduction during the period; and that Mr Eric Dutruit (Managing Director and Head of EMEA Equity Derivatives Sales) did not have or receive any approvals to commence a recruitment process at GCB4 or GCB3 level in Equity Derivatives Sales during 2019 and 2020. The last recruitment exercise he sought approval to commence was for the role eventually filled by Andre Von Riekhoff in August 2018.

18. The findings on witness evidence expressed above form part of my general fact find.

19. I was also referred to a relevant pages of an extensive hearing bundle of over 1225 pages and a supplementary bundle consisting of 99 pages. However, I only considered documents that were specifically referred to during evidence and submissions.

Facts

20. I have found the following facts from the evidence.

Claimant

21. The Claimant is an intelligent and tenacious individual. She is an experienced investment banker with a unique set of skills in both sales and structuring. The Claimant proudly refers to feedback describing her as "*very technical, pushy internally and externally, does not give up".* These are attributes that the Claimant demonstrated in her attempts to secure employment with the Respondent, which forms the foundation of her claims.

22. The Claimant has extensive experience of Employment Tribunal litigation having presented claims against her former employer Barclays Bank on:

22.1 14 December 2017;
22.2 22 February 2018;
22.3 14 June 2018;
22.4 12 November 2018; and
22.5 30 April 2020.

23. The Claimant presented her first claim against the Respondent in this matter on the 1 November 2020 and presented her second claim on the 14 May 2021.

24. The Claimant has submitted 8 separate DSAR's to the Respondent on:

24.1 10 October 2018 for information *between 1 February 2018 until 10 October 2018..in particular… interview for a Equity Derivatives Sales job …there have been communications between HSBC employees and Barclays employees of which [the Claimant is] the subject*;

24.2 1 May 2020;

24.3 18 May 2020 where she stated "*HSBC made the decision not to hire me in 2018*";

24.4 22 May 2020;

24.5 18 September 2020;

24.6 18 October 2020;

24.7 15 March 2021; and

24.8 15 March 2021.

25. The Respondent responded to each DSAR within a six week period.

26. The Claimant accepted in evidence during cross examination that she was aware of the Employment Tribunal time limits and their importance. She had access to specialist employment lawyers. The Claimant produced a witness statement in December 2018 in preparation for her claims against Barclays indicating the full extent of her knowledge at that time, she stated:

> *21 I hope the tribunal will understand that I could not possibly bring the claim any sooner, and in the same time with this opportunity, I want to bring to the attention of the tribunal the fact that it could be appropriate to systematically relaxed 3 months limit delay when it applies to pregnant women or women who have just given birth.*

27. In her same witness statement at paragraph 450 the Claimant stated:

> *450. Since I was made redundant, I made copious attempts to secure new employment. After many successful interviews at HSBC I was even invited for lunch by Marc Lemmel, who was visiting from Paris and who was very happy at the idea to work together, as he wanted to hire me already 10 years back. Clients also told me they have been contacted by HSBC and that HSBC told them they wanted to hire me, they were congratulating me on the new position already. The head of trading, Renaud Delloye, during the interviews, told Eric Dutruit, that if he does not hire me in sales, he will be hiring me in trading.* ***However, all that positiveness was brutally and suddenly stopped by unofficial feedback from Barclays****. I have been told by Eric Dutruit that (in breach of policy) unofficial feedback was provided to new employers stating that I am ´a total disaster'; for example, a comment passed to the Global Head of HSBC Equities, Hossein Zaimi. This was a comment attributed to my 'ex-boss' i.e. Makram.* ***It was this specific feedback that halted my recruitment after numerous successful interviews at HSBC*** *[TB11 p3919]. It was reconfirmed by a female employee of HSBC in August 2018, who initially introduced me to HSBC. Although my potential new manager, Eric Dutruit, wanted to hire me, the appointment had been blocked by a more senior manager (i.e. on Mr Zaimi's level). Makram had a connection at HSBC, as he had interviewed for a job there recently and he was known by the senior managers.*

28. I have emphasised the text in bold as it is clearly relevant in assessing what the Claimant was alleging at the time in respect of the progression of her recruitment process with this Respondent. Contrary to the position outlined in that statement, the

position that the Claimant now maintains is that her recruitment with HSBC was continuous from April 2018 until Mr Dutruit sent her an email response to her query on 15 February 2021 stating:

> *"The position hasn't changed since we met for coffee in November 2019. There is no headcount as the business continues to downsize.*
>
> *Sorry this isn't the news you want and it is very unlikely that the situation will change in the near term. As mentioned in November 2019, the market position is simply not what it was when we discussed a role in Spring 2018"*

29. Following this email, the Claimant sought to meet with other individuals within the Respondent without success. The Claimant claims that her blacklisting with the Respondent continues.

Respondent

30. The Respondent is the trading entity within a corporate group which is a global banking and financial services organisation. The Respondent has a number of different internal business divisions, including its Global Banking and Markets ("**GBM**") business. Within GBM there are several further business divisions including the Respondent's global equities business. There are 9 'Global Career Band' ("**GCB**") levels, GCB8 the most junior and GCB0 the most senior.

31. The Respondent is a regulated by the Financial Conduct Authority in the Prudential Regulatory Authority. The Respondent has, since 2016, been subject to the Senior Managers Certification Regime (SMCR) and it has committed to certifying that relevant employees within GBM are 'fit and proper' persons. Consequently, the Respondent has enhanced its recruitment processes to seek compliance with SMCR and ensure that new hires are fit and proper to undertake their roles and meet the regulatory requirements and commitments which the bank is subject to.

32. The Respondent's structured recruitment processes within GBM from 2018 were designed to achieve these aims can be summarised in six key stages steps

33. In mid-2018, recruitment for a role within GBM involved six steps, namely:

(1) Pre-approval to start the recruitment process;
(2) Internal and external advertisement;
(3) Formal interviews;
(4) Value assessments (Hogan Test);
(5) Final approval to hire (GCAS); and
(6) Formal offer.

34. Once the interviews and assessments had been completed, the feedback and outcomes for all candidates are reviewed before a decision is made for final approval progress to an offer.

35. Following this, the relevant member of the recruitment team manages the process of formally recommending an offer to a particular candidate, and then the Performance and Reward team facilitate the process of final approval to make an offer.

36. During 2018, the final approval process for recruitment was done through the Respondent's Global Compensation Approval System (**GCAS**) (called My Compensation Approval from 2019). GCAS was used to obtain final approval for the role, for the particular candidate (based on the business case or rationale given), their specific compensation offer, and their GCB level.

GCB3 Role

37. In January 2018, the Respondent sought to recruit a director to lead its Institutional Flow Sales team, reporting to Mr Eric Dutruit. The Respondent advertised this as a GCB3-level role and Mr Dutruit was the hiring manager.

