EMPLOYMENT TRIBUNALS

Claimant: Ms S Coningham

Respondent: Warner Bros Entertainment UK Limited

Heard at: London Central (CVP) **On: 10 March 2022**

Before: Employment Judge A.M.S. Green

Representation
Claimant: Mr M Singh - Counsel
Respondent: Mr T Cordrey - Counsel

RESERVED JUDGMENT ON A PRELIMINARY MATTER

The application to strike out the claimant's claims is refused.

REASONS

Introduction

1. For ease of reading, I refer to the claimant as Ms Coningham and the respondent as Warner Bros.

2. The purpose of this hearing was, amongst other things, to consider Warner Bros application to strike out Ms Coningham's claims or, in the alternative for the Tribunal to make a deposit order.

3. We worked from a digital bundle. Mr Singh and Mr Cordrey helpfully provided skeleton arguments upon which they elaborated in their oral submissions. I am grateful to them for their clarity in presenting their respective cases.

4. I have refused the application to strike out the claims and I have refused to make a deposit order.

The claims

5. On 6 July 2021, Ms Coningham presented a complaint to the Tribunal claiming age discrimination, race discrimination and sex discrimination under the Equality Act 2010 ("EQA"). She also made a claim for equal pay under EQA. At an open preliminary hearing on 10 March 2022 I dismissed the following claims upon withdrawal:

    a. The claim for indirect sex discrimination pursuant to EQA, section 19.

    b. The claim for equal pay pursuant to EQA, sections 65 and 66.

    c. The parts of the claims for direct race, sex, and age discrimination pursuant to EQA, section 13 and harassment pursuant to EQA section 26 as identified in the document entitled "Agreed Schedule of Withdrawn Complaints" as appended to that judgment.

6. Essentially Ms Coningham claims that she was denied promotion several times and that Warner Bros failed to benchmark her for a management role. She says that these detriments were because of her protected characteristics of age, race, and sex and where continuing acts.

Warner Bros' application to strike out the claims or for grant of a deposit order

7. On 7 January 2022 Warner Bros applied to the Tribunal for an order to strike out Ms Coningham's claims for direct race, sex, and age discrimination or, in the alternative, for a deposit order to be made [67]. They also applied to strike out the claim for equal pay, but this is no longer a live issue given that I have dismissed that claim upon withdrawal.

8. Warner Bros contends that the claims should be struck out for the following reasons:

    a. All of Ms Coningham's claims for race sex and age discrimination are out of time on the basis that all of the alleged acts and/or omissions took place before 6 April 2021 (being three months before the submission of the claim plus the relevant ACAS early conciliation period).

    b. The most recent alleged discriminatory act appeared to have occurred in February 2021, when Ms Coningham alleged that Warner Bros failed to properly benchmark her for a management role. Before that, the most recent allegations arose in late 2019 and early 2020. Ms Coningham refers to a number of very historic matters in her particulars of claim dating back to 2016 and involving many different alleged discriminators. Warner Bros submits that there is no pleaded basis upon which Ms Coningham can assert that the allegations form part of a continuing act.

c. There would clearly be significant prejudice to Warner Bros if Ms Coningham was allowed to proceed with her historic discrimination complaints given that some of the alleged discriminators are no longer employed by them, and those who are still employed would be required to recall evidence from up to 6 years ago. It is submitted that it is inevitable that memories will have faded such that a fair hearing may no longer be possible.

d. Ms Coningham has provided no explanation as to why she did not bring her claims within the prescribed time limits. Accordingly, Warner Bros contends that there is no basis upon which Ms Coningham could assert that it would be just and equitable to extend time to allow the Tribunal jurisdiction to consider her discrimination complaints.

9. In the alternative, Warner Bros contends that Ms Coningham's discrimination complaints should be struck out on the grounds that they have no reasonable prospect of success, for the following reasons:

a. In relation to most of the allegations set out in the claim, Ms Coningham has failed to provide information on the basis of which, even if proven as fact, the Tribunal could possibly conclude, in the absence of an adequate explanation from Warner Bros, that an unlawful act of discrimination has been committed. The burden of proof placed on Ms Coningham to demonstrate a prima facie case has not, therefore, been discharged and all such claims must fail.

b. In particular, but without limitation, Warner Bros submits that there is little or no prospect of Ms Coningham being able to demonstrate that the alleged acts of direct discrimination at paragraph 71 (a)-(j) of her further and better particulars were in any way related to her race, sex, or age. As part of Warner Bros internal grievance process, these complaints were thoroughly and fairly investigated by an Executive Director in the WarnerMedia People Relations team, an independent corporate team with a remit to investigate workplace concerns arising from the WarnerMedia Group's Equal Opportunities policies, and then considered in detail by two senior managers at Warner Bros (the grievance hearing manager and the grievance appeal hearing manager). None of these three senior managers found any evidence of unlawful discrimination. Warner Bros relies on the findings of the grievance investigator, summarised at paragraph 13 of its amended response [62] in support of their application.

10. In the alternative, Warner Bros submits that if the Tribunal is not minded to strike out the claims, Ms Coningham should be required to pay a deposit to the Tribunal of £1000 per allegation or detriment in order to continue to advance her claims on the grounds that they have little reasonable prospect of success pursuant to rule 39 (1). The grounds relied upon by Warner Bros for a deposit order are the same as those set out in relation to strike out.

