EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs B Som	**v**	**Technical One Ltd & another (1)** **Eleven Plus Exams Tuition Ltd (2)** **Mr Ilesh Kotecha (3)** **Ms N Lakhani (4)**

Heard at: Watford (by CVP) **On**: 17-20 May 2022

Before: Employment Judge Bedeau
Mrs C Smith
Mr B McSweeney

Appearances
For the Claimant: Mr E Som, Solicitor Advocate
For the Respondent: Mr G Heimler, Counsel

JUDGMENT

1. The claims of direct race discrimination are not well-founded and are dismissed.

2. The claim of indirect race discrimination is not well-founded and is dismissed.

3. The claims of indirect sex discrimination are not well-founded and are dismissed.

4. The claims of indirect disability discrimination are not well-founded and are dismissed.

5. The remedy hearing listed on 2 November 2022, is hereby vacated.

REASONS

1. By a claim form presented to the Tribunal on 10 August 2020, the claimant made claims against all four respondents of direct and indirect race discrimination; indirect sex discrimination; and indirect disability discrimination.

2. To these claims all the respondents deny liability. The first respondent asserts that the correct respondent is Eleven Plus Exams Tuition Ltd.

3. At the Preliminary Hearing held on 13 January 2022, it was ordered that the respondents should send by 21 January 2022, the final version of the list of issues incorporating changes made by the claimant.

4. We had before us a short list of issues prepared by the respondents amounting to eight lines of text focusing on what was the reason for the claimant's dismissal. There was a more detailed document prepared by the claimant's representative in response to an earlier order by Employment Judge George at a preliminary hearing on 28 June 2021, which sets out in 17 paragraphs the basis upon which the claimant put her claims against the respondent. A further document was produced, believed to be agreed between the parties, summarising the claims and issues in 14 paragraphs.

5. The Tribunal, having considered the representations made by Mr Eric Som, Solicitor-Advocate on behalf of the claimant, and by Mr Heimler, Counsel on behalf of the respondents, decided that the issues document we will accept is the one agreed comprising of 14 paragraphs. Should it require any clarification, we would consider the claimant's further Particulars comprising of 17 paragraphs.

List of issues

6. The list of legal and factual issues in dispute is set out below as agreed between the parties:

   6.1 Whether in relation to the Respondent, the claimant was in a relationship governed by Equality Act s.83(2).

   6.2 Was the refusal to allow the claimant to work from home in March 2020 by reason of her being a non-UK National (the claimant compares herself to Alistair Tsang, Samantha Wainwright and Sonia Szczupak who were UK nationals)?

   6.3 Did any of the Respondents apply a provision, criterion, or practice ('PCP') of refusing to allow staff to work from home in March 2020?

   6.4 If so, was that PCP particularly to the claimant's disadvantage on the grounds of gender because as a woman she was more likely during the pandemic to have responsibility for the care of school age children?

   6.5 If so, was there any justification for the PCP?

6.6 Alternatively:

6.6.1 At the material time, was the child of the claimant agreed to be one that is defined by S.6 of the Equality Act 2010?

6.6.2 Was the PCP particularly to the disadvantage of the Claimant as mother of a disabled child defined by S.6 of the Equality Act 2020 because his condition made it particularly necessary for her to work from home so as to care for him.

6.7 As relating to the claimant's dismissal on 1 April 2020:

6.7.1 What was the reason for the claimant's dismissal; and

6.7.2 Was the claimant's selection for dismissal discriminatory?

6.8 Did the respondents have a PCP of making employees for whom where was no work redundant even if re-employment after the pandemic was envisaged?

6.9 If so, was this PCP particularly to the disadvantage of the claimant as a US National because she had "no recourse to public funds"?

6.10 Was the PCP set out in paragraph 8 indirectly discriminatory on the grounds of gender in that, during the Coronavirus crisis, women, such as the claimant, were more likely to be unable to find alternative work than men, due to increased childcare responsibilities?

6.11 If so, was the PCP justified?

6.12 Additionally, did the PCP set out in paragraph 8 constitute indirect discrimination on the grounds of the claimant's son's disability in that, as the parent of a child with severe and/or recurrent respiratory issues, it was going to be especially difficult for the claimant during the Coronavirus crisis to obtain alternative work?

6.13 If so, was the PCP justified?

6.14 If the claimant be successful, the issue of the remedy for financial loss and injury to feeling be in accordance with the Equality Act 2010.

The evidence

7. The Tribunal heard evidence from the claimant, who called Ms Laura Biggs, former Teaching Assistant.

8. On behalf of the respondent evidence was given by: Mrs Nita Lakhani, Manager and joint shareholder; Mr Ilesh Kotecha, Director; Ms Sheenal Khimasia, Manager; Ms Jennifer Leonard, Senior Tutor, Head of English Years 5 and 6; and Ms Olivia O'Connor, Consultant in English.

9. In addition to the oral evidence the parties adduced several separate bundles of documents, the precise total number of pages is unclear. Wherever possible reference will be made to the documents as numbered.

Findings of fact

10. On the last day of the hearing, Mr Som acknowledged that the correct employer is Eleven Plus Exams Tuition Ltd. Accordingly, all claims against Technical One Ltd trading as Eleven Plus Exams UK, were dismissed by the tribunal.

11. Eleven Plus Exams Tuition Ltd shall be referred to as Eleven Plus or the respondent in this judgment. When we refer to respondents, it is to all three respondents. The primary business of Eleven Plus is preparing children for the Eleven Plus examination predominantly through Year 4 and Year 5 weekend courses. For those attempting the Independent Schools Examinations, there is an additional short Year 6 course of 12 weeks. The Year 4 weekend course lasts 35 weeks, and the Year 5, 40 weeks.

12. Mr Eric Som, the claimant's husband, was employed by Eleven Plus from 2016 to 2019. From February 2019 to the end of 2019, he provided his services to Eleven Plus on a consultancy basis. This was at his request. He is a legally trained United States and United Kingdom lawyer and represented the claimant during this hearing in his professional capacity as a Solicitor-Advocate.

13. While employed by Eleven Plus, Mr Som asked Mr Ilesh Kotecha, Director, to sponsor his wife, the claimant, to enable her to emigrate from the United States to this country. Mr Kotecha willingly obliged and supported the claimant in her application. A further request was made in November 2018 by Mr Som of Mr Kotecha whom he asked to send an updated letter in support of his sponsorship of the claimant which Mr Kotecha willingly agreed to do. The comment by the claimant was that Mr Kotecha's response was "Perfect".