38. In the period leading up to April 2018, Mr Dutruit had also been keen to hire someone into the Equity Derivatives Sales team with experience in risk recycling, however there was no confirmed additional vacancy advertised.

39. On 18 April 2018 the Claimant speculatively sent her CV to Ms Hanna Assayag, her friend who was a Director at the Respondent. Ms Assayag sent the Claimant's CV onto the Global Head of Equities, Mr Hossein (Hoss) Zaimi. Mr Zaimi the emailed Mr Dutruit on 25 April 2018 asking him to interview the Claimant.

40. On 11 May 2018, the Claimant attended interviews with Mr Dutruit, Franck Lacour (Global Head of Equities Trading), Marc Lemmel (Global Head of Structuring) and Renaud Delloye (EMEA Head of Trading).

41. On 14 May 2018 Mr Dutruit sent an email to Mr Zaimi stating *We need to hire [the Claimant*]*".* Mr Zaimi responded on 15 May 2018 *"Find space and do it* ". Whilst efforts could have been made to try and create more roles the only 'space' in vacancy terms within the Respondent at the time was the Institutional Flow Sales Director role and the Claimant's potential employment was being progressed against that vacancy.

42. On 18 May 2018, the Claimant met Mr Dutruit for a coffee, and Mr Dutruit indicated to her that he would like to progress the Claimant's hiring. At this meeting, the Claimant explained to Mr Dutruit that she was in a dispute with her former employer, Barclays.

43. As part of the recruitment process, Mr Dutruit sought feedback on the Claimant from her clients and former colleagues. The DSAR disclosed an email dated 12 June 2018 that said:

Off that's [sic] [if the Claimant is the] best candidate happy to support but we know that some of the feedback has been very negative too.

44. Whilst the Claimant discovered some of the detail of the feedback that was being sought on her when she received the DSAR response in 2020, the content of the feedback was not inconsistent with her knowledge and understanding she had at relevant time when her appointment was not progressed in 2018. By email dated 5 July 2018 the Claimant provided further positive references to seek to address the negative feedback or observations that she was aware had been provided about her during May/ June 2018. It is also clear that despite the negative feedback Mr Dutruit was actively

progressing the Claimant's candidacy which was being and considered against other potential candidates.

45. As part of the recruitment process, on 13 June 2018, the Claimant was asked to take the Hogan test, a test used by the Respondent as part of its recruitment process to ascertain candidates' values and leadership capabilities.

GCAS

46. On 15 June 2018 Mr Lacour wrote:

> *I look like both Andre von Riekhoff an[d] ..*
> *They would seriously upgrade our Vol trading capability.*
> *They are credible alternative to [the Claimant]*
>
> *[The Claimant] Is certainly more technical and therefore independent on that side.*
> *both … and Andre have more experience with European client base.*
> *they are both join /lea …*
>
> *Andre would give you firepower in flow business.*
> *we need to decide quickly what to do as the window is closing.*
> *common GCAS is being processed as per Hoss request.*
> *should we do the same for these two while we decide on who and how many?*

47. Given Ms Collett's evidence, and the inability to agree a GCB4 with the Claimant, I do not conclude that the Claimant had GCAS signed off and as such Mr Lacour was mistaken in his email, which must have represented his expectation not his knowledge.

GCB grade - no promotion on hire

48. On 18 June 2018, the Claimant met with Ms Thina Andersson, the Respondent's Recruitment Manager. On 19 June 2018, Ms Andersson emailed Mr Dutruit stating:

> *"I met with [the Claimant] yesterday, I really liked her. Main thing to note is she was a VP with Barclays and not a Director level. She said she hadn't mentioned this to you yet as she's not ha[d] firm conversations around a potential offer or money.*
>
> *Our policy is not to promote on hire and I got a pretty strong impression that Carmen wouldn't come for a VP / AD level role."*

49. Contrary to the contentions of the Claimant, I find that the Respondent had an operational practice, that Ms Andersson was referring to, of "no promotion on hire" that prevented an individual from joining the Respondent in a more senior role than the one they had most recently held at another bank. This was because the Respondent did not want to disadvantage internal talent in promotion processes by promoting external individuals ahead of them; and it is part of the Respondent's steps to ensure individuals are suitable and qualified for their roles to earn promotions based on proven performance.

50. As the Claimant's most senior previous role was not at director level she would have had to be employed at a GCB4 level to secure employment with the Respondent. The advertised progressed vacancy was for a GCB3 role. However, the initial interest

in the Claimant was such that consideration was being paid to offering her the vacancy at GCB4 level with a view to converting it to a GCB3 role in future.

51. On 29 June 2018, Mr Dutruit spoke to the Claimant, explaining that the Respondent would not be able to offer her the GCB3-level role as her last role was equivalent to GCB4. Mr Dutruit indicated that the Respondent would instead look at creating a hybrid risk recycling/hedge fund role at GCB4- level. The Claimant, however, stated in a message in response to Mr Dutruit later that day:

> "*in my view, being a director is a must in order to make this job and business a success. The title is necessary as head of the Hedge Fund team, necessary to navigate smoothly between the different teams internally, necessary as well with the clients as some of them need to know that they are dealing with someone senior in the organisation*".

52. Mr Dutruit replied on 30 June 2018 stating:

> *Hi Carmen, I agree with all of your arguments but HR will not allow us to hire people who currently are employed with a title and offer them a higher title on arrival. This could be seen as defeating the purpose of offering a fair and transparent promotion process for all current employees. What we can do is offer you a path to directorship if certain objectives are met. Can you consider this? Happy to put you in front of Hoss our global head of equities this coming week.*

53. As mentioned above, I do not find that a Claimant's GCAS was signed off as she asserts. This could not have been concluded without determining the grade, which was clearly still unresolved by the end of June 2018.

54. There was an impasse. The Claimant sought a director GCB3 role but the Respondent's practice was such that she could not be promoted on appointment. Mr Dutruit still tried to make her appointment a possibility, even with the negative feedback having been received by this time, by suggesting that he would create a hybrid role at GCB4 for the Claimant to work up to the GCB3 role. This may have been in place of the currently signed off GCB3 role for the Claimant or an increased headcount bid would have been required for an additional role. Ultimately, this did not progress as the GCB3 vacancy was subsequently filled when approval was obtained to hire Mr Andre von Rieckoff, which was announced 17 August 2018.

55. The Claimant's skills and experienced remained of interest to Mr Dutruit but he took no steps to convert his interest into an organisational role or opportunity. I accept Ms Collett's evidence that there was no record of any bid for increased headcount made by Mr Dutruit in the Respondent's record from 2018. I find that save for the 2018 GCB3 role, there were no other relevant vacancies in Mr Dutruit's team for the Respondent to make offers of employment. Whilst efforts could have been made to try and create a role, this was not done. Therefore, the process in respect of Claimant's potential recruitment ceased in or around mid-July 2018.

