



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Conningham

**Respondent:** Warner Bros Entertainment Ltd

**Heard at:** London Central

**On:** 24 – 28 and 31 Oct,  
22 Dec 2022 (in  
Chambers)

**Before:** Employment Judge H Grewal  
Mr S Jary and Mr D Schofield

## Representation

**Claimant:** Mr M Singh, Counsel

**Respondent:** Mr S Purnell, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaints of direct age, race and sex discrimination and harassment in respect of the Respondent's failure to benchmark the Claimant's role to that of manager are not well-founded;

2 The complaints of direct sex discrimination and harassment about not paying the Claimant a salary more commensurate to her role are not well-founded; and

3 The Tribunal does not have jurisdiction to consider all the other complaints of direct age, race and sex discrimination and harassment.

# REASONS

1 In a claim form presented on 6 July 2021 the Claimant complained of age, race and sex discrimination. Early Conciliation ("EC") was commenced on 8 June 2021 and the EC certificate was granted on the same day.

2 At a preliminary hearing complaints of indirect sex discrimination, for equal pay and some of the complaints of direct age, race and sex discrimination were dismissed on withdrawal by the Claimant.

## The Issues

3 It was agreed that the issues that we had to determine were as follows.

### Direct discrimination because of age and/or race and/or sex

3.1 The Claimant describes herself as being of Asian/Indian ethnic origin and was aged between 46 and 51 at the material time. Whether the Respondent discriminated against the Claimant by:

- i. Not appointing her on 7 June 2017 to the Content Manager role following an interview with Simon Culm, Executive Director, Sales and Business Development;
- ii. Gemma Broadhurst not selecting her on 1 October 2017 for interview for the Creative and Formats Manager role;
- iii. Not giving her a final interview for the Senior Strategy Manager role after a pre-interview chat with Natalie Francis on 27 November 2017 although external head-hunters had recommended the Claimant for short-listing for role;
- iv. Not appointing her on 5 March 2018 to the Sales Executive, Theatrical Sales role following an interview with Neil Marshall, SVP, Theatrical Sales (The Claimant relied on Patrick Keane as a comparator);
- v. Nikki Giles, Business Development Analyst, informing her on 24 April 2018 that she would not be interviewed for the Harry Potter role;
- vi. Not interviewing her on 1 May 2018 for the Senior Marketing Executive role;
- vii. Ms Glasscoe withdrawing an offer of promotion that she made on 3 September 2018;
- viii. Not putting her forward for interview for the Business Executive to Robert Blair role on 19 January 2019 although the Respondent's US head-hunters had recommended that she be interviewed;

- ix. Mr Thomas, Head of Catalogue Marketing, not offering her an interview on 22 February 2019 for the Marketing Manager, Theatrical Catalogue Marketing role;
- x. Not offering her an interview on 9 March 2019 for the Marketing Executive, Film Marketing UK WHEG role (the Claimant relied on Natalie Fern Davies as a comparator – race and age);
- xi. Ms Glasscoe not asking her the same questions as she asked the other candidate at an interview for the Digital Sales Manager role on 14 October 2019 and not offering her the role (The Claimant relied on Harry Greasley as a comparator – race, age and sex);
- xii. Ms Sharp, VP of Digital Sales and Distribution, telling her in January 2020 that she did not qualify for the third of the three Sales Manager roles;
- xiii. Not offering her an interview on 23 January 2020 for the Marketing Executive, WBTV Marketing role (The Claimant relied on Maggie Bolhous as a comparator – race and age);
- xiv. Failing to benchmark the Claimant’s role to that of a manager on 25 March 2021 (The Claimant relied on a hypothetical comparator and relied on Joseph Gibbons, Harry Greasley and Matthew Keegan to assist the Tribunal to construct the appropriate comparators)

#### Direct Sex Discrimination

3.2 Whether the Respondent discriminated against the Claimant by failing to pay her a salary more commensurate to her role which was similar to Mr Keegan’s role. The Claimant relied on a hypothetical comparator and relied on the Respondent’s treatment of Joseph Gibbons, Harry Greasley and Matthew Keegan to assist the Tribunal to construct the appropriate comparator.

#### Harassment related to age, race or sex

3.3 In the alternative, whether any of the matters at 3.1 and 3.2 (above) amounted to unlawful harassment.

#### Jurisdiction

3.4 Whether the Tribunal has jurisdiction to consider any complaints that were not presented within the primary time limit (including the extension granted for Early Conciliation).

#### The Law

4 Section 13(1) of the Equality Act 2010 (“EA 2010”) provides,

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

Race, sex and age are protected characteristics (section 4 EA 2010). On a

comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case (section 23(1) EA 2010)..

5 Section 26(1) EA 2010 provides,

- “A person (A) harasses another (B) if –
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of -
    - (i) violating B’s dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

Section 26(4) EA 2010 provides,

- “In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
- (a) the perception of B;
  - (b) the other circumstances of the case,
  - (c) whether it is reasonable for the conduct to have that effect.”

6 Section 136 EA 2010 provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred unless A shows that A did not contravene the provision.

7 In **Igen Ltd v Wong [2005] IRLR 258** the Court of Appeal gave guidance on what is required under section 136 to shift the burden to the Respondent. It said,

*“(1) ... it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful... These are referred to below as “such facts.”*

*(2) If the claimant does not prove such facts he or she will fail.*

*(3) It is important to bear in mind in deciding whether the claimant has provided such facts that it is unusual to find direct evidence of sex discrimination. In some cases the discrimination will not be an intention but merely based on the assumption that ‘he or she would not have fitted in’.*

*(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*

*(5) It is important to bear in mind the word ‘could’ [in section 136] At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage the tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*

...

*(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts ... This means that inferences may also be drawn from any failure to*

*comply with any relevant code of practice.*

*(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.”*

8 In **Madarassy v Nomura International plc [2007] IRLR 247** Mummery LJ stated,

*“The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent ‘could have’ committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”*

9 The Equality and Human Rights Commission: Code of Practice on Employment (2011) (“the EHRC Code”) provides at paragraph 1.13,

*“The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the courts and tribunals can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any question arising in proceedings.”*

Paragraphs 16.44 and 16.45 of the EHRC Code provide,

*“16.44 An employer should ensure that these processes [the selection, assessment and interview processes] are fair and objective and that decisions are consistent. Employers should also keep records that will allow them to justify each decision and the process by which it was reached and to respond to any complaints of discrimination. If the employer does not keep records of their decisions, in some circumstances, it could result in an Employment Tribunal drawing an adverse inference of discrimination.*

*16.45 In deciding exactly how long to keep records after a recruitment exercise, employers must balance their need to keep such records to justify selective decisions with their obligations under the Data Protection Act 1998 to keep personal data for no longer than is necessary.”*

Paragraph 1.7.1 of the Data Protection: Employment Practices Code (2011) provides that an employer should establish and adhere to retention period for recruitment records that are based on a clear business need. It should,

*“ensure that no recruitment record is held beyond the statutory period in which a claim arising from the employment process may be brought unless there is a clear business reason for extending that period.*

Paragraph 17.3 of the EHRC Code provides,

*“Where resources permit, employers are strongly advised to maintain proper written records of decisions taken in relation to individual workers , and the*

*reasons for these decisions. Keeping written records will help employers reflect on the decisions they are taking and thus help avoid discrimination. In addition, written records will be invaluable if an employer has to defend a claim in an Employment Tribunal.”*

Paragraph 17.83 of the EHRC Code provides,

*“Failure to inform workers of opportunities for promotion or transfer may be direct or indirect discrimination. To avoid discrimination, employers are advised to advertise all promotion and transfer opportunities widely throughout the organisation. This includes development or deputising opportunities or secondments that could lead to permanent promotion.”*

10 Section 123(1) EA 2010 provides,

“Subject to section 140B 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.”

Section 123(3) provides,

“For the purposes of this section –

- (a) conduct extending over a period is to be treated as done at the end of that period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.”

Section 140B provides for extension of time to facilitate Early Conciliation. The effect of section 140B in this case is that complaints about any acts or failures to act that occurred before 8 March 2021 will not have been presented within the primary time limit.

11 An act of discrimination occurs when the act or omission takes place and not when the claimant acquired knowledge of it. Time begins to run from the date on which the act or omission occurred and not from the date when it is communicated to the claimant – **Mensah v Royal College of Midwives EAT/124/94** and **Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24**.

