EMPLOYMENT TRIBUNALS

Claimant: Miss J Blackwood

Respondent: Greenwich Leisure Ltd

Heard at: London South, by video

On: 4 – 6 October 2023, and in chambers on17 November 2023

Before: Employment Judge Cawthray
Judith Clewlow
Nigel Shanks

Representation
Claimant: Mr. Bennett, Solicitor for Free Representation Unit
Respondent: Ms. Begg, not legally qualified, Respondent's HR Manager

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is well-founded. The Claimant was unfairly dismissed.

2. The complaint of direct sex discrimination is not well-founded and is dismissed.

3. The complaints brought under section 18 of the Equality Act 2010 are not well-founded and are dismissed.

4. The complaint of indirect sex discrimination is dismissed upon withdrawal by the Claimant.

REASONS

Evidence and Procedure

1. The Claimant was represented by Mr. Bennett of the Free Representation Unit, acting on a pro bono basis.

2. Prior to this hearing a case management preliminary hearing was conducted by Employment Judge Morton on 13 December 2022. Within the Case Management Summary and Order Employment Judge Morton set out the issues for determination at this final hearing.

3. On 3 October 2023 the Claimant submitted an amendment application. The Free Representation Unit were only instructed to represent the Claimant in late September 2023. The Claimant sought to add a section 18 Equality Act 2010 complaint. The Claimant had provided details of such a complaint within the further information she had provided previously, dealt with the matter in her witness statement and the Respondent had addressed the matter in Mr. Nusl's witness statement.

4. Ms. Begg, on behalf of the Respondent, confirmed that the Respondent was content to add the complaint to the issues and for it to be considered in full. As this was accepted by the Respondent, this was an issue for determination.

5. The Claimant's indirect sex discrimination complaint was withdrawn, and is dismissed upon withdrawal.

6. A zip file of documents containing 49 documents and approximately 231 pages was provided. Unfortunately each document was included separately in the zip file and had to be accessed individually and there was no pagination. The Tribunal also had some difficulty accessing some of the documents, and it was necessary for Ms. Begg to provide a number of documents separately at the start of the hearing.

7. Witness statements had been provided for the Claimant, and for the Respondent: Mr. Daniel Nusl (General Manager) and Andrew Bindon (Chief Officer). A draft timetable had been discussed at the case management preliminary hearing on 13 December 2022. The last day, day three, had been reserved for decision making, delivering judgment and dealing with remedy. On 13 September 2023 the Respondent wrote to the Tribunal stating that Mr. Bindon was out of the country on 4 and 5 October 2023. The Claimant objected to the inclusion of Mr. Bindon's witness statement without the ability to cross examine. Ms. Begg confirmed that the Respondent still wished to call Mr. Bindon as a witness. This meant that the evidence and submissions was not completed until the last day, and it was not possible to give an oral judgment.

8. Each witness affirmed and gave oral evidence.

9. Both parties produced outline written submissions, which were supplemented orally.

10. At the start of the hearing the process of giving and challenging evidence was explained, together with an explanation regarding the difference between evidence and submissions.

11. The Tribunal met on 17 November 2023 to conclude deliberations.

Issues

12. The issues, which were discussed and agreed at the start of the hearing, are set out below.

Unfair dismissal

13. What was the reason for dismissal? It is not in dispute that the Claimant was dismissed. The Respondent says the reason for dismissal was redundancy, a potentially fair reason under s98(2)(c).

14. In dismissing the Claimant did the Respondent adopt a process that was fair for the purposes of section 98 (4) ERA and in particular:

    a. Did the Respondent adopt selection criteria that were fair and reasonable;
    b. Did it apply those criteria fairly and reasonably and arrive at scores that a reasonable employer could have arrived at?
    c. Was the procedure adopted by the Respondent in other respects a procedure that a reasonable employer would have adopted? This includes warning and consulting and taking steps to find suitable alternative employment.
    d. If the procedure adopted by the Respondent was not a fair procedure under s98(4) would the adoption of a fair procedure have made any difference to the outcome of the process (Polkey v AE Dayton Services[1988] ICR 142)?