56. Whilst the Claimant was not specifically informed by the Respondent that no hybrid GCB4 role was created for her she had been fully aware that the GCB3 role that she was in the running for had been filled.

57. I accept Ms Collett's evidence that there have been headcount reductions across the Respondent's entire equities business through redundancies and/or by not replacing

individuals who have left the business; and that no business case for additional recruitment was submitted for Mr Dutruit's team.

58. The Claimant points to miscellaneous roles that she says existed between 2019 to 2020. However, the Claimant was not GCAS sanctioned and as such separate recruitment consideration would have been necessary for her recruitment in accordance with the SMCR and the Respondent's formal processes. I do not accept the Claimant's contention that Mr Dutruit's desire to retain her unique set of skills meant that she could and should have been appointed to any GCB4 or GCB3 role within the Respondent regardless of the job role and specification. The Respondent's structured recruitment process precluded this.

Post recruitment process communication and contact.

59. Mr Dutruit did not have any communication with the Claimant between 16 July 2018 and 8 February 2019.

60. However, the Claimant sent a WhatsApp message to Mr Dutruit on 20 September 2018 where she wrote:

> "*Hi Eric, I hope you well. I just heard Andre von Rieckoff is coming to HSBC. I believe congratulations are in order. This also makes me believe that it is official now that I will not be joining you. It would have been a great pleasure. All the best!*"

61. Mr Dutruit did not respond to that message.

62. On 8 February 2019, the Claimant sought to reconnect with Mr Dutruit, sending him a further WhatsApp message stating:

> "*We almost bumped into each other today. I had lunch with Yun. Hope to see you again, maybe for a coffee. I know you did not hired [sic] me, but no need to ignore me…*".

63. Mr Dutruit responded later the same day, stating: "*Definitely not ignoring you and yes very happy to have a coffee with you...*"

64. No coffee catch up, however, was subsequently arranged.

65. The Claimant was subsequently introduced to Mr Samir Assaf, who was the Chief Executive of Global Banking and Markets of the Respondent by a mutual acquaintance. Mr Assaf met with the Claimant on 8 March 2019. The Claimant was asked to send in her CV and he would circulate it to his teams. The Claimant alleges that Mr Assaf stated he believed that the Respondent would have a role for her but that he was surprised that she was looking for work while pregnant with her second child and that would delay her recruitment and she should not seek to work until after giving birth in 2020.

66. The Claimant was undeterred and was successful in arranging to meet with Mr Marc Lemmel (Global Head of Structuring) on 9 May 2019 in Canary Wharf and 22 August 2019 in Paris. The meetings were all initiated by the Claimant.

67. The Claimant also maintained some contact with Mr Dutruit on 10 September 2019.

68. On 18 November 2019, the Claimant sent a WhatsApp message to Mr Dutruit asking to arrange a meeting over coffee. Mr Dutruit and Mr Tristan Larrue (Head of QIS and Equity Structuring EMEA) subsequently met with the Claimant at a Costa Coffee on 25 November 2019. Given that there was no actual role available I find that this meeting was a preparatory meeting for managers to consider whether to try and "create space" to employ the Claimant. However, no bid was subsequently made to increase headcount and no job offer was made to the Claimant, nor were any follow-up meetings scheduled, despite the Claimant attempting to arrange meetings from January 2020.

69. The Claimant met with Mr Lemmell for a coffee in Paris on 28 January 2020, at her request.

70. The Claimant received DSAR response to her third and fourth responses on 17 June 2020. The Claimant criticises the Respondent for withholding documentation that should have been sent to her following her first DSAR in October 2018.

71. The Claimant contacted Mr Dutruit on WhatsApp on 15 July 2020 after hearing that Mr Zaimi had left the Respondent, asking the following day about whether she could now join the Respondent. The Claimant asked Mr Dutruit to meet her "*to grab a coffee"* . The Claimant chased Mr Dutruit on arranging a coffee on 4 August 2020 and 3 September 2020.

72. At times during 2020 the Claimant had difficult personal circumstances, dealing with COVID lockdown travel restrictions, having to look after two young children, organising her maternal grandmother's health care arrangements and subsequent funeral outside the UK; and flooding at her house discovered on her return.

73. Mr Dutruit agreed to meet Claimant for coffee on 29 September 2020 and they met at The Ivy in the Park in Canary Wharf. The Claimant covertly recorded this meeting. Mr Dutruit is alleged to have made a comment about Lebanese connections which forms the basis of the Claimant's race discrimination complaint.

74. Mr Dutruit received further messages from the Claimant via WhatsApp on 28 October 2020 and 30 October 2020; and via text message on 10 November 2020. Mr Dutruit did not respond to this text message.

75. The Claimant also made contact with Mr Remi Bourette on 26 August 2020 to discuss the feedback he had provided in July 2018. She covertly recorded their conversation.

76. Following further communications between the Claimant and Mr Bourette, the Respondent's HR department commenced an investigation into the Claimant's complaints concerning Mr Bourette's feedback.

77. On 7 October 2020, the Respondent's HR department informed the Claimant that they had investigated her complaint and found no breaches of process.

Law

78. Section 39 Equality Act 2010 **('EqA')** states as follows:

> **Employees and applicants**
>
> (1) An employer (A) must not discriminate against a person (B)—
> (a) in the **arrangements** A makes for deciding to whom to offer employment;
> (b) as to the terms on which A offers B employment;
> (c) by **not offering** B employment.
> ….
> (3) An employer (A) must not victimise a person (B)—
> (a) in the **arrangements** A makes for deciding to whom to offer employment;
> (b) as to the terms on which A offers B employment;
> (c) by **not offering** B employment.

Arrangements

79. The term "arrangements" is not defined in the Equality Act 2010, so it is a matter of interpretation for the Tribunal. I accept that arrangements must be given a purposive and broad interpretation.

80. In the case of NHS Direct NHS Trust v Gunn [2015] IRLR 799 the Langstaff J EAT stated:

> *"9. [The] three limbs [of section 39(1) of the EqA 2010] all relate to offers of employment (and thus relate to the class of "applicants" described in the heading to the section), and involve an employer making a choice – as to who the employee should be, or should not be: (a) and (c); or as to the terms of the offer of employment: (b) […]*

81. Ms Sen Gupta QC contended that the reference to "making a choice" encapsulated the need for a decision or action by the employer in this context. She contended that an arrangement is the action, process, or result of arranging and as such an arrangement is necessarily the result of a positive step or decision. The words "the" and "makes" confirm this construction.

