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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms P Bradley		London School of English and Foreign Languages Limited

Heard at: London Central **On**: 23, 24, 25, 26 and 27 January 2017

Before: Employment Judge Glennie
Mrs C I Ihnatowicz
Mr S Soskin

Representations
For the Claimant: In person
For the Respondent: Mr A Johnston of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. **The complaints of indirect discrimination and victimisation are dismissed.**

2. **The Respondent's application for a costs order is refused.**

REASONS

1 By her claim to the Tribunal the Claimant, Ms Bradley, makes complaints of indirect discrimination related to sex and of victimisation. The Respondents by their response dispute those complaints.

2 The Tribunal is unanimous in the reasons that follow.

3 The issues in the case were set out partly in a note of a preliminary hearing on 21 November 2016 conducted by Employment Judge Wade and partly in further particulars that the Claimant gave in response to that preliminary hearing. The Tribunal defined those issues as follows:

3.1 **Indirect discrimination:** Did the Respondents operate a PCP that all staff were to arrive early for a 9.00 am class at 8.45.

3.2 Did this PCP put women at a particular disadvantage as compared to men, and did it put the Claimant at that disadvantage.

3.3 Can the Respondents show that the application of the PCP was a proportionate means of achieving a legitimate aim.

3.4 **Victimisation:** Did the Claimant's emails of 9 May 2016 to Ms Norton and 16 May 2016 to Mr Tallon amount to protected acts.

3.5 Did the Respondent subject the Claimant to detriments because she had done a protected act or acts in (a) not offering her work from the date of the protected act(s) until 11 July 2016; and (b) Ms Norton's attitude to her on 11 July 2016.

4 Turning to the evidence and the Tribunal's findings of fact, we heard evidence from the following witnesses:

(1) The Claimant, Ms Bradley

(2) Ms Michelle Oldman, a full-time trainer for the Respondents between 2002 and 2004 and thereafter a course administrator until November 2016.

(3) Mr Hauke Tallon, the Respondents' Chief Executive.

(4) Ms Shirley Norton, a Director of Courses since October 2014 and previously a trainer and courses manager.

5 There was an agreed bundle of documents and page numbers that follow refer to that bundle.

6 The background to the case is as follows. The Respondents, as their name indicates, provide language courses, predominantly in English as a foreign language. There are two sites in London, one in Holland Park and the other near Stamford Brook. It was common ground that the Respondents provide group and one-to-one teaching aimed at professional people and senior managers in various fields.

7 The Respondents provide what could be described as an up-market service offering a restaurant at the Holland Park site and net-working and social opportunities for the participants, in addition to the actual teaching. The charge of around £80 per hour for one-to-one tuition is relatively high within the industry and reflects the nature of the service provided. The teaching or training is delivered by 20 employed trainers and a pool of around 44 freelance trainers who are called upon as and when needed.

8 The Claimant began work with the Respondents as a freelancer in 2005. She signed conditions of service at that point which are found at pages 165-166. In terms of timings, which are really at the heart of this case, Clause 8 of those conditions referred to the organisation of schedules and said that a typical morning for a client on a one-to-one programme was from 9 to 12.30 and a typical afternoon was from 1.45 to 5.00 pm. Then it observed that as schedules were entirely governed by client's requests, many variations could be expected. There was no specific reference to starting times or the time of 8.45 which assumed importance in this hearing, but as would be evident in any event, it was said to be necessary for the trainer to be ready to start the session at the stated time.

9 The Claimant worked regularly for the Respondents from 2005 onwards. She has a particular specialism in law but taught professionals from other disciplines as well. The Claimant described her work at this time as being full-time; she appreciated however that there was no guarantee of work being offered to her. She never turned down any work that the Respondents offered her.

10 There was some issue about whether the Respondents as a matter of practice required an attendance time of 8.45 for a 9 o'clock session at this stage. The Claimant's position was that this was not required at the outset and that it was something that was introduced later, as from about 2010.

11 The Respondents' evidence was that it had always been the understanding that trainers would attend at 8.45 for a 9 o'clock start. Ultimately it is not necessary for the Tribunal to decide that point, because all the events with which we are concerned occurred considerably later, after 2010, and as we will explain, at a time when the question of an 8.45 attendance was specifically canvassed.

12 The heart of the Claimant's case about indirect discrimination is that there was a PCP (provision, criterion or practice) imposed of an 8.45 attendance for a 9 o'clock meeting with the client, and the Respondents accept that this PCP was indeed in place.

13 The Claimant's daughter was born in 2009 and at all times since then the Claimant has been solely responsible for her care. Following her daughter's birth the Claimant took some time off work.

14 The Respondents introduced revised conditions of service in 2010. These made specific reference to timekeeping in the following terms at page 167-5. Clause 8, headed "Punctuality and Timekeeping" read:

> "You are expected to arrive at school at least 15 minutes before the start of any class which you are teaching and should ensure you are on time for the start of the lesson. You must inform a courses manager if you will be late for any reason."

Clause 9 then included the statement that a typical morning was 0900 to 1230.