Direct sex discrimination - s13 and 39 Equality Act 2010

15. Did the Respondent treat the Claimant less favourably than her comparator Montell Williams by not appointing her to the full-time fitness instructor role and instead dismissing her for redundancy?

16. If so, was the reason for that the Claimant's sex?

Pregnancy discrimination – section 18 Equality Act 2010

17. Did the Respondent treat the Claimant unfavourably by doing the following things:

    a. The Claimant says in October 2020, she received a phone call from Dan Nusl in which she told him that she was pregnant. She says he told her not to mention this to other colleagues until after the redundancy consultation was complete, as this probably would not go in her favour if she openly disclosed it at that time. The Claimant's daughter, A-T, was born in April 2021, so she believes she fell within the protected period at the relevant time.

    b. In the redundancy process because she had exercised the right to take maternity leave, which she returned from in February 2019.

18. In relation to allegation (a) Did the unfavourable treatment take place in a protected period?
19. If not did it implement a decision taken in the protected period?
20. Was the unfavourable treatment because of the pregnancy?
21. In relation to allegation (b) was the unfavourable treatment because the Claimant had exercised or sought to exercise, the right to ordinary or additional maternity leave.

Facts

22. These findings of fact are made based on the evidence presented.

23. The Respondent is a national employer. Prior to the pandemic it employed approximately 13,000 employees, but following the pandemic it employs in the region of 10,000 employees.

24. The Claimant worked for the Respondent as a part-time Fitness Instructor on a permanent basis between 5th April 2012 and 20th November 2020. She worked 16 hours per week at Croydon Leisure Centre. The Claimant was on maternity leave with her twins during 2018 and 2019 and returned to work on 15 February 2019.

25. At the time of returning from maternity leave, there was a different General Manager in place, Mr. Daniel Nusl was not the General Manager on her return to work, he joined the Croydon Leisure Centre in September 2019. The Claimant's witness statement states that upon her return to work comments were made by staff which made her feel unwelcome. She stated at paragraph 11 of the witness statement that Duty Managers passed comments like *"How are you going to cope with two young children"* and *"You're not going to have any more are you?".* This was not challenged in cross examination. In response to a panel question the Claimant confirmed the comments were made by persons called Lewis and Sam. There is no evidence that the Claimant raised this matter with anyone at the Respondent. Mr. Nusl was not based at the Claimant's place of work at the time.

26. The Claimant's place of work closed at the start of the lockdown in March 2020 and the Claimant was put on furlough on 22 March 2020.

27. Management at the Respondent's various sites were tasked with identifying cost savings as a result of the pandemic.

28. In or around September 2020 the Respondent's management team considered a restructure to achieve financial savings and there was a reduction in headcount across the organisation. Prior to identifying at risk roles the Respondent produced internal guidance, namely "Covid 19 Redundancy Process Checklist for Lead Managers" and "Covid 19 Redundancy Management Guidance". In total these two documents amount to 30 pages, and set out the internal process to be followed together with template documentation.

29. Mr. Daniel Nusl, General Manager of the Respondent's Croydon Leisure Centre was designated as Lead Manager for the restructure at the Croydon site. Mr. Nusl was provided with some form of briefing and/or training in relation to implementing the restructure/redundancy process but was not provided with any material other than the Checklist and Guidance.

30. It is not possible to make a definitive finding of fact on whether or not Mr. Dan Sullivan, Assistant Manager of the Respondent's Croydon Leisure Centre, also attended any training. Mr. Sullivan remains employed but was

not called as a witness. There was no documentary evidence regarding management training and in this respect Mr. Nusl's evidence was not consistent in this respect. In any event, Mr. Nusl was the Lead Manager for the redundancy process.

31. One of the affected roles was Fitness Instructor at Croydon Leisure Centre. Croydon had 1.5 FTE Fitness Instructors and it had been decided that should be reduced to 1 FTE position.

32. The role of Swim Team Lead was also identified as an at risk role, and the single post holder was later made redundant at the Croydon Leisure Centre.