14. On 25 May 2017, Mr Som emailed Mr Kotecha stating the following:

> "Dear Ilesh:
>
> I am writing to formally introduce my wife, Bonnie, whom I have copied on this email and whose CV I have also attached hereto for your review. As I have mentioned to you in the past, Bonnie is passionate about helping students achieve their goals. Since Eleven Plus may be looking for additional help this coming summer, I hope you consider Bonnie's credentials and see if she can assist in whatever way she can.
>
> Very many thanks for your kind consideration!" (A10)

15. An interview with the claimant was arranged in June 2019, following Mr Som's repeated requests to Mr Kotecha to consider employing her even in a student role on a part-time basis as she was becoming desperate and depressed because she was not working. We find that there was no specific advertised role applied for by the claimant and, at the time, the respondents had no vacancies.

16. The claimant was interviewed by Ms Sheenal Khimasia, Manager, who was later joined by Mr Kotecha. They offered the claimant the opportunity to explore all of the various aspects of the business and then figure out what she would like to focus on. During the interview a role was formulated, that of Curriculum Design, specifically based on the claimant's curriculum vitae and her express preferences during interview. She spoke to Mr Kotecha privately about her salary and he offered her £28,000 gross per year with the possibility of an increase after successfully completing her probation of three months. She verbally accepted the offer after the interview.

17. In an email dated 21 June 2019, sent to the claimant by Mrs Nita Lakhani, Manager, she wrote the following:

> "This is just to confirm the offer of a full-time position to commence next week, 26 June. The week-day hours are 9.30am to 6pm.
>
> I will prepare an offer letter for you on your first day which I hope is ok. The salary offered is £28,000 per annum.
>
> Looking forward to having you join our team!" (A15)

18. The claimant emailed Ms Khimasia and Mr Kotecha on 13 June 2019, thanking them for interviewing her the previous day. She stated it was great to meet them and that she had a better picture of Eleven Plus' business and the team behind it. She then wrote:

> "I am excited by the opportunities we discussed. It was also really nice to join in for dinner afterward. Feel part of the family already!
>
> To confirm, I will come in on Saturday, around 3pm, to observe a tuition session. Do let me know if anything changes or if I need to bring anything." (A14)

19. She commenced employment with Eleven Plus on 26 June 2019. (C11)

20. In Eleven Plus's job offer to her dated 25 June 2019, in relation to "duties", it states the following:-

> "Your primary role would be to utilise your expertise in Curriculum Design by expanding our course offering to Year 3 and thereafter older GCSE (focussing on English and mathematics initially omitting science and other subjects). The focus thereafter will be on course creation and lesson planning. Other ad hoc duties may include supporting our other areas of the business that you expressed an interest in during the interview:
>
> Tuition: With particular focus on the creative writing programme.
> Publishing: Contributing content to our English list and help with proof reading.
> Mock exams: Invigilation.
> Social media: Providing ideas and possibly guest post.
> Marketing: Providing ideas to promote our services."

21. The letter confirmed that the salary was £28,000 gross per annum payable monthly in arrears into her bank account. It also covered other terms and conditions, such as, holiday; termination; working hours; the probationary

period; sick pay; pension arrangements; and grievance and disciplinary policies and procedures. (C9 to C10)

22. Mr Kotecha told the tribunal that employees are ranked in order of seniority from Level 0 to the highest Level 6, Director. Level 0, is casual staff working Saturdays and invigilating in mock exams; Level 1, is a graduate intake with less than one year's experience; Level 2, is Head of Year 4, Teachers and Trainees; Level 3, are Heads of Department, Year 5 Teachers; Level 4, Section Managers and Specialists; Level 5, Senior Managers; and Level 6 Director.

The claimant's roles

23. The claimant joined at Level 4 which was at managerial level because of her newly created Curriculum Design role to help drive and grow the tuition business. Her first line manager was Ms Khimasia.

24. As regards her performance, the first task assigned to her was not completed because she had struggled for the best part of two months from June to August 2019. An external teacher, Ms Olivia O'Connor, Consultant Tutor, instead completed it in half a day. The claimant conceded that Curriculum Design was, in her words, "not my thing".

25. We find that by August 2019, based on her performance in Curriculum Design, it was clear to the respondents that she was going to fail her probation and was likely to be dismissed, but some latitude was given her because she was Mr Som's wife. She was, thereafter, given a variety of roles she had volunteered for and was kept on due to the respect Mr Kotecha had for Mr Som, who sensed that there may be financial issues at home, particularly when the claimant asked him for an advance payment on her salary as her husband had not budgeted for that month's Council Tax.

26. We further find that in late February 2020, she met with Mr Kotecha at her invitation and admitted to him she was mindful that he had given her so many chances because of his relationship and respect for Mr Som.

27. From July 2019 to January 2020, at her request, Mr Kotecha agreed that she could fill the newly vacated Optimisation and Social Media role. She was temporarily in charge because she had declared herself an expert in social media and claimed to run the same for a charity in East London outside of her work.

28. After some time it was clear that she was not generating the content nor the traction expected in this new role and was failing. When it was raised by Ms Khimasia that she had not proven herself capable of handling social media as there had not been sufficient posts, nor any forward planning, the claimant presented her social media plans. Mr Kotecha later learned from Ms Khimasia that the respondent's Twitter account had been inactive during the whole of July 2019 to January 2020. It was, therefore, decided to assign social media to an external consultant.

29. From September to October 2019, the claimant was engaged in marketing as that was her "dream role". There were, however, potential legal issues, in that, she had threatened to use her husband to sue the respondents' business counterparties, but legal action was rejected by Mr Kotecha.

30. A further short-term assignment from November to December 2019 at Level 1, was given to her as she expressed an interest in Proof Reading, Creative Writing Examples Book 2 tasks earmarked for the new worker, Ms Laura Biggs. The book was nearly complete at that stage and the claimant stepped in and contributed a section. There were, however, two serious oversights which could have led Eleven Plus being sued as she had inserted copyrighted images, such as those belonging to the Disney Corporation, and had failed to check whether written permission had been given by all the children contributing to the passages in the book. She later admitted that publishing work and proof-reading was not "her thing".

31. She was on a further short-term assignment from October to December 2019, Year 6 English/Creative Writing Course Delivery of Creative Writing, which was half a day on Saturday. This was at Level 3. The course would normally be taught by Ms Jennifer Leonard, Head of English, on a Sunday, however, the claimant was persuaded to take it on and run it on a Saturday. The marking load was shared with the rest of the English Team's part-time Teaching Assistants.