82. The Claimant referred to the EHRC Employment Statutory Code of Practice ("the Code") in respect of "Avoiding Discrimination in Recruitment". In respect of arrangements the Code states:

> "*Arrangements refer to the policies, criteria and practices used in the recruitment process including the decision making process. 'Arrangements' for the purposes of the Act are not confined to those which an employer makes in deciding who should be offered a specific job. They also include arrangements for deciding who should be offered employment more generally. Arrangements include such things as advertisements for jobs, the application process and the interview stage".*

83. I do not accept the Respondent's contention that alleged failures or omissions cannot amount to "the arrangements [an employer] makes". For example, if the employer fails to offer an applicant an interview on unlawful discriminatory grounds that would be an actionable arrangement regardless of whether the applicant would have succeeded in securing the role.

84. I also considered whether there needs to be an actual role or opportunity for the arrangements to apply to. Section 39 EqA refers to employment. Section 88(8) EqA defines employment in relation to a worker as meaning employment under the worker's contract, and related expressions are to be read accordingly. When considering section

88(3) EqA I interpret this to mean that there must be a contract or opportunity for employment to be offered.

85. In this regard, in the EAT HHJ Richardson held in Padgett v Serota UKEAT/0097/07 at paragraph 33 and 34 of the judgment, that the Claimant need not be a "*job applicant*" in the traditional sense:

> 33 "*in our view it is not necessary for there to be an application as such before reg 6(1) applies. For example, an employer might make arrangements for recruitment which positively barred applications of a particular kind, and thereby prevented a person from applying. Of those arrangements amounted to unlawful discrimination, it would be no answer that the person on whom they impacted had not made an application".* 34 "*Generally speaking, therefore , it applies where an employer is recruiting*"

86. However, Padgett held that the employer must have employment to offer at the relevant time as opposed to a claimant being able to rely on a completely speculative application where no such employment was available or possible.

87. In the EAT case of Clymo v Wandsworth London Borough Council [1989] IRLR 241 it was held that there had to be an available job or opportunity to offer.

88. In the case of Tyagi v BBC World Service [2001] IRLR 465, CA LJ Brooke held at paragraph 25:

> *In my judgment, that deal he with submitted the kind of correctly situation that about it is which these Mr Tyagi may be concerned. Section 28(3) makes provision for proceedings in respect of a contravention of the section. A general discriminatory practice which, among other things, would be likely to result in an act of discrimination to the person to whom it is applied, including persons in any particular racial group, and as regards which there has been no occasion for applying it, is policed only by the Commission for Racial Equality. The way in which s.1 bites on the actual treatment of an applicant or the actual application of a requirement or condition adverse to an applicant, in my judgment, means that it does not bite on a discriminatory practice which is not in action at all vis-à-vis a particular applicant if he is not employed by the employer at all so as to be denied access to the opportunities and benefits or otherwise treated disadvantageously in the ways mentioned in s.4(2), and if he is not being treated unfavourably by not being offered a job because of a discriminatory practice because there is no job on offer.*

89. The Court of Appeal held that a discriminatory practice which is not in action in respect of a particular applicant because he is not employed by the employer or because there is no job on offer is policed only by the [EHRC]. I do not accept the Claimant's contention that Tyagi is distinguishable; out of date, is limited to the construction of the Race Relations Act 1976; or should not be followed in this regard. As such I consider that I am bound by the reasoning in Tyagi to the extent that it applies to the facts of this matter.

90. However, I separately considered whether failing to create a vacancy or '*find space'* to employ the Claimant engaged section 39 EqA. I conclude that section 39 EqA could be engaged in these circumstances if there was an unfettered authority for an individual to hire at will.

Time limits

91. Section 123 of the EqA 2010, provides the relevant time limits for bringing claims. It states:

> "**Time Limits**
>
> "(1) Subject to section 140B5 proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (2) […]
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

92. Section 123 of the EqA 2010 necessitates consideration of difference between one-off and continuing acts. In Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 168 CA, Mummery LJ stated at paragraph 52 that in determining when time begins to run in a Tribunal claim:

> *"The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."*

93. In Lyfar v Brighton and Sussex University Hospital Trust [2006] EWCA Civ 1548 CA, Hooper LJ endorsed the test as set out in Hendricks, when considering whether the 17 allegations were not part of one continuing act of discrimination.

94. In Tyagi the Court of Appeal rejected the claimant's argument that s.68(7)(b) of the RRA 1976 could be relied upon to save an otherwise out-of-time claim on the basis that the discrimination suffered by the claimant constituted a continuing act. On that issue, the Court held that the EAT had been right to find that a job applicant could not be protected against a policy of "*continuing discrimination*" extending beyond the point at which the applicant had been refused employment and the relevant job was no longer on offer. As acts complained of after the recruitment process had ended did not come within the scope of the relevant legislation, such a policy could not amount to a 'continuing act' from that point onwards.

95. I had regard to the summary of the law regarding time limits and extension of time at paragraphs 30-41 provided by Jackson LJ in the case of Aziz v FDA which sets out a helpful summary. I also considered the guidance of Robertson v Bexley Community Centre (t/a Leisure Link) that the extension of time is the exception rather than the rule.

96. I also considered the balance of prejudice between the parties when considering whether it is just and equitable to extend time and the factors in the case of British Coal Corp v Keeble where Mrs Justice Smith held:

> "*The EAT also advised that the Industrial Tribunal should adopt as a check list the factors mentioned in Section 33 of the Limitation Act 1980. That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action. The decision of the EAT was not appealed; nor has it been suggested to us that the guidance given in respect of the consideration of the factors mentioned in Section 33 was erroneous.*"

97. I was referred to the case of Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, where Leggatt LJ stated at paragraph 19:

> "*[…] factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).*"

98. In the case of Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal held that the Tribunal should not rigidly adhere to the checklist of potentially relevant factors in section 33 of the Limitation Act 1980 and advised against the adoption of a mechanistic approach. It stated that when exercising discretion under section 123(1)(b) of the EA 2010, tribunals should assess all relevant factors in a case, including "the length of, and the reasons for, the delay". The Court of Appeal noted that, in Keeble, it was suggested that a comparison with the checklist might help illuminate the tribunal's task, not that the checklist should be a framework for any decision.

99. When considering whether it would be just and equitable to extend time, I therefore considered the balance of prejudice which each party would suffer as the result of the decision to be made having regard to all the circumstances of the case.

Strike Out

100. The relevant ET rule is as follows:

> 37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party,
> a Tribunal may strike out all or part of a claim or response on any of the following grounds—
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
> (d) that it has not been actively pursued;
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

101. In Zeb v Xerox (UK) Ltd UKEAT 0091/15 Simler J gave a summary of the relevant application of the legislation.

> The Employment Tribunal's power to strike out a claim at a preliminary stage is derived from Rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. That Rule enables a Tribunal to strike out a claim that has "no reasonable prospect of success". This power has rightly been described as a draconian one, and case law cautions Employment Tribunals against striking out a claim in all but the clearest cases, particularly where that claim involves or might involve allegations of discrimination. Cases in which a strike out can properly succeed before the full facts have been found are rare. As Lord Steyn explained in Anyanwu v South Bank Students' Union [2001] IRLR 305:
>
> "24. … For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. …"

102. In the same case at paragraph 37 Lord Hope made the following observations:

> "37. I should like first to say that, if I had reached the view that nothing that the university is alleged to have done could as a matter of ordinary language be said to have aided the students' union to dismiss the appellants, I would not have been in favour of allowing the appeal. I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence. …"

103. In Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 in the Court of Appeal, Maurice Kay LJ said:

> "29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. … It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

Submission and conclusions

104. Having regard to my findings of fact outlined above, the relevant law and the extensive and oral submissions and written statements (opening and closing) my conclusions are as follows.