12 In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** the Court of Appeal was considering a decision made by a Tribunal at a preliminary hearing on how to approach the issue of an act extending over a period. Mumm LJ said at paragraph 52,

*“The concepts of policy, rule, practice scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement if the indicia of ‘an act extending over a period’... Instead the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. 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."*

Mummery LG stated,

*"She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period' ...*

*At the end of the day Miss Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and there was no 'act extending over a period' for which the Commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination."*

13 In **South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168** Choudhury J stated at paragraph 33,

*"In order to give rise to liability, the act complained of must be an act of discrimination. Where the complaint is about conduct extending over a period, the Claimant will usually rely upon a series of acts over time (I refer to these for convenience as the 'constituent acts') each of which is connected with the other, either because they are instances of the application of a discriminatory policy, rule or practice or they are evidence of a continuing discriminatory state of affairs. However, if any of those constituent facts is found not to be an act of discrimination, then it cannot be part of a continuing act. If a Tribunal considers several constituent acts taking place over the space of a year and finds only the first to be discriminatory, it would not be open to it to conclude that there was nevertheless conduct extending over a year."*

He said at paragraph 36,

*"reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time."*

14 Where the complaint of discrimination is about a failure to appoint someone to a particular role or to regrade a person's role, in the absence of evidence about that decision being made in the pursuit of a policy or practice that prevents persons having the same protected characteristic as the complainant from being employed in that role or at the higher grade, that will be an act or omission that occurred at the time when the decision was made. The fact that that act has continuing consequences does not make it conduct extending over a period – **Amies v Inner London Education Authority [1977] ICR 308** and **Sougrin v Haringey Health Authority [1992] ICR 650**.

## **The Evidence**

15 The Claimant and Julian Conningham (her husband) gave evidence in support of her claim. We admitted the witness statement of Emma Bendrien-Gumbs (former Sales Admin Executive) who did not attend. We indicated that we would attach to it such weight as we thought appropriate. The following witnesses gave evidence on behalf of the Respondent – Samantha Glasscoe (Digital and Physical Online Sales Controller), Gemma Broadhurst, (Director for Talent Acquisition, EMEA) Simon Culm (Executive Director of Sales and Business Development, Filmbank Distributors Ltd), Natalie Francis (Executive Director, Executive Search), Neil Marshall (Head of Theatrical Distribution and Local Film Production and Acquisition), Nicola Gillies (Head of International Talent Acquisition), Sarah Perry (Talent Acquisition Manager), Ruth Sharp (Vice-President, Digital Sales and Market Insight), Shelly Drury (Executive Director, Marketing – Television), Samantha Winetroube (Compensation Partner, Compensation and Benefits Team), Alexandra Saifer (Head of People Partners, UK and Ireland) and Sameera Anwar West (Executive Director, EMEA People Relations). The documentary evidence in the case comprised five lever-arch files. Having considered all the oral and documentary evidence the Tribunal made the following findings of fact. We have not made and recorded findings of fact on every single issue before us. We have focused on those that are, in our view, central to the issues. The failure to make or record a finding of fact on a particular issue does not mean that we did not have regard to it.

## **Findings of Fact**

16 The Respondent is a large company and is part of a global group of multimedia and entertainment companies. The identity of the global group has changed over the last four years as a result of a number of mergers and acquisitions. In 2019 Warner Brothers and Time Warner merged with HBO and Turner to become Warner Media. In May 2021 it was announced that WarnerMedia would be merging with Discovery Inc and the new company would be known as Warner Bros Discovery. These different businesses had different staff structures, benefits, processes and policies which had to be harmonised when the mergers took place. The Respondent employed 525 people in the UK.

17 The Respondent had a 2.5 page Equal Opportunities Policy that was created in May 2013. It did not deal specifically with recruitment. Warner Bros had an anti-Bullying and Anti-Harassment Policy that was effective from 30 October 2019. Warner Bros had a Diversity and Equality Policy that was effective from 1 June 2020. That policy comprised 3.5 pages, of which about half a page related to recruitment and selection.

18 The Claimant was born on 11 August 1970 and describes herself as being of Asian/Indian origin.

19 The Claimant commenced employment with the Respondent (which was then part of the Warner Bros Group) on 23 May 2016 as Digital Sales Admin Executive. She was nearly 46 years old at the time. She was interviewed and selected for the role by Samantha Glasscoe, who was then the Digital and Physical Online Sales Controller. The salary for the role was £31,000 per annum. The Claimant reported to Ms Glasscoe who remained her line manager until September 2019. Ms Glasscoe



reported to Doug Fox (Vice-President, Sales) who in turn reported to John Stanley (Managing Director).

20 The team managed by Ms Glasscoe was a small team. In addition to the Claimant, there were three National Account Managers who managed various accounts and had individual responsibility for meeting sales targets and generating revenue. They all reported to Ms Glasscoe. The Claimant's role was to work with the US team to ensure that film and TV content was made available to the right digital partners at the right time in a format that could be accessed by the digital partner's customers. It was essentially a co-ordinating administrative role that supported and enabled the distribution of content. It did not require any particular qualifications. In terms of skills and experience, it ideally required 2-3 years' studio, media supply chain and/or Digital distribution experience and strong Office and Excel skills. In her first few weeks in the role the Claimant was assisted by C Olafare, a temporary employee on a fixed-term contract. The Claimant's job description listed one of her responsibilities as "*managing the allocation for the Sales Admin Assistant.*"

21 Prior to her employment with the Respondent, the Claimant had worked at the BBC from July 2014 to September 2015 as an Executive Assistant and from October 2015 to February 2016 as a Scheduling Assistant. Prior to that it appeared the Claimant had held another role at the BBC, but we could not determine what it was or for how long she had been in that role because in the various applications that she made while with the Respondent she gave different job titles and dates for that role. She had a degree in Land Economy and a post graduate diploma in Marketing.

22 At a catch up meeting with Ms Glasscoe at the end of June 2016 the Claimant complained about her workload since the departure of Ms Olafare. Ms Glasscoe proposed to her manager that they hire another person in the Digital Admin role to divide the workload between two persons. That was accepted. On 3 October 2016 Miguel Mesa-Banez joined Digital Sales as Digital Content Administrator. When he first started and was new to the role the Claimant introduced him to the Respondent's processes and contacts. Once he had settled in, the work was formally divided between him and the Claimant, with Mr Mesa-Banez being responsible for film and the Claimant for TV. Mr Mesa-Banez reported to Ms Glasscoe at all times. He was not line managed by the Claimant. He was employed on a fixed-term contract.

23 In her role the Claimant attended weekly sales and digital sales meeting with her team. She also attended other meetings when she was invited to them. Ms Glasscoe also had some one-to-one meetings with the Claimant, although these did not take place on a regular basis. The Claimant was not invited to meetings that Ms Glasscoe had with the Account Managers as she did not manage accounts and that was not considered a good use of her time. The Claimant accepted that when she had said in her internal applications that she attended all sales and marketing meets that had not been correct.

24 At the material time the Respondent did not have a written recruitment policy. Its policy though was to advertise all roles internally as well as externally. Internal applicants could either apply online through a tracking system (BrassRing) or by email to the Talent Acquisition team. If the application was made through BrassRing, it would generate an automated response. The Claimant had initially said in her evidence that no such response was generated, but in the course of the hearing she produced one such response. HR would normally speak to internal candidates

informally about their interest in, and suitability for, the role. HR would also screen internal candidates and pass a shortlist to the hiring manager. The hiring manager would then decide who to interview. HR would normally provide feedback to unsuccessful internal candidates. Following the passing of the Data Protection Act 2018 the Respondent only retains recruitment records for a period of six months. It had a GDPR-complaint document retention policy of expunging candidate sensitive information every six months.

25 The Respondent does not keep records of the age or race of applicants and employees. The evidence that we were given of the age and race of the successful candidates for various roles for which the Claimant applied was not based on data held but was the view of the person giving evidence.

26 In May 2017 the Claimant applied for a Content Manager role in Filmbankmedia Distributors Ltd ("Filmbankmedia"). (Application 1) Filmbankmedia is a separate entity from the Respondent but was partly owned by Warner Bros. It used WB for some support functions such as recruitment and HR. Filmbankmedia was in the business of non-theatrical film distribution (i.e. selling content to places such as hotels, hospitals, schools, etc) in over 80 international territories and it provided licensing for film screening that took place outside of the cinema and home environment.

27 The Content Manager role reported to the CEO. The role required 4-5 years' experience within the commercial licensing background, ideally from the Entertainments industry, a passion for content and experience of working with international distributors/producers was desirable. The role was benchmarked at an Account Manager level.