15 The Claimant did not sign a copy of that document in 2010. She did sign one that contained the punctuality and timekeeping clause later, in 2015. In terms of the Claimant's working pattern the records that the Respondents rely on show that in 2010 she worked a total of about 30 hours, this of course being during the period shortly after the birth of her daughter. She returned to working substantially for the Respondents in 2011, working 207 hours in the latter part of the year, and in 2012 something of the order of 469 hours, substantially in the first three quarters of the year.

16 For a period in 2012 and 2013 the Claimant and her daughter were resident in Spain. Then it is evident from the Respondents' records (page 166.8) that in 2013 the Claimant worked for 120 hours across weeks 26-33, being the summer period. It is the Respondents' evidence, which Tribunal accepts, that the summer is the busiest time for them. We can understand that the clients that they seek to attract would be more likely to be available for teaching of this nature during the summer period when businesses might be less busy than at other times of the year.

17 In 2014, according to page 166.9, the Claimant did no work for the Respondent before week 25, but thereafter through to week 50, and so the second half of the year, worked 209 hours, mainly between weeks 30 and 50, spread quite evenly over the weeks of that period.

18 The Respondents' evidence is that by the latter part of 2014 the market for the services that they offer was in decline and that this decline continued through to 2015. This was at its worst at the beginning of 2016 and more recently there has been some glimmer of hope that things are not quite as bad as they have been. That evidence is supported by a document at page 60.1, which is a set of minutes of a trainers' meeting on 22 October 2014 conducted by Ms Norton and attended by, among others, the Claimant. This records at item 3 that numbers towards the year end are relatively low, and that Ms Norton will keep freelance trainers informed over the coming weeks and endeavour to share available work. Then the first 10 weeks of 2015 (page 166.10) saw the Claimant doing only 15 hours of work during that period.

19 On 25 February 2015 there was a conversation between the Claimant and Ms Norton which led to an email from the latter at pages 69-71. It is apparent from this that the Claimant had said to Ms Norton that the distribution of freelance work was not being carried out fairly. It is evident from page 70 that the Claimant had said that Ms Norton was allocating work to her "friends", as she put it, first. Ms Norton denied that and referred to the low demand that was available in the market at the time.

20 The Claimant then sent a further email of 26 February 2015 (pages 65-69) to which Ms Norton added her comments, which are shown on the copy that is before us. Again, the question of the distribution of work amongst the freelancers was canvassed. On the question of timings, page 66 records that the Claimant said that there had been issues with her punctuality, but for reasons that Ms Norton was aware of. She referred to a conversation when Ms Norton took over from the previous manager where the Claimant said:

> "I explained logistically it was not always possible for me to arrive 20 minutes before a class due to having to take Jasmine [her daughter] to school in Islington. You accepted that and told me that as long as I tried to do so on day 1 you did not have an issue with me negotiating a slightly later start with the CP [course participant] when necessary."

Then the Claimant went on to explain how she would do that with participants and stated that Ms Norton had said that she would consider any arrival less than 20 minutes before a class to be late. She said that Ms Norton had said that she might be higher up the "pecking order" (an expression which Ms Norton denied using) if she were not late so often.

21 Ms Norton's comments were that there were notes in the Claimant's file going back to 2008 about timekeeping. She said: "I do not feel that arriving late makes a good impression on our clients. We have discussed this before and then under any circumstance all our trainers are expected to be on site 15 minutes in advance to class starting as outlined in the terms of association". There were then further emails passing between the Claimant, Ms Norton and Mr Tallon going over much of the same ground that had been discussed here.

22 In April 2015 a client identified as NK made a complaint about the Claimant (pages 72-75). The complaint included questions of punctuality, among other things, but here it was in terms of late return from breaks, as the classes or sessions concerned started in the afternoon, and so the morning start time was not an issue. There was some difference between the Claimant and Ms Norton about how this matter was dealt with, but ultimately we find that nothing relevant to the issues before us turns on that particular outcome

23 Then in July 2015 there was another complaint about timekeeping, this time relating to start times in the morning. Ms Norton had a conversation with the Claimant on 29 July, her notes of which are at page 76. These record that the client had complained that the Claimant had been 20 to 30 minutes late on the Monday and the Friday of the course (typically a course might last for a week from Monday through to Friday). The note says that the Claimant acknowledged that the complaint was justified. She added that she was aware that she had a problem with timekeeping and that she found this not only unprofessional but also personally distressing.

24 Ms Norton recorded that she asked for solutions so as not only to be on time to the lesson but arrive 15 minutes before class as per the terms and conditions. The Claimant proposed that she would get up a bit earlier so that she would be able to leave the house by 7 with her daughter, and the traffic across London would allow her to reach school with plenty of time. If late she would revise her parking arrangements so that she could still be on time. The note then continues that Ms Norton said that if the Claimant continued to be late the Respondents would only be able to schedule her from 9.30. It appears that at first sight the Claimant was happy with that proposal, but then Ms Norton explained that that would mean that she would be unlikely to get much work as the individual tuition times were scheduled from 9 o'clock. Ms Norton recorded:

"I told her it was undesirable but better than arriving late to arrange a 9.15 start say with the student and make up the time across the morning. However we would still require her to arrive at 8.45 on the Monday."