Section 39 EqA - Arrangements

105. In this matter I conclude that the Claimant was a job applicant for employment in 2018 only. There was a contract of employment to offer at that stage.

106. I conclude that the contention advanced by the Claimant that she was in a continuous recruitment process following this to be contrived and contrary to her contemporaneous expressions. The meetings she refers to, from 2019, took place

following her 'pushy' and indefatigable requests to meet to see if she could be employed by the Respondent. The difficulty for the Claimant is that from August 2018 there was no authorised role for her to be employed to and any separate vacancies would have needed to be filled following separate recruitment exercises in the Respondent. The Claimant refers to other candidates that were offered roles and offer letters during the subsequent period but given my finding that there was no GCAS processed for her, as she suspected, she could not be said to be 'employed' waiting for an appropriate role or opportunity.

107. Following July 2018, there was no rolling open application for the Claimant's unique set of skills to be accommodated. Whilst there was an interest, fanned by the Claimant's continuous efforts to meet with senior employees within the Respondent, the Respondent's senior employees did not invite meetings nor indicate that they had vacancies. They indicated that the Claimant would be of interest if appropriate vacancies arose. No such vacancies arose for the Respondent's structured recruitment process to be circumvented. Therefore, there was no employment to offer for arrangements to apply to in respect of matters following July 2018. I conclude on the evidence before me that the Claimant was fully aware that that her process ended by September 2018 despite not being specifically informed of this. To use modern parlance, she was ghosted.

108. The Claimant's case is summarised as the Respondent's failure to create an opportunity to utilise her unique set of skills, in whatever role that may have become available, amounted to unlawful victimisation and discrimination. However, I do not conclude that the Respondent's senior employees had unfettered authority offer employment or opportunity within the Respondent. The Respondent is regulated and committed to a structured recruitment process policed by HR. HR insisted on there being no promotion on hire and there was no evidenced bid or business case for additional headcount. An attraction or interest in an individual is not the same as having an opportunity or vacancy. Steps needed to have been implemented in order to convert the interest into an opportunity. There was no evidence that was done in this matter. On the contrary, Ms Collett evidenced that there was no bid for increased headcount from Mr Dutruit. In any event, I do not conclude that any loose, out of context or unguarded conversations from the Respondent's senior employees created an opportunity or an offer of a role to engage section 39 EqA.

109. The Claimant appreciated that there was no vacancy following mid 2018 but sought to stay in the picture should a vacancy arise. When, on 15 July 2020, the Claimant became aware that Mr Zaimi had left the Respondent she queried whether she could be employed, the implication being that there was now a vacancy. However, any such vacancy would then have been filled using the Respondent's structured recruitment process and as such the Claimant could not have just been employed at the time, as she alleges, without consideration of any other meritorious candidates.

110. I do not accept the Claimant's submissions that Padgett can be distinguished from the facts of this case. I conclude that the only matters which the Employment Tribunal has jurisdiction to consider under section 39 of the Equality Act 2010 relate to her non appointment to a role in July 2018. Therefore, the Claimant's allegations following July 2018 and her second claim to the Tribunal are not within the Employment Tribunal jurisdiction. I therefore strike out these complaints, pursuant to ET Rule 37, on the basis that they have no reasonable prospects of success.

Time limits

111. The burden of proof to show that a claim was brought within time falls on the Claimant.

112. The Claimant was a job applicant for employment up July 2018 only. I do not conclude that matters following July 2018 formed part of conduct extending over a period of the alleged continued non appointment of the Claimant to an available role or opportunity.

113. Unlike Hendricks, the Claimant had no ongoing relationship with the Respondent once her candidacy for the role in June 2018 ended. There was no further authorised vacancy or opportunity and the Claimant was not, as she alleged, in a continuing recruitment opportunity. I apply Tyagi and conclude that the Claimant cannot be protected against a policy of "*continuing discrimination*" extending beyond July 2018, where the relevant job was no longer on offer. The extensive allegations the Claimant makes after the recruitment process had ended (including the Claimant's second claim) do not come within the scope of Section 39 EqA, and such a policy alleged does not amount to a 'continuing act'.

114. The Tribunal has jurisdiction to consider the Claimant's claims relating to events pre-dating August 2018. In these circumstances, the Claimant ought to have contacted ACAS in respect of her claims by the end of October 2018 and brought her claim within the prescribed period thereafter. However, the Claimant submitted her complaint on 1 November 2020. Her complaint in this regard is therefore out of time.

Just and equitable extension

115. The Claimant asserts, as she did in her earlier Barclays claims, that the EqA 3 months time limit is onerous and as such the just and equitable extension should be exercised liberally, the purpose of the EqA being to challenge discrimination and not to allow wrongdoing Respondents to escape liability on technical time points.

116. I accept that I have a wide discretion to extend time but such discretion must be judiciously exercised. I therefore considered the balance of prejudice which each party would suffer as the result of the decision to be made having regard to all the circumstances of the case.

117. The Claimant advanced claims against Barclays timeously and these were subsequently settled. The Claimant has also presented further claims against Barclays that are subject to separate proceedings.

118. The Claimant was fully aware of the Employment Tribunal time limits and their importance. She has access to specialist employment lawyers and previous experience of Tribunal litigation.

119. The Claimant submitted DSAR's to the Respondent on 10 October 2018 and Employment Tribunal claims against Barclays in June and November 2018 in respect of her non appointment to the Respondent in July 2018.

120. The Claimant relies on the flagrant alleged breach by the Respondent of the EHRC Code in respect of references which would form the basis for inference of unlawful discrimination.

121. The Claimant contends that her claims against HSBC only crystalised after 26 August 2020 or by 16 October 2020 when the Claimant received the outcome of the HR investigation and the following DSAR reply which included the handwritten HR notes from the investigation. I do not accept this, the Claimant's contemporaneous expressions and actions wholly undermine her contentions in this regard. The Claimant was fully aware of the elements of her claim for non-appointment to a role in July 2018, due to bad reference from Barclays, at the time. She proceeded with claims against Barclays but strategically opted not to pursue a claim against the Respondent in the hope of securing employment with them if another opportunity arose in future.

122. The Claimant contends that the delay in bringing her claims has been caused and/or contributed by the deliberate concealment and misleading tactics and concealing relevant documentation. I do not accept this. The basis for the Claimant's claim was apparent from an early stage and the Claimant chose not to bring a complaint against the Respondent at the time.

