

Neutral Citation Number: [2026] EAT 53

Case No: EA-2022-001462-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 April 2026

Before :

HIS HONOUR JUDGE JAMES TAYLER

Between :

Ms M Mulumba

Appellant

- and -

(1) Partners Group (UK) Ltd
(2) Partners Group (USA) Inc

Respondents

Ms M Mulumba the **Appellant** in person
Freddie Onslow (instructed by Macfarlanes LLP) for the **Respondents**

Hearing date: 9 April 2026

JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal did not err in law in case management decisions concerning the list of issues and exclusion of material from a reply witness statement.

HIS HONOUR JUDGE JAMES TAYLER:

The issues

1. The issues in this appeal are whether the Employment Tribunal erred in law in case management decisions, made during a final hearing, by removing an issue that the claimant contended should be in the list of issues; and excluding parts of the claimant’s reply witness statement.

The decision appealed

2. The two case management decisions of Employment Judge Nicolle, sitting with members, were set out in a set of written reasons sent to the parties on 24 January 2022.

The claimant’s employment with the respondent

3. Partners Group provides investment services. The two respondents are companies in the Partners Group.

4. The claimant was offered employment as an Associate on the MBA Associate Program (“the Associate Program”) by letter dated 10 July 2015, sent by the second Respondent (which I shall refer to as the Respondent).

5. The claimant commenced employment with the respondent on 17 August 2015. The claimant undertook initial “rotations” in departments in the USA.

6. The claimant’s authorisation to work in the USA lapsed in July 2016. She then undertook rotations in Zug, Switzerland.

7. From October to November 2016, the claimant was absent on medical leave. She returned to work in Zug.

8. On 6 March 2017, the claimant rotated to London. The usual maximum length of the Associate Program is two years. If an associate has not been made an offer of a permanent role within that period they will generally leave the employment of the respondent.

9. The two year period for the claimant came to an end in August 2017. The claimant continued in the employment of the respondent until 31 August 2018. The basis upon which her employment

continued has been a matter of dispute between the parties. It can be referred to neutrally as the continuation of employment.

10. The respondent asserted that the continuation of employment was as a result of what it described as an “Accommodation Period” that primarily gave the claimant an opportunity to regularise her immigration status and find alternative employment, although it was possible that she could find a permanent placement with the respondent during the Accommodation Period. The claimant strongly objected to the use of the term “Accommodation Period” which she contended was not mentioned to her until she was informed on 5 July 2018 that her employment was to terminate. She asserted that the use of the term “Accommodation Period” was an attempt to rewrite history and create a false narrative in which the respondent kept her in employment as an act of largesse, outside of the Associate Program.

11. After her employment terminated on 31 August 2018, the claimant submitted a claim to the Employment Tribunal on 28 January 2019. The claimant brought complaints of sex, race and perceived disability discrimination, automatic unfair dismissal (asserting that the reason, or principal reason, for her dismissal was making protected disclosures), ordinary unfair dismissal and protected disclosure detriment.

12. In its response to the claim, the respondent asserted that the Employment Tribunal lacked territorial jurisdiction.

13. A list of issues was agreed on 13 September 2019, which included an allegation of direct race and sex discrimination that had originally been raised in the claim form (“the July 2018 meeting issue”):

(z) By the Claimant being told disingenuously in a meeting with Christian Truempler and Gabriela Reimer in the first week of July 2018 that she had not successfully converted onto a team and her contract would therefore be coming to an end by prior agreement when in fact there had been no such prior agreement and the Claimant had been offered a permanent position in the Real Estate team in London in February 2017?

14. The July 2018 meeting issue concerned the meeting at which the claimant was informed that her employment would terminate at the end of August 2018. The claimant contends that Mr

Truempler and Ms Reimer falsely asserted that she had already been informed that this would happen, and for the first time referred to an Accommodation Period.

15. A Preliminary Hearing was held on 3 and 4 December 2019, before Employment Judge Nicolle sitting alone, to determine the issue of territorial jurisdiction. In a judgment sent to the parties on 14 January 2020 the Employment Tribunal held in favour of the claimant that territorial jurisdiction was established. The Employment Tribunal stated of the latter period of the claimant's employment in London:

17. There is a dispute between the parties as to whether the final period of up to twelve months of the Claimant's employment was part of the Associate Program or fell within a specific category, pertaining to the Claimant's personal circumstances, referred to by the Respondents as the Accommodation Period. I set out my findings in relation to the Accommodation Period below. ...

36. As indicated above there is a dispute between the Claimant and the Respondents regarding her status in London for up to the last twelve months of her employment. The Claimant's position is that up until a meeting on 5 July 2018 that she regarded herself as a continuing participant in the Associate Program with an opportunity of a permanent position with the Respondents. The Respondents' position is that it was made clear to the Claimant at a meeting on 31 August 2017 that her employment with the Respondents was being continued on a good will basis with the opportunity to obtain longer term immigration status in the UK and to secure alternative employment. The position of the Respondents being that this was to assist the Claimant who wished to avoid any possibility of having to return to the DRC.

37. I consider that the existence, or otherwise, of the Accommodation Period and the Claimant's knowledge of it has some relevance to the question of jurisdiction given that the existence of, what the Respondents term the Accommodation Period, significantly elongated the Claimant's employment in the UK. I also consider that whether the Claimant had a genuine expectation of a permanent position of employment with the Respondents during the Accommodation Period is relevant. This relates to whether she should properly be regarded as an employee seconded to the UK for a relatively short duration or in the expectation of a more permanent arrangement. ...