25 Following this meeting, the Claimant continued to work during August and into September. Ms Norton's evidence was that she was intending to speak to the Claimant and say that because of the two complaints that had been received the Respondents could not realistically continue to offer her work, but that in the event that conversation never happened. This was because in September the Claimant spoke to Mr Anthony Myers and Ms Emma Whitehead, who were courses managers, and explained that she was having difficulty arriving on time. The position by now was that the Claimant, who lives in Victoria Park in East London, would drop her daughter at school in Islington at 8.00 am at the earliest. It was not possible for her to drop her daughter off before that. She had over time tried public transport for this journey and by now was driving to work. Either way, she was finding it difficult to arrive on time.

26 Use of the expression "on time" requires the Tribunal to observe the following. It is evident to us that there is a difference between the parties, and has been for some time, about what is meant by being on time. The Respondents say that this means arriving by 8.45, while the Claimant maintains that this means starting the class or lesson at 9 o'clock. This difference has been apparent throughout much of the interaction between the parties and indeed in the evidence that the Tribunal has heard.

27 That said, it is agreed that there was a PCP of requiring the Claimant to arrive at 8.45 for a 9.00 am session on a Monday, after which the Claimant could negotiate with the client for a later start, as has already been mentioned. We raised at the outset of the hearing, and the Claimant agreed, that the PCP would on the face of the matter continue to apply for the rest of the week if the client was unwilling to agree to a later start. The Claimant's evidence was that when she raised this with clients it would be about 50-50 whether they would agree to this re-arrangement or not.

28 Returning then to the conversation in September 2015, the Claimant's evidence was that she told the two managers that the stress of her commute was taking a toll on her health. She asked for a later start time and earlier finish time. They reiterated that while different times could be the subject of negotiation with the client, any arrival later than 8.45 on a Monday when the course started would be regarded as late.

29 The Claimant's evidence was that the matter was left in terms that she would try to change her daughter's school and let the Respondents know when she had done that, and that meanwhile she was willing to work but only with a later start time. Ms Norton's evidence was that she understood that all of that meant that the Claimant was not available for work from September 2015. The Tribunal can see that the Respondents would understand the position in that way given their requirements, and the Claimant's stated inability at that time to fulfil them.

30 There was then no further communication between the parties until January 2016. At this point the Claimant told Mr Myers that her daughter had changed schools, or was going to change schools very shortly, and that she had childcare arrangements in place that would enable her to arrive by public transport "on time". This is how it is put in her witness statement, although after the observation about being able to arrive on time, the Claimant added "(before 9.00 am)".

31 The Claimant was not, however, offered any work in the early months of 2016. The evidence about the reason for this from Ms Norton was that predominantly this was because of a lack of work, to which we have already referred. The issue of timekeeping was also said to be relevant in the sense that, where work was available, the Respondents would seek to match the student with the appropriate trainer, but then beyond that there would be criteria applied including the trainers' records regarding matters including timekeeping. The Claimant could therefore have been at something of a disadvantage when being considered for work because of that. However, Ms Norton's evidence was that primarily the problem was lack of available students.

32 Then at pages 89-90 Ms Norton sent an email to the Claimant on 9 May 2016 referring to a conversation that the latter had had with Ms Ann Morris, saying that she was unhappy that she had not been given any work recently. The Claimant's evidence was that she had been phoning the Respondents about every two weeks between January and May 2016 to find out whether there was any work. The email continued that the Claimant had said that she considered herself to be an employee/worker, had a right to work and would be taking legal action should she not be provided with any. Ms Norton set out her understanding of the position regarding freelance work and concluded that she could understand that the Claimant was unhappy, but felt sure that she would have appreciated that the economic conditions for English schools were weak, resulting in declining numbers. She said "should we have any suitable work we will continue to contact you to see if you would be available".

33 The Claimant replied to that email on the same day at page 88. She said that Ms Morris had got the wrong end of the stick and that she was trying to establish the reasons why she had not been offered any work since the previous September. She referred again to the point about timekeeping and the pecking order. The Claimant then said this:

> "The official line is that there has been no work available but that doesn't appear to be the case according to certain members of your staff. I approached you last year and later Anthony to ask for slightly more flexible hours that would help me with childcare and hence my timekeeping. I was told that this would not be possible or at least not on Mondays and only if the CP concerned was happy with it, but that you were not prepared to formally offer to designate classes with a slightly later start/earlier finish to facilitate my childcare/work/commute dynamic. As the situation had become too stressful and unmanageable my only option was to wait until I was able to get Jasmine into another school

> which would afford childcare options which would enable me to carry out work for you within the exact hours you required.
> I contacted Anthony in January this year to confirm that I had changed her school and had alternative childcare in place but I have still not had one single offer of work.
> What has been suggested to me is that my position might in practice, despite what is written in the freelancer agreement, be viewed as that of 'de facto employee' and as such I would have certain legal rights if the situation were to be viewed as one of indirect discrimination, which I understand it might."

Pausing there, the last words that we have quoted are relied on as the first of two protected acts in relation to the victimisation complaint.

34 The Tribunal would comment that this email does not mention 8.45 in terms, but given what had been said in September referred to above, the reasonable understanding of it was that the Claimant was saying that she was now able to work within the hours required, i.e. arriving by 8.45, at least on a Monday. That is what the Respondents had said they required in September.