123. The Claimant criticises the Respondent's piecemeal disclosure of documentation under the DSAR, that she refers to as having received on 17 June 2020. The Claimant relies on her late knowledge of the true facts and the fact that her delayed knowledge was caused by the deliberate obfuscation and misrepresentation by the Respondent and refers to the case of Southwark London Borough v Afolabi [2003] IRLR 220 for just and equitable extension. However, I conclude that the late disclosure did not change what the Claimant was already aware of in 2018, namely that negative references had been given which she sought to address in her email of 5 July 2018.

124. The Claimant's GCAS suspicions were founded by the latter disclosure of Mr Lacour's email dated 15 June 2018 which suggested that the Claimant had been submitted to GCAS. However, the Claimant was fully aware that she had not been sanctioned for GCB3, which was the grade of the role, and in these circumstances no GCAS could have been concluded.

125. Finally, in this context, I conclude that there was no ongoing relationship between the Claimant and the Respondent for the Afolabi reasoning to apply for late knowledge as she contends.

126. The Claimant refers to her very difficult personal circumstances including being outside of the country in June 2020 with COVID travel restrictions; looking after her grandmother then grieving and managing the funeral; and having a flooded house at her return to England. However, all these difficulties occurred nearly 2 years after the acts complained of.

127. I am unimpressed with the Claimant's reasons for not bringing a claim against the Respondent sooner. Much time has elapsed, there has not been a contemporaneous grievance or review of the complaints to refer to and a number relevant witnesses no longer work for the Respondent. The cogency of evidence will inevitably be adversely affected.

128. The Claimant has, at all material times, had the resources and capacity to secure legal advice to bring a claim but did not do so timeously.

129. The Claimant has brought, and settled claims, against Barclays arising from the same facts and there is the potential for reopening of matters that Barclay's witnesses could have reasonably expected to have been closed. This is undesirable.

130. The Claimant's claims are very serious and public policy dictates that such matters are heard. However, a cursory review of the evidence does not indicate that the reason for her non appointment was necessarily the negative references, whatever the content of the references may have been. The emails I have been referred to illustrate that the Claimant was being objectively assessed against Andre von Riekhoff, the successful candidate in 2018 in spite of the references.

131. Further, is evident that the Claimant seeks to advance her claim based on piecemeal responses to DSAR requests and covert recordings made with unwitting individuals discussing matters out of context. The Claimant has also been consistent in her wide ranging, onerous specific disclosure applications seeking to expand the scope of her claim.

132. Having considered all of the circumstances and submissions I conclude that the balance of prejudice favours the Respondent in refusing to exercise my discretion to extend time. The Claimant has not convinced me that it is just and equitable to extend time.

133. The Tribunal therefore does not have jurisdiction to consider the Claimant's complaint in respect of her non appointment to a role in 2018, which has been presented out of time and it is not just and equitable to extend time.

134. The Claimant's claims are therefore dismissed.

Employment Judge Burgher

25 October 2021

SCHEDULE A
List of Issues

1. Jurisdiction

A. Time points

1.1. Were the matters claimed issued at the Tribunal within time?

1.2. In respect with the ET1 claim, did the alleged conduct take place more than three months before the claims were registered with ACAS early conciliation (ie: before 17 June 2020)? In that regard, C notified ACAS of her claims on 16 September 2020 and the early conciliation certificates were issued on 1 October 2020. The ET1 claim was issued on 1 November 2020.

1.3. If yes then:

1.3.1. Is it permissible for a course of conduct extending over a relevant period to apply in respect of s13 or s27 claims made under s39 of the EA Act 2010? (NB: In that regard, C relies on s123(3)(a) of the EA 2010 and asserts the claim is within time. R relies on s123(3)(b) and s123(4) and asserts the claim is out of time).

1.3.2. If Tyagi v BBC World Service [2001] IRLR 45 ("Tyagi") prevents such claims, can Tyagi be distinguished on the facts or is Tyagi still good law in the light of the commencement of the Equality Act 2010?

1.3.3. If Tyagi does not prevent such claims, do any of the alleged acts constitute a course of conduct extending over the relevant period?

1.3.4. If not, would it be just and equitable to extend time under s123(1)(b) EA 2010? The Claimant will rely on witness evidence which is summarised at [ET1 POC paras 98-106];

B. The scope of section 39 EA 2010

It is agreed by both parties that the Claimant was a Job Applicant (ie: someone for whom arrangements were being made to decide whether or not to offer them employment) during the relevant period.

1.4. Over which period was the Claimant a Job Applicant at R2?
The Claimant's case is that she was a Job applicant from April 2018 until the date of the ET1 [Claimant's entire ET1 POC and for example at para 14—20, or para 21-33, para 37-49, para 61-69, 81-83]

The Respondent's position is that the Claimant was a Job applicant for two periods during the relevant period: (1) May-July 2018; and (2) November 2019-January 2020 [ET3 GOR para 1 sub para 2.2; para 2.1, para 2.2].

1.5. Are the claims set out below at (2) and (3) either (a) arrangements R2 made for deciding to whom to offer employment; and/or (b) terms on which R2 offered employment; and/or (c) R's decision not to offer employment to Claimant? Do all or any of the said alleged acts or omissions fall within the scope of section 39?

1.6. If so, does the Tribunal have jurisdiction pursuant to sections 39(1) and/or section 39(3) of the Equality Act 2010 to determine the claims for direct discrimination and victimisation respectively and as set out below at (2)-(3)?
The Claimant claims that all of the acts or omissions of detriment at (2) and (3) fall within the scope of section 39(1) or (3) of the Equality Act 2010. The Respondent asserts that none of the acts or omissions fall within s39 EA 2010.

2. Victimisation

2.1. The Respondent accepts that C carried out the following protected acts:

2.1.1. The ET1 claim and its contents issued on 14 December 2017 against Barclays and Mr Fares, Case Number 3201726/2017

2.1.2. The ET1 claim and its contents issued on 22 February 2018 against Barclays and Mr Fares, Case Number 3200307/2018

2.1.3. The ET1 claim and its contents issued on 14 June 2018 against Barclays and Mr Fares, Case Number 3201379/2018

2.1.4. The ET1 claim and its content issued on 12 November 2018 against Barclays and Mr Fares, Case Number 3202333/2018

2.2. The Respondent admits it had knowledge of the protected acts that the Claimant "has been discriminated against during her maternity period" [ET3 GOR 4.7]
When did R2 first have knowledge of the protected acts?

a) Was it March 2018, before Claimant applied to R2 ? [ET3 GOR para 4.7 and para 7.4]
b) Was it on 18th of May 2018 ? [ET3 GOR para 4.7]
c) Was it June - July 2018? [ET1 POC para 34]
d) Was it September 2018 – Jan 2019? [ET1 POC para 53 and para 54]
e) Was it 26th of August 2020 [ET3 GOR para 6.2 and para 7.4]
f) Was it continuous from in or before July 2018 onwards [ET1 POC para 35]?