28 The hiring manager for the role was Simon Culm, who was then the Executive Director of Sales and Business Development at Filmbankmedia. He was assisted by Gemma Broadhurst (Talent Acquisition in WB). There were 152 applications. On 24 May Ms Broadhurst sent Mr Culm a shortlist of about six candidates for him to decide which ones he wanted to interview. The Claimant was one of the people Mr Culm selected to interview. She was interviewed on 7 June 2017 by Mr Culm. Due to the passage of time, Mr Culm did not have any notes or clear recollection of the interviews and the questions asked. His evidence, however, was that all interviewees were asked the same questions. His decision was that the successful candidate was the best suited to the role as she had the most relevant experience for the role.

29 The successful candidate was a white French woman in her mid-to-late 30s. She had worked in film since 2010. She had worked for Filmbankmedia since February 2015. From February 2015 to January 2017 she had worked as an Account Manager and had managed the HotelVision department licensing the content of various studios to System Integrators for the international hospitality market across approximately 500,000 rooms. Since January 2017 she had worked as Account and Acquisitions Manager and had been responsible for content acquisition as well as existing licensors' legal account management. Her starting salary in the role was £48,000.

30 On 12 June Ms Broadhurst informed the Claimant that she had not been successful. She said that Mr Culm had felt that she did not have quite enough experience for what they needed for that role.

31 On 4 July 2017 the Claimant applied for the role of Business Executive in the International TV Distribution team (Application 2). It was a 12 month fixed-term contract. The salary for the role was £70,000 per annum plus bonus and benefits. The primary purpose of the role was described as follows,

*“The role ... will support the EVP and his team with a variety of projects for ongoing development and management of Warner Bros International Television Distribution. The projects will include analysis, research, business development, marketing, strategy, reporting and planning. This role will also support and drive the progress of key projects as directed by the EVP. It is a highly visible role and requires frequent interaction with all employee levels, including the senior executive team.”*

The ideal candidate was described as “a consistent over-achiever with excellent academic qualifications”, preferably multilingual and was required to have relevant experience. Research, business development or strategy experience would be a distinct advantage.

32 In her application the Claimant said that she had worked as Content Executive at the BBC from 2006 to 2012 and that in her role at the Respondent she attended all sales and marketing meetings to review release performance, forecasts and budgets.

33 The recruitment for the role was carried out by Tom Carver, a temporary consultant in the Respondent’s Executive Search team. It was advertised internally and externally. There were 366 applications for the role, 40 of whom made it through the initial screening process and 8 of whom were invited to a final interview and assessment day.

34 The Claimant made it through the initial screening and Tom Carver had a short telephone interview with her on 14 July 2017. On 26 July the Claimant was informed that she had not been selected for the assessment day. She was told that it was due to the fact they had a number of applicants with “a strong mix of European languages, media background, international experience and relevant project experience.”

35 The successful candidate was a white male (Italian) in his early 30s. He had a degree in Business Administration and Management and an MSc in International Management (part of which was done in Shanghai). He was fluent in Italian and English and had low level knowledge of Spanish and a Chinese language. He had worked for Discovery Communications in Milan since February 2013 in different roles. Since September 2015 he had been in the role of Business Strategy Executive and had supported the EVP General Manager Italy and the senior management team in developing business strategy.

36 On 1 October 2017 the Claimant applied for the Creative and Formats Manager role in the Respondent’s International TV Production department (Application 3). The Respondent had been unable to locate either the job description or the CV of the successful candidate for this role. It was a mid-to-senior production focused role with a salary of £50,000. In this application the Claimant said that she had worked as Content Executive (Including Formats) at the BBC from 2011-2013. In terms of what that role had entailed, she added that it included liaising with format owners on

international potential of their programming slate, putting together the roll out strategy for new formats, monitoring the quality of international versions of BBC formats and incorporating changes/improvements into the format bible.

37 Gemma Broadhurst assisted in recruiting for that role. The role was advertised internally and externally. There were 158 applicants. Ms Broadhurst compiled a shortlist of the candidates to be interviewed. 11 applicants were interviewed. The Claimant was not invited for an interview. Due to the lapse of time Ms Broadhurst did not have a clear recollection of why the Claimant was not selected for interview. Having looked again at the Claimant's CV she thought that it was probably because the Claimant's relevant experience for the role was more than four years old at the date of her application.

38 The successful candidate was a woman of South-East Asian origin in her early 40s. She had strong and recent experience as a Marketing and Creative Manager, International Formats.

39 Following the Claimant's unsuccessful application for this role, Ms Broadhurst met with the Claimant to give her feedback and to discuss her broader career aspirations. She suggested ways in which the Claimant could present her CV more effectively and better frame her experience for similar roles in the future.

40 On 24 November 2017 the Claimant applied for the role of Senior Strategy Manager, UK Ireland and Spain, reporting to the President and Managing Director, Warner Bros, UK, Ireland and Spain (Application 4). The primary purpose of the role was to support the President and Managing Director across all of his responsibilities within the business, including the management of those territories and franchise management of the Harry Potter franchise globally. The essential job functions included strategic advice to the President, oversight and guidance on high level projects, representing the President during key meetings and preparing and overseeing presentations for key external and internal clients. The education required was a BA/BSc degree from a top 10 university and an MBA or equivalent international degree/experience was highly desirable. The salary for the was £90,000

41 The incumbent in the role, L Nemazee, was a BAME woman in her 30s who had a degree from Brown University and an MBA from INSEAD and had strong relevant experience in the finance and entertainment industries. She was progressing into a more senior role as Vice President, Franchise Development.

42 Natalie Francis in Executive Search assisted the then President in the recruitment to this role. There were 232 applicants for the role. Eight candidates were invited for interview. The Claimant was not selected for interview. Ms Francis had not met the Claimant prior to rejecting her application and she did not know the Claimant's age or race. Those who were selected for interview had significantly stronger and more relevant experience than the Claimant and typically came from Strategy Director or equivalent backgrounds.

43 On 27 November Ms Francis sent Ms Nemazee a final list of potential candidates and pointed out that there was an internal candidate and gave the Claimant's name and said that she would have to deal with her (i.e. provide her feedback). Ms Nemazee responded,

*“Yeah I noted the internal though she doesn’t feel right. She’s eager and has reached out to me before about getting involved in initiatives like diversity, picking up on things that Josh has said on it. Style not quite right from what I recall.”*

44 On 1 December Ms Francis met with the Claimant and told her that her application would not be progressing to interview and provided informal feedback., which included constructive advice on focusing on more realistic recruitment opportunities.

45 The successful candidate was a white (British) male in his 30s. He had a BA in Global Development Studies from the University of California at Berkely and an MBA from INSEAD. He had worked for three years as a Lead Co-Ordinator for a large media production house in Los Angeles. His role had involved project management, client relationships and problem solving and structured analysis.

46 On 5 March 2018 the Claimant applied for a Sales Executive (Theatrical Sales) role in Film Sales & Distributions (Application 5). The focus of the role was selling Warner Bros content to a large cinema chain and a number of independent cinemas. It required a strong background in sales and negotiations. The salary for the role was £30,000. In her application for this role the Claimant said that she had worked as a Sales Executive for the BBC from 2008 to 2013.

47 Neil Marshall, Head of Theatrical Distribution, was the hiring manager for the role and was assisted by an internal HR person. There were a large number of applicants for the role and about 8-10 progressed to an interview. The Claimant was one of them. Mr Marshall conducted the interviews and used a standard set of questions which he asked all the applicants. His recollection was that the Claimant had struggled to demonstrate relevant sales experience and he was not convinced that she had the level of passion and knowledge about contemporary film required for the role. The Claimant was not successful.

48 The successful application was a white (British) male in his 20s. He had been a Theatrical Sales intern with Warner Bros International Pictures for a year in 2015-2016 and since September 2017 had worked as Sales Assistant for United International Pictures.

49 In July 2017 Will Harrison, the Business Development Director for Harry Potter Global Franchise Development, drew up a job description for a Business Development Analyst role and sent it to Niki Gilles in International Talent Acquisition. The job description was revised in October 2017 as the compensation team felt that it needed to be revised if Mr Harrison wanted to recruit and pay at the level that he did. He wanted someone who had an undergraduate degree in a relevant subject and a Masters degree as a desirable. He wanted someone with more than six months’ experience in a consulting firm or start-up or in analytical/project management role. The primary purpose of the role was to *“provide support to the Business Development Director and broader team across a range of tasks including financial analysis and business planning, market and competitor research, strategy development, and negotiation support.”* The salary for the role set at £48,000.