35 Ms Norton replied on 11 May (page 87), referring to the reasons and the practices for the use of freelance teachers, and saying that the number and demand for freelance teachers had been reduced in 2016. She concluded:

> "Anthony has made me aware of the changes in your circumstances and that this should no longer be a problem. We will continue to review our need for freelancers and I can assure you that should the need arise and you are able to meet the needs of a particular client than you will be considered equally with other freelance trainers."

36 There was a further email from the Claimant to Mr Tallon (page 82) on 12 May 2016, relied on as the second protected act. The Claimant asked for a meeting and said that there was, according to preliminary legal advice, a potential issue of indirect discrimination. This led to Ms Anita Wynn, an HR Consultant engaged by the Respondents, inviting the Claimant to a meeting on 19 May 2016.

36 The meeting was recorded and there is a transcript of that recording (pages 94-120). The transcript shows that the meeting was attended by the Claimant and Ms Wynn. In fact Ms Norton was also present, as was Mr Francis Duncan, the Staff Representative, and it may be (the Tribunal speculates) that their non-appearance in the list of persons present is because they did not speak and therefore were not picked up by the transcriber of the recording.

37 It is a lengthy transcript and of necessity we refer only to selected parts of it. On page 94 Ms Wynn opened the meeting, saying that the subject matter was the suggestion that the school had acted in a way which was possibly indirectly discriminatory, and the Claimant said: "We're here to explore that." Following that the Claimant set out the difficulties that she was experiencing with her childcare and the journey. On page 99 the Claimant said that Emma and

Anthony had said that they would look at, or they had been asked to look at, whether it would be possible for her to start a little later in the morning and finish a little earlier. She said that the general policy was, if you can negotiate it with your client than that is ok, but you have to be here, as she put it, on Monday for 9 o'clock. The Claimant went on to say that what she was asking for was an official start time of 9.15 or 9.30 to give her breathing space.

38 On page 100 the Claimant said that she became ill and had to remove the stress from the scenario, this being a reference to her discussion in September with Mr Myers. She then said that it really took her until January to achieve that, and that she therefore contacted Mr Myers with the suggestion that she would be available to start again at the February half-term as her daughter was to change schools.

39 There was then reference to indirect discrimination, but returning to issues of timing, on page 102 the Claimant said that there would not now be an issue because there were different scenarios happening. She said: "So I can be here at nine. It's not too problematic, and before I couldn't." Then there was discussion of equal allocation of work. At page 105 Ms Wynn said that she was "keen to put this to bed once and for all in terms of how we are going forward…. …..under the assumption that you've got your arrangements made so that you can turn up for work on time." The Claimant replied that from January that was in place. Ms Wynn said "and therefore you can, you as well as anybody else can be there for 9 o'clock", to which the Claimant agreed. The Claimant then agreed that she wanted Ms Wynn to investigate both why she was not being given what she perceived to be a fair share of the work, and whether work had in the past been allocated in a discriminatory way.

40 On page 108 Ms Wynn asked the Claimant how things had been working in the previous year, to which she replied: "Typically I was walking in at 5 past 9. At 10 past 9 something like that and came dashing upstairs, that's the kind of typical scenario when I was late." Then she said that there was a different scenario altogether when she was stuck in traffic, that this happened maybe three times, and then she would be seriously late, not a matter of a few minutes. Then the Claimant said that she felt that starting at 9.30 would have given her "breathing room", which she explained as meaning time "to actually come in, sit down, look over what I was going to do, walk in relaxed and composed rather than come dashing in and up the stairs". Then she continued: "and this is what the school was upset about I think in that they are aware that doesn't particularly give a good impression at the school if you've got a teacher kind of flustered running into the classroom."

41 Pausing there, those are the Claimant's words, but they seem to us to echo the Respondent's stance about the reason why they would require an 8.45 arrival for a 9 o'clock start with the class.

42 Returning to the transcript of the meeting, there were other references to the possibility of a 9.30 start and how that would work for the Claimant. At page 113 there was discussion about whether the Claimant had spoken to clients about a later start. She said that she had and that sometimes they would agree

to it, she thought it might be 50-50 or maybe 60-40 in favour of them saying it was not a problem. Then she said that the start time in relation to Monday mornings was presented to her as non-negotiable. She referred to a need or requirement to arrive by twenty or a quarter to nine and said that there was always that kind of extra pressure on a Monday morning. Ms Wynn asked about the reason for that and the Claimant said: "Well, because it was too stressful for management if they felt that people are not going to be here on time" and she explained that Monday was particularly important because that was when the students arrived and the trainers were introduced to the students. There was a meeting in the restaurant with everybody together.

43 Then the Claimant said, in many ways mirroring what the Respondents say about the matter: "I guess if they are aware that somebody is missing than it is stressful for them to think are they going to turn up, what am I going to do if they don't turn up and have we got another teacher".