32. From November 2019 to March 2020, she tutored on the Year 3 course on Creation and Delivery, another Level 1 role. The course was a dilution of the Year 4 course and involved a limited amount of work. She was assisted by two members of staff in the creation of the programme and associated resources.

33. According to Mr Kotecha, the overall impression was that the claimant had started work as a Level 4 Manager. She then moved sideways before moving down the levels rather than being tasked with managerial roles. She was reduced to taking on small ad-hoc tasks, reception work and an intermittent Saturday role. She was offered work part-time two days a week which she turned down. It was clear to the respondents that by February 2020, there was not a full-time role available to her.

34. Ms Leonard, Head of English, in evidence said that the claimant in January February 2020, was finishing off final lessons and the book. She asked her to write some comprehensions and mock papers. They had a talk in February regarding the tasks she, the claimant, would be able to do and this was followed by a further two to three meetings in February and early March. The claimant took over working on comprehensions and other tasks but there was no long-term project for her.

35. Ms Khimasia had informed her in January 2020, that her only role was the delivery of the Year 3 course but it was not a full-time position and that was a concern of management.

36. In an email dated 11 February 2020, the claimant wrote to Ms Khimasia asking for a meeting that day at 5.30pm. Ms Khimasia responded by agreeing to meet with her. (A42 to A43)

37. On 11 February 2020, they met for over an hour during which Ms Khimasia informed the claimant that her full-time hours needed to be reduced unless other work could be found for her as the respondents were running out of work to give her following on from her previous duties in Social Media, Curriculum Design, and Marketing, which were areas she had not established herself in. According to Ms Khimasia, any other employer in a similar situation would have terminated the claimant's employment but as she was the wife of Mr Som, who was well-liked, Mr Kotecha wanted the situation to be handled amicably. Ms Khimasia wanted the claimant to consider her strengths and where she felt she could utilise her skills in order to retain her in a full-time position.

38. The claimant told the tribunal that she had confided in Ms Khimasia that she was struggling with her mental health and the response by Ms Khimasia was that she was giving her advice not as her manager but as her friend. She suggested to the claimant that she could take time off work or consider part-time work. They agreed that the claimant would think about it and would revert to her later. About two weeks later the claimant told Ms Khimasia that she was feeling better, the days were growing longer, spring was approaching, and that she neither wanted nor needed to take time off or to go part-time.

39. Ms Khimasia, in evidence, said that there was no discussion about the claimant's mental health. She was concerned about the claimant's long commute to work and the fact that she had a child which prompted the discussion about part-time working.

40. We find as fact that by February 2020, there was not enough work to occupy the claimant full-time and this led to discussions about her working part-time for Eleven Plus.

<u>Ms Leonard's role</u>

41. In an effort to improve her employment prospects at Eleven Plus, she invited Ms Leonard out to lunch on a day between 11 and 14 February 2020. During their meeting she asked Ms Leonard about Ms Leonard's workload as she was looking to take over Ms Leonard's role from September 2020, if Ms Leonard started her Post-graduate Certificate in Education, "PGCE", a teacher training course. At that time Ms Leonard had not decided whether to enrol on to the PGCE course, nor whether she would be leaving work but had mentioned, in late November 2019, that she was thinking about doing so to Ms Khimasia and Mr Kotecha. She informed Ms Leonard that Ms Khimasia had asked her to arrange a meeting with her, that is, with Ms Leonard, to learn about the role, duties and responsibilities of her job as Head of English, on the basis that Ms Leonard was leaving the respondent.

42. In answer to questions put by a member of the tribunal, Ms Leonard said that the claimant was busy in January and February 2020, and she had talked to the claimant three times in February on what she could work on but there were no long-term projects available. The clamant told her that she was struggling to find work to take on, namely big projects. Years 3 and 6 courses had come to an end. The claimant told her that she wanted to work full-time and be in charge of a project, but there was not much work to keep her in full-time employment.

43. On 1 February 2020, the claimant emailed Ms Khimasia and blind carbon-copied Ms Leonard. It was in connection with their lunchtime meeting. She wrote:

> "We agreed that it would be best for at least the three of us to meet to figure out what I can take over from her as she wont be full-time when she pursues her PGCE in autumn." (A45)

44. Ms Leonard told the tribunal that at no time had she confirmed to anyone that she would not be in full-time work in autumn of 2020, and that the statement made by the claimant in the email put her in an awkward position with management as evidenced in Ms Khimasia's email response to her in which, amongst other things, she stated:

> "Also on a side note I keep hearing from your staff that you are leaving in autumn for your PGCE? Is this the case? Before you inform staff of any movements you have planned please keep management in the loop more so as we consider you senior and it doesn't sit well hearing it from your department. I know you said you were thinking about it but is it confirmed?" (A49)

45. Ms Leonard responded to Ms Khimasia's email on 19 February, in which she wrote, amongst other things:

> "Nothing has been confirmed yet about the PGCE. I'm going to be taking it, but I do not yet know if I will be leaving – I am hoping I can still work here for the majority of the time. I will have this confirmed by the end of March. From the meeting with Bonnie, [the claimant] she said that you and Ilesh wanted her to start training to take over the Year 5 course in case I was away for the PGCE, which I think is what she meant from the email?" (A49)

46. There was a short follow up meeting on 25 February 2020 between Ms Khimasia and the claimant during which the claimant relayed the lunchtime discussion she had with Ms Leonard. There was no outcome at the meeting but there was a discussion about working on reception. Ms Khimasia suggested that the claimant should speak with Mrs Lakhani if she wanted to pursue her request to work on reception.

47. Sometime later, Ms Khimasia informed the claimant that Eleven Plus could not agree to her working on reception as there was not enough work for an extra member of staff. Mrs Lakhani had always had two members of staff in reception aside from herself and there was not enough work for another person. The claimant was also informed that Ms Leonard's plan to start PGCE course was never communicated formally, therefore, Eleven Plus

could not engage in any meaningful discussions with her with regard to taking over Ms Leonard's work unless Ms Leonard confirmed her plans.