2.3 Under s27 EA 2010 did the Respondent subject C to the following alleged detriments either (1) because C carried out a protected act or acts or (2) because R2 believed that C has done, or may do, a protected act?

2.3.1 By preventing C as a job applicant , "the best candidate", from obtaining a job at HSBC from until the date of the ET1 [ET1 POC para 6 and 7, heading on page 4 before para 12, para 11 and para 70] for any of the roles suggested and available for her over the relevant period:

a) Head of Hedge Fund Sales [ET1 POC para15, para28] or equivalent role eg: Head of Hedge Fund (in Sales);

b) Head of UK Pension Fund Sales [ET1 POC para 21, 22] or equivalent role;

c) Equity Derivatives Trading [ET1 POC para18] or equivalent role;

d) Combined Hedge Fund and UK Pension Fund Sales [ET1 POC para28] or equivalent role;

e) European Head of Risk Recycling [ET3 GOR para 4.2] or equivalent role;

f) Hybrid Risk Recycling and Hedge Fund Role [ET3 GOR para 4.3] or equivalent role;

g) Risk Recycling [ET1 POC para 61] or equivalent 1role ; and

h) Other unspecified/untitled/yet to be titled roles in equity derivatives sales [ET1 POC para 20, 36, 67, 81-82];

2.3.2 From 12th of June 2018 to date the Respondent fail to be transparent about the obstruction to the Claimant's hiring processes by using misleading tactics, false statements and concealment of the same [ET1 POC para 9, 10, 11, 25, 36, 67, 74, 75, 76, 80, 81] though some of the actions were unearthed over the relevant period:

a) on 17th of June 2020 [ET1 POC para 73] [ET3 GOR para 6.1 (e)]
b) on 26th of August 2020 [ET1 POC para 74-77 and para 101-104],
c) on 29th of September [ET1 POC 81],
d) On 16th of October 2020 [ET1 POC para 95, 105] [ET3 GOR para 6.1 (g)];

2.3.3 On 15 May 2018 by R2 verbally offering the Claimant the Equity Derivatives Sales Job at R2 ("exploring whether the commercial deal being proposed was of interest to the Claimant" [ET3 GOR para 4.8]), and by telling her to wait for the contract [ET1 POC para 20] but ultimately not proving her that contract or any explanation for that failure [ET1 POC para 44, 45 and 50];

2.3.4 On 29th of June 2018, by not offering the Equity Derivatives Sales job to the Claimant at the Director Level but instead offering it to her at a lower seniority level (VP or Associate Director) [ET1 GOP para 31] and [ET3 GOR 4.11 (b)] despite being considered the "best candidate" by R2 [ET1 POC para 6];

2.3.5 From 12th of June 2018 by Mr Bourrette (Head of Analytics) involving himself proactively in the Claimant's recruiting process for a role in Sales with the intention to negatively impact it and prevent her recruitment, despite not being a formal decision-maker in that recruitment [ET1 POC para 25, 37 and 40 and page 8 before para 36, para 74] [ET3 GOR para 4.10 and para 6.5];

2.3.6 On about 3rd July 2018 by (according to Mr Dutruit) Mr Zaimi (or more likely a more senior manager at R2 such as Patrick George), providing one or more negative informal references about C from C's former boss Makram Fares at Barclays to Eric Dutruit [ET1 POC para 32] [ET3 GOR para 4.9 (c) and (f)];

2.3.7 On 6th July 2018, by Frank Laccour providing negative informal reference about the Claimant [ET1 POC para 33] and [ET3 GOR para 4.9 (h) (i)];

2.3.8 On 10 July 2018 by Mr Bourrette misleading the Claimant, by making her believe that he was going to follow up with the coffee invitation, which he never did when in fact he used the information from her to sabotage her hiring process. [ET1 POC para 36];

2.3.9 On 11th July 2018, by senior hiring manager/s at R2 showing interest in receiving a negative unofficial feedback, from victimising sources about the Claimant in the hiring process at R2 [ET1 POC para 38];

2.3.10 On about 11 July 2018, by Mr Bourrette providing and endorsing a negative informal references, from victimising sources, about the Claimant to Mr Dutruit and Mr Delloye [ET1 POC para 37,39, 41, 44-49, 74, 76, 80], the "negative feedback …related to the Claimant's behavioural issues that had involved HR" [ET3 GOR para 4.10], and by Mr Bourrette using his senior position against C's hiring process [ET1 POC para 42, 43]

2.3.11 From July 2018 to the date of the ET1 claim, by the Second Respondent failing to organise a promised meeting between the Claimant and Mr. Zaimi, Global head of Market [ET1 POC para 31,32] and [ET3 GOR para 4.12];

2.3.12 In July 2018 by the Second Respondent hiring Andre von Riekhoff [ET3 GOR para 4.4] instead of the Claimant to the Head of Hedge Funds role [ET1 POC para 49];

2.3.13 From July 2018 to February 2019 the Second Respondent stopping Claimant's hiring process upon the false, derogatory, unofficial feedback from Mr Bourrette [ET1 POC heading page 9, and ET1 POC para 44-49] and failing to give her any explanation or feedback for that decision [ET1 POC para 50];

2.3.14 From July 2018 to February 2019, by the decision by the Second Respondent to suddenly stop communicating with Claimant in respect of any of the roles (2.4.1) for which she was being considered [ET1 POC para 45] and failing to give her any explanation or feedback for that decision [ET1 POC para 50] and by Eric Dutruit avoiding the Claimant until May 2019 [ET1 POC para 44];

2.3.15 On 9 May 2019 by Eric Dutruit and Marc Lemmel deciding to delay the progression of the C's hiring process, in respect of one of the Risk Recycling Sales roles (for which she was still being considered and for which the Respondent stated it still greatly needed people with C's skills), until after the birth of her child due to her pregnancy [ET1 POC para 61-62];

2.3.16 From 9th of May 2019 to 25th of November 2019, Eric Dutruit not meeting the Claimant while she was pregnant and using Marc Lemmel as an interface instead [ET1 POC para 62,63,64];

2.3.17 Mr Dutruit not disclosing to the Claimant that Mr Larrue was going to join the interview with her and Mr Dutruit [ET1 POC 65] and failing to declare to her the real reasons why he was joining them at that interview [ET3 GOR para 5.1 (b)].