44 Finally with regard to the transcript, towards the end of the meeting at page 116, in relation to the timing aspect Ms Wynn said: "I'll need to look at this as a jigsaw piece in amongst all the other jigsaw pieces to see how viable and moving outside that jigsaw piece would be". Then she said: "and benefit cost from an individual from the issues you've raised, versus client, versus all of those things" and the Claimant added "and the legal position." Ms Wynn continued "and the legal position exactly and how all that would fit together" and then the conversation went on to the question of the allocation of work amongst the freelancers.

45 The Tribunal makes the following two observations about this meeting. The first is that, although in the course of this hearing the Claimant put it to the Respondents' witnesses that she understood that a compromise had been reached at this meeting in the sense of it being acceptable for her to arrive either at or by 9 o'clock, the transcripts do not reflect that. Ms Wynn said, as we have described, that she was going to look at the jigsaw pieces, and we find that this must have meant that she was not making any decision at that point or expressing any agreement one way or another. Secondly, it can again be seen that the Claimant was expressing the view that being on time meant arriving in time for 9 o'clock, whatever exactly that involved, and related to that it appears that there was no specific mention by anybody in the course of the meeting of the time of 8.45. The concept of arriving 15 or 20 minutes early for a session was mentioned, as we have said.

46 The outcome letter from that meeting which is dated 2 June 2016 (pages123-127) was drafted by Ms Wynn and sent to Ms Norton for approval, she then being off work having suffered a bereavement at that time. Essentially that letter gives the Respondents' answers to the allegation of discrimination and again it is notable in the light of the issues that we have now had to decide that it does not make any specific reference to the time of 8.45. What it did say on the question of timing was that Ms Wynn and Ms Norton could understand why the Claimant felt that the specific and rigid start time might have a detrimental impact on those with caring responsibilities, albeit that they said that they did not believe that this was necessary linked with the sex of the employee, and then made

observations about men and women sharing care and responsibilities. The letter continued that a consistent and fixed start time was a reasonable requirement for the role, and set out an argument to which we will refer about the provision of premium services to professional clients and it being generally expected by the clients that the training date should mirror a normal working day.

47 The letter said that the Monday morning induction and break times were key in introducing the various groups and individuals to each other and to members of the Respondents' team. Secondly, the letter stated that the marketing and supporting material said that the one-to-one programmes start at 9.00 am and the Respondents were keen to have a clear, simple and consistent marketing message. It said that they needed to ensure that it was as easy as possible for agents to sell the courses and having mixed messages could make this more complex. There was a third point about working with a large number of individuals, and having repeated the need for simple and consistent processes, the letter referred to the suggestion that the Respondents could support the Claimant negotiating a later start time with individual clients. It was said not to be possible to meet the suggestion of exploring this individually with clients at booking or later in the process and allocating those who were more flexible to those trainers with a later start time.

48 It was said that this last point was because at the time of the booking (which could be months or weeks in advance) the Respondents were unaware of the existing language capability or the specific requirements of the client, which were collated later in the process. Until then, (generally done one or two weeks before the student arrived) they could not allocate an appropriate trainer; and at that point the introductory communication was completed and the flights were booked, so the start time on the first day was immoveable. The letter then dealt with the allocation of work as between the freelancers.

49 It then occurred that on 7 July 2016 the Claimant was offered a week's work with a one-to-one client to start on Monday 11 July. The events of that morning were as follows. By 8.45 the Claimant had neither arrived nor telephoned the Respondents. She actually arrived at around 8.52 or 8.55: there was a difference between her and Ms Norton about that. It seems to the Tribunal that it is not material to decide whether it was 8.52, 8.55, or something between the two: the material point is that it was after 8.45. Ms Norton spoke to the Claimant on her arrival. There was an issue about whether she said hello or not. Again, the Tribunal does not find it necessary to decide whether she actually uttered that word or not. There is no dispute that she did ask something to the effect of whether there had been a problem with the traffic, in other words registering that in her opinion the Claimant had arrived late. As to whether or not she said that in an angry or irritated manner, the Claimant's evidence was that she did and that she raised her eyebrows and looked at the clock in a meaningful way. Ms Norton's evidence was that there might have been a hint of annoyance in her voice when she spoke.

50 The Tribunal finds that, however it was communicated, Ms Norton was annoyed and she conveyed that to the Claimant, whether by tone of voice or

expression, or possibly both of those. We find that Ms Norton had been expecting or hoping that the Claimant would arrive for 8.45.

51 The Claimant then went to a colleague, Mr Fonseca, to take a handover in respect of the client who was due to start the session at 9 o'clock. The client had not in fact arrived at 9 o'clock and a minute or two after that Ms Norton called the Claimant into her office. Again, precisely how she did that and in what terms is not necessary to decide: we have little doubt that Ms Norton was still annoyed. The earlier conversation about problems with the traffic had taken place in the general area when other people, both trainers and students, were around. Ms Norton invited the Claimant into her office but left the door open, she said, because she did not want to be accused of acting unprofessionally towards her. In other words he was seeking to ensure that it would be possible for other people to witness what was being said if necessary.

52 Ms Norton said to the Claimant that Mr Myers had told her that the Claimant was unhappy about the way that Ms Norton had spoken to her, and had said to him that she would not be teaching for the rest of the week. Her evidence was that the Claimant confirmed that this was correct and that she said by way of explanation to Ms Norton: "You pounced on me when I came through the door". Ms Norton said: "No one pounced on you"; and at that point the Claimant left and the Respondents made other arrangements for the client's session.