The effects of the Covid-19 pandemic

48. On 19 March 2020, Mrs Lakhani emailed team members stating the following:

> "First and foremost, thank you for your support and effort so that ElevenPlusExams remains pre-eminent in the market for tuition. We would also like to thank all those that have made a conscientious effort to come in to work and help even in the hardest of circumstances.
>
> It has been very encouraging to see the team that has now developed in such a crisis making great progress on projects that have developed within recent weeks. We highly appreciate your time and effort and it is something we will be taking on board.
>
> With schools shutting this Friday, there will be no physical lessons until further notice.
>
> This means that our working weeks will be scheduled Monday to Friday starting on 23 March . This week only we will all be coming in on Saturday 21 March.
>
> It is important to know that if you are unwell or if you have self-isolated, please note government guidelines are now 14 days isolation so you must adhere to that and ensure you do not put other staff members at risk. At present we do not have the opportunity to work from home unless you are in a business critical role." (A55)

49. We find that the email was sent as a result of the Government's decision at the time to impose a nationwide lockdown from 23 March 2020.

50. Ms Laura Biggs, Teaching Assistant at the time, in an email to Mrs Lakhani requested that she should work from home as she was self-isolating. She had a persistent cough and four members of her family had symptoms of the virus. She wanted confirmation whether those who were self-isolating would only get statutory sick pay. She requested flexible working from home and asked whether she should stay away from work for a longer period than two weeks as there were vulnerable people at work (A56).

51. Mrs Lakhani forwarded Ms Biggs' email to Ms Khimasia who responded by saying that Ms Biggs was not in a business critical role and had never bothered to do anything with videos nor pushed for fair resources for Year 4 students in English. With all the issues, Eleven Plus would have to contend with, it would be in a position to start offering redundancies to a few members of staff. She suggested redundancies or the prospect of redundancies should discussed with Ms Biggs. (A56)

52. On 23 March 2020, the government announced the first lockdown measure nationwide.

53. On the same day, Mrs Lakhani sent a WhatsApp message to the claimant in which she wrote:

> "Hi Bonnie, In light of this evening's news you should not attend work until further notice. Keep safe!

54. The claimant replied:

> "Hi Nita, thank you. Would it be possible to borrow a work laptop? We only have one at home and 'C' [the claimant's son] needs to keep up with his schoolwork"

55. The following day Mrs Lakhani messaged the claimant:

> "Hi, at the moment we won't be assigning work to do at home as I believe we will be cancelling final term of Year 3 course. Sonya will finish last two sessions by tomorrow or Thursday in any case. We will update you but for now there isn't any work for you."

56. The claimant responded:

> "Ok please let me know if I can help in any way. I did get my old laptop up and running for C"

57. Mrs Lakhani:

> "Sure will do." (A59 to A60)

58. On 24 March 2020, Mrs Lakhani answered the questions raised by Ms Biggs in her earlier email, and on 24 March 2020, emailed her stating the following:

> "Thank you for your email and I appreciate your frustration. Also I hope you are feeling better.
>
> In line with government advice it is now requested that you should not make the unnecessary journey to work until further notice.
>
> As explained by Sheenal, you will appreciate that the critical work of the company now takes precedence over all else and so at the moment you will not be assigned any work. We are in the process of considering which staff are critical to the business for the foreseeable future.
>
> Our tuition competitors, who employ tutors on zero hours contracts, have effectively laid off staff for the foreseeable future and we are in the same situation as them. Our company's income is affected in a severe way, as the next few months are the most critical financially for our seasonal business:
>
> 1. No physical face to face classes as a consequence of which a number of parents have sought a refund for the final term.
>
> 2. As a consequence of above we may have to also give a partial refund to those who[se] parents remain with us for the short substitute videos.

3. No intensive courses over Easter, as a consequence of which we are refunding parents

4. No mock exams likely as a consequence of which some parents are opting for a refund and others waiting to see if we are able to reschedule over the summer.

5. No assessment of new students currently possible, therefore will affect income next academic year too.

6. Huge dent in our book sales since we sell more in the coming months based on past years; furthermore, we are unable to attend the London Book Fair this month to find new marketing avenues for our titles.

7. No mocks intensive courses over the summer, this will reduce revenues for the year too.

8. If the funding is not there for staff salaries, we will have no option but to consider unpaid leave or redundancies as the 80% government grant is only intended for situations where the employee can be retained in their jobs long term, not purely for the period of the grant.

9. Thank you for your understanding and rest assured we will do what we can to avoid redundancies.” (A61-A62)

Ms Leonard’s decision

59. Mrs Lakhani wanted Ms Leonard to tell her, her decision regarding enrolling onto the PGCE course in September 2020, and called her on Monday 30 March 2020, to discuss the need to reduce staffing overheads and Ms Leonard’s future employment plans, in particular, whether she would be embarking on the PGCE course as this would impact on Mrs Lakhani’s decision-making. Although Ms Leonard promised to give her decision in March, the matter was not considered by her prior to 30 March 2020. She needed more time. The following day, between 10.30 am and 1pm, she contacted Ms Lakhani to confirm that she was not going to enrol on to the PGCE course in September 2020 and had decided to defer it. It was at that point everything crystalised in Mrs Lakhani’s mind to make the claimant and Ms Biggs redundant.

60. In her witness statement Mrs Lakhani wrote that the claimant would have been the most likely choice as she was the newest member of staff with the lightest workload. The exercise of exploring other roles would not need to be carried out if the claimant had a pre-existing workload occupying her full-time as a senior member of staff. She was the last member of staff to join the English Department.

61. In a letter dated 31 March 2020, sent by Ruckland House Surgery, concerning the claimant’s son, it stated that he was a person at risk of severe illness if he were to catch the Coronavirus. The reason being that he had an underlying disease or health condition and were he to catch the virus it would be more likely than others that he would be admitted to hospital.

He was advised to stay at home at all times and to avoid all face-to-face contact for at least 12 weeks from 31 March.

62. The NHS letter was sent as an attachment to an email sent by the claimant Mrs Lakhani dated 1 April 2020, in which the claimant wrote:

> "Hi Nita,
>
> His came in the post today. Eric said I should send it to you for you to have on file.
>
> Hope all is well with you, all things considered!" (A70-A74)

63. We find that the covering email is not and was not a request by the claimant that she should work from home to care for her son. She was complying with the suggestion by her husband that she should send the NHS letter for the respondent to put on file. We further find that on 23 March 2020, she was instructed by Mrs Lakhani not to attend work until further notice. She replied on the same day asking to borrow a work laptop. This was not a request to work from home. The following day she was notified that there was no work for her to do while at home. Thereafter, on 1 April 2020, she forwarded to the respondent the NHS letter, in so doing she did not ask to be assigned work to do from home.