11. In his paragraphs 24 to 34 of his skeleton argument, Mr Cordrey submits the following in relation to timing of the presentation of the claim to the Tribunal and the extent of delay as follows:

a. The last promotion which Ms Coningham says that she was denied related to a decision taken by Warner Bros relevant recruitment and/or hiring manager for that role on 23 January 2020.

b. The ordinary three-month time limit under EQA, section 123 for bringing the claim therefore gives a deadline of 22 April 2020.

c. Ms Coningham obtained her Early Conciliation certificate with Day A on 8 June 2021 and Day B on 8 June 2021. Pursuant to EQA, section 140B (3) the day after Day A (9 June 2021) to Day B (8 June 2021) (a total of -1 days) is to be added to the three-month time limit, therefore not in this case extending the time limit for submitting the claim.

d. EQA, section 140B (4) provides a potential second route of extension if the primary time limit, as extended by section 140B (3) expires between Day A (8 June 2021) and one month after Day B (8 July 2021). Since the primary time limit expired on 22 April 2020, this did not fall within that period and therefore there is no extension provided here either.

e. The claim form was lodged on 6 July 2021 leaving the most "recent" claim of a denial of promotion of more than 14 months out of time. The oldest claim is 3 years and 10 months out of time. That is an enormous delay in the context of a three-month primary time limit prescribed by Parliament.

f. As to the alleged failure to benchmark Ms Coningham, she claims that this took place on 25 March 2021. Applying the three-month time limit there was a prima facie deadline of 24 June 2021 for bringing the claim with no extension provided by EQA, section 140B (3). However, that the deadline of 24 June 2021. Between Day A (8 June 2021) and one month after Day B (8 July 2021) leading to the limitation period extending to 8 July 2021 pursuant to EQA, section 140B (4). As the claim form was lodged on 6 July 2021, this claim is within time by 2 days.

g. Ms Coningham claims that her denied promotions are in time because they amount to "conduct extending over a period". Ms Coningham must, therefore, rely on the denials of promotion being connected to a refusal to benchmark (which is just in time) as together, an "ongoing situation or continuing state of affairs".

h. It can immediately be seen how implausible an argument this is for the following reasons:

    i. The string of allegedly denied promotions ceases, on Ms Coningham's case, on 23 January 2020 with no further detriment occurring until the single benchmarking detriment on 25 March 2021, well over one year later. Temporally this break significantly undermines the existence of any kind of ongoing situation or continuing state of affairs.

    ii. The group of allegedly denied promotions are a different type of detriment from the failure to benchmark Ms Coningham against

a manager's role, making it hard to argue they together form conduct extending over a period.

iii. Ms Coningham does not plead that there is any connection between the failure to benchmark and the denial of promotion and does not plead that Ms Sharp, the individual responsible for the failure to benchmark, had any involvement in or influence over the individuals who denied her the promotions.

iv. In keeping with **Owusu v London Fire & Civil Defence Authority [1995] IRLR 574** these denials of promotion are to be treated as "specific one-off instances" rather than conduct extending over a period.

12. In his oral submissions, Mr Cordrey argued that paragraphs 24 to 29 of his skeleton argument should not be disputed. He reiterated the point that the benchmarking allegation was in time, and it should not be struck out. He then referred to a block of 12 denials of promotion which Ms Coningham complained about, the most recent of which was 14 months out of time. The oldest example was 3 years and 10 months out of time. Ms Coningham's claim was fundamentally predicated upon all of these being "dragged" into time by the benchmarking allegation. The Tribunal, therefore, had to consider whether her lack of promotion was connected to benchmarking.

13. Mr Cordrey also referred to paragraph 30 onwards in his skeleton argument where the chronology of denied promotions ran from June 2017 until January 2020. Thereafter, Miss Coningham did not suffer any further detriment until she was not benchmarked against a manager position which was in March 2021. He described this as a "desert" between the final denial of promotion in January 2020 and the failure to benchmark in March 2021. This undermined the argument that there was an ongoing situation or a continuing state of affairs which required repetition. In this case, there was a gap of over a year which immediately broke the chain of causation and suggested that there was no ongoing situation or continuing state of affairs. The block of similar detriments had ended. It had a definite start point and a definite endpoint. More than a year later, Ms Coningham separately said that she should have been benchmarked for a management role and she was not. There was no connection with that event and the earlier detriments (i.e. failure to promote). He then repeated what he set out in paragraph 32 and 33 of his skeleton arguments.

14. Mr Cordrey submitted that I should take Ms Coningham's case at its highest. This is based on what she has claimed. In her claim, she says that the lack of benchmarking was connected to the denials of promotion. If she had pleaded that an individual, Ms Sharp, had connived with the decision-makers who refused her 12 promotions or if it was somehow connected with a small group of managers who had it in for her, I would have to take this at its highest. However, Ms Coningham was not saying this in her particulars of claim or in her further and better particulars. There was no connection between benchmarking and the failure to be promoted. Ms Sharp is not one of the named individuals. She is not said to be the guiding hand or the guiding mind. I was also referred to the decision in **Owusu**, which Mr Cordrey said was in point. It was a very similar case that was heard by the EAT concerning a complainant who abandoned their claim based on denial of promotion being

conduct over a period of time. In particular, I was referred to paragraph 19 of that decision. The EAT agreed that these were specific instances outside the three-month period. In Mr Cordrey' submission the same applied to Ms Coningham's case. The failure to promote her should be treated as specific instances all of which fell outside the three-month limitation period.

15. In Mr Cordrey's submission the minimum period that the claims were out of time is 14 months. If Ms Coningham wanted to bring discrimination claims in respect of the 12 decisions denying her promotion, she had three months from the date of each decision. She did not have 14 months to do that. She did not have more than two years to do that. She would have to provide a good reason for her delay. From Warner Bros' perspective it would be very difficult for it to evidence why someone other than Ms Coningham was promoted in June 2017. That is part of her claim. Mr Cordrey submitted that Parliament intended claims should be brought quickly. Furthermore, I was asked to consider the likelihood of the relevant decision makers still being employed by Warner Bros and whether they would be able to remember what happened. Additionally, there may be issues about paperwork concerning the decision and whether it had been retained. The earliest decision was almost 5 years ago. There was no reasonable prospect of showing that the 12 denials of promotion are connected with benchmarking. I was invited to strike out the claims as a matter of substance.

16. Mr Cordrey referred to paragraphs 35 onwards in his skeleton argument and acknowledged that it is very unusual to strike out a discrimination claim but reminded me that judges should not be shy to take a robust decision in a case where there is realistically only one possible outcome.