33. Redundancies were made at various sites, and approximately 500 redundancies were made across the Respondent's sites.

34. On 13 October 2020 Mr. Nusl spoke with the Claimant over the phone and informed her that she was at risk of redundancy and that a consultation process would be commenced. This was an initial and informal discussion and the Checklist provides a template script: "Reddoc 3 Covid 19 Informal at risk of redundancy consultation script." It is not clear whether or not this script was followed.

35. The Respondent sent the Claimant an at-risk letter on 13 October 2020. The Checklist references a template letter "REDLET 1 Covid-19 At risk master letter" and the letter sent to the Claimant follows the template in part, but does not provide details of the selection pool – including numbers within the pool. The Checklist states:

    *"LM launches the consultation period (*length of time depends on number of people being made redundant) and sends the 'REDLET1 Covid-19 At risk master letter' with the 'REDDOC5 Covid-19 Redundancy selection criteria' to all affected individuals. If there are any new posts being created, LM should also send the JD to affected staff."*

36. The Claimant was not sent the selection criteria with the at risk letter.

37. The Claimant says at some point between the 13 and 16 October 2020 a further telephone conversation took place, and that Mr. Nusl called her, and during the conversation she told Mr. Nusl she was pregnant. The Claimant says Mr. Nusl told her not to mention her pregnancy to anyone as it may work against her. The Claimant discovered she was pregnant in around July/August 2020. The Claimant did not notify anyone else at the Respondent of her pregnancy, but told HR at some stage in early 2021, after her employment had ended and after submission of the ET1.

38. Mr. Nusl says there was only one telephone call that took place between him and the Claimant, that was on 13 October 2020, and that he did not discover that the Claimant had been pregnant until recently, and that no one else in the Respondent had known the Claimant was pregnant.

39. There are no corroborating documents, neither party has included phone records in the Bundle. Both the Claimant and Mr. Nusl gave clear and consistent evidence in this respect.

40. It is noted that there was no mention of pregnancy in the Claimant's ET1, which was submitted on 28 January 2021, at which stage she was still pregnant.

41. On balance, taking into account the lack of corroborating evidence but noting the Claimant did not notify anyone at all about her pregnancy, including HR, until significantly later (after her employment had ended) together with the fact there was no mention of pregnancy during the appeal process, we find that the Claimant did not tell Mr. Nusl that she was pregnant and therefore he did not tell her not to tell anyone about her pregnancy. We find that the Respondent was not aware that the Claimant was pregnant at the time of the redundancy process.

42. A first consultation meeting took place on 16 October 2020 over zoom. Mr. Nusl attended as the Lead Manager. Mr. Sullivan also attended. Mr. Nusl asked Mr. Sullivan to participate in the redundancy process relating to the Fitness Instructor role. Mr. Sullivan attended the meeting as a "Management Witness" and not a designated note taker. The Respondent's Guidance states that a notetaker should be present at consultation meetings and makes no reference to management witnesses. Mr. Nusl took a typed note of the meeting, and the notes are contained within the Bundle. It is not clear whether or not Mr. Sullivan took a note, but no notes have been disclosed. The Checklist states:

    "LM conducts individual consultation meetings using 'REDDOC4 Covid-19 First individual consultation meeting script' with a note taker present. The lead HRA/HRBP does not need to be present at the meeting. Following the meeting, the notes should be sent to the individual to either sign or reply via email that they agree with the content."

    "LM obtains 'REDDOC8 Covid-19 Redundancy FAQ's' and adapts these depending on questions asked by staff during consultation period. The FAQ document should be sent out to all staff at risk of redundancy."

43. The REDDOC4 document was not specifically used by Mr. Nusl during the first consultation meeting, but he used it as a guide. He sent his notes of the meeting to the Claimant on 27 October 2020. However, he did not ask the Claimant to confirm the notes were accurate.