64. We also find that the claimant's email of 1 April 2020 sent at 11.52 to Mrs Lakhani attaching the NHS letter, came after Mrs Lakhani had decided to terminate her employment on grounds of redundancy. Her decision was taken on 31 March 2020, after being told by Ms Leonard that she had deferred enrolling on to the PCGE course.

65. Mrs Lakhani, on 1 April 2020 at 12.8, sent an email to the claimant terminating her employment on grounds of redundancy. As this is an important document we cite the content in full. She wrote:

> "Dear Bonnie
>
> As you will be aware, the coronavirus outbreak has had a severe effect on the company's business. I am writing to inform you that we are facing financial challenges in providing you with work for the foreseeable future.
>
> As a consequence of this, I am deeply sorry to have to give you one week's statutory notice of termination by reason of redundancy. Please be aware that where an employer makes less than 20 people redundant, and where the employee has less than 2 years' service, there is no requirement for a formal process for redundancy or a consultation. Due to the current lockdown and your absence, it has not been possible to have a meeting with you so that you could ask me any questions about this, but I am happy to do so by phone call or email if you have any.
>
> I know this will come as a disappointment to you and we are very sad that such a decision has become necessary. I confirm that you are not the only staff member being made redundant. I hope you can appreciate that the coronavirus pandemic is affecting all businesses and organisations severely. Sadly, with our main

income stream being related to face to face group sessions, the loss is very significant, especially due to the fact that the large proportion of our income is generated from the mock exams book sales and Easter and summer courses all of which take place from March to early September. Things have rapidly changed since school closures were announced and the government has now indicated that an extension of the lockdown by up to six months, In addition, we also learnt yesterday that we will also now incur a loss in online book sales via our website, and other retailers, as a result of the Gardner's Books Warehouse, which fulfils our orders being closed down from 31 March until further notice.

Aside from a reduction in the income, in the coming months, we also lack the security of enrolments for the next academic year as well as uncertainty with regard to our premises, at Congress House and at the local school, thus limiting our scope for enrolments. Another factor in the redundancy is that we will now be looking to operate in the future with more weekend staff, and fewer full-time staff which is more cost effective, as traditionally full-time staff have only been variable because they have also worked on producing several books each year.

With the cancellation of all services noted above and the changing situation, we have been advised that it is necessary for us to reduce staff head count by two.

In these circumstances, we are not able to ensure that there would be work for you in the near future, and for this reason we have elected for redundancy rather than designate you as a "furlough" employee under the government's Job Retention Scheme, the purpose of this is to retain employees long-term, and not to merely defer their redundancy so it would only be appropriate to join the scheme unless we could ensure your continued employment.

Should circumstances change or improve, and we have further need to re-hire staff, then we would welcome you back as a full-time team member if you were interested. In any case, when tuition resumes, either next term or in autumn, it is likely we would be in a position to offer you a weekend position as a tutor, on a consultancy basis as we do with other teaching staff. Hope this will be of interest to you.

Finally, I would just like to clarify the reason for selecting you for redundancy. With such a small full-time work force and the nature of the business, the selection process was very simple. It is vital for us to reduce head count by at least two staff immediately. The English Department had two more staff than the Maths Department (maths had already lost two members of their team at the turn of the year) and so we decided to make the reduction in the English Department. We needed to retain two staff who had the most experience and versatility and would therefore offer greatest value to the business. Therefore, two employees with the shortest period of experience with us have been selected for redundancy.

We appreciate that it is a difficult time for everyone and I do hope that, should you desire to seek employment elsewhere, that you find a suitable role at the earliest. Thank you for your service and loyalty to the company which has been valued.

I confirm that your P45, final and any holiday entitlement will be paid to you in the next month's payroll…

We wish you all the best for the future and that you and your family remain healthy and well during the current crisis." (A69)

66. A similarly worded email was sent to Ms Biggs on the same day but one minute earlier than the email to the claimant. (A68)

67. After the claimant was notified of her dismissal, she was represented by Mr Richard O'Dair, Barrister, who corresponded with Mrs Lakhani arguing that the claimant should not have been made redundant but should have been placed on the furlough scheme. This was rejected by Mrs Lakhani who argued that the claimant could not be provided with work as no work was available for her. She was, therefore, in a redundancy situation.

68. In Mr O'Dair's letter dated 6 April 2020, sent to Mrs Lakhani, amongst other things, he wrote:

> "Your decision to make redundant rather than furlough (and any refusal to re-employ in response to this request) those whose services you no longer need puts Mrs Som at a particular disadvantage in that
>
> 1. Like very many women she has had childcare responsibilities thrust upon her by the closure of schools and cannot therefore seek to find work elsewhere.
>
> 2. Mrs Som as an American citizen has no access to public funds such as Universal Credit. (It is accepted that you were not aware of Mrs Som's visa status when making your decision, but you are asked to bear it in mind when considering whether to re-employ her).
>
> 3. There is no justification for putting her at this disadvantage since the State is ready to meet the cost of furloughing." (E3)

69. Mr O'Dair and Mrs Lakhani were not persuaded by the other's arguments. (E1 to E22)

<u>The claimant's son</u>

70. The claimant's son, C, was born on 16 March 2013. At the time of her dismissal he was seven years of age and attending school. From C's patient summary dated 9 July 2021, it records that on 19 September 2017, he was suffering from ongoing asthma. On 9 July there is a reference to allergic disorder.

71. We find that C suffers from asthma and was suffering from asthma at the time of the claimant's dismissal. The issue is whether or not his condition had a substantial adverse effect on normal day-to-day activities. The claimant wrote in a second witness statement that C started having asthmatic symptoms when he was about 18 months old. On his third birthday he ended up in hospital emergency as he was not responding to normal doses of medication. He stayed overnight. When C was three and a half years old, the claimant travelled with him to the United Kingdom from the Unites States to be with Mr Som, who was studying. C was registered with the Paediatric Asthma Clinic at Whittington Hospital.

72. The claimant told the tribunal that when C gets a cold, he would frequently become uncontrollably wheezy and that puts her on high alert. She stated

that out of the four or five times she was absent from work, only on one occasion was it as a result of her own illness. She either had to leave work early or stay at home on a handful of days over the eight months of her employment to care for C. She said that she mentioned on more than one occasion that C's asthmatic condition was a problem and had been in hospital on many occasions over the past few years.