50 The Claimant’s evidence was that she applied for this role in April 2018 and she produced an application which she said that she submitted for the role (Application

6). The Respondent had no record of ever having received an application from the Claimant for this role and the Claimant did not produce any evidence of it having been submitted. We concluded that the Claimant did not apply for this role when it was advertised between July and October 2017. If she had done so, it is very unlikely that she would have been interviewed or successful in being appointed as she did not have the relevant experience.

51 The successful candidate was a multi-racial male in his late 20s/early 30s. He had worked as an analyst for a strategy consultancy from April 2013 to September 2014 and as a consultant for another consultancy that specialised in M&A advisory and commercial due diligence for transactions from August 2015 to July 2016. Since July 2016 he had worked as a Commercial Assistant in a venture capital firm which invested in film, television and tech content.

52 At the beginning of 2018 the Claimant asked Ms Glasscoe if she could take on a small account to get experience of managing a digital account. The Claimant also asked for her job title to be changed to include the word “manager”. In March 2018 Ms Glasscoe proposed extending Mr Mesa-Banez’s contract for a further six months, changing his and the Claimant’s job titles to Digital Content Managers and for digital accounts with zero facetime to sit with them. The extension of Mr Mesa-Banez’s contract was approved. She was asked to work on the plan for certain accounts to sit with them and to remit it and was told that the change of job titles was a matter to be discussed. At some stage Ms Glasscoe told them that she had proposed the change of title for them. Ultimately, those proposals were not approved by Ms Glasscoe’s line managers.

53 In May 2018 Gemma Broadhurst assisted Andrew Forrest, Marketing Director in WB International Television Production (“WBITVP”) to recruit a Senior Marketing Executive in his team. Mr Forrest left the Respondent some time ago. The role reported to Mr Forrest and was responsible for coordinating all aspects of trade marketing for the WBITVP business, supporting the commercial objectives of WBITVP local production companies as well as the London based format sales team and the WBITVP finished programme sales team. It took sole responsibility for the development and creation of high impact marketing materials. The successful candidate for the role was required to have “*proven marketing experience within international TV production or distribution, with knowledge and understanding of TV production process, international TV markets and TV trade marketing.*” The post was advertised internally and externally.

54 The Claimant says that she applied for this role and has produced an application which she drafted for it (Application 7). In the CV she prepared for that role she said that she had worked as a Sales and Marketing Executive for BBC Television from 2008 to 2013. The Respondent had no record of the Claimant having applied for the post. The Claimant did not produce any evidence to show that the application had been sent. The Claimant was not interviewed for the role.

55 The successful candidate was a white (British) woman aged about 28. She was hired at Executive level as none of the candidates were of Senior Marketing Executive calibre. She had worked as Marketing Assistant at MTV from May 2015 to May 2016 and since May 2016 had been a Marketing Executive at ITV Studios. She was paid a salary of £34,000.

56 In May 2018 Sara Florence, who was the National Account Manager for the Amazon account (both physical and digital) in Ms Glasscoe's team, went on maternity leave. A job description was drawn up for the maternity cover of the Amazon Physical National Account Manager role, but the post was not advertised. The job description stated that responsibilities of the role included managing the planning and delivery of effective sales strategies, building effective cross functional business relationships to deliver sales team objectives and business plans and monitoring and reporting on activities, trends and changes in Amazon's business. Joe Gibbons was seconded from the Insights/Retail Planning team to cover the role while Ms Florence was on maternity leave. Mr Gibbons had worked closely with Ms Florence on the planning and forecasting of all the sales, stock and revenue for both the digital and physical sides of the account. He showed an interest in covering Ms Florence's role and his boss had discussions with John Stanley (Managing Director) and Doug Fox (Vice-President, Sales) about the secondment. Although the job description was for the physical side of the Amazon account, Mr Gibbons also forecast revenue for the Digital accounts.

57 At a one-to-one meeting in September 2018 the Claimant said to Ms Glasscoe that she had offered her a promotion to Digital Content Manager and had then withdrawn it (Application 8). She said that she would like to accept the offer of promotion. Ms Glasscoe said that she had not offered the Claimant promotion as she had no authority to do that. The Claimant accepted in evidence to us that she knew that promotions could only be authorised by Ms Glasscoe's managers. In any event, Ms Glasscoe had not proposed promotion but a change of title because that was what the Claimant had wanted.

58 John Deller, another of the National Account Managers, left suddenly at the beginning of 2019. At that time the Respondent was unable to recruit because of pending merger with HBO. Joe Gibbons, Simone Ashby (the third National Account Manager) and Ms Gibbons covered his role.

59 In February 2019 the Respondent advertised a Marketing Manager (Catalogue) role (Application 9). The role was responsible for creating and implementing Product and Promotional plans for the Respondent's Film Catalogue and maximising sales and delivering financial expectations across a defined group of retail partners. The skills and experience required for the role were said to be,

*“Excellent project manager; taking end-to-end ownership for product lifecycles and retailer promotions.*

*Track record in planning product promotions and bringing new product to market, from profit margin to point of purchase execution.”*

The hiring manager was Colin Thomas, Head of Catalogue Marketing, who left the Respondent in 2020. He was assisted by Sarah Perry and Nicola Gillies from Talent Acquisition.

60 The Claimant was interested in applying for the role but accepted that she did not apply for it. She said that she had an informal conversation with Mr Thomas who told her that she did not have the right skill-set for the role. As Mr Thomas had long since left the Respondent's employment it could not comment on whether such a conversation had taken place. It was not unusual for recruiting managers to have

informal conversations with internal persons who might be interested in applying for a role.

61 There were 270 applicants for the role and 4 were invited for interview. However, the recruitment process was put on hold as the Senior Marketing Manager TV and Family Entertainment Franchises in Catalogue was going to be absent for a year. The duties of the advertised role and the absent Senior Marketing Manager were divided among three individuals already working in the Catalogue Marketing team. They were S Douglas, W Attard and W Fraser. They were all given temporary pay increases while they undertook the additional duties. W Fraser's job title was changed to Interim Junior Marketing Manager.

62 In March 2019 the Respondent advertised a Marketing Executive - Film role in its Marketing department (Application 10). The role entailed providing support and assistance on marketing campaigns on the Respondent's film titles across their theatrical and home entertainment releases. It required a good understanding of the film marketing process from either a home entertainment or theatrical background. The salary for the role was £32,000. Lisa Towney was the hiring manager and was assisted by Sarah Perry from Talent Acquisition.

63 There were 271 applicants for the role. Ms Perry compiled a shortlist of candidates to be interviewed by Ms Towney. Ms Perry had no recollection of the Claimant applying and did not have her CV. At the hearing the Claimant produced an automated response to her application for the role. Ms Perry shortlisted seven applicants. The Claimant was not one of them. At that time Ms Perry had not met the Claimant and did not know her age or her race.

64 The successful candidate was a 22 year old white (British) female. She had been a Film Marketing Intern in the Respondent's Film Marketing department from July 2017 to July 2018 and had carried out the duties of the advertised role.

65 In March 2019 S Florence returned from maternity leave. In April 2019 Simone Ashby (the other NAM in Ms Glasscoe's team) left. At that stage the Respondent could not recruit anyone to replace her because of the merger with HBO and the TUPE obligations which would potentially arise from that. Mr Gibbons took on responsibility for the iTunes, Microsoft and Sony accounts and on 1 May 2019 his title was changed to Account Manager. Around the same time Ms Florence also gave notice that she would leave in July 2019. In June 2019 Ms Glasscoe had discussions with John Stanley about the Account Manager vacancies in her team and the members of her team who were interested. The Claimant indicated that she would be interested in the Digital Account Manager role. In about the middle of 2019 the Respondent merged with Turner and HBO and Time Warner to become WarnerMedia.

66 There was a leaving lunch for Ms Florence which the Claimant described as "a long boozy lunch". At the lunch Ms Florence asked the Claimant questions about her family and her children. The Claimant found the questions intrusive. She was sensitive about her age.

67 There was a restructure in September 2019 as a result of which Ruth Sharp, who was then Finance Director, replaced Ms Glasscoe as the Claimant's line manager.