42. In relation to ... the Accommodation Period I find that the Claimant would, on the balance of probabilities, have been aware that her ongoing employment in London was for reasons outside the normal Associate Program and I make this finding for the following reasons:

- that the Claimant's total duration of employment with the Respondents significantly exceeded the ... normal two year maximum duration of the Associate Program;
- that there is some evidence that communications took place between various members of the Respondents' management regarding the Claimant's status, and in particular immigration status, and what could be done to assist her position;

- that there is evidence that the Respondents had concerns regarding the Claimant's performance which would have meant that it was unlikely that she would be offered a permanent position on completion of the Associate Program;
- that **in an email sent to the Claimant in early 2018 she was asked as to her progress in securing alternative employment** to which the Claimant did not respond, but the existence of such an email would have been inconsistent with the Claimant's position that she was on continuing ongoing rotas as normal as part of the Associate Program. ... [emphasis added]

16. In its conclusions, the Employment Tribunal stated:

78. Given that the last 18 months of the Claimant's employment was based exclusively in London I do not consider that her employment was peripatetic. Her location was largely determined by her immigration status. I find that on the balance of probabilities the Claimant's employment in London was significantly extended as a result of the Respondents' expressed wish to assist her, given her immigration status, and her wish to avoid returning to the DRC. I reach this finding based on the Associate Program being for a normal maximum period of 24 months, the Claimant having been employed as at the date of her termination for nearly three years, various emails (albeit not all sent to the Claimant) talking about her "special" situation, emails referring (albeit not necessarily contemporaneously) to the Accommodation Period, an email enquiring as to her progress in securing alternative employment and the various documentary evidence that the Claimant did not, on the Respondents' case, meet the required standards for a permanent position at the end of the Associate Program. I do, not, however, find that the status of the Accommodation Period was it itself the determining factor in my finding that the Tribunal has jurisdiction but it was rather the fact, and duration of the Claimant's employment in London, rather than the label the parties placed on it. [emphasis added]

17. The Employment Tribunal concluded that territorial jurisdiction was established.

18. The respondent appealed. The EAT gave judgment on 25 May 2021: **Partners Group (UK) Ltd and another v Mulumba** [2021] I.C.R. 1501. The appeal was successful in that, so far as is relevant to this appeal, the EAT held that, if the claimant's employment situation had evolved, such that there came a time when there was a sufficient connection with the UK, the Employment Tribunal should have fixed the date from which territorial jurisdiction was established.

19. Mrs Justice Eady noted some of the findings of the Employment Tribunal relevant to territorial jurisdiction. Referring to paragraph 37, quoted above, Eady J stated:

17. Essentially accepting the respondents' case in this regard, the tribunal concluded that the claimant would have been aware that her on-going employment in London was outside the normal associate program. The claimant contends the tribunal did not make a clear finding as to when such a change in her employment status was made and points to the absence of any documentary record of the alleged 31 August 2017 meeting. **From the tribunal's reasoning, however, it is clear it accepted the**

respondents’ position that the claimant’s employment had continued outside the associate program in recognition of the difficulties arising from her immigration status, and that this was known to the claimant (written reasons, paras 37–42). [emphasis added]

20. The fact that the claimant’s employment continued outside of the Associate Program was of considerable significance to the determination of territorial jurisdiction:

65. What is clear is that the employment tribunal saw the employment relationship in this case as one that “evolved” over time (para 70 of the written reasons), and it stated it would not have found a sufficient connection had the claimant moved to London merely on a three or six-month rotation as part of the associate program (para 81). The difficulty is that neither party had suggested that the claimant had moved to London on any other basis: on the respondents’ case, she had moved off the associate program on 31 August 2018; on the claimant’s case, she had never left it. The employment tribunal apparently accepted the respondents’ case in this regard (see para 42 of the written reasons) and seemed to acknowledge that this would mean that her initial employment in London did not have the relevant connection: see its suggestion that British statutory employment protections might not have applied “immediately” (written reasons, para 81). **If, however, the claimant’s employment in London did not “immediately” fall within the scope of British employment law, the obvious question is: when did it do so?**

66. The employment tribunal again declined to clarify the position in this regard on the application for reconsideration, stating that this would be “a wholly artificial exercise”. I respectfully disagree. **The tribunal’s conclusion on the issue of territorial jurisdiction makes clear that it was satisfied that there came a time when the claimant had sufficient connection with Great Britain and British employment law, so as to fall within the scope of the relevant statutory protections, notwithstanding the fact that she was a foreign national, employed by a US company, who had initially moved to work in London on a rotational assignment as part of a US program of such temporary placements. The identification of that time—the apparent change in the claimant’s position—was potentially relevant to determining which of the various claims made in these proceedings fell to be determined by the employment tribunal.** By failing to specify when the claimant fell within the scope of British employment law, the tribunal failed to complete the task required of it; it was an error of law not to determine this question and the fourth ground of appeal is therefore also upheld. ...

69. Although the tribunal’s written reasons certainly suggest it accepted the respondents’ case on the accommodation period, its conclusions are somewhat more nuanced than this argument allows. Whilst it found that the claimant would have been aware that her on-going employment in London was outside the associate program (written reasons, para 42), it did not make a clear finding as to whether she might still have held out hope to be kept on in some permanent capacity. In this regard, it is relevant to note that the length of time this additional period of employment was allowed to continue plainly weighed with the tribunal, as did the fact that, during that time, on the tribunal’s findings, the claimant was fully integrated into the London office, with no continuing connection with the US. To a large extent, as the tribunal found, that was due to the claimant’s immigration status, but that does not undermine the force of the point. **The fact was that the claimant could not return to the US and, having moved**

off the associate program, there was no expectation that she could move to work for the second respondent in some other jurisdiction. [emphasis added]

21. The matter was remitted to the Employment Tribunal to reconsider the issue of territorial jurisdiction. A Preliminary Hearing was held on 19 and 20 August 2021. The judgment was sent to the parties on 28 August 2021. The Employment Tribunal summarised the key previous findings of fact:

26. To avoid repetition, **I will keep this brief and merely highlight by way of paraphrasing those sections of the Judgment which are directly referable to the issues which have been remitted to me for reconsideration.** This judgment should nevertheless be read in conjunction with the Judgment.

27. At paragraph 25:

As a result of the Claimant spending more than 183 days in the UK, she became eligible to UK income tax as of 5 September 2017.

28. At paragraph 39:

The Claimant attended a meeting in London with Mr Truempler on 5 July 2018. Any grounds for doubt as to the existence of the Accommodation Period ceased ... with effect from this meeting.

29. At paragraph 42:

I find that **the Claimant would, on balance of probability, have been aware that her ongoing employment in London was for reasons outside the normal Associate Program.**

30. At paragraph 70:

This is a complex case concerning an employment relationship which evolved over the course of the Claimant's employment.

31. At paragraph 73:

I find that **the US was no longer her "home" base and that she had no reason to return, and given her immigration status,** it would not have been possible for her to do so.

32. At paragraph 78:

Given that the last 18 months of the Claimant's employment was based exclusively in London I do not consider that her employment was peripatetic.

33. At paragraph 81:

I find that **the Claimant's employment in London was not consistent with a normal short term three month "or at most six months" rota under the Associate Program.** If not immediately, that during her 18-month period during which she lived and worked in London, her employment evolved to one where UK statutory employment protection applied.

34. At paragraph 82:

That the Claimant remained an employee of the Second Respondent throughout her employment. I find that the identity of the Claimant's employer as the Second Respondent is not, however, determinative of the jurisdiction question.

35. At paragraph 83:

I find that the Claimant's workplace was in the UK by the time her employment was terminated on 31 August 2018. [emphasis added]

22. The Employment Tribunal concluded:

Given my decision above at what point did the Claimant acquire UK jurisdiction?

101. The parties and the EAT acknowledge that this is something of an artificial exercise, but it is nevertheless one which I am obligated to undertake.

102. I consider this to be a more difficult issue. In approaching this question, I deliberately avoided referring in advance of my decision to the list of acts and omissions relied upon by the Claimant and when they occurred, but rather have approached matters from the perspective of how I consider her employment relationship evolved in the UK.

103. The earliest date upon which UK jurisdiction could have existed is when the Claimant commenced in London on 6 March 2017 and the latest is the date of her dismissal on 31 August 2018. It has already been held that all acts and omissions prior to 6 March 2017 are dismissed albeit they can be referred to by the Claimant as background matters.

104. It is relevant to consider what the Claimant's realistic expectations were as to the possibility of ongoing employment at the end of the Accommodation Period. Whilst I consider that it may have been objectively and subjectively reasonable for her to believe, based on communications made ... by representatives of the Respondents, in the first 6 to 12 months of the Accommodation Period that the possibility existed of her performance in London being rewarded with an offer of a permanent position, I consider that this would have become a diminishing possibility, before being extinguished entirely following her meeting with Mr Truempler on 5 July 2018.

105. I also consider it relevant that in an email of 22 January 2018 from Mr Munz to the Claimant he asked her how the job search is progressing which was clearly in relation to an external position. The Claimant did not reply, but it nevertheless would have been indicative to her that she was not seen as having a realistic prospect of a permanent position of employment with the Respondents. Whilst the Claimant says that she suspects this email was a retaliatory action in respect of the letter from her New York lawyers, Bailey Duquette P. C. dated 3 January 2018 to Oliver Jimenez, Chief

Compliance Officer of the 2nd Respondent, it would, whatever the reason which motivated it being sent, have highlighted to the Claimant that she was highly unlikely to have a long-term future with the Respondents.

106. Given that I have previously found a distinction exists between the Associate Program and the Accommodation Period I have decided that the point at which it could reasonably be considered that the Claimant's status transferred from being on the Associate Program to the Accommodation Period represents an appropriate starting point for UK jurisdiction. Given that the normal expectation for a given "seat" on a rotation during the Associate Program is between three and six months I have decided that the first six months of the Claimant's employment in London is the maximum period during which it could be said to fall within the normal scope of the revolving seats within the Associate Program. This therefore gives a date of 6 September 2017. Therefore, I have concluded that UK jurisdiction applies in respect of all acts and omissions relied on by the Claimant after 7 September 2017.

107. I do, not, however, find that the status of the Accommodation Period was the sole determining factor in my finding that the Tribunal has jurisdiction, with it being the duration of the Claimant's employment in London, rather than the label the parties placed on it which I consider significant.

108. In reaching this decision it is not solely the Claimant's realistic expectations as to the duration of a seat on the Associate Program I have relied on but various other factors pointing to the Claimant acquiring an increasing level of connection with the UK. These were as set out in the Judgment but for completeness include the factors set out at paragraphs 109 to 117 below.

109. The Claimant having a substantial level of connection with the UK in that she had lived here for six of the eight years prior to commencing employment with the Respondents and has lived here since that employment ended.

110. The Claimant's employment in London was under the guidance and direction of the UK office. She reported to London based managers and worked with UK Presidents and Vice Presidents in the Infrastructure and Private Market teams

111. She worked on behalf of UK based clients and was subject to applicable UK regulatory bodies e.g., the FCA.

112. The Claimant becoming liable for the deduction of a UK tax after 183 days in the UK as of 5 September 2017. She was given a notional UK salary for tax purposes of £81,000 as documented in an email from Gabriela Reimer, Human Resources of the 1st Respondent to the Claimant on 4 October 2017 which coincidentally is at about the same time as I have found she morphed from being on the Associate Program to working under the Accommodation Period.

113. US tax form W-4, signed by the Claimant on 31 October 2017, gave her home address as being Flat 7, 16 Queensborough Terrace in London

114. Determinations regarding the Claimant's entitlement to a bonus being made in London and/or Zug and ultimately not New York.

115. The Claimant's notice of termination letter being signed by a representative of the

1st Respondent as well as the 2nd Respondent.

116. At various points the possibility of the Claimant's employment being "localised" to the UK was considered by the Respondents.

117. The evidence that the Respondents regarded the Claimant's situation as being a "special case" and in their decision making were self-evidently cognisant of, and potentially influenced by, her being a potential litigant and therefore sought to take steps to minimise her acquiring further levels of connectivity with the UK beyond the various matters I have relied on. [emphasis added]

23. Thus, the Employment Tribunal held that territorial jurisdiction was established from 7 September 2017 ("the territorial jurisdiction date").

24. In the period leading up to the liability hearing, the list of issues went through a number of iterations. Matters that predated the territorial jurisdiction date were moved into a background section. The respondent removed the July 2018 meeting issue on the basis that it was no longer live after the territorial jurisdiction decision. The claimant, who was no longer represented by solicitors, did not appreciate prior to the final hearing that the July 2018 meeting issue had been removed from the list of issues. The matter was raised at the start of the liability hearing. The claimant was represented by Counsel at the liability hearing. The parties set out their contentions about the July 2018 meeting issue in a track-changes version of the list of issues:

(j) **Claimant's proposed addition:** "By the Claimant being told disingenuously in a meeting with Christian Truempler and Gabriela Reimer in the first week of July 2018 that she had not successfully converted onto a team and her contract would therefore be coming to an end by prior arrangement when in fact there had been no such prior agreement and the Claimant had been offered a permanent position in the Real Estate team in London in February 2017?"

Rs' position:

The first part of this proposed addition cannot sensibly be an issue in the case given the Tribunal's findings in its Judgments/Reasons on territorial jurisdiction, including that: the Claimant was aware that her ongoing employment in London (i.e. after August 2017) was for reasons outside the normal Associate Program (see §42 of the first judgment but also §§17, 36-41 and §81 of the Reasons at A/11/113)).

Whether or not the Claimant was offered a permanent position in the Real Estate team in February 2017 is already included in the List of Issues (Schedule, para(l)).

Claimant's position:

What the Respondents label an addition is taken verbatim from the Agreed List of Issues at A76 (paragraph 6z). It is a summary of paragraph 27 and 28 of the Claimant's

claim.

Nowhere has the Tribunal ruled on the factuality of the specific prior agreement herein described as disingenuous, this is something for the Full Merits Hearing and not something for the Respondents to unilaterally remove from the list of issues.

In fact, the Tribunal has noted the non-contemporaneous nature of the Respondents evidence of said specific prior agreement (evidence generated only after the Claimant's lawyer submitted a formal written complaint and 8 months after the supposed specific arrangement was claimed to be made).

The specifics of agreements made or not made between the parties is not something that the Tribunal chose to delve into at the jurisdiction stage. It certainly did not rule that on "X" date the Claimant agreed to her employment being terminated on "Y" date (the supposed prior agreement that is referenced as being disingenuous in the Claimant's claim form).

Finally, it goes without saying that dates and timelines are of the upmost importance, especially with regards to matters like retaliation. [emphasis added]

25. The claimant's Counsel did not assert that the findings made in the territorial jurisdiction judgments about the July 2018 meeting were unnecessary to the determination of territorial jurisdiction.

26. The Employment Tribunal decided that the July 2018 meeting issue should not be included in the list of issues. The reasons were given in a document, separate from the liability judgment and reasons, that was sent to the parties on 24 January 2026. The Employment Tribunal held:

14. Then at paragraph [4](j) the attempted introduction by the Claimant of an additional new paragraph. We do not consider it appropriate for this to be added to the list of issues. We consider that this constitutes a transparent attempt by the Claimant, whether wittingly or unwittingly, to circumvent the previous rulings regarding the existence of an Accommodation Period and therefore is not a matter which is properly brought before the Tribunal in this hearing.

27. The liability hearing, towards the start of which the case management decisions that are challenged in this appeal were made, took place from 29 November to 12 December 2021, with chambers meetings on 13 to 15 December 2021. The judgment was sent to the parties on 4 January 2022.

28. As explained above, the question of whether the claimant was offered a permanent position in the Real Estate team in February 2017 was considered as part of one of the background issues. The point was decided against the claimant:

530. We consider that the Claimant's position is confused. On the one hand she complains about being blocked from a permanent role on the London Real Estate Asset Management team, but she also contends that she received offers from both Mr Kalashnikov and Mr Bryant. We find that no such offers were made.

531. We consider that the evidence is consistent with Mr Kalashnikov, Ms Alsterlind, Mr Bryant and others giving genuine consideration as to whether the Claimant would be a suitable permanent recruit to Real Estate Asset Management. However, the consensus was that she had not performed well enough and ..., and potentially more significantly, was not enthusiastic about Real Estate.

29. Although the July 2018 meeting issue was excluded as a specific complaint of direct race and/or sex discrimination, the circumstances in which the claimant's employment terminated were considered in the liability judgment. The Employment Tribunal held that the dismissal of the claimant was not discriminatory:

Discriminatory Dismissal (s. 39(2)(c) EQA)

What was the reason for the Claimant's dismissal? Was the Claimant dismissed:

(a) as the Respondents contend, because she had come to the end of the Accommodation Period or,

(b) as the Claimant contends, because of her race and/or sex and/or perceived disability?

626. We find that the Claimant was dismissed because she had come to the end of the Accommodation Period. Given our findings above in relation to her individual allegations of alleged discriminatory treatment on account of her protected characteristics this in effect follows automatically. Whilst we have found that the Claimant undertook some protected acts, we find that there was no causative connection between these and her dismissal. We reach this finding for the following reasons.

627. There is no evidence that Mr Garcia-Altozano disclosed his conversation with the Claimant to anyone else. He was not, in any event, involved in the decision to terminate her employment.

628. There was evidence that from as early as March 2017 the possibility of a separation with the Claimant was being considered and therefore substantially predating her conversation with Mr Garcia-Altozano on 9 August 2017.

629. The Claimant was on the Accommodation Period. She had not received an offer of permanent employment whether during the Associate Program or in the Accommodation Period. Therefore, we consider that the overwhelming evidence supports the reason her employment was terminated as being because she did not have a permanent position rather than because of her protected characteristics.

630. This allegation therefore fails.

30. The question of what the claimant had been told about the basis upon which her employment

in London continued, was considered as an aspect of her unfair dismissal complaint:

Unfair Dismissal (s. 94 ERA)

Was the Claimant dismissed for a potentially fair reason, namely capability or some other substantial reason?

640. We find that the Claimant was dismissed on the grounds of some other substantial reason (SOSR). Whilst Mr Truempler said, in response to a question from the Employment Judge, that she was dismissed on performance grounds we find that the actual reason for her dismissal was SOSR i.e. the expiry of the Accommodation Period. Whilst the Claimant being on the Accommodation Period was to an extent a result of her performance not being of the requisite standard to convert during the Associate Program, we do not consider that this as a consequence became a capability related dismissal.

641. The Respondents' position is that the Claimant performed satisfactorily but not to a sufficiently high standard to attract interest from any given team so that she converted. We accept the Respondents' position that the invocation of any performance improvement process would have been contrary to the operation of the Associate Program with three month rotations and what the Respondents say was an expectation that Associates would either convert or realise after say 12 to 15 months, that they were unlikely to do so and then look to secure alternative positions. It would have been highly humiliating, in our view, for the Claimant to have been placed on a performance improvement plan particularly where the concerns were more subjective i.e. that she did not show the requisite enthusiasm or interest rather than that she was simply not capable of performing core parts of her duties.

Did the First and/or Second Respondent have a genuine belief in a fair reason for the Claimant's dismissal?

642. We find that they did. This was the end of the Accommodation Period and therefore SOSR.

Was a fair process followed in dismissing the Claimant?

643. We find that it was not. We therefore find that the Claimant's dismissal was unfair. We reach this finding for the following reasons.

644. **First, we find that the Claimant was not, as averred by the Respondents, given notice on or about 30 August 2017. Whilst it may have been the Respondents' intention to make it clear to the Claimant that her ongoing employment was of finite duration, whether for six months or an eventually extended period of 12 months, this was not unequivocally communicated to her and it is accepted was not put in writing.** We would have expected any notice of the intended termination of employment to have been documented. In its absence there was scope for uncertainty.

645. Further, given the Respondents' position that the possibility remained that the Claimant could, in the event of exceptional performance, have converted we would have expected written updates to be have been communicated to her as to her possibility of converting and further at what point it was considered that this was no longer a possibility. There was no clear communication. Whilst there may have been oral

communications, for example, enquiries as to how the job search was going, there were no communications consistent with unequivocal notice of termination having been given.

646. We therefore find that it was not until the meeting on 5 July 2018 that the Claimant was unequivocally advised that her employment was being terminated.

647. We consider this to be relevant in the context of applicable case law on the application of SOSR in similar circumstances and in particular *Terry v Sussex County Council* and *Fay v North Yorkshire County Council* in which the Court of Appeal approved the reasoning in *Terry* and set out the circumstances when the expiry of a fixed term contract can amount to SOSR, namely:

- It must be shown that the fixed term contract was adopted for a genuine purpose;
- The fact was known to the employee; and
- That the specific purpose for which the fixed term contract was adopted has ceased to be applicable.

648. Whilst we do not consider that a fixed term contract existed, we find that similar principles applied in the Claimant's case. It is relevant that the Court of Appeal in *Fay* said that the fact of the existence of a fixed term contract must be known to the employee and that the specific purpose for which the fixed term contract was adopted has ceased to be applicable. **We consider that the Respondents failed to properly communicate the fact to the Claimant, and whilst arguably mistaken and contrary to all the prevailing evidence, the Claimant remained uncertain as to what her exact position was, or at least arguably did so, until relatively late in the Accommodation Period. Had the Respondents felt there was no ambiguity regarding her position, and the Claimant was aware that her employment would automatically terminate on 31 August 2018, it would have been inconsistent for Mr Truempner to consider it necessary to travel to London and attend a meeting lasting two hours to inform her of this fact.**

649. The issue then arises as to whether this made any difference to the outcome. Arguably had a fair procedure been followed the Claimant would have been dismissed at or about the same time i.e. 31 August 2018.

31. The Employment Tribunal broadly accepted the claimant's contention that she was not told about the so called "Accommodation Period" in 2017. It was only at the meeting on 5 July 2018 that the claimant was unequivocally informed that her employment would be coming to an end. That made her dismissal unfair, and must have been in the minds of the members of the Employment Tribunal when the allegation that her dismissal was discriminatory was rejected. While the Employment Tribunal rejected the contention that the claimant was informed in 2017 that there was an Accommodation Period that would terminate at the end of August 2018, the Employment Tribunal had held, in the territorial jurisdiction judgments, that in the latter period of her

employment in London, the claimant was no longer on the Associate Program and knew that her position had changed. As Eady J put it, the “claimant having moved off the associate program, there was no expectation that she could move to work for the second respondent in some other jurisdiction”.

32. An appeal against the decision not to include the July 2018 meeting issue was permitted to proceed to a full hearing after a Rule 3(10) Hearing, at which the claimant was represented by ELAAS Counsel, by an Order of His Honour Judge Shanks sealed on 18 July 2024:

7. In relation to proposed issue 4(j) I consider that it is arguable that the ET were wrong to conclude that the first part of the proposed issue had already been resolved by the tribunal’s judgment/reasons on jurisdiction since (a) the findings relied on do not appear to be very clear (even as to whether the August 2017 meeting took place) (see paras 36-42 of the judgment sent out on 14/1/20 at C43-45)) and (b) it is arguable that those findings were not an essential ingredient in the jurisdiction issue. I therefore allowed this issue to proceed to a FH in the EAT.

33. The simple answer to this ground of appeal is that the claimant’s then Counsel, when contending that the July 2018 meeting issue should remain in the list of issues, did not assert that any decision made in the territorial jurisdiction judgments about the claimant leaving the Associate Program, and remaining in the UK primarily so that she might seek to regularise her immigration position and seek alternative employment, was not necessary to those judgments. I do not accept that there is a proper basis upon which that new point of law can be argued now, it not having been raised while the claimant was represented by Counsel and in circumstances in which it would be likely to open up new areas of enquiry: **Secretary of State for Health v Rance** [2007] IRLR 665.

34. Further, the Employment Tribunal concluded that the claimant had not been offered a position in the real estate department. Despite the failure of the respondent to make clear the precise basis upon which the claimant’s employment continued after she moved off the Associate Program, she was aware that she was no longer on the program. While the term “Accommodation Period” was terminology that the respondent applied only late in the claimant’s employment, it reflected the fact that the claimant had moved off the Associate Program, there would be no further rotations and the possibility of ongoing employment with the respondent was becoming increasingly unlikely. In

light of the finding of the Employment Tribunal that the dismissal of the claimant was not discriminatory, and the findings about the circumstances of her dismissal, which essentially covered the same ground as the July 2018 meeting issue; even if the July 2018 meeting issue had remained an individual allegation of direct sex and race discrimination, there is no realistic prospect that it would have been determined in the claimant's favour.

35. Finally, I consider that it was necessary for the Employment Tribunal to determine the basis on which the claimant remained in London in the latter part of her employment. The parties agreed that the appropriate test in respect of issue estoppel is one of necessity: **Foster v Bon Groundwork Ltd** [2012] EWCA Civ 252, [2012] ICR 1027, **Caterham School Ltd v Rose** [2019] UKEAT 0149 19 RN.

36. It was necessary for the Employment Tribunal to consider the claimant's contention that she remained on the Associate Program and so might have had other rotations in other jurisdictions as opposed to the respondent's position, which was against their interests on territorial jurisdiction, that she had left the Associate Program and continued in employment in London on an ad hoc basis without any expectation of further rotations within the Associate Program. Eady J clearly accepted that these findings were material to the issues of territorial jurisdiction and, particularly, the date by which the employment relationship evolved such that territorial jurisdiction was established.

37. The claimant believes that the respondent deliberately planted the concept of an Accommodation Period which took root and eventually undermined her entire case. While Employment Judge Nicolle adopted the term "Accommodation Period" in some passages in the judgments, it is clear that he appreciated it was of the respondent's making and it was not the "label" that mattered but the basis upon which the claimant continued to work in London. It is in the nature of preliminary issues that they may have significant knock on consequences for the determination of a claim. The preliminary issue of territorial jurisdiction was determined after hearing evidence and full submissions. The factual findings necessary to the determination of territorial jurisdiction were thereafter binding. That is not altered by the fact that Employment Judge Nicolle sat alone

when determining territorial jurisdiction and as part of a full panel when determining liability.

38. The first ground of appeal is dismissed.

39. The second case management decision challenged in this appeal relates to the exclusion of some paragraphs from the claimant's reply statement. The leading case on the exclusion of evidence in the employment law context is **HSBC Asia Holdings BV and another v Gillespie** [2011] ICR 192 in which Mr Justice Underhill (President) summarised the authorities at paragraph 13. His comprehensive analysis should be read in full. I shall only extract a few of the points most salient to this ground of appeal. Generally, relevant evidence should be admitted and irrelevant evidence excluded. Relevance is not an absolute concept. Marginal evidence, or evidence that is unlikely to assist the court, may be excluded on relevance grounds. Sometimes such evidence is described as not being "sufficiently" relevant. The fact that evidence is inadmissible because it is insufficiently relevant does not, however, mean that it is necessary to take steps to exclude it in every case, but there are cases where there are real advantages in ruling out irrelevant evidence before it is sought to be adduced. Early rulings on admissibility can be appropriate in discrimination complaints, particularly to avoid the risk of the essential issues being obscured in a morass of detail.

40. Care should be taken before excluding evidence in discrimination complaints, which are generally highly fact sensitive, but as Underhill J stated in **Gillespie**:

But each case is different, and caution should not be treated as an excuse for pusillanimity. If a judge is satisfied on the facts of a particular case that the evidence in question will not be of material assistance in deciding the issues in that case and that its admission will (in Hoffmann LJ's words) cause "inconvenience, expense, delay or oppression", so that justice will be best served by its exclusion, he or she should be prepared to rule accordingly.

41. In reality, it is often claimants who suffer more from vast amounts of evidence being put before the Employment Tribunal which is, at best, of marginal relevance, and often of no relevance, because it obscures the real issues and makes it less likely that any discrimination will be uncovered. Discrimination complaints are often highly fact sensitive, but success in such complaints rests not on the quantity, but the quality, of the evidence.

42. The question of whether to exclude evidence is a matter of case management that can only

be challenged where there is an error of law in the analysis of the Employment Tribunal or the decision is one that exceeds the generous ambit within which reasonable disagreement is possible:

Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 at 345; **Canadian Imperial Bank of Commerce v Beck** [2009] EWCA Civ 619, [2009] IRLR 740.

43. Both parties were permitted to serve reply statements. The Employment Tribunal permitted the introduction of parts of the claimant's reply statement but excluded some passages. The claimant's reply statement was dated 17 November 2021, relatively shortly before the liability hearing commenced on 29 November 2021. There was very limited time for any response to the allegations raised in it. The claimant contends that the reply was, in part, an attempt to respond to comments witnesses made about the respondent's commitment to equality.

44. The first excluded passage was in the following terms:

17. Even having worked at Goldman Sachs for just a couple years (but longer than Mr Erni and Mr Gantner), it makes me wince to see Goldman Sachs seemingly affiliated with Partners Group. The two cultures could not be more different. In fact, considering the other institutions that I have worked for and even studied at, I have yet to encounter a culture less like Goldman Sachs' culture.

a. Partners Group maintains an unprofessional work environment, where the men and women towards the top of the Firm's internal caste system feel entitled to conduct themselves in a base and brash manner

b. Partners Group's culture is defined by an ethnicity rather than a mission or commitment to excellence

c. Partners Group chooses to cut corners on the provision of important services, like travel visa processing, and basic benefits, like international healthcare coverage, to its own employees — all the while branding itself as being better to the employees of portfolio companies than other private equity firms are

i. While international private health coverage is expected from top employers, even for employees that do not travel for work, Partners Group chose to send Associates to foreign countries for months at a time without international private health coverage — opting for a cheaper emergency only travel insurance policy. Said emergency only travel insurance policy was suboptimal, but remained the only form of private healthcare coverage that I had over the 18 months that I was based in London — even though the Firm thought I had been diagnosed with cancer. And during the 2019 Jurisdiction hearing the Firm even lied to say that it had provided me with a private health insurance, without providing any evidence of the supposed coverage.

ii. When requiring employees to travel, top employers do not expect employees to navigate foreign visa requirements, rather opting to commission specialised support — Partners Group did not, even for something as significant as an international office transfer. Such “corner cutting” often resulted in unpleasant surprises and greater costs. By contrast, even as a new undergraduate, Goldman Sachs gave me the phone number of a point person at Macfarlanes to answer all of my visa related questions and another person accompanied me to my premium same day visa processing appointment to make sure that the process was smooth and glitch free.

18. As ethnicity and identity politics are of the utmost importance at Partners Group, even German colleagues openly spoke about feeling like second class citizens for not being Swiss German. And the Firm has been in receipt of at least one discrimination claim from a non-Germanic white male. Accordingly, I found it incredibly disingenuous to read witness statements claiming surprise regarding my experiencing race and ethnicity based discrimination at Partners Group.

19. While there was no memo circulated on the matter, there was a palpable “hierarchy of identities” (or caste system) at Partners Group

- a. Swiss Germans sat at the top of the internal hierarchy — colleagues would dryly joke that the Partners Group moto is that a Swiss German man is capable of anything, qualified or not
- b. Germans were undoubtedly second to Swiss Germans
- c. Scandinavians, Englishmen and Scotsmen occupied the third rung
- d. White Americans occupied the fourth rung
- e. Swiss French occupied the fifth rung
- f. Swiss Italians occupied the sixth rung — which is where I will end this exercise

45. The Employment Tribunal held:

Paragraphs 17, 18 and 19

36. We deal with these paragraphs together. We consider they are inadmissible and therefore should be deleted. We reach this decision based on their effectively involving the introduction of new matters which did not form part of the Claimant’s pleaded case including at (a) for the first time reference to what the Claimant refers to as a caste system at (b) a culture defined by ethnicity rather than a commitment to excellence, in effect it could be interpreted as an allegation of institutional racism, and that does not form the pleaded case. We do not consider that that is directly a reply to the Respondents’ witness statements given a reasonable interpretation as to what a reply involves, but placed in the context of the pleaded case and the original set of witness statements.

37. Paragraph (c) in 17 concerns completely new matters which cannot in any way be

seen as related to the Respondents' witness statements. It does not concern the pleaded issues and nor does it concern less favourable treatment on account of protected characteristics. There can be no relevance to assertions that the Respondents do not treat employees generally well in terms of the provision of benefits and foreign visa requirements.

38. Paragraphs 18 and 19 again references a caste system and sets out what the Claimant considers to be a hierarchical list of individuals based on their gender, race or nationality. This does not form part of the pleaded based on the Claimant's protected characteristics.

46. The decision clearly fell within the case management discretion of the Employment Tribunal. The suggestion of a "caste system", with a hierarchy of racial groups other than the claimant's, was wide-ranging, unlikely to assist in determining the claimant's complaints and risked a substantial amount of time being spent on issues of no significant relevance, such as the respondent's approach to travel arrangements.

47. The next excluded paragraph was 20:

20. Notably, of the four black investment professionals that were hired into the Associate Program in my intake year (from MIT, Cornell, the University of Pennsylvania and the University of Virginia) not a single one is still at Partners Group.

a. After 9 months, Peter Owusu-Opoku, returned to his previous employer, Jones Lang LaSalle — a real estate focused investment firm.

b. After 2 years, Chidozie Ugwumba left his permanent seat on the US Debt Team for another investment firm— which he had permanently joined after completing two Debt Team rotations (one in New York and one in Zug HQ). Upon returning to the Debt Team as an AVP and expecting AVP work and exposure, Mr Ugwumba was characterised as being too big for his britches and his performance rating was more than halved by members of the debt team.

c. After 3 years, I was dismissed, following a protracted campaign of discrimination, harassment and retaliation.

d. After 6 years, London based Edward Kimotho left for another investment firm, however in the USA. As Partners Group chose to bring him to London via the undesirable "inter-company transfer" (ICT) visa, Mr Kimotho's ICT visa barred him from leaving Partners Group to accept another UK role — without first leaving the UK for 1 year.

48. The Employment Tribunal held:

Paragraph 20

39. Paragraph 20 raises a slightly different issue but again we find this inadmissible. This involves the Claimant seeking to introduce evidence regarding three other black employees and what she says were their early departures from the firm. First, this could

have been included in the original pleadings or further particulars, it was not, and it cannot properly be regarded as a reply. It was always inevitable that the Respondents would deny there was a culture of institutional sex and race discrimination and therefore that could hardly of come as a surprise to the Claimant and nor does it provide her with the opportunity to thereby introduce what are new matters.

40. We consider that the Respondents would be significantly prejudiced by not being able to adduce evidence in relation to the circumstances of these individuals and, in any event, the fact that another employee left after six years to join another investment firm does not necessarily provide evidence that it was as a result of him suffering discriminatory treatment.

49. This determination was also clearly well within the case management discretion of the Employment Tribunal. If the circumstances of these other employees were to be properly investigated it would have required large amounts of additional evidence. The Employment Tribunal was entitled to conclude that this would cause disproportionate disadvantage to the respondent, particularly as moving to alternative employment does not, on the face of it, suggest that the employees had been subject to discrimination. It was not suggested in the claimant's reply witness statement that the employees had made such allegations.

50. The Employment Tribunal did permit the claimant to introduce evidence about a "black face photograph" from the claimant's time in the Zug office. This demonstrates that the Employment Tribunal did not adopt an all or nothing approach and was alive to the possibility that evidence of matters not directly related to the claimant could be of relevance in determining her complaints. This gave the claimant an evidential basis to challenge the assertions about the respondent's commitment to equality.

51. The final excluded paragraph was 31:

31. In July 2017, I again experienced Partners Group's lack of care regarding racism and race based harassment.

a. I was racially profiled, harassed and bullied by two white female members of the reception team at London's Heron Tower, where Partners Group's London offices were based. The main aggressor had initially approached me insisting that she knew the people who worked in the building (in spite of Heron Tower being the second tallest building in the City of London) and she supposedly knew that I was not one of them.

b. She was subsequently triggered into a defensive tirade upon being shown to be wrong.

c. I requested a meeting with the two women in question, their manager and

Partners Group's London office manager.

d. However, Partners Group did not care for me to address the matter and refused to hold the meeting I requested.

e. Thus, I was left unsupported — regularly being faced with the women as I entered and exited the office each day. (And in the knowledge that they had actually tried to preempt a complaint by telling their manager that they were scared and intimidated by me.)

f. I would later learn that it was Thomas (Tom) McArdle that vetoed the meeting I requested without once discussing the matter with me.

52. The Employment Tribunal held:

Paragraph 31

45.Paragraph 31 is a separate issue involving an incident alleged to have taken place in July 2017 at the Respondents' Heron Tower premises. We find this inadmissible. We reach this decision for the following reasons.

46.It would have been perfectly possible for the Claimant to have included this matter in her original complaint, she failed to do so, the first time it was mentioned was in a statement shortly before the full merits hearing. It is not at all clear that anything beyond the Respondents' failure to set up a meeting was in any way attributable to the Respondent. It could be anticipated that the reception staff at Heron Towers serve multiple occupants of the building and would not be employed by the Respondents or under their direct control. It does not in itself, even if it were to be accepted to have taken place i.e. racial profiling, indicate any propensity towards discriminatory treatment or racial profiling as far as the Respondents are concerned. It is a specific complaint and it is too late for it to be introduced and therefore it is inadmissible.

53. There was no error of law in this case management decision. As the Employment Tribunal noted, the only conduct on the part of the respondent was an asserted failure to investigate by Mr McArdle. The matter could have been raised from the outset as one of the claimant's background complaints. As the respondent notes, Mr McArdle was not one of the individuals against whom the claimant brought her specific complaints.

54. The second ground of appeal is dismissed.