73. In her email to Mrs Lakhani dated 7 February 2020, she informed her that C was ill and that as Mr Som was in court on that day, she would have to stay at home with C. Mrs Lakhani responded by saying that she hoped that C gets better. In the claimant's email no reference is made as to C's asthmatic condition, nor the severity of that condition. (2-44)

74. In relation to Mrs Lakhani's knowledge of C's asthmatic condition, she said in evidence that she was not verbally aware of it. She was not told that he had a disability and was not notified of any disability related to asthma, nor of any conditions impacting on his normal day-to-day activities.

75. In the claimant's email dated 7 February 2020, she made no reference to C's "Chronic asthma". She stated in her witness statement, at paragraph 13, that she did not feel the need to specify that C was suffering from that condition as she had already made it known that he had chronic asthma.

76. Mr Kotecha told the tribunal he also was unaware that C was suffering from asthma.

77. Bearing in mind the claimant's absences from work of which few were to do with her son's condition, and the 7 February 2020 email from her to Mrs Lakhani, we are satisfied that she did not inform either Mr Kotecha or Mrs Lakhani that C was suffering from asthma.

78. Ms Olivia O'Connor, Consultant, working for Eleven Plus, had a conversation with Mr Som, in either 2017 or 2018, during which she said that she had asthma, whereupon Mr Som said that his son, C, was also suffering from asthma. That was the only point at which she became aware that his son was asthmatic. She was not, however, part of management, and this was a social interaction between two work colleagues.

79. Having looked at the medical evidence, between 25 August 2020 to 26 January 2021, C was required to attend three scheduled appointments at the Paediatric Department, Asthma Clinic, Whittington Health NHS Hospital, but he attended one on 25 August 2020.

80. He was seen by the Asthmatic Team in February 2018 and again in July 2020. (2-31 to 2-32; 2-33 to 2-34; 2-38 to 2-40)

81. At the preliminary hearing held on 13 January 2022, Employment Judge R Lewis, in paragraph 4.1, stated that, "The claimant is put to proof that at the material time, her son met the section 6 definition of a person with disability".

82. The Judge suggested that in many cases a letter from a specialist or a treating GP and a parent's evidence of the fact of the impairment, would be sufficient. Notwithstanding that direction, the claimant did not provide medical evidence of C's alleged disability at the material time which would be when she requested the laptop to the date of her dismissal. The tribunal would have been assisted had there been clear and cogent medical evidence of C's condition covering the period from 1 March to 1 April 2020.

83. On 24 January 2020, the claimant completed a Flamethrowers Dreamcatchers Adventure Registration Form on behalf of her son. She was allowing him to attend an activity to do with dungeons and dragons for children. The form asked a number of questions. In relation to giving the details of any medication to be administered by the organiser's staff, it was left blank by the claimant. In relation to "Additional notes (assistance with special needs, requirements, behaviour, non-life threatening allergies, etc):" The claimant wrote: "Mild asthma – should not need medication". The session was on the very day she completed the form. She told the tribunal that she completed the form allowing C to attend because she did not want to preclude him from taking part in any activities, and his Ventolin and allergy medication were in the possession of a friend.

84. In relation to what information the claimant conveyed to Mr Kotecha and Mrs Lakhani about her son's condition we adopt paragraph 4(c) in Mr Kotecha's second witness statement which supports the respondents' position that the claimant did not disclose her son's asthmatic condition on 6 August 2019 and 19 February 2020. She referred to him having a cold on 6 August 2019 and on 19 February 2020, as having stomach issues.

85. We were not persuaded that there was evidence before us that C was, at the material time, suffering from a disability with regard to his asthma, as there was little evidence of any substantial adverse effects on his normal day-to-day activities.

86. We find that Mrs Lakhani only became aware of C's asthma after the claimant had been dismissed.

87. Ms Leonard in her evidence said that in conversations with the claimant, the claimant never mentioned that her son was suffering from asthma.

Comparators

88. The claimant relies on three actual comparators: Mr Alistair Tsang; Ms Samantha Wainwright; and Ms Sonia Szczupak.

89. In relation to Mr Tsang, he is employed full-time as Head of Reasoning, Verbal and Non-verbal, and is a British citizen. He has been working for the respondent for five years. We find that he is more experienced than the claimant although they were at the same level of seniority. He worked full-time during the lockdown from home. Mrs Lakhani told us and we accepted her evidence, that he was an essential worker.

90. We further find that he is a computer gamer and has two powerful computers at home which reduced the time it would ordinarily take on an ordinary laptop to record and edit a short video. He is an English graduate who can work across the Maths as well as the English departments. In the respondents' view, he was in a unique much-valued position. We were told that he is also very good in front of a camera.

91. In relation to Ms Wainwright, she commenced her employment with Eleven Plus in October 2018, in Teaching and Publishing, and taught Year 4. One week before the lockdown she was working from home. She is not involved in Year 3. She is a British citizen and had previously worked in social media.

92. In relation to Ms Szczupak, she is a Polish national as well as a British citizen, and is employed as a Teaching Assistant but only works on Saturday.

93. During the course of the hearing refence was made to Ms Catherine Howlett as a potential comparator. She has been working for the respondent for a number of years as a Teaching Assistant. She contributed to the books published by Eleven Plus and would proof-read other written works. She works as a Consultant but not on a full-time basis.

94. Another name was mentioned, that of Ms Letitia Zanea, who is Romanian and a Business Analyst. She was on a one year contract supporting the respondents' IT Team. She was in a critical role. However, she fell sick and was put on furlough, and was able to carry out the work she was contracted to do, namely to complete an IT project. She was one of the first to have long-covid and became frail because of it. IT is more flexible as the respondents work with consultants in India and it did not matter what time she spoke to them. She was able to carry out her role from home to the very high standards required by the respondents.

<u>English Teaching and Online Content Assistant</u>

95. The claimant told the tribunal that following her dismissal she was looking for work and came across a position advertised by the respondent of English Teaching and Online Content Assistant. The salary ranged from £20,000 to £23,000 gross per annum. Candidates were required to have an A Level English qualification. The ideal candidate would be a graduate or post-graduate in English language/literature. Pre-PGCE candidates would be considered. The duties included lesson preparation for Years 3 to 6; tests and questions for online practice for students; classroom assisting, occasional lesson delivery; marking; student performance monitoring, data analysis and reporting; and mentoring. The post was full-time (2-47 to 2-49)

96. In an email dated 2 September 2020, sent by the claimant to Mr Som, she wrote:

> "This is/was my job, or very near to it. Clearly wanted to get rid of me to get someone in they could pay less."