44. The Claimant was not provided with the FAQ document.

45. We have found, based on the evidence of the Claimant, Mr. Nusl and the notes of the meeting, that at the first consultation meeting there was an explanation of the need to make redundancies and that it was explained that there was a 1.0 FTE available post and although the Claimant expressed that she would be interested in a full-time role Mr. Nusl gave the Claimant time to consider and confirm whether she was interested in the full-time role.

46. Based on the evidence, both oral and documentary – namely the note of the meeting, we find that the Claimant was not given any clear or precise information on the selection criteria that she was to be assessed against or the selection pool during the first consultation meeting. The Claimant queried whether herself and any other candidates would return to work to be assessed and Mr. Nusl explained that the selection criteria would be based on previous performance.

47. Mr. Nusl, during cross examination, accepted the reference to performance was vague.

48. The discussion also involved practical matters such as use of leave, notice period and payments if selected for redundancy. However, the Claimant was not informed of the support helpline, as advised should be the case in Reddoc 4.

49. Following the first consultation meeting the Claimant looked at childcare arrangements and emailed Mr. Nusl to confirm her interest in the full time role on 20th October, Mr. Nusl had asked for a response by 19 October 2020, the Claimant had attempted to reply on 19th October but the email did not send. Mr. Nusl received a response on 20 October 2020.

50. The selection scoring exercise was undertaken by Mr. Nusl and Mr Dan Sullivan. Mr. Nusl asked Mr. Sullivan to also score the Claimant as he felt it was better to have two managers undertake scoring. Mr. Nusl and Mr. Sulivan produced separate scoring sheets, and the scores for both the Claimant and her comparator, Mr. Williams were recorded on the same sheet. The Checklist states:

    "LM conducts the redundancy scoring exercise using 'REDDOC5 Covid-19 Redundancy selection criteria'. Please ensure that this is conducted in a transparent and fair manner and those staff who have remained furloughed are not penalised."

51. The Checklist does not require a second person to score an at risk employee. The Claimant, and her comparator, Mr. Williams, were scored against the criteria as set out below:

    The Claimant's scores:

	Mr. Nusl	Mr Sullivan
Performance	3	2
Skills & Experience	3	2
Disciplinary & Capability	4	4
Attendance	4	3
Total	14	11

Montel Williams' scores:

	Mr. Nusl	Mr Sullivan
Performance	4	3
Skills & Experience	3	3
Disciplinary & Capability	4	5
Attendance	5	5
Total	16	16

52. There were comments within the scoring sheets based on Mr. Nusl and Mr. Sullivans views.

53. The Claimant did not know Mr. Sullivan well, despite him being an Assistant Manager, and had little interaction with him.

54. It is necessary to set out findings of fact in relation to each selection criteria. The Guidance states that scoring should use information from the previous 12 months. Mr. Nusl accepted that he did not do this and relied on a record of conversation from April 2019 in relation to the Claimant.

Performance

55. Mr. Nusl referenced a lack of enthusiasm and engagement, that the Claimant was often seen in the gym office and seen in a hoodie rather than uniform.

56. There is no evidence of anyone addressing with the Claimant the time perceived to be spent in the office.

57. The Claimant had previously requested a work jumper/hoody due to being cold in the gym. This was pre Mr. Nusl. This was not actioned and when cold, the Claimant would wear a hoody on top of her uniform. There is no evidence of anyone addressing her wearing a hoody, save for the record of conversation from April 2019 regarding uniform.

58. Mr. Sullivan referenced a lack of enthusiasm, struggling to hit referral targets and a requirement for cleaning tasks to be supervised.

59. There was no evidence provided of how any referral targets were measured, and no data regarding the Claimant's performance in this respect.

60. There was no evidence of any performance concerns, being raised with the Claimant, or recorded internally, save for the record of conversation dated April 2019.

Skills & Experience

61. Both Mr. Nusl and Mr. Sullivan only referenced the Claimant as having a level 2 and no CPD.

62. The Claimant was not asked about her skills and experience as part of the redundancy process and Mr. Nusl relied on the Respondent's HR system. He was not aware the Claimant had undertaken additional qualifications such as Level 3 Personal Trainer, boxercise instructor and group exercise instructor and although level 3 was not a requirement of the Fitness Instructor role, the qualifications relate to fitness matters.