53 Thereafter there was an exchange of emails on the same day, at pages 133-134. Ms Norton said she was writing further to the conversation that morning and she gave her account, saying:

> "I asked you on your arrival if there had been any problems with the traffic because we were expecting you at 8.45 along with all the other trainers. Whilst I acknowledge your comments about childcare we need to be able to organise cover for any trainer who is delayed or absent in good time. This is why we need to have everyone on site at 8.45 or have a phone call from anyone delayed so that we know they are on the way. I would appreciate if you would confirm by return that it is still your decision not to work this week in order that I can make alternative arrangements."

The Claimant replied:

> "For the record I did not have an issue with you asking me if there was a problem with the traffic but with the way you spoke to me on my arrival at LSE today. You were gunning for me the moment I walked through the door at 8.52 am without even saying hello or good morning or in fact anything. You looked at the clock on the wall, looked at me and raised your eyebrows. You were clearly agitated and didn't even bother to take me to one side to give me your ticking off which was done in front of several colleagues. It has been clearly explained to you on more than one occasion that I am unable to get to the school for 8.45 am due to my childcare commitments and I do not expect to have to reiterate that each time I arrive at the school."

Then the Claimant continued with other observations about what had happened and concluded that she would "pass on this week", meaning that she would not be attending, and since then the Claimant has not worked for the Respondents.

54 Those then are the facts, and we turn to the law that is applicable to them and to our conclusions.

55 The Tribunal reminded itself of the provisions about the burden of proof in discrimination claims, set out in section 136 of the Equality Act 2010 in the following terms:

> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

56 In the well-known authorities of **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007] IRLR 246** the Court of Appeal described a two-stage test arising under the equivalent burden of proof provisions in the former anti-discrimination legislation. In **Hewage v Grampian Health Board [2012] IRLR 870** at paragraph 32 of its judgment, the Supreme Court said this:

"……it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other."

57 In the present case the Tribunal has found itself able to make positive findings on the evidence in the way envisaged by the Supreme Court in **Hewage**.

58 Dealing first with the complaint of indirect discrimination, section 19 of the Equality Act 2010 provides as follows:

> *(1) A person (A) discriminates against another person (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 person 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.*

59 Turning to the elements of this test, it is common ground that there was a PCP in the terms relied on by the Claimant. It is also evident that the PCP was applied to all freelancers who worked for the Respondent and therefore it was applied to persons, i.e. men, with whom the Claimant did not share the protected characteristic of sex.

60 We have asked ourselves whether this PCP puts or would put women at a particular disadvantage as compared with men. In that connection we were referred indirectly to the decision of the Employment Appeal Tribunal in **Shackletons Garden Centre -v- Lowe UK EAT0161/2010.** We say indirectly because this was referred to in an Employment Tribunal decision of **Mather -v- Chief Constable of Greater Manchester** which the Claimant showed to us. In paragraph 9 of the judgment in **Shackletons** the Employment Appeal Tribunal said that the Employment Tribunal, when considering the question of whether a PCP put women at a particular disadvantage when compared with men, made the following finding:

"It is well recognised that significantly more women than men are primarily responsible for the care of their children. Accordingly, the ability of women to work particular hours is substantially restricted because of those childcare commitments in contrast to that of men."

In paragraph 10 of its judgment the EAT said that the Tribunal was entitled to come to that conclusion based on what is now well recognised in industrial and employment circles.

61 In the present case it has been suggested to us that there is no evidence that the PCP in play here would put women at a particular disadvantage when compared with men. Although no evidence was called on the point, it may well be that with the passage of time more men are undertaking childcare responsibilities, including as sole carer, than was the case in the past. However, we make the same finding as the Employment Tribunal made in the **Shackletons** case, and we will not repeat it. We make the same finding on the basis of what we understand to be recognised in employment circles, and on the basis that, even allowing for change with the passage of time, this proposition still holds good today.

62 The question then is whether this PCP put the Claimant at that disadvantage, and we bear in mind that as held by the Court of Appeal in **Naeem v Secretary of State for Justice [2015] EWCA Civ 1264** we have to ask ourselves the question why the PCP put any particular individual at a

disadvantage. On this point Mr Johnston has submitted that the reality of the situation was that what put the Claimant at the disadvantage that she experienced in not being able to arrive at or by 8.45 at least on a consistent basis was really a matter of geography rather than that of her sex (or more particularly, her childcare responsibilities).

63 So far as the factual position is concerned, we find that both elements make up the reason why she was put at a disadvantage by that PCP. If either were taken away the disadvantage would not be there. So in other words one cannot, we find, say that the matter was purely one of geography because as the Claimant herself pointed out, if she had not been a mother with sole care of her child, then the difficulties imposed by dropping her child at 8 o'clock and not being able to do so before would not have arisen. She would have been able to leave home at whatever time was necessary in order to arrive at work at the required time. Equally if one took out the geographical factor and supposed that the Claimant lived within a few minutes' journey of both her daughter's school and of her workplace, then again the problem would not arise.