97. The difference in pay compared with the claimant's pay, was £5,000 to £8,000. (2-47)

98. Mr Kotecha had placed the advertisement several months after the termination of the claimant's employment. We find that it did not relate to the claimant's role she was contracted to perform. Nearly all tuition roles will have similar descriptions. The nuances of the job and that person's position in the Teaching Department, would be clarified during interview. The advertised position was at a lower grade than the claimant's position. She was hired for, and contracted to carry out, a senior management role at Level 4. She was underperforming and ended up fulfilling many duties junior staff would undertake which were not her contractual role. The entry requirements for the advertised role which were at a lower level, reflected the difference in salary compared with the claimant's salary of £28,000 gross per annum. We find that the starting salary for junior staff was £18,000 which then increased to £20,000, which was the starting salary in the advertised role.

<u>Offer of employment to Ms Laura Biggs</u>

99. Ms Biggs was offered part-time consultancy work but declined due to the time it would take her to travel to work from her home which was 1 hour 20 minutes. She stated that the travel involved was stressful. She also said that her time working for Eleven Plus had severely impacted on her mental health. As the role was that of a part-time Teaching Assistant in the office, she did not feel comfortable doing it as the country was still in borderline lockdown and restrictions kept changing.

Submissions

100. The tribunal heard oral submissions from Mr Som, Solicitor-Advocate, on behalf of the claimant and from Mr Heimler, Counsel, on behalf of the respondents. We do not propose to repeat their submissions herein and the cases that they have referred us to having regard to Rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. We have, however, taken them into account.

The law

101. Under section 13, Equality Act 2010, "EqA", direct discrimination is defined:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

101. The protected characteristics are set out in section 4 EqA and includes race, sex and disability.

102. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

103. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

104. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

105. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

106. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicated 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.

107. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the

respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

108. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

109. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment. This was recently confirmed by the Supreme Court in the case of Royal Mail Group Ltd v Efobi [2021] UKSC 33, Judgment by Lord Leggatt.

110. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

111. The Tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be

difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

112. The claimant has to prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.

113. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799.

114. Section 19 EqA, on indirect discrimination, states:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

115. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

116. In the case of Seldon v Clarkson Wright & Jakes [2012] ICR 716, a judgment of the Supreme Court, Lady Hale held that,

> "The measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so…, paragraph 50 (5).
>
> The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen…, paragraph 50 (6)
>
> 55. It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) they are consistent with the social policy aims of the state and (iii) the means used are

proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it."

118. In paragraph 4.29 Equality and Human Rights Commission Code of Practice in Employment, an employer solely aiming to reduce costs cannot expect to satisfy the test that it is a legitimate aim.

119. A claimant can pursue a claim of indirect associative disability discrimination based on the disability of another person, Follows v Nationwide Building Society 2021 WL 04134370, a judgment by a London Central Employment Tribunal.

120. A tribunal can accept well-recognised facts that more women than men are primarily responsible for childcare and that this substantially restricts the ability of women to work certain hours, Shackletons Garden Centre Ltd v Lowe UKEAT/0161/10.

Conclusion

120. We now go through the agreed list of issues which covers 14 paragraphs.

The correct employer

121. In relation to paragraph 1, whether the claimant was in a relationship governed by the Equality Act 2010, we find that she was. She was contractually employed by Eleven Plus Exams Tuition Limited and remained so employed throughout her employment. We were satisfied having regard to the pre-contractual, the contractual documents, and the termination notice written by Mrs Lakhani, that the correct employer was Eleven Plus. In the end Mr Som acknowledged that the claimant was employed by Eleven Plus Exams Tuition Limited.

Direct race discrimination

122. The question is asked "Was the refusal to allow the claimant to work from home in March 2020 by reason of her being a non-UK national (the claimant compares herself to Mr Alistair Tsang, Samantha Wainwright and Sonia Szczupak, who were UK nationals?" We have found that the March 2020 WhatsApp message from the claimant was a request for a laptop not a request for her to work from home. Even if there was a refusal on the part of Mrs Lakhani to allow her to work from home, we are satisfied that it was unrelated to the claimant's United States of America nationality. Mrs Lakhani stated that Eleven Plus Exams Tuition Limited, would not be assigning work to do at home and that it would be necessary to cancel final term of Year 3 course. The reason was that the nation was in a Covid-19 pandemic and the respondents had no work for her to do at home. Further, applying Madarassy, the comparators were not appropriate comparators. Mr Tsang was considered an essential worker who with his powerful computers was able to carry out video work in a short space of time from home. Further, he could teach in both English and Maths. Ms Wainwright was involved in Year 4 and was employed in October 2018. One week before the lockdown she was working from home

and was not involved in Year 3. She also worked with Year 5. Her circumstances were different from those of the claimant.

123. In relation to Ms Szczupak, she is both a Polish and British citizen but only worked Saturdays as a Teaching Assistant whereas the claimant worked full-time and her contract placed her at management level. Her last area of work was with Year 3.

124. We have come to the conclusion that the comparators' particular circumstances were materially different from those of the claimant's and they are not appropriate comparators.

125. In relation to Ms Howlett, although not cited as a comparator, she had been working for Eleven Plus for a number of years as a Teaching Assistant but at Level 4. She contributed towards the books published by the respondent and engaged in proof-reading. She is not an employee but a consultant and carried out work when required. If she is to be relied upon as a comparator, she is not an appropriate comparator as there are material differences between her particular circumstances and those of the claimant's.

126. We have come to the conclusion that the claimant cannot satisfy the first part of the burden of proof test as she is unable to establish less favourable treatment because of race, Efobi. The direct race discrimination claim is not well-founded and is dismissed.

Indirect sex discrimination

127. In relation to the indirect sex discrimination claim, the question is asked whether "the respondent applied a provision, criterion or practice of refusing to allow staff to work from home in March 2020?" We have come to the conclusion that the alleged PCP was not of general application. The few employees whom the respondent considered were essential to its operation, were allowed to work from home. The claimant was not considered to be an essential worker and, along with other members of staff, was not provided with work to enable her to work from home.

128. Following on from the statement in relation to the alleged PCP, the question is asked, "If so, was that PCP particularly to the claimant's disadvantage on the grounds of gender because as a woman she was more likely during the pandemic to have responsibility for the care of school age children?" We do acknowledge that women have the greater responsibility for childcare of school-aged children compared with men, Shackletons Garden Centre Ltd. It is very difficult to see what the claimant's disadvantage was even if the alleged PCP is appropriate. She stayed at home and was paid. The respondent was unable to provide her with any work, because of the pandemic. She, like most of her colleagues, were not allowed to go into the office to carry out work. We do not understand what was the disadvantage to her, nor do we understand the group disadvantage. No statistical evidence was provided of group disadvantage.