17. In paragraph 37 of his skeleton argument, Mr Cordrey submits that most of Ms Coningham's race, sex and age discrimination claims are entirely speculative. In effect, he submits that her claim is that she is an older, Asian/Indian woman and individuals who beat her to various promotions were not, and therefore, the refusal to appoint her to those promoted positions was because of her age, race and/or sex.

18. In paragraph 38 of his skeleton argument, Mr Cordrey refers to background evidence of comments and allusions to Ms Coningham's age, sex and race which does nothing to assist her since she does not assert that those background events are in any way connected to and involve the majority of the individual decision-makers who were responsible for the 12 denials of promotion relied upon. Mr Cordrey submits that Ms Coningham's case appears to be on the lines of "because W and X once asked intrusively about my age, sex or race, that calls into question decisions by Y and Z who had no connection with W and X and were not present and not even aware of the behaviour of W and X". Such a contention has no reasonable or little prospect of success, and, in this regard, I am referred to the decision of the EAT in **London Borough of Camden v Miah [2009] All ER (D) 258**. If Ms Coningham's case is allowed to proceed than in any instance where any employee had been refused a promotion, they could look at the person who had received the promotion, identified different protected characteristic, and brought a discrimination claim.

19. In paragraph 40 of his skeleton argument, Mr Cordrey submits that Ms Coningham must be able to show on her pleaded case that there is a

reasonable prospect of a Tribunal concluding that the reason she suffered the pleaded detriments was her race, age and/or sex. However, she has not identified any information or allegation about the individuals that denied her promotion or benchmarked her against a manager role, save in relation to Ms Sharp, that would provide a basis for inferring, even as a prima facie case, that the reason for the detriment was her race, sex, or age. In a number of cases she simply did not know who made the impugned decision.

20. In paragraph 40 of his skeleton argument, Mr Cordrey refers to evidence that Warner Bros has provided of the extensive grievance and grievance appeal investigations which showed that the reason for the denial of promotions were wholly non-discriminatory. Mr Cordrey relies on the decision in **Ahir v British Airways plc [2017] EWCA Civ 1392** in support of his proposition that this is a case where there is a straightforward and well documented explanation for what had occurred on the basis of a mere assertion that the explanation is untrue without Ms Coningham being able to advance some basis, even if not yet provable, for that being so.

21. In his oral submissions, Mr Cordrey said that the allegations of 12 detriments relating to promotion should be struck out. This was because Ms Coningham was pleading that she was denied promotion by those individuals and that someone else with a different protected characteristic was promoted which she says is discrimination. In relation to those 12 decision-makers, nothing is said that could be inferred that they had a discriminatory animus when they made their decisions.

22. Mr Cordrey submitted that Miss Coningham had not advanced anything more than what anyone can say about any promotion decision (i.e. they are different from me). That is not enough to justify taking up the Tribunal's time and putting Warner Bros to proof in a discrimination claim.

Ms Conningham's opposition to the application to strike out her claims or for grant of a deposit order

23. In relation to time limits, Mr Singh sets out Warner Bros position in paragraphs 8 & 9 of his skeleton argument as follows:

    a. Ms Coningham's claims are now more focused, and he invites Warner Bros to reflect upon their application and in particular that the Tribunal will take the claims at their highest.

    b. The claims are in time and Warner Bros have erroneously relied upon the cut-off date of 6 April 2021 however:

        i. The failure to promote was, and is, an ongoing situation or state of affairs and, in this regard Mr Singh refers to the decision in **Hendricks v Commissioner of the Metropolis [2002] EWCA Civ 1686**

        ii. Regarding pay and benchmarking, Ms Coningham was informed of the outcome of the benchmark 25 March 2021 meaning that the failure was ongoing until that point. ACAS was notified and the Early Conciliation certificate was issued on 8 June 2021. The limitation period ended on 8 July 2021 (Employment Rights

Act 1996, section 207B (4). The claim was issued on 6 July 2021.

iii. The harassment type allegations are withdrawn.

24. Regarding the substantive merits of the claims, Mr Singh submits at paragraph 10 of his skeleton argument that this is a matter to be determined at a final hearing but, nonetheless, on the face of it, the application to strike out or grant a deposit order falls far short of the required test concerning prospects.

25. In paragraph 11 of his skeleton argument, Mr Singh addresses Ms Coningham's career prospect allegations as follows:

a. There are a large number of examples where she failed in various applications throughout her employment. Instead, those who were younger, male and/or white were successful. She has named comparators.

b. Although Ms Coningham withdrew her harassment type allegations, they provide useful background and point to Warner Bros' culture in the following ways:

i. Comments about her voice suggesting racial stereotyping.

ii. Ashley Cosgrove's comments about Bollywood movies.

iii. Questions about Ms Coningham's age.

iv. Whilst the context is denied, Warner Bros admits Shelley Drury made comments in relation to Tik-Tok.

v. Warner Bros accepts that Shelley Drury made comments that Mr Stenhouse "only recruits blondes", which, even if not strictly true, suggests an absence of non-discriminatory and objective recruitment processes. Only recruiting blondes is inherently discriminatory. In this regard, Mr Singh relies upon the decision in **James v Eastleigh Borough Council [1990] IRLR 288**.

vi. Polly Cochrane made comments about younger team members feeling uncomfortable around more experienced employees.

vii. Mr Cosgrove mixing up the names of two black members of staff.

viii. Ms Coningham being asked where she is from.

c. Mr Singh refers to the grievance outcome. The allegations of discrimination were not upheld but there was an absence of any apparent probing or analysis of comparators. In this regard, Mr Singh relies upon the decision in **Badeway v Circle Thirty Three Housing Trust Limited [1997] UKEAT/332/95** where it was held that evidence about an individual's firm and truthful belief, that the protected

characteristic played no part in their own decision-making process, is not only not determinative evidence, it is not even relevant evidence as to whether or not a protected characteristic has played a part. In any event, the outcome identifies isolation from the outset; lack of line management support and feedback on development; an absence of discussions and development including promotion; and a lack of transparency. Mr Singh then refers to the grievance outcome [261].