63. The Claimant had worked for the Respondent for 8 years, whereas Mr Williams had only worked for them in the region of 18 months to two years, having had no previous fitness experience.

64. Mr. Sullivan referenced the Claimant having a lot of experience but commented this does not get shown.

Disciplinary & Capability

65. Mr. Nusl stated the Claimant required constant supervision to complete tasks. Mr. Nusl himself would undertake a gym walk once or twice a day. The Claimant's evidence was that she was not supervised, and this was not challenged. There was no evidence of any supervision of the Claimant, indeed there are no notes of discussions and no appraisals.

Attendance

66. The Claimant had two periods of absence taken into account. Mr. Nusl referenced the Claimant having a period of 9 days absence. The Respondent's HR system records 7 days of absence, due to self-isolation, as not to be used. Mr. Nusl did not exclude this absence in awarding scoring.

67. There was no appraisal information provided and Mr. Nusl accepted that he could not find any appraisals on file.

68. Generally, the comments about Mr. Williams were much more positive. Generally, Mr. Sullivan scored the Claimant lower than Mr. Nusl, despite him having limited dealing with the Claimant.

69. The Claimant was not provided with a copy of the scoring matrix and assigned scores. The Claimant only saw a copy of the scoring sheet on receipt of the bundle in these proceedings in February 2023.

70. The second consultation meeting took place on 28 October 2020, Again, both Mr. Nusl and Mr. Sullivan were present. The Checklist states:

"LM arranges second consultation meetings if applicable and uses 'REDDOC7 Covid-19 Redundancy second individual consultation meeting script' to capture the notes. LM should advise individuals of the outcome of the redundancy selection process. A note taker should be present at the meeting. Following the meeting, the notes should be sent to the individual to either sign or reply via email that they agree with the content."

71. The Guidance contains a script for the second consultation meeting . The script states:
"Advise the individual of how they scored against each criteria."

72. The Claimant was not provided with a breakdown of her scores nor detailed scoring information. The Claimant was not provided with a copy of the notes.

73. Mr. Nusl told the Claimant that she had been selected for redundancy. The notes of the second consultation meeting set out the reasons for selection as explained to the Claimant*:*

"DN explained the scoring was marginal and the decisive decisions were made on absence, and performance. DN explained there were no levels of absence recorded by the other candidate and that candidates could not score the same as JB has recorded several bouts of absence DN stated that the other candidate showed more enthusiasm for the role and was more proactive."

74. There is no evidence that the Claimant was given any clear or specific detail regarding the scores awarded to her by Mr. Nusl or Mr. Sullivan. Mr. Nusl also made reference to cleaning tasks during the meeting.

75. The majority of the meeting, based on the contemporaneous notes, focused on the practical arrangements of the redundancy.

76. The Claimant was sent a letter on 2 November 2020 setting out details about her redundancy pay and leaving arrangements.

77. The Claimant appealed against her redundancy on 5 November 2020. Within the appeal the Claimant stated she felt that she had been discriminated due to being a woman and a mother, but there was no mention of her pregnancy.

78. Her appeal was considered, by way of a paper review, by Mr. Andrew Bindon – Chief Officer, Change & Values. Mr. Bindon is very experienced in conducting and managing redundancy processes and volunteered to hear appeals from the process. Mr. Bindon was very busy with work pressures as a result of the pandemic at this stage, and was working up to 20 hours per day.

79. Mr. Bindon did not speak or meet with the Claimant. He did not speak or correspond directly with Mr. Nusl or Mr. Sullivan and he undertook a paper review. Mr. Bindon conducted approximately 50 appeals, all by way of a paper review. Only one appeal was successful.

80. Mr. Bindon considered his role as appeal officer was to consider the appeal as presented and undertake a review, and not to undertake a rehearing. The Guidance does not impose any limitations on the appeal process.

81. Mr. Bindon was sent an email from Ms. Janet Akinkuolie on