68 In October 2019 the Respondent advertised the Digital Account Manager role (Application 11). The role was to drive the Respondent's Home Entertainment sales and to maximise its revenue by working with digital partners, marketing and retail planning. It required a proven track record of working in a similar sales focused role within the media industry and a clear and proven track record in delivering targets. Three years' experience of working in a digital account manager or equivalent role within the entertainment industry was desirable. The salary for the role was £39,400

69 There were six individuals who expressed an interest in the role – three from the Respondent (one of whom was the Claimant) and three former HBO employees who were to TUPE transfer to the Respondent. One of the Respondent's employees, W Attard, who worked in Catalogue Marketing, was not invited for interview as it was felt that his marketing experience was not a good fit for the role. He was a white male in his early 30s. The remaining five were invited to interview. The interviews were conducted by Ms Glasscoe. The HBO candidates were asked different questions from the Respondent's employees. The reason for that was that some of them had country management experience and they had been offered competitive severance packages. Ms Glasscoe wanted to gauge how serious they were about moving into a role for which they might consider themselves to be too senior and experienced. The Claimant and Mr Dracott (the other candidate from the Respondent) were asked to do a short presentation. Mr Dracott was a 28 year old white male.

70 The successful candidate was Harry Greasley, one of the HBO employees. He was a 26 year old white (British) male. Since June 2018 he had worked as Associate Manager, International in HBO's International Product Management Team. Key aspects of his position had included overseeing the digital release strategy across multiple territories, product life cycle management of HBO's portfolio, product pricing, media briefing and building strong working relationships with distribution partners. He started in his role with the Respondent on 1 January 2020.

71 Ms Glasscoe had a face to face meeting with the Claimant to give her feedback as to why her application had not been successful. She told him that her presentation had been focused on marketing rather than how she would deliver from a sales perspective.

72 In December 2019 the Claimant met with John Stanley and complained about having been overlooked for promotions/not being appointed to roles for which she had applied. Mr Stanley no longer works for the Respondent.

73 In January 2020 the Respondent was still looking to fill a National Account Manager role. The role involved managing Sky, which was one of the Respondent's biggest accounts. The Claimant told Ms Sharp that she was interested in applying for the role. Ms Sharp told her that they were looking for candidates with recent experience of running a large account and strong understanding of marketing campaigns and media planning. She did not consider that the Claimant had that experience. Ultimately, it was decided to integrate that role into Ms Glasscoe's role and no-one was recruited to it.

74 In January 2020 the Respondent advertised a Marketing Executive TV, UK and Ireland role in its Marketing department (Application 13). The role was to assist the Deputy Director in working with UK and Irish broadcasters and platforms to ensure that clients received support in launching the Respondent's series and features. It

was a junior role and the responsibilities of the role were primarily administrative and organisational. The salary for the role was £34,000 p.a.

75 Shelly Drury, who was the Deputy Director at the time, was the hiring manager for the role. In emails that she exchanged with Gemma Broadhurst about recruiting for the role she said that she wanted to focus on candidate who had 1-3 years' prior experience (with a preference for people with 18 months – 2 years' experience) as they would get more out of the role. She was looking for *“someone bright and motivated who loves TV and wants to work in Marketing or PR, who sees this as an opportunity to grow rather than someone who’s a more seasoned professional.”*

76 On 22 January 2020 the Claimant sent Ms Drury an email that she was interested in applying for the role and Ms Drury directed her to Gemma Broadhurst. **711**

77 There were 533 applicants for the role. The Claimant said that she applied for the role but the Respondent has no record of her applying for the role. The CV produced by the Claimant for this role showed her as having worked at the BBC as a Marketing and Sales Executive from 2008 to 2013. 12 applicants were passed to Ms Drury for consideration and she interviewed 7 of them. The successful candidate was a 32 year old white (American) woman. She had worked for the Respondent as a Marketing Executive for a little over a year and a half.

78 The Claimant’s managers, Ms Glasscoe and Ms Sharp, were not aware of any of the applications made by the Claimant, other than the one for the Digital Account Manager. They played no role in the decisions made.

79 In early 2020 the Claimant asked Ms Sharp whether role could be benchmarked as she felt that her job title and remuneration did not reflect the responsibility of her role. The Claimant said that she felt that her role was equivalent to a manager role and that should be reflected in her title and remuneration. She felt that her role was similar to that of Matt Keegan because he did the same job as her but in relation to physical content. Mr Keegan’s job title was Senior Pre-Production Manager and it was three levels higher than the Claimant’s role in in the grading structure. Ms Sharp agreed to benchmarking the Claimant’s role.. However, the matter was not progressed for several months and Ms Sharp’s explanation was that at that time there was a freeze on new hires and promotions and that would have made it difficult for the Claimant’s role to be regraded.

80 In a conversation in February 2020 which involved the Claimant and others Ms Drury made a comment about not understanding TikTok and that it was best to leave it to “the kids”. In another conversation around the same time staff joked about Ms Drury’s boss only hiring blondes for the Marketing Executive role as the previous three women appointed to the role had been blonde. Other senior women who reported to him, including Ms Drury, were not blonde.

81 Sometime in 2020 a Sales Manager when referring to a black employee used the name of another black employee and when it was pointed out to him that it was the wrong name, he responded “same difference” Some of the Claimant’s colleagues referred to her as having a “posh voice” and said that she should be reading the news.

82 In summer 2020 Ms Sharp asked the Claimant to provide her with an updated job description of her role. The Claimant sent her a job description on 21 September 2020. The job description comprised nearly three typed pages. Most of the Respondent's job descriptions that we looked at in the course of the hearing were just under two pages.

83 Ms Sharp amended the job description provided by the Claimant to make it (a) more concise and (b) to more accurately reflect the skills and experience for the role. For example, the Claimant's "overview of the role" ran into five paragraphs. Ms Sharp reduced it to the first of those five paragraphs which was "*Accountable for the planning and delivery of all digital product avails for Warner Bros, HBO and Turner Home Entertainment, UK & Ire.*" That summarised the overview of the role concisely. She moved responsibility for the performance management of three external agencies based in the US and Germany from the overview of the role to the primary responsibilities. The Claimant had set out 16 skills and requirements for the role. Ms Sharp reduced them to 9. She left out things such as "*successful track record in project management skills*", "*extensive stakeholder management experience*", "*comfort communicating with senior management*" which were not skills and experience required for the Claimant's role. The job description drafted by Ms Sharp was closer to the job description that had been used when the Claimant had been recruited in 2016, although Ms Sharp had not seen that job description. Ms Sharp also removed from the skills and experience section references to the Claimant building team standards and guiding and developing other members of the team. The Claimant had put in her job description that one of her responsibilities was to manage the allocation for the Sales Admin Assistant. That had appeared in the Claimant's original job description but there had not been any Sales Admin Assistant since Ms Olafare had left a few weeks after the Claimant started. Ms Sharp removed that.

84 On 11 November 2020 Ms Sharp sent Sammi Winetroube, Compensation Analyst in the Compensation and Benefits team, her revised job description of the Claimant's role and asked her to benchmark it against other similar roles within the Respondent. Ms Winetroube forwarded Ms Sharp's email to Alexandra Saifer and Lisa Youde in HR because it is the responsibility of HR to liaise with the manager and to determine what he/she is seeking from the benchmarking exercise. It appears that they took no action at that stage and on 21 January Ms Sharp chased them up on it. Ms Youde responded that they had been told that no promotions were being considered at the time and suggested that it might be worth waiting in case anything changed. Ms Sharp pressed her to proceed with it at that time.

85 On 27 January Ms Youde referred the matter back to Ms Winetroube for her to do the benchmarking. Ms Winetroube reviewed the role based on the job description. She used Willis Towers Watson's external data to match the role with equivalent roles in other business and its guidance to determine where the role was placed within the discipline. A broad overview of the guidance is look at the scope, responsibility and accountability of the role concerned. Ms Winetroube matched the role to the Willis Towers Watson level of P2-10 which meant that the person performing the role had working knowledge and experience in their own discipline, continued to build their knowledge of the organisation, processes and customers, performed a range of assignments that were normally straightforward, used prescribed guidelines and policies to analyse and resolve problems and received a moderate level of guidance and direction. On the limited knowledge available to her, Ms Winetroube thought that the role might potentially fit at the next level up – P3-11. She explained to Ms Youde

what the two levels denoted and asked her where she thought that the role fitted She also asked her whether there were any internal comparators. Ms Youde responded that she did not know of any internal comparators and, although she did not have enough working detail of the role, she thought that it fitted into level P2-10. Ms Winetroube then informed her that the salary range for that role was between £28,401 and £42,601 with a mid-point range of £35,501 and a bonus target of 5%. The Claimant's salary at that time was £35,500 with a bonus target of 4%. On 10 February Ms Youde informed Ms Sharp of the outcome of the benchmarking exercise.

86 Ms Sharp sought further information from Ms Youde about the benchmarking process. Ms Youde responded on 10 March 2021. She said that they had benchmarked the role in line with the contents of job and not its title and based on that the Claimant was paid the correct amount. She said that they had reviewed other roles in the business but they were not the same in terms of content and seniority; some roles were managers of people. While the Claimant's role had some activities that were typical of a more senior role, there were still a lot of tasks at the administrative level.

87 On 23 March Ms Sharp shared the outcome of the benchmarking process with the Claimant. The Claimant felt that the benchmarking process did not accurately reflect the responsibilities of her role, such as responsibility for process and directing performance of other teams and external agencies. She also referred to Mr Keegan, who she felt was performing the same role as her on the Physical Supply Chain but was graded a Manager. Ms Sharp suggested that it would be a good idea for the Claimant to meet with Ms Youde to further discuss the issues that she had raised. On 23 March the Claimant asked Ms Sharp to send her a copy of the job description, which she knew Ms Sharp had "tweaked" before sending it on. Ms Sharp supplied her with a copy of that job description.

88 Shortly thereafter Ms Youde reminded Ms Sharp that on the benchmarking the Claimant was eligible for a 5% bonus rather than the 4% bonus on which she was at the time. She asked her whether she wanted her to explore it. Ms Sharp's response was that she was happy to bring it into the mix but as a stand alone change it felt a bit minimal. She felt that an additional 1% bonus as the only change as a result of the benchmarking process would be perceived by the Claimant as an empty gesture and was likely to be inflammatory. She felt it would be more appropriate to reconsider it in the round as part of the Respondent's annual salary review process.

89 In April Ms Youde met with the Claimant to discuss the benchmark. After the meeting the Claimant sent her an email with a few questions. She said that Ms Youde had said that one of the reasons that she did not have a Manager title and Mr Keegan did was because he managed two persons (an executive and an intern). She said that managing an assistant had formed part of her job description when she took on her role and that she now managed Mr Keegan in his digital work. In any event, one did not need to manage staff to have a Manager title. In the Digital team, there were two managers who did not manage people. Her expectation had been that her role would have been benchmarked against Mr Keegan's role and that her role should be upscaled to reflect the importance of digital for the future growth of the business.

90 Ms Youde had further discussions with Ms Winteroube about the salary differences between P2-10 and P3-11. Ms Winetroube agreed that if the business wanted to offer the Claimant a salary increase of 10%, which would bring her salary up to £40,000, that could be justified as it would be at the top end of P2-10 and the bottom end of P3-11.

91 Ms Youde responded to the Claimant's email on 11 May 2021. She said that several factors were considered in determining what level should be assigned to a particular role. Her role had been assessed by HR in conjunction with the Compensation and Benefits team, taking into account the information provided by her manager Ms Sharp. The conclusion of the exercise had been that her role did not meet the criteria for a manager position. In respect of the Claimant's assertion that she managed/supervised Mr Keegan, Ms Youde said,

*"I understand from Ruth that this is not the case and that, whilst you have educated him on a process involved in his role, this is just a small portion of his role and his management sits under another structure. It is not correct that your role should be benchmarked against Matt's."*

92 Mr Keegan's job title was Senior Pre-Production Manager – Creative Services. The job description stated that there were two direct reports and the responsibilities of the post included to manage, motivate and mentor direct reports. Mr Keegan, in fact, had two direct reports – an executive and an intern. The primary responsibilities for the role were (i) responsibility for the distribution of content across the Respondent's Home Entertainment Group in the UK and Ireland, (ii) managing the delivery of all WB content (including local and international sources) for certification in the UK and Ireland across physical and digital releases, (iii) the identification and implementation of process enhancements to deliver efficiencies on behalf of the Home Entertainment Group and (iv) super user for certain business process systems). The second responsibility included driving relationships with Industry certification bodies in the UK and Ireland, keeping abreast of new legal requirements and changes in process and continuing to build upon the Respondent's relationship with those industry bodies to trial new initiatives across digital submissions. The third responsibility entailed the postholder heading Nimbus, which was a project to identify and implement key cost saving/time efficiencies in the supply chain and to gain management buy-in and approval for all key initiatives.

93 Ms Winetroube gave evidence that if she had benchmarked Mr Keegan's job description, she would have matched it to the Willis Towers Watson level M2-12.

94 In 2021 WarnerMedia merged with Discovery.

95 On 25 May 2021 the Claimant raised a grievance in which she complained about the failure to benchmark her to Senior Manager level and unequal pay due to sex, age and race discrimination. She gave reasons why she believed that her role was not just a co-ordinator role. She also complained that the benchmarking process had been explained to her in advance and that she had not been consulted in the course of the process. In respect of pay discrimination, she made the following points – She said that her role, which managed the digital supply chain, had been held by women and that the two persons in leadership position in the physical supply chain were both men and younger. The women had not been promoted although digital revenue had outgrown physical revenues over the past ten years. She believed that the business

did not want to promote her or people of her age because they considered that it unsettled younger and less experienced staff. It was self-evident that the business had had structural issues around race due the lack of ethnic diversity at all levels in the business. White staff were more likely to be offered opportunities and promotions.

96 Oliver Mundy in People Relations was tasked with investigating the Claimant's grievance. The People Relations team undertook investigation of employment concerns cross the WarnerMedia group of companies. Mr Mundy interviewed the Claimant on 2 and 4 June 2021

97 Mr Mundy interviewed Ms Youde on 24 June, Ms Sharp on 25 June and Ms Glasscoe on 6 July 2021.

98 On 12 July 2021 the Claimant raised a second grievance about the handling of the first grievance. She complained about failure to disclose the "role and remit of" Mr Mundy, incomplete grievance procedure policy and failure to have a grievance hearing within ten days as stipulated in the Respondent's grievance policy. The Claimant asked for a new grievance investigator to be appointed.

99 On 12 July Samira Anwar, Executive Director of People Relations, wrote to the Claimant that she would take over the investigation of her first grievance. The second grievance was investigated by someone else.

100 Ms Anwar met with the Claimant on 26 July 2021 and sent her the notes of the meeting on the following day. At the meeting the Claimant raised a number of issues which had not featured in her original grievance. The Claimant returned the notes with a few amendments on 30 July 2021. She also sent Ms Anwar a copy of the particulars of claim that she had submitted to the Tribunal. The particulars of claim contained a substantial number of new allegations that the Claimant had not raised either with Mr Mundy or her. Ms Anwar met with the Claimant again on 25 August 2021. At the meeting the Claimant confirmed that the particulars of claim set out set out the entirety of her grievance. Ms Anwar extended the scope of her investigation to include all the matters in the particulars of claim. In the course of her investigation Me Anwar interviewed a large number of witnesses and spoke to some of them more than once.

101 Ms Anwar produced her investigation report on 28 September 2021. The report comprised 20 typed pages. Ms Anwar did not find any evidence to corroborate/support that the Claimant had been discriminated against by reason of a protected category. She found that the benchmarking process had been reasonable, had used a job description drafted by the Claimant and had followed a formalised process which had assessed her role against market data. She did not consider that Mr Keegan should have been regarded as an internal comparator for benchmarking processes. She found the Claimant did not have/had not had any management responsibility for Mr Mesa-Banz or Mr Keegan. She considered that Ms Sharp should have corrected the Claimant on that during the benchmarking process as she had a fundamental misapprehension that Mr Keegan reported to her. In relation to the Claimant's internal search for roles within WB she had not found any evidence to support that any failure to obtain an alternative role was by reason of discrimination.

102 The grievance hearing took place on 5 October 2021 and was conducted by Dan Penfold, Vice President Business and Legal Affairs. It lasted nearly two hours. The

Claimant said that Ms Anwar's report was "biased, unfair and unsympathetic" and then explained in detail what she disagreed with and why.