64 So we find that both elements are relevant to the disadvantage. One cannot exclude either, and therefore we find that it is correct to say that the Claimant was put at a disadvantage by the PCP and that in terms of disadvantage to women as identified by the Employment Tribunal and approved by the EAT in **Shackletons**, the particular type of disadvantage to which the Claimant was put is the same as the group disadvantage. Therefore we answer the question in **Naeem** as to why the PCP put the Claimant at that disadvantage as being that it was because of her sex.

65 There remains therefore the question of justification as posed in section 19(2)(d). This is a matter, we reminded ourselves, for the Respondents to show. The Claimant does not have to disprove it.

66 On this point the question of the 9.00 am start as such has not been directly in issue. If, however, it requires consideration, the Tribunal would find that the Respondent has demonstrated that the requirement of a 9.00 am start sessions was in itself a proportionate means of achieving a legitimate aim. The aim of the 9.00 am start is perhaps the simple one of the furtherance or operation of the Respondents' business. The Respondents' evidence, which we accept, is that they found that a 9.00 am start is the most acceptable to clients and is therefore the most beneficial for their business to offer. We bear in mind that it is not an unusual or extravagant start time. The justification for it is that it mirrors an ordinary start to the working day: it therefore fits with the participants' expectations and helps to present a professional image. Should it be necessary to do so, we find that it is a proportionate response to the aims of the business that the Respondents should in general start their classes at 9.00 am.

67 The 9.00 am start time as such was not, however, directly in issue. The actual issue as identified was that of the 8.45 arrival time. In that connection the Respondents rely on two aims. The first is that there should be a prompt and organised start to the class at 9.00 am and that the teacher should have had sufficient time to do any last minute organising of the class or the session

materials, to make sure that the room is in order, and to collect himself or herself so as to be ready for the student at exactly 9.00 am. That, we find, is a legitimate aim and, as we have indicated, the Claimant herself really explained in the course of the main meeting why that was. It would be an unprofessional scenario to have the teacher arriving flustered or not entirely ready, and we find that clients who were paying, or whose organisations were paying, £80 per hour for the service would expect it to start on time and in good order. The Tribunal found this to be a legitimate aim.

68 The second aim that is suggested was mentioned by the Claimant herself, and it is that if an arrival time of 8.45 is identified, then that involves the need for the teacher to indicate if they are en route but have not arrived by 8.45. That enables the Respondents to be aware that, although there is going to be a late arrival, they do not need to arrange cover and that the individual trainer is on the way. That seems to us to be legitimate aim because otherwise the Respondents would be left not knowing between 8.45 and 9 o'clock or a few minutes after, whether they needed to organise cover or not.

69 We therefore find that the Respondents have proved two legitimate aims for this PCP. That leaves the question whether this was a proportionate means of achieving those legitimate aims. We have not found that a particularly easy question to resolve.

70 The Respondents' evidence is that it would be unprofessional to contact clients in advance and to ask whether they would be prepared to accept a variation from the advertised start time of their sessions. We had no difficulty in accepting that the Respondents could not be expected to make such an approach at the time of the original booking. This would usually be (but not invariably) months in advance of the proposed session and so it would not be possible at that stage to know who the trainer was likely to be. Therefore this would involve contacting every client to ask them as a matter of precaution whether they would be willing to accept a variation in the arrangement. We can readily see that, having advertised the start time of 9 o'clock, to then contact every client and ask whether they would accept a later time would be regarded as risky by the Respondents in terms of the appearance of the service they were offering.

71 Equally, we can appreciate why in practical terms the Respondents might find it acceptable to raise this issue of a later start date with the individual client after they had attended on the first day and with the trainer having spent some time with them, although we should add that we noted that Mr Tallon and Ms Norton perhaps differed about this. The latter found that that was an acceptable practice. The former evidently was not very happy with even that idea.

72 The Claimant's suggestion in her submissions was to the effect that the Respondents could have contacted individual clients when they were potentially matched with her in order to see whether they would accept a later start. That was something that was not directly put to Ms Norton in terms of something that could have been done but, as we have noted, it was mentioned in the outcome

letter at least in passing and it was referred to briefly by Ms Norton in her evidence.

73 We should say that we found some immediate attraction in this particular idea. However, Ms Norton's evidence was that even this approach would have carried some risk of seeming unprofessional. Bearing in mind the nature of the service being offered, its cost, and the general nature of the clients (professional people and managers), we can understand that concern on the part of the Respondents. It seems to us that a client approached in this way before they had arrived at the school might be dissatisfied with a proposed variation from the course times, and that even if the client felt that they should agree to it, while not actually cancelling, might consider that this reflected badly on the professionalism of the Respondents' organisation. That carries with it the risk that the individual client might share that opinion with others in his or her organisation and with other potential clients. We can therefore see that there is a genuine concern about that taking place.

74 We have reminded ourselves in this connection that the test that we have to apply is not whether the Respondents did everything that they could to assist the Claimant, or any similar formulation. What we have to ask is whether their approach to this situation was proportionate.

75 In considering the question of proportionality the Tribunal has reminded itself that the Respondents were offering a service that was intended to be at the top of the range in the relevant market, and which was priced accordingly. The Respondents would reasonably be concerned to maintain the "up-market" nature of the service.