d. Mr Singh refers to the apparent lack of diversity within Warner Bros. During the grievance meeting on 26 July 2021, Ms Coningham referred to black and Asian interns being recruited for the first time ever. Ms Anwer referred to "a culture change generally".

e. Mr Singh refers to the lack of transparency. In Ms Anwer's investigation of Ms Coningham's applications, a culture of poor record-keeping of the processes is revealed in relation to job application; criteria; and written feedback. There is an absence of an investigation into the comparators Ms Coningham identified. In relation to the Digital Sales Manager post (circa October 2019 to January 2020), and unambiguous and inconsistent "process" was followed with no records apparently maintained. The absence of any contemporaneous documents dealing with the selection processes and explaining the decision-making constitutes a breach of the EHRC Code of Practice for Employment. It is reasonable to have expected a paper trail of the interview/recruitment process and in this regard Mr Singh refers to paragraphs 17.38 and 17.4 of the EHRC Code. Inferences of discrimination could be drawn from such failures.

f. Because of the lack of transparency, there is an absence of evidence that Warner Bros recruited in a non-discriminatory way based upon objective criteria. In relation to the Senior Strategy Manager post it was commented that Ms Coningham's "style not quite right from what I recall though". Mr Singh refers to emails on 5 July 2019 suggesting that the Sales Manager process was predetermined between Mr Stanley and Ms Glasscoe.

g. Mr Singh refers to Warner Bros failing to provide details of 19 recent promotions.

h. Mr Singh refers to Ms Coningham being the only permanent member of staff in the digital sales team that is not a manager other than the interns.

i. Mr Singh refers to there being no performance issues raised against Ms Coningham to justify the absence of opportunities.

j. A job description suggests an outdated culture (e.g. "Excellent man-management skills").

26. In paragraph 12 of his skeleton argument, as to Singh addresses the benchmarking/pay allegations as follows:

    a. Ms Coningham is the only permanent member of staff in the digital sales team that is not a manager other than the interns.

b. Mr Keegan is paid approximately twice as much as Ms Coningham, but the difference in their roles is not substantial. Warner Bros relies upon Ms Coningham's role not requiring line management, but to younger white males have marketing roles (and pay) but are not line managing.

c. Mr Gibbons and Mr Greasley did not line manage but our managers. Mr Gibbons was promoted without a formal process.

d. Ms Sharp, Ms Coningham's line manager appear to have forgotten the benchmarking process and she requested that Ms Coningham obtained Mr Keegan's job description (which Warner Bros failed to provide at the time). Ms Sharp was neutral on whether Ms Coningham's role was at a manager level, which unsurprisingly People Relations found "unusual". Mr Singh also refers to a "bizarre and unexplained discrepancy" in relation to communications between Ms Sharp and Ms Youde. Amnesia about the process extended to Cat Richards.

e. Mr Singh refers to the ambiguity about whether Ms Coningham line managed or had line management responsibility he submits that this is supported by the finding that Ms Sharp failed to correct Ms Coningham about whether she had management responsibilities over Mr Banez and/or Mr Keegan. The absence of limited line management responsibilities does not explain the disparity in pay.

27. In his oral submissions, Mr Singh submitted that there was a significant difference between the parties regarding how they consider the prospects of the claims. He suggested that this could be down to their having a different understanding as to how discrimination works in the workplace which underscores the need for caution with discrimination claims when applications for strike out or deposit orders are made. He submitted that there was no magic formula and that in similar cases a Tribunal may find an inference of discrimination, but another Tribunal would reach an opposite conclusion on the same facts. He submitted that some Tribunals might think that 12 failed applications for promotion was enough to warrant having a final hearing.

28. Mr Singh submitted and emphasised the importance of the fact-finding element in discrimination cases. He said that the Tribunal must dig deep into such cases and that he attributed his differences with Mr Cordrey's position to the connectivity between the applications for promotion and the benchmark process. Mr Singh submitted that Mr Cordrey was seeking to minimise that connection. A Tribunal might look back at a history of non-promotion and consider the benchmarking process as simply being no more than an ongoing extension of Ms Coningham's belief that she was not been recognised for what she was doing. Essentially, Ms Coningham wanted to be a manager and she wanted to be paid for performing that role. This was enough for the Tribunal to determine at a final hearing.

29. On the question of time limits, Mr Singh referred to Parliament's intent which he said was set out in EQA, section 123 which recognises that if there is discrimination over a period of time there is no time limit for that period.

30. Regarding the decision in **Owusu** Mr Singh submitted that it was not in point with this case. He acknowledged that Counsel in that case had abandoned presenting the claim regarding promotion and it was safe to assume that this was because they believed that each failed promotion was a discrete event and not interconnected. This is not the case in Ms Coningham's claim and failure to be promoted can be a continuing act. It is a question of fact as to whether acts extend over a period of time. They do not require to be connivance. Often in these cases, respondents can gaslight an employee and that is a matter for a Tribunal to determine on the evidence.

31. Ms Coningham's case is that the failure to promote is connected with the benchmarking which did not occur in a vacuum. It was part of an ongoing process. I was referred to the notes of the grievance hearing as evidence of connectivity [213]. In Mr Singh' submission this showed evidence of a connection between the benchmarking and job opportunities.

32. Mr Singh submitted that the application was nowhere near the threshold of no reasonable prospects. He also referred to the fact that Warner Bros admitted that a comment had been made that a member of management would only hire blondes. This is evidence of connectivity with promotion and being paid the right salary.

33. Mr Singh submitted there was a constant theme within the grievance process that Ms Coningham saw herself as a manager. She wanted to have the title of manager and to be paid appropriately to reflect that role. This required a benchmarking process to achieve that.