103 Mr Penfold sent the Claimant his grievance outcome on 22 October 2021. His conclusions on the benchmarking exercise were as follows,

*"the benchmarking exercise performed in respect of your role was conducted in a reasonable fashion, using appropriate job descriptions and following a formalised process which considered both internal and external metrics. I have not been able to find evidence that the failure to benchmark upwards to Senior Manager level was the result of an unfair procedure..."*

*I conclude that you have not acted as a line manager, that it was appropriate for the Compensation and benefits team to conclude that your lack of line management responsibility clearly distinguished your role from that of Matt Keegan, and that he was therefore not an appropriate point of internal comparison for the benchmarking exercise. Accordingly, given that your role is distinguished from Matt Keegan's role by line management responsibility, in addition to a number of other functional differences between the two roles, I am unable to find that you have been discriminated against with regard to pay on the basis of gender.*

*I find that it is not unusual that you were not involved in the benchmarking process personally, although it is irregular that your line manager did not feed back to you some of the material details of the benchmarking as it progressed"*

In respect of the Claimant's unsuccessful applications for numerous internal roles, although he accepted that some inappropriate comments had been made (such as "my boss only recruits blondes") he had been unable to locate any evidence that the Claimant had been treated unfairly or in a discriminatory fashion. He did not uphold any of the Claimant's grievances but found that there were numerous areas in which the management that she had experienced at WB had been "sub-optimal". He explained,

*"Clearly, there have been a number of instances in which communication with your line managers has not been clear, or has lacked the requisite frequency. Perhaps consequently, your expectations and understandings have not been aligned with those of your managers."*

He made recommendations to address that and advised the Claimant of her right to appeal.

104 The Claimant appealed against the grievance outcome on 28 October 2021. The appeal was heard by Trevor Albery, Vice President, WW Content Protection & Analytics, on 19 November 2021. He dismissed the appeal.

105 Ms Wintetroube's unchallenged evidence was that the Account Manager roles (held by Joe Gibbons and Harry Greasley) were sales roles and would be matched to a different discipline from the Claimant's role which was essentially an administrative role in Sales. Her evidence was that they would be matched to the Willis Towers Watson level S3-11 which is slightly more senior than the Claimant's P2-10. The "S" denotes "sales" and "P" denotes "professional". The S3-11 level overview includes

the following – has a solid understanding of business, financials, products/services , the market and the needs of assigned accounts, works with a complex or large territory/account, products/services, sales or account management processes, has authority/opportunity to set and negotiate products/service terms and plans own territory or account approach and manages own resources.

106 In January 2022 the WarnerMedia UK & Ireland Executive Committee had seven members. The most senior person, the Country Manager, was Polly Cochrane, a woman. Three of the other members were men and three were women. At the time of the hearing, there were nine members of the Executive Committee, five of whom were women. An extract from the Respondent's Gender Pay Gap Report showed that 52.9% of its employees were women and 47.1% men. In the Lower and Middle Quartiles the women formed a larger part of the workforce. In the Upper Quartile 53.2% of the employees were men and 46.8% women. The median gender pay gap was 9.3%.

## **Conclusions**

### **Jurisdiction**

107 The effect of sections 123(3) and 140B of the Equality Act 2010 is that any complaints about acts or omissions (failure to do things) that occurred before 9 March 2021 will not have been presented in time and the Tribunal will not have jurisdiction to determine them unless it considers it just and equitable to do so,

108 The Claimant's complaint of sex discrimination about the failure to pay her a salary commensurate to her role is linked to the complaints of discrimination about the failure to benchmark her role to a manager role. The Claimant asked for the benchmarking exercise in early 2020 because she felt that her job title and remuneration did not reflect the responsibility of her role. The benchmarking exercise was concluded on 9 February 2021 and the decision was that the Claimant was being paid at the mid-point level of the salary range for her role. On 10 February 2021 Ms Youde communicated that to the Claimant's line manager, Ms Sharpe. Ms Sharpe sought further information from Ms Youde about the process and Ms Youde responded on 10 March 2021. On 23 March 2021 Ms Sharp shared the outcome of the process with the Claimant, which was that her job title was correct and she was being paid the correct amount. The Claimant raised some issues about the process and Ms Sharp suggested that she spoke to Ms Youde. The Claimant spoke to her in April and Ms Youde sent her an email on 11 May confirming that the original decision stood.

109 On the basis of the above facts it is arguable that the decision to benchmark the Claimant's role to P2-10 and not to increase her pay was made on 9 February 2021 and that it was confirmed on 11 May 2021 that that decision remained unchanged. It is equally arguable that the final decision was made on 11 May 2021. If we had concluded that the decision was made on 9 February 2021, we would have concluded that it was just and equitable to consider those claims because that decision was first communicated to the Claimant on 23 March 2021. The Claimant had no way of knowing when the decision was made and when any time limit for complaining about it would expire. We concluded, therefore, that the Tribunal had jurisdiction to consider those two claims.



110 The complaints of age, sex and race discrimination about the various roles for which the Claimant applied will only have been presented in time if the Tribunal finds that (i) the complaints of age, race and sex discrimination about the benchmarking exercise are well-founded and (ii) some or all of the complaints about the Claimant's applications are well-founded, and that they are part of continuing act which culminated with the benchmarking exercise. We concluded that even if any of the Claimant's complaints about her applications were well-founded they could not be said to be part of an act extending over a period and certainly not part of an act extending over a period which ended with the benchmarking exercise. Our reasons for so concluding are as follows. The benchmarking exercise is a completely different process from the recruitment process and is carried out by different individuals from those who were involved in the various recruitment processes. There is a gap of a year between the last unsuccessful application and the conclusion of the benchmarking exercise. There is no link between the Claimant's failed applications and the benchmarking exercise in terms of the actions of the Respondent.

111 Furthermore, we concluded that the failure to invite the Claimant to interview or to appoint her to the roles for which she applied were isolated and unconnected acts and were not an act extending over a period. There was nothing inherently discriminatory in the recruitment process applied by the Respondent. There was no evidence that it was weighted against women, older persons or those of Asian/Indian origin. The Claimant's applications were made over a period of two and a half years (between May 2017 and January 2020). They were made to different parts of the Respondent's business and the decisions were made by different individuals. There was no evidence to link the various individuals who made the decisions or of any collusion between them. The Claimant failed to establish any link between those decisions take by different persons at different times. We concluded that they were specific, single, one-off processes entirely unconnected with and independent of each other.

112 We then considered whether it would be just and equitable to consider the complaints of discrimination about the various applications which had not been presented in time. The complaint about the earliest application was presented nearly four years after the time limit for presenting it expired. The complaint about the last one fifteen months after the time limit expired. That is a significant delay The Claimant has not provided any explanation for not presenting the claims earlier. The facts on which she relies to found her claims of discrimination were known to her at the time. This is not a case where she discovered the discrimination as a result of facts which came to light much later. The Claimant is an intelligent and educated woman. Her husband is a solicitor. There was no reason why the Claimant should not have known or been able to find out about time limits. Instead of bringing a claim after the last failed application, the Claimant asked for her role to be benchmarked. Having received the outcome of the benchmarking exercise the Claimant raised a grievance about it and discrimination in relation to her pay. The first time she complained about discrimination in respect of her unsuccessful applications was when she presented her claim form on 6 July 2021. The Respondent has faced considerable forensic prejudice in defending claims where the alleged acts of discrimination occurred four years before the presentation of the claim and some of the background evidence relied on even earlier. Much of the relevant documentary evidence no longer exists because the Respondent had a GDPR-compliant policy of destroying recruitment records after six months. Many of the individuals who could

have given evidence about the background evidence on which the Claimant relies and the allegations no longer work for the Respondent. The witnesses who did give evidence about recruitment processes, interviews and other conversations struggled to remember exactly what had been said or done many years. Having considered all the above matters, we concluded that it would not be just and equitable to consider the complaints of discrimination about the Claimant's unsuccessful applications.

### The benchmarking exercise

113 In order for the Claimant's complaints of discrimination about the benchmarking exercise to succeed, she would have to establish (i) that the Respondent subjected her to a detriment by not conducting the exercise fairly and properly and/or reaching a conclusion that was not open to it; (ii) in doing that it treated her less favourably than it treated or would have treated others in similar circumstances and (iii) that it did so because of her race and/or sex and/or age.

114 The most important part of the benchmarking exercise was carried out by Ms Winetroube who used external data to determine at what level the role should be placed based on the job description of the role. There was no criticism of her or the exercise that she had carried out by the Claimant. The Claimant's case essentially was that the process was seriously flawed and the result incorrect because Ms Sharp changed the Claimant's job description, the Claimant had line management responsibility and Mr Keegan had not been considered as an internal comparator.