76 Given the flexibility that was allowed once the client was on board in the sense of having arrived at the school, and the importance of a professional service and the appearance of a professional service to the Respondents as explained above, we find that their approach was a proportionate means of achieving both of the legitimate aims that have been identified. The complaint of indirect therefore discrimination fails.

77 We turn then to the complaint of victimisation. Section 27 of the Equality Act provides in subsection (1) that:

> *"A person (A) victimises another person (B) if –*
>
> *(a) A subjects B to a detriment because B does a protected act, or*
>
> *(b) A believes that B has done or may do a protected act."*

Then in subsection (2) protected acts are identified as including:

> *"(d) making an allegation (whether or not express) that A or another person has contravened that this Act."*

78 We have referred to the two emails that are relied on as protected acts. Without setting them out again in detail we are satisfied that those at least made an implied allegation of a contravention of the Act. The material point in issue before us was that of causation. There are two detriments relied on: first that the Claimant was not offered any work with the Respondents between the dates of those emails and 7 July 2016, and secondly the response that she received from Ms Norton on her arrival on 11 July 2016.

79 We find that there is no evidential support for any causal link between the allegations of discrimination and the failure to offer work. As we have stated, on one view there had been no offer of work since September 2015, or on another view no offer of work since January 2016. Whichever is the correct starting point, before those allegations were made there had been a substantial number of months during which the Claimant had not been offered work and where the reason for that could not be the making of the allegations of the contravention of the Act as those had not then been made.

80 There then followed a shorter period from May to 7 July when that situation continued. There was no change in the sense that there was no offer of work during those weeks. The irresistible inference, we find, is that the position was the same after the making of the allegations as it was before, and if there be any doubt about the lack of causal connection, it is notable that an offer of work was made on 7 July. It seems to us to be most unlikely that, if the Respondents had reacted to the making of the allegations by refusing or declining to offer the Claimant work over the following six weeks or so, they would then somehow reverse that and make her an offer of work on 7 July.

81 In short, we accepted Ms Norton's evidence on this point. She said that she was not pleased by the allegation of discrimination. She said that it was something that she found unpleasant to have put to her and that she was somewhat shocked by it. In terms of offers of work, her reaction to it was to say to herself that she should not allow that to influence her in favour of offering the Claimant work where she would not have otherwise have done so, on the basis that there was a threat of litigation. We accept that evidence, which we found to be an inherently plausible reaction to the situation, and we find that there was no causal link between the non-offer of work during that period and the allegations of discrimination.

82 Then in relation to 11 July, on the findings that we have made Ms Norton certainly responded angrily or with annoyance to the Claimant's arrival on that morning. She did ask whether there had been problems with the traffic in front of other people and she did call the Claimant into the office. As we have found, Ms Norton communicated her annoyance to the Claimant.

83 Again, we find that there is no evidence to support a causal link between the making of the allegations of discrimination and Ms Norton's annoyance on that occasion. On the face of the matter the most likely explanation is that Ms Norton was annoyed for the reason that she conveyed at the time, which is that she had been hoping or expecting that the Claimant would arrive at 8.45, and she arrived at either 8.52 or 8.55 not having phoned at 8.45 to explain the

position. It seems to us natural that Ms Norton would be annoyed about that given everything that had gone before about the issues of timekeeping and the significance of arriving 15 minutes or so before the start of the session. That clearly was, to say the least, an issue between these parties, and for the Claimant to arrive back at work later than 8.45 on the first occasion after a break of something approaching a year, was we find likely to cause Ms Norton to be annoyed. That, we find, is the explanation for why she was angry, and showed it, and we find that there is no causal link with the allegations of discrimination.

84 The victimisation complaint is also therefore unsuccessful and both of the complaints in the matter are therefore dismissed.

85 Following the delivery of these reasons the Respondents applied under Rule 76 for a costs order.

86 The application was made in respect of the victimisation complaint on the basis that the claim had no reasonable prospect of success. It is true that we have found against the Claimant on the victimisation complaint and have done so in fairly clear terms. However, we find this to be a complaint that has failed, but not one which it could be said to have had no reasonable prospect of success. We have found that there were protected acts and that the matters relied on as detriments were essentially made out on the facts, but that there was no causal link between the protected acts and the detriments.

87 In relation to the indirect discrimination complaint the Respondents rely on unreasonable conduct of the proceedings. In that regard the Respondents' solicitors wrote to the Claimant on 8 November 2016 and 19 January 2017 asserting that the claims had no reasonable prospect of success and that the Claimant would fail to establish a prima facie case of indirect sex discrimination. The position is that we have found that this was not so, and we determined the complaint against the Claimant on the issue of justification. Ultimately the Respondents' position was to say that the complaint should be withdrawn because it had no reasonable prospect of success. It is not the case that the complaint had no reasonable prospect of success because, as our reasons indicate, we have given some considerable thought to it. In the circumstances we do not find that it was unreasonable for the Claimant to continue with the complaint in the face of that correspondence, nor, to the extent that it arises, do we consider that this complaint had no reasonable prospect of success.

Employment Judge Glennie
21 March 2017