34. A Tribunal might think that all of the people who were promoted other than Ms Coningham was inherently discriminatory behaviour. This suggests that the claim has far greater prospects than merely being of no or little prospect.

35. Mr Singh referred to the grievance outcome where Warner Bros found that it had forgotten about her. They do not know why that was, but they claimed that it was not because of discrimination. However, Mr Singh submitted that a Tribunal would take a different approach. It may be that Warner Bros are saying that they are not the best employer, but it is for them to present a clear and cogent case as to why they treated Ms Coningham in the way that they did. This is an ongoing problem for her, and she is still not getting promotion opportunities.

36. Mr Singh also submitted that Warner Bros had taken forensic advantage at the time to delay benchmarking because of Covid. The process also lacked transparency because of a lack of records. This was in breach of the EHRC Code and adverse inferences could be drawn because of that breach.

37. There was no record of applications for promotion. There was no feedback justifying making the decision not to promote. There were references to Ms Coningham not having the right style. The Tribunal might say that this is something discriminatory and not an objective basis for recruiting.

38. Mr Singh submitted that Ms Coningham was the only person in her team who was not a manager other than the interns and yet there were no performance issues that would justify that which pointed to race, age or sex being the

reason why she had not been promoted. There was also an issue about whether terms such as "man management" were appropriate.

39. Mr Singh submitted that if I was not with him on refusing strike out on the grounds of connectivity and time, I was invited to consider exercising the just and equitable discretion to extend time or whether the matter should be considered at a final hearing.

40. Finally, in relation to a deposit order, Mr Singh submitted that the threshold had not been met. The issues had to be determined at a final hearing and not at a mini trial. There was evidence to support Ms Coningham's case.

Warner Bros' rebuttal

41. I allowed Mr Cordrey to rebut some of the points made by Mr Singh in his closing submissions. I was taken to an email from Warner Bros solicitors to Ms Coningham's solicitors dated 25 January 2022 [2019] where it was stated: that if Ms Coningham contended that there were reasons why it would be just and equitable for the Tribunal to extend time she was requested to provide a witness statement setting out these and any other documentary evidence that she intended to rely upon as soon as possible and no later than 24 January 2022. They were warned that they would object strenuously of Ms Coningham tried to raise new evidence at this hearing about the just and equitable issue if they have been given no warning of it and will ask new evidence to be refused. Mr Cordrey was astonished that Mr Singh had referred to the just inequitable extension given what had been written in that email. Ms Coningham had not provided a witness statement, or any documentary evidence as requested. Her solicitor had not replied to that email. I was invited not to determine the just and equitable extension.

42. Mr Cordrey also stated that he had gone through the grievance process and the references by Ms Coningham as to why she had not been given a promotion. Matters such as style and not fitting in had been referred to. This reinforced his position that her claims were out of time, and she could have raised her concerns within the three-month time limit as and when they arose. To allow the claims in this late would significantly prejudice Warner Bros.

43. In relation to references such as not hiring blondes, even if Warner Bros admitted that an employee made such remark it would not support the case that there was conduct extending over a period. That would only arise if it could be shown that it influenced the detriments. Ms Coningham has never said that any of those individuals influenced or affected the detriments that Warner Bros says were out of time.

Ms Coningham's reply

44. I invited Mr Singh to reply to Mr Cordrey. He told me that there had been correspondence and that the claims had been significantly pared down. He referred to the fact that any party can require the other to do something in correspondence but that does not mean that they have to comply. He invited me to determine the just and equitable discretion to extend time and that it did not need to be pleaded. This was provided for in EQA. He submitted that this was not an abuse of process.

The applicable law

45. Rule 53 (1) (c) of the Rules of Procedure confirms that a Tribunal has the power to consider the issue of strike at out a preliminary hearing. Rule 37 sets out the grounds on which a Tribunal can strike out a claim or response (or part). A claim or response (or part) can be struck out on a variety of grounds including that it is scandalous or vexatious or has no reasonable prospect of success (rule 37 (1) (a)).

46. In **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL**, discrimination cases are generally fact sensitive, and any issues should usually only be decided after all the evidence has been heard. However, in that case, Lord Hope observed:

> *The time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail*

47. In **Chandhok v Tirkey [2015] ICR 527** Langstaff P cited **Anyanwu** and went on to say at paragraph 20:

> *This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out—where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ in Madarassy v Nomura International plc [2007] ICR 867 , para 56):*
>
> > *"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."*
>
> *Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike out a claim should be sparing and cautious.*

48. The Tribunal must take a view on the merits of the case and only where it is satisfied that the claim or response has no reasonable prospect of succeeding can it exercise its power to strike out.

49. In **Ahir v British Airways plc 2017 EWCA Civ 1392, CA**, the Court of Appeal asserted that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored. The Court accepted that the test for strike-out on this ground with its

reference in rule 37(1)(a) to 'no reasonable prospect of success' was lower than the test in previous versions of the strike out rule, which referred to the claim being frivolous or vexatious or having 'no prospect of success'. In this case, the Court upheld an employment judge's decision to strike out the victimisation and discrimination complaints of an employee who had been dismissed for falsifying his CV. His claims were based on allegations that six managers who had each separately considered the admitted misconduct of the employee during the disciplinary process had allowed their decisions to be tainted by the protected acts of the employee even though there was no evidence to suggest that they were aware of those protected acts. The Court concluded that the employment judge had rightly described the allegations as 'fanciful' and struck out the claims as having no reasonable prospect of success.

50. In **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA**, Lord Justice Underhill reiterated the sentiment he had previously expressed in **Ahir** when concluding that an employment judge had correctly struck out a constructive dismissal claim based on a final straw incident on the basis that it had no reasonable prospect of success. His Lordship observed: '

> *Whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed. There were in this case, no relevant issues of primary fact. Had the matter proceeded to a full hearing the job of the tribunal would not have been to decide the rights and wrongs of the [final straw] incident of 22 April, and it would not have heard evidence directly about that question. The issue would have been whether the disciplinary processes were conducted seriously unfairly so as to constitute, or contribute to, a repudiatory breach of the Appellant's contract of employment. The evidence relevant to that question in substance consisted only of the documentary record. It is true that if there were any real grounds for asserting actual bad faith on the part of the decision-makers that could not have been resolved without oral evidence; but that was not the pleaded case, and the employment judge was entitled to conclude that there was no arguable basis for it.*

51. In **E v X, L and Z UKEAT/0079/20 (10 December 2020, unreported)** the immediate point in this appeal was that a second Employment Judge had erred in overturning a case management decision of the first Employment Judge without these being a change in circumstances. However, of more general importance is the context, namely a striking out of a claim raising the always difficult area (on time limits) of whether the claimant can rely on the concept of 'acts extending over a period'. The judgment of Ellenbogen J in the EAT at [50] subjects this question to lengthy guidance in the light of six leading cases, namely **Sougrin v Haringey Health Authority [1992] IRLR 416**, **Robinson v Royal Surrey County Hospital NHS Foundation Trust UKEAT/0311/14 (30 July 2015, unreported)**, **Sridhar v Kingston Hospital NHS Foundation Trust UKEAT/0066/20 (21 July 2020, unreported)**, **Caterham School Ltd v Rose UKEAT/0149/19 (22 August 2019, unreported)**, **Lyfar v Brighton & Sussex University Hospitals NHS Trust**

[2006] EWCA Civ 1548, and **Aziz v FDA [2010] EWCA Civ 304**. The guidance is lengthy, but is important and is set out here in full:

a. In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: **Sougrin**.

b. It is appropriate to consider the way in which a claimant puts their case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: **Robinson**.

c. Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: **Sridhar**.

d. It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated; or (2) substantively to determine the limitation issue: **Caterham**.

e. When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: **Lyfar**.

f. An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: **Aziz; Sridhar.**

g. The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: **Aziz**.

h. In an appropriate case, a strike-out application in respect of some part of a claim can be approached assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required – the matter will be decided on the claimant's pleading: **Caterham**.

i. A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: **Robinson.**

j. If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable

prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing: **Caterham**.

k. Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: **Caterham**.

l. Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: **Caterham**.

m. If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may be no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background to more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: **Caterham**.

52. I now turn to consider time limits. EQA, section 123(1) provides that proceedings of this nature 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.

53. EQA, section 123 and its legislative equivalents do not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons. Accordingly, there has been some debate in the courts as to what factors may be relevant to consider.

54. To establish whether a complaint of discrimination has been presented in time it is necessary to determine the date of the act complained of, as this sets the time limit running. Where the act complained of is a single act of

discrimination, this will not usually give rise to any problems. A dismissal, for example, is considered to be a single act and the relevant date is the date on which the employee's contract of employment is terminated. Where dismissal is with notice, the EAT has held that the act of discrimination takes place when the notice expires, not when it is given (**Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT**). Rejection for promotion is also usually considered a single act. In this case, the date on which another person is promoted in place of the complainant is the date on which the alleged discrimination is said to have taken place (Amies v Inner London Education Authority 1977 ICR 308, EAT).

55. The question of when the time limit starts to run is more difficult to determine where the complaint relates to a continuing act of discrimination, such as harassment, or to a discriminatory omission on the part of the employer, such as a failure to confer a benefit on the employee. EQA, section123(3) makes special provision relating to the date of the act complained of in these situations. It states that:

    a. conduct extending over a period is to be treated as done at the end of that period (section123(3)(a));

    b. failure to do something is to be treated as occurring when the person in question decided on it (section123(3)(b)). In the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something, or, if the person does no inconsistent act, on the expiry of the period within which he or she might reasonably have been expected to do it (section123(4)).

56. Much of the case law on time limits in discrimination cases has centred on whether there is continuing discrimination extending over a period of time or a series of distinct acts. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed. This can sometimes be a difficult distinction to make in practice.

57. The leading case is **Barclays Bank plc v Kapur and ors 1991 ICR 208, HL**, which involved a pension scheme that allegedly discriminated against a group of Asian employees. The argument on time limits centred on whether the operation of the pension scheme was a continuing act that subsisted for as long as the employees remained in the bank's employment (in which case their complaints were presented in time) or whether it was a single act that took place when the bank decided not to credit the employees' service in Africa for the purpose of calculating pension entitlement (in which case their complaints were time-barred). The House of Lords found in favour of the employees and ruled that the right to a pension formed part of their overall remuneration and, if this could be shown to be less favourable than that of other employees, it would be a disadvantage continuing throughout the period of employment. It would not be any answer to a complaint of race

discrimination that the allegedly discriminatory pension arrangements had first occurred more than three months before the complaint was lodged.

58. Crucially, their Lordships drew a distinction between a continuing act and an act that has continuing consequences. They held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time. Thus in **Sougrin v Haringey Health Authority 1992 ICR 650, CA**, the Court of Appeal held that a decision not to regrade an employee was a one-off decision or act, even though it resulted in the continuing consequence of lower pay for the employee who was not regraded. There was no suggestion that the employer operated a policy whereby black nurses would not be employed on a certain grade; it was simply a question whether a particular grading decision had been taken on racial grounds. That case can, however, be contrasted with the case of **Owusu v London Fire and Civil Defence Authority 1995 IRLR 574, EAT** In that case O commenced employment with L in 1986 as a fire safety caseworker graded MG12. In February 1991 O made a claim of race discrimination, alleging that on four occasions between 1986 and 1988 he was not promoted, that on three occasions, the last being in August 1990, he was not shortlisted for vacancies, and that on several occasions he had not been given the opportunity to act up or been regraded when he had acted up. The tribunal dismissed all O's complaints as being time-barred by reason of the three-month time limit contained in the Race Relations Act 1976 s.68(1). The EAT held, allowing the appeal in part, that (1) the tribunal erred in failing to treat the acts complained of on regrading and failure to give the opportunity to act up as continuing acts. In accordance with the principles stated in **Sougrin v Haringey HA [1992] I.C.R. 650**, and **Barclays Bank Plc v Kapur [1991] 2 A.C. 355, [1991] 1 WLUK 769**, an act that has continuing consequences is not therefore a continuing act within the meaning of s.68(7)(b) of the 1976 Act. However, an act does extend over a period of time if it takes the form of a policy, rule or practice in accordance with which decisions are taken from time to time. In making the allegations concerning failure to regrade and give opportunities for acting up O had alleged that a discriminatory policy existed and (2) the tribunal had not erred in ruling that O's claims concerning failure to shortlist and promote were time-barred. The complaints related to specific instances and were not continuing acts.

59. In **Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA,** the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. In that case the claimant, who was a female police officer, claimed, while on stress-related sick leave, that she had suffered sex and race discrimination throughout her 11 years' service with the police force.

She made nearly 100 allegations of discrimination against some 50 colleagues. In determining whether she was out of time for bringing complaints in respect of these incidents, the EAT upheld an employment tribunal's ruling that no 'policy' of discrimination could be discerned and that there was, accordingly, no continuing act of discrimination. However, the Court of Appeal overturned the EAT's decision, holding that it had been side-tracked by the question whether a 'policy' could be discerned in this case. Instead, the focus should have been on the substance of the claimant's allegations that the Police Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the police force were treated less favourably. The question was whether that was 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.

60. However, shortly after the promulgation of the decision in **Hendricks**, a differently constituted division of the Court of Appeal took a different view in **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, holding that the claimant's race discrimination claim failed because he had been unable to show that his employer operated a practice, policy, rule, or regime that governed the acts he complained of.

61. The conflict between these opposing decisions was finally resolved in favour of the test set out in Hendricks by the Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA**. In that case L brought 17 complaints of race discrimination against the employer concerning the way in which it had investigated complaints of bullying and harassment made against her by a colleague. At a pre-hearing review, the employment tribunal decided that L's complaints about the employer's internal investigation and the subsequent disciplinary hearing (although these were, in themselves, continuing acts of discrimination) were not linked to later complaints she had made about her manager's actions after the disciplinary hearing and the employer's handling of her grievance. As a result, the events giving rise to the 17 complaints were not part of one continuing act of discrimination, meaning that many of the earlier complaints were time-barred. The Court of Appeal upheld the tribunal's decision on the particular facts of the case. However, in reaching its decision, the Court clarified that the correct test in determining whether there is a continuing act of discrimination is that set out in **Hendricks.** Thus tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

62. **Hendricks** was also cited with approval by the Court of Appeal in **Aziz v FDA 2010 EWCA Civ 304, CA** — another race discrimination case — where the Court noted that in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'. This was taken to heart by the EAT in **Greco v General Physics UK Ltd EAT 0114/16**. In that case the Appeal Tribunal held that, while six of the seven acts of sex discrimination about which G complained concerned her manager in some way, the manager's involvement was not a conclusive factor and the employment tribunal had been entirely justified in finding that the seven quite

specific allegations concerned different incidents that ought to be treated as individual matters. Accordingly, they were not to be considered as part of a continuing act and, in consequence, some were out of time. The tribunal had not erred in its approach to deciding that it was not just and equitable to extend the time limit for the allegations that had been presented out of time.

63. In discrimination claims under the EQA, claimants benefit from a slightly more favourable burden of proof rule in recognition of the fact that discrimination is frequently covert and therefore can present special problems of proof. Broadly speaking, S.136 EqA provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the respondent to prove a non-discriminatory explanation.

64. Mr Justice Elias appeared to accept in both **Laing v Manchester City Council and anor 2006 ICR 1519, EAT**, and **Network Rail Infrastructure Ltd v Griffiths-Henry 2006 IRLR 865, EAT**, that in direct discrimination cases proof of less favourable treatment (discounting the employer's explanation for such treatment) can, of itself, establish a prima facie case of discrimination. However, much of the case law concerning the statutory burden of proof provisions suggests that something more than less favourable treatment compared with someone not possessing the claimant's protected characteristic is required. The clearest indication that this is so comes from the judgment of Lord Justice Mummery in **Madarassy v Nomura International plc 2007 ICR 867, CA**, where he stated:

> *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.*

65. Rule 39 (1) provides that where at a preliminary hearing a Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, "it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument". The Tribunal must be satisfied that there is "little reasonable prospect" of the particular allegation or argument succeeding. This maintains a distinction between the criterion for making a deposit order and that for striking out a case under Rule 37 (1) (a) on the ground that the proceedings have "no reasonable prospect of success".

66. The test of "little prospect of success" is not as rigorous as the test for "no reasonable prospect". It therefore follows that a Tribunal has a greater leeway when considering whether or not to order a deposit. Nonetheless it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or the response (**Jensen Van Rensburg v Royal Borough of Kingston-upon-Thames EAT 0096/07**). A Tribunal should have regard to the likelihood of the facts being established by the claimant when making the order. The Tribunal should balance the contentions on the one side against the undisputed facts on the other and should conclude on the evidence that the claimant has little prospect of proving

his/her claim at the hearing (**Spring v First Capital East Limited EAT0567/11**).

67. In **Hemden v Ishmail [2017] IRLR 228** the purpose of a deposit order was identified at paragraphs 10 and 11 as:

> *to identify at an early-stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. The purpose is emphatically not… to make it difficult to access justice or to affect a strikeout through the back door.*

68. I also recognise the importance of engaging with an understanding, the basis of the claimant's claims before considering whether any allegation has little reasonable prospect of success. An assessment of whether there is little reasonable prospect of success under Rule 39 (1) is a summary assessment intended to avoid cost and delay and should not involve a mini trial of the facts, as this would defeat the object of the exercise.