115 The process that was followed by the Respondent was the process that it normally follows when benchmarking roles. We accept that there was a delay in starting the process after the Claimant first asked for it. We do not accept, as was suggested by the Claimant, that Ms Sharp waited for Mr Stanley to leave before starting the process or that she pressed HR to proceed with it, contrary to their advice to wait, because she knew that would lead to the Claimant's role not changing. There was no evidence to support either of those suggestions. A freeze on promotions would have no impact on Ms Winetroube's assessment of a job description against the external data. The Claimant had an input in the job description that was used. She produced the first draft. The changes made by Ms Sharp were largely stylistic to make the job description more concise and like the Respondent's other job descriptions. She removed the reference to the Claimant being responsible for managing the allocation for the Sales Assistant because the Claimant had only done that for about two weeks after starting in her role. The Claimant was aware that Ms Sharp had "tweaked" her job description before she sent it. When the Claimant received a copy of the job description on 23 March 2021 she did not complain about the changes that had been made.

116 The Claimant's case was also that her role should have been benchmarked against that of Mr Keegan because (i) the work that she did for the digital supply chain was the same as the work that he did for the physical supply chain and (ii) she had line managed Mr Mesa-Banez and managed/supervised Mr Keegan. That was not the case. We have found that Mr Mesa-Banez and the Claimant did the same job and that they both reported to Ms Glasscoe. The Claimant did not line manage him. Equally she did not manage Mr Keegan. She trained him on the Respondent's digital avails process which formed a tiny part (approximately 5% of his role). Nor were their roles the same. Mr Keegan line managed two employees, the Claimant did not line manage anyone. Their roles were in different part of the business and Mr Keegan's

role had greater and more complex responsibilities than the Claimant's role. He was responsible for driving and building upon relationships with industry certification bodies and he headed Nimbus, a project to identify and implement savings and efficiencies in the supply chain. We accepted Ms Winetroube's evidence that his job description would have been benchmarked to M2-12.

117 We concluded that there were no serious flaws in the benchmarking process to render its conclusions unfair or unsafe. The process that was carried out was fair and reasonable and the conclusion was fair and justified. The Claimant was being paid the mid-point of the salary range for that role. The Respondent did not subject the Claimant to a detriment in the benchmarking of her role.

118 It was not a conclusion of the benchmarking process that the correct salary for the Claimant was £40,000. Following further discussions between HR and Ms Winetroube, after the Claimant had expressed her unhappiness about the outcome of the benchmarking exercise, Ms Winetroube had advised HR that if the business wanted to increase the Claimant's salary, a salary of £40,000 could be justified as it would be at the end P2-10 and the bottom end of P3-11. She never said that that was the correct salary for the Claimant's role and that it was what she ought to be paid.

119 There was no evidence from which we could infer that the Respondent treated the Claimant less favourably than it treated, or would have treated, others in a similar position. We did not consider that Messrs Keegan, Gibbons and Greasley helped us in any way to construct the hypothetical comparator (we look at this in more detail when we consider the Claimant's sex discrimination complaint about the level of her pay). There was no evidence from which we could infer that the Claimant's race, age or sex played any part whatsoever in the benchmarking exercise (we deal with the matters from which the Claimant said we could draw inferences when we deal with her other complaints).

120 We concluded that the complaints of age, race and sex discrimination about the benchmarking exercise failed because (i) she had not been subjected to a detriment; (ii) there was no evidence that she had been treated less favourably than a man, a white person or a younger person would have been in similar circumstances and (iii) there was no evidence from which we could infer that her race, age or sex had played any part in the way the process was conducted or the decision reached.

#### Sex discrimination – pay

121 In order for this claim to succeed, the Claimant has to establish that a man doing the same role would have been paid more than she was. The Claimant's case was that we could determine what a male comparator would have been paid by looking at the Respondent's treatment of Messrs Keegan, Gibbons and Greasley. We did not consider that they assisted us in constructing the hypothetical male comparator, We have already set out the differences between Mr Keegan's role and the Claimant's role. The roles of Messrs Gibbons and Greasley were also different. They were account managers, who managed individual accounts, and had individual responsibility for meeting sales targets and generating revenue. Their roles were sales roles. The Claimant's role was an administrative co-ordinating role in Sales. The person who did the same role as the Claimant was Miguel Mesa-Banez. He was employed on fixed-term contracts and was not a permanent employee. There was no

suggestion by the Claimant that he was paid more than her. There was no evidence from which we could infer that a man doing the Claimant's role would have been paid more than she was.

The complaints about the failed applications

122 As we have not found the Claimant's complaints about benchmarking and her level of pay to be well-founded, we do not have jurisdiction to consider the complaints about the failed applications. In case we are wrong in that conclusion, we set out briefly what we would have concluded in respect of those complaints.

123 In the course of 2.5 years the Claimant's case is that she applied for about 11 different roles. In a few cases, the Respondent had no record of having received an application for the Claimant. In one case, the Claimant produced an automated reply from Brassring to prove that she had applied. She did not do so for the others. Almost all the roles were advertised internally and externally. In most cases there were a large number of applicants (between 152 and 533). The roles were in different parts of the business and different Talent Acquisition personnel and managers were involved in the selection processes. The initial sifting was done by the Talent Acquisition staff. The Managers conducted the interviews. The Claimant did not have the requisite experience for some of the roles. She applied for roles that were much more highly paid than her existing role (roles that paid between £48,000 and £90,000). The Claimant was interviewed for some of the roles. Those who were selected for the roles generally had more, or more recent, relevant experience than the Claimant. Five out of the ten persons appointed to roles that were advertised were women. One of the persons appointed was South-East Asian and one was multiracial. Most of those appointed were in their 20s or 30s, and one person was in her 40s. The Tribunal could not conclude on the basis of the facts that the failure to appoint the Claimant to any of those roles was on the grounds of her race, sex or age.

124 The Claimant's case was that we could infer race, age and sex discrimination from a number of facts. We deal briefly with the main points. It was said that the Respondent's recruitment process was informal, lacked transparency and the absence of contemporaneous documents relating to the selection process was in breach of the EHRC Code of Practice. We do not accept that the process was informal. As we have said almost all the posts that we considered were advertised internally and externally, there were job descriptions for the roles, the applications were sifted by Talent Acquisition personnel, the managers shortlisted for interview and interviewed the applicants. A process was followed to try to find the best candidate. We accept that a couple of roles were not advertised, but that was the exception and not the norm. The EHRC Code makes it clear that in deciding how long to keep records after a recruitment exercise employers must balance the need to keep those records to justify any decisions made with their obligations under the Data Protection Act 1998 not to keep them any longer than is necessary. The Data Protection Code provides that employers should not hold recruitment records beyond the statutory period for bringing claims relating in relation to it unless there is a clear business reason for extending that period. The Respondent's policy of retaining records for six months is in accordance with both those Codes. The absence of records stems from the Claimant bringing claims years after the recruitment process and long after the time limits for bringing such claims have expired. We concluded

that we could not draw any inferences of discrimination from the recruitment process or the absence of contemporaneous records.

125 The Claimant gave evidence about the majority of the workforce being white and that the majority of those who were promoted in 2021-2022 were white. There is very limited documentary evidence to support that. Without knowing what percentage of the Respondent's employees is of BAME origin and how many of them applied for promotion, it is not possible to draw any inferences from that evidence in respect of the Claimant's complaints.

126 It was also said that we could infer discrimination from certain comments that were made in the workplace. We have found that the following comments were made – at a lunch the Claimant was asked questions about her family and her children (paragraph 66), in respect of a junior administrative role Ms Drury said that she wanted to focus on candidates with limited previous experience as they would get more out of the role (paragraph 76), Ms Drury made comments about it being best to leave TikTok “to the kids”, staff joked about Ms Drury's boss only hiring blondes (paragraph 80), a Sales Manager mixed up the names of two black employees and, when corrected, said “same difference” and the Claimant's colleagues made comments about her “posh voice” and said that she should be reading the news (paragraph 81). We accept that some of those comments are inappropriate. We also accept that expressing a view about hiring someone with less experience could give rise to an inference of age discrimination. The other comments, however, did not assist us in determining whether the hiring managers and Talent Acquisition personnel involved in making the decisions for the roles for which the Claimant had because of race, sex or age treated her less favourably than they treated, or would have treated, others.

127 We also took into account the fact that in January 2022 the majority of the Respondent's Executive Committee members (including the Country Manager) were women and that the majority of its employees were women. All the members of the Executive Committee were white.

128 Had we considered those complaints, we would have concluded that none of them were well-founded.

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Employment Judge - Grewal

Date: 13<sup>th</sup> Feb 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

13/02/2023

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FOR THE TRIBUNAL OFFICE