2.3.18 On 25 November 2019, by Mr Larrue seeking, providing, repeating, and endorsing to the hiring managers of the Second Respondent, including to Marc Lemmel, Eric Dutruit, Frank Laccour, Renaud Delloye and also to the Claimant), false negative statements made about C during their hiring due diligence process or reconsideration of the same [ET1 POC para 66, 68, 69];

2.3.19 On 25th of November 2019, Mr Dutruit failing to disclose and misleading the Claimant about Mr Bourrette's role in the Claimant 's hiring process [ET1 POC Para 67];

2.3.20 On 28 January 2020, by Mr Lemmel repeating to C, and accepting false negative statements made about C by Barclays to Tristan Larrue during the hiring due diligence process or reconsideration of the same [ET1 POC para 68];

2.3.21 From 25th of November 2019 to 29th September 2020, Mr Dutruit not arranging any follow ups or feedback with the Claimant as promised in the interview of 25th of September 2019 [ET1 POC para 69];

2.3.22 On 26 August 2020, by Mr Bourrette informing C that he had negatively interfered with C's hiring process, by providing derogatory feedback on her, and concealing that fact from her, and admitting that he was aware of her protected acts and settlement with Barclays, and that he had remained in touch with C's manager at Barclays Bank [ET1 POC para 76-77, 80];

2.3.23 After C's email of 27 August 2020, and to the ET1 date, by Mr Bourrette not writing the requested letter by C, to those HSBC staff to whom he had provided derogatory and victimising information about C to prevent her recruitment, to inform them that the negative reference was unsubstantiated but involving HSBC HR instead [ET1 POC para 77];

2.3.24 On 29 September 2020, by Mr Bourrette further providing and endorsing a negative, unchecked references about the Claimant to the HR of the Second Respondent [ET1 POC para 77, 80];

2.3.25 On 29 September 2020, by Mr Bourrette falsely presenting the telephone conversation he had with the Claimant on 26 August 2020 to HR with the intention of negatively characterising C as pressing him (for the true role of Mr Bourrette in the prevention of her recruitment) [ET1 POC para 80];

2.3.26 On 29 September 2020, by Mr Dutruit informing C that the reason that she had not been hired thus far was the negative feedback from her "old boss at Barclays", and referencing the senior managers (all Lebanese male managers) at the Second Respondent for whom (Mr Dutruit said) their Lebanese connection with her old boss would make it more difficult for the Second Respondent to hire the Claimant in the future [ET1 POC para 81-83];

2.3.27 From 10th of July 2018 to 29th of September 2020, by Mr Dutruit failing to inform the Claimant about Remi Bourrette's adverse involvement in her recruitment processes at R2 over the relevant period, and only on 29th of September 2020 confirming he had received comments about the Claimant from Remi Bourrette [ET1 POC para 81];

2.3.28 From 10 September 2020 to 7 October 2020 by the sham investigation conducted by Ms Craven of HR [ET1 POC para 78, 84-92] including R2's refusal to investigate complaints if there was no email to support it [ET1 POC para 85], its failure to look into Mr Bourrette's messages with C's old boss from Barclays [ET1 POC para 86], the covering up of the detrimental treatment complained of [ET1 POC para 87, 89, 90, 91, 92] and the failure to address and properly investigate Mr Bourrette's covering up of his unlawful conduct [ET1 POC para 88];

2.3.29 On 7 October 2020, by the report of Ms Craven which wrongly failed to find any breach of the Respondent's recruitment processes [ET1 POC para 92] [ET3 GOR para 6.5];

2.3.30 On 7th of October 2020, Mr Craven refusing to disclose any information or document to the Claimant about the HR investigation into Claimant's hiring process. [ET1 POC para 92];

2.3.31 By the failure of R2 to inform C from July 2018 to the date of the ET1 that it had decided not to make a job offer to her in the future (aka - that she had been blacklisted) [ET1 POC para 11 and 70]

2.3.32 From 12th of June 2018 to the date of the ET1 claim by Mr Bourrette and R2 retaining information about the Claimant's hiring process from the Claimant (the identity of Claimant's old boss, sources of the damaging feedback, the exact content of the feedback, the decisions and the factors that went into C's hiring process), and hence preventing her future recruitment at R2 but also preventing her from finding employment elsewhere and stigmatising her [ET1 POC para 10,11,48, 94, 96,104, 106];

2.3.33 By R2's failure to disclose documents under the DSAR reply from 10 November 2018 to the date, requested for on 10th of October 2018 and in May 2018, (although partly remedied on 17 June 2020 [ET1 POC para 73], on 16th of October 2020 and on 18th of May 2021 part of the Disclosure Process) with the intent of hiding the facts about the Claimant's hiring process [ET1 POC para 55 and 57, 73, 96]; and

2.3.34 Over the relevant period, by the Second Respondent creating a hostile recruitment environment where sex discrimination and victimisation are practiced at an institutional level within the hiring process [ET1 POC para 11, para 52, para 51, para 88].

3 Direct Sex Discrimination

3.1 Was C treated less favourably because of her sex contrary to section 13 of the Equality Act 2010 by the following alleged detrimental acts (2.3.1 -2.3.343) ? The comparator is Andre von Riekhoff [ET1 POC para 49] and if this comparator is deemed to be unsuitable then the Claimant relies on a hypothetical comparator.

4 Direct Race Discrimination

Was C treated less favourably because of an offensive racist remark made by Mr Dutruit to her about the conduct of Lebanese managers towards her contrary to section 13 of the Equality Act 2010 as set out below?:

4.1 On 29 September 2020, by Mr Dutruit informing C that the reason that she had not been hired thus far was the negative feedback from her "old boss at Barclays", and referencing as the reason for that career obstruction the fact that the senior managers (all Lebanese male managers) at the Second Respondent held(Mr Dutruit said) a Lebanese connection with her old boss which would operate to make it more difficult for the Second Respondent to hire the Claimant in the future [ET1 POC para 81-83]. The remark was offensive, racist, and put forward to disguise his involvement in her blacklisting as well as the main reasons for her blacklisting which were her protected act and her gender.

5. Remedy

If the Tribunal finds that any of the Claimant's claims above are proven:

5.1 Is an award for pecuniary losses such as loss of earnings appropriate on the facts?

5.2 If so, how much should be awarded for any such pecuniary losses?

5.3 Is an injury to feelings award appropriate in the circumstances?

5.4 If so, how much should this injury to feelings award be taking into consideration the bands as set out in Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102 (EWCA) as clarified in Da'Bell v NSPCC UKEAT/0227/09)?

5.5 Is an award for aggravated damages appropriate on the facts?

5.6 If so, how much should be awarded for any such aggravated damages?

5.7 Is an award for stigma damages appropriate on the facts?

5.8 If so, how much should be awarded for any such stigma damages?

5.9 Is it appropriate for the tribunal to make an appropriate recommendation (section 124(2) EqA)?

5.10 Is it appropriate for the tribunal to make a declaration?

5.11 Whether any compensation should be altered to take into consideration any breaches of the ACAS code?

5.12 Should a s12A Employment Tribunal Act 1996 be made and if so what fine should be levied against R2?