Discussion and conclusion

69. During the open preliminary hearing I was asked to consider the draft list of issues [122] and to determine four contested areas.

70. I allowed the following amendments to the list of issues:

    a. The deletion in paragraph 2(a).

    b. Retaining paragraph 2(a)(xii). Warner Bros had sought this deletion.

    c. Deleting paragraph 2(a)(xiv)

    d. Retaining direct sex discrimination. Warner Bros had sought this deletion.

71. In paragraph 2 of the list of issues, Ms Coningham alleges that she was treated less favourably because of her race and or age and or sex. In relation to race, she relies upon her Asian/Indian ethnic origin and sites the following alleged detriments:

    a. Not being offered a promotion. She alleges that she was not offered promotion to/considered for the following roles by Warner Bros' relevant recruitment and/or hiring managers (or as specified below). She relies upon hypothetical comparators and/or the comparators specified as follows:

        i. On June 7, 2017, content manager role, Ms Coningham was unsuccessful following an interview with Simon Culm, the Executive Director, Sales, and Business Development.

ii. On 1 October 2017, creative formats manager role, Ms Coningham was not selected for interview by Gemma Broadhurst.

iii. On 24 November 2017, senior strategy manager role, Ms Coningham was recommended for shortlisting by external head-hunters but after a pre-interview chat with Natalie Francis, was not given a final interview.

iv. On 5 March 2018, sales executive, theatrical sales role, Ms Coningham was unsuccessful following an interview with Neil Marshall, the SVP of Theatrical Sales. She relies upon Patrick Keane as a comparator (race, age, and sex).

v. On 24 April 2018 Harry Potter, business development analyst, Nikki Giles informed Ms Coningham she would not be interviewed for the post.

vi. On 1 May 2018, senior marketing executive, Ms Coningham was not interviewed by Warner Bros relevant recruitment and/or hiring manager for that role.

vii. On 3 September 2018, Ms Coningham was offered a promotion by Ms Glascoe, but this offer was then withdrawn.

viii. On 19 January 2019, business executive to Robert Blair role, Ms Coningham was recommended for interview by Warner Bros' US head-hunters, but HR did not put forward for interview.

ix. On 22 February 2019, marketing manager, Theatrical Catalogue Marketing role, Ms Coningham was not offered an interview by Mr Thomas, the Head of Catalogue Marketing.

x. On 9 March 2019, marketing executive, film marketing UK WHEG role, Ms Coningham was not offered an interview by Warner Bros' relevant recruitment and/or hiring manager for that role. Ms Coningham relies on Natalie Fern Davies as a comparator (race and age).

xi. On 14 October 2019, Digital Sales Manager, Ms Coningham was not asked the same questions as other candidates by Miss Glascoe and was not offered the role. Ms Coningham relies on Harry Greasley as comparator (race, age, and sex).

xii. On 23 January 2020, marketing executive, WBTV marketing role, Ms Coningham was not offered an interview by Warner Bros' relevant recruitment and/or hiring manager for that role.

b. On 25 March 2021, Ms Coningham alleges that Warner Bros failed to benchmark her role. She relies upon a hypothetical comparator. She relies upon Joseph Gibbons, Harry Greasley, and Matthew Keegan to assist the Tribunal to construct appropriate comparators.

72. I prefer Mr Cordrey's analysis of the calculation of time limits, and the role of Early Conciliation has, to Mr Singh's for the reasons given by Mr Cordrey in his skeleton argument and his oral submissions.

73. For the reasons given by Mr Singh in his skeleton argument and in his oral submissions, I do not accept that the 12 instances of alleged failure to promote Ms Coningham amounted to specific instances all of which occurred outside the three-month time period. The fact that different individuals were involved does not detract from the possibility of there being continuing acts. Mr Singh has eloquently argued that the acts that Ms Coningham complained of relating to failure to promote and failure to benchmark her to a management role were continuing acts. Failure to promote and failure to benchmark are in substance part of the same regime. For the reasons given by Mr Singh I believe that the allegations amount to a prime facie case that there was a continuing act relating to denying Ms Coningham the opportunity to be promoted to a management position. It must be the case that benchmarking formed part of that practice because it was intended to be used as a tool for determining her role in management. The continuing act was in the form of maintaining a practice which when followed or applied, excluded Ms Coningham from promotion to a management position. I believe that there is a prime facie case that these acts extended over a period of time because they took the form of some policy, rule or practice in accordance with which decisions were taken from time to time. What is continuing is alleged in this case is a practice which resulted in consistent decisions that were discriminatory of Ms Coningham.

74. It follows, therefore, that it is a matter of evidence for the Tribunal as to whether such a practice as is alleged by Ms Coningham in fact exists. Mr Singh has set out what amounts to the "something more" required to establish less favourable treatment compared with someone not possessing the Ms Coningham's protected characteristics is. Ultimately, this is a matter to be determined at a final hearing and, no doubt, Warner Bros will provide their explanations which they say will show that there is no link between the unfavourable treatment and Ms Coningham's protected characteristics. No doubt they will also attempt to show that there was no linking practice but a matter of one-off decisions each having different explanations that cannot constitute a practice.

75. It is important to emphasise that even if it was to be established that there was some practice built up of denying Ms Coningham promotion and benchmarking, it must still have to be proved that it was a discriminatory practice. Under such circumstances, it may be the case that Warner Bros will be able to satisfy the Tribunal at the final hearing that there are non-discriminatory explanations for the treatment of which Ms Coningham complains about. However, these are all matters for investigation by the Tribunal at the final hearing. The application to strike out the claims is refused.

76. Although the test for granting a deposit order is less stringent than for striking out a claim, for the reasons given by Mr Singh, I am satisfied that Ms Coningham has more than little reasonable prospect of succeeding in her claim or claims at a final hearing and the application for a deposit order is refused.

Employment Judge - Green
16th March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

16th March 2022.

FOR EMPLOYMENT TRIBUNALS