129. We have come to the conclusion that the indirect sex discrimination claim is not well-founded and is dismissed.

Indirect associative disability discrimination

130. The claimant further claims indirect associative disability discrimination based on the alleged disability of C. We have found that there was little in the way of persuasive evidence to stablish that C, was at all material times, suffering from a disability having regard to s.6, Schedule 1, Equality Act 2010. We acknowledge that he suffers and was suffering from asthma during the claimant's employment but the substantial adverse effects on normal-day-to day activities, were not established based the evidence. We accept that the threshold is low, that being either minor or trivial.

131. As this claim also relies on the same PCP as for indirect sex discrimination, we maintain our position that the PCP is not appropriate. There was no request to work from home, therefore, there was no refusal, simply a statement that some members of staff were to stay at home. It was argued that it was necessary for the claimant to work from home to look after her son, but we have concluded that she was not prevented from staying at home and was in a position to look after her son while being paid by the respondent up until the termination of her employment. This claim is also not well-founded and is dismissed.

Direct race discrimination in relation to the dismissal on 1 April 2020.

132. In considering the reason for the claimant's dismissal, we are satisfied and do conclude that it was redundancy. We found that the role the claimant was contracted to do, she had underperformed in. In many of the projects she was engaged in, she failed to achieve the requisite standards of performance. Her Year 3 work had come to an end in the spring of 2020, and she knew that she was not performing at Level 4. She met with Ms Leonard to discuss the possibility of taking over her post as Head of English. In our view, such a step was a recognition by the claimant there was a limited amount of work for her to do, and that the prospect of taking over Ms Leonard's post, if it was successful, would save her from being made redundant. Mrs Lakhani was informed of Ms Leonard's decision on 31 March 2020 and, following that disclosure, she decided on that day, to make the claimant, as well as Ms Biggs, redundant. The claimant's son's condition and nationality played no part in the decision to dismiss. This was a commercial decision taken by Mrs Lakhani.

133. Applying the "reason why" in the case of Shamoon v Chief Constable of Northern Ireland, the reason for the claimant's dismissal was redundancy and not nationality. Accordingly, this claim is not well-founded and is dismissed.

Indirect race discrimination

134. The claimant further claims indirect race discrimination, in that, the respondents applied the PCP of making employees for whom there was no

work, redundant even if re-employment after the pandemic was envisaged. This was not a PCP applied by the respondents. There were only two people who were made redundant. In both cases there were genuine reasons for making them redundant.

135. Re-employment was not envisaged by Mrs Lakhani in her dismissal letter. She simply held out the possibility of circumstances changing and, if that was to be the case, the claimant may be taken on, on a part-time basis but that would depend on whether there was the need to take on staff as stated by Mrs Lakhani in the dismissal letter.

136. If we are in error about the appropriateness of the PCP, the next question to ask is, was it particularly to the disadvantage of the claimant as a US national because she had "No recourse to public funds"? We accept that by making her redundant and as a US national she may not have had recourse to public funds and, if so, would be at a financial disadvantage.

137. The tribunal did not, however, receive any evidence, even if the PCP is appropriate, of group disadvantage, that is, that all or the majority of US nationals living in this country do not have recourse to public funds. The claimant was unable to satisfy the group disadvantage requirement.

138. Even if all of the requirements are established proving indirect race discrimination, we conclude that the respondent can justify its action. Its aim would be to ensure its viability as a business in times of crisis. To achieve that it would be reasonable and necessary to make commercial decisions on who to retain in order to achieve financial viability. A fair skills assessment has to be undertaken in order to determine who would be kept on and who would be made redundant. Given the circumstances at the time of the Covid-19 pandemic and the large number of requests from parents to be refunded monies they had paid for the courses their children had enrolled on but were not going to receive because of the lockdown, the respondent had to engage in commercially based business decisions which necessitated making some members of its staff, in particular two members of its staff who had only been employed for comparatively short periods, redundant. The legitimate aim would be to ensure that viability of its business. In doing so, the proportionate means of making some staff redundant through a fair process, were reasonable and necessary. Accordingly, we have come to the conclusion that this claim of indirect race discrimination is not well-founded and is dismissed.

Indirect sex discrimination

139. The next claim is indirect sex discrimination based on the same PCP as the above claim of indirect race discrimination. We again repeat our conclusion in respect of the appropriateness of the PCP. The question asked is whether the PCP was indirectly discriminatory on grounds of gender, in that, "during the Coronavirus crisis, women, such as the claimant, were more likely to be unable to find alternative work than men, due to increased childcare responsibilities?". The tribunal was not referred to any statistical evidence of the disparate treatment of women with childcare responsibilities who were seeking work

during the Coronavirus pandemic. Indeed, the lockdown affected both men and women who were required to work from home unless they were key or essential workers. Many were put on furlough. There was no evidence given that during the crisis more women compared with men were unable to find alternative work due to their greater childcare responsibilities. We acknowledge that women are disadvantaged in the in the workplace because of their greater childcare responsibilities, Shackletons Garden Centre Ltd. However, in the particular context of the Coronavirus crisis, the claimant had not provided evidence of group disadvantage. Accordingly, this claim is not well-founded and is dismissed.

Indirect associative disability discrimination

140. The final claim is indirect associative disability discrimination, in that, applying the same PCP, as a parent of a child with severe and/or recurrent respiratory issues, it was going to be especially difficult for the claimant during the Coronavirus crisis to obtain alternative work. Again, we repeat our conclusion in relation to the claimant's son's alleged disability. We also repeat that we were not satisfied that, at the material time, with reference to the dates referred to in the claims, he was a disabled person. Further, in relation to group disadvantage, no evidence was presented that parents of a child with severe and/or recurrent respiratory issues, were disadvantaged during the Coronavirus crisis in obtaining alternative work. Accordingly, this indirect associative disability discrimination claim is not well founded and is dismissed.

141. It follows from our conclusions that all the claims against the respondents have been dismissed. The provisional remedy hearing listed on 2 November 2022 is hereby vacated.

Employment Judge Bedeau

Date: 17 August 2022

Sent to the parties on:
17 August 2022

For the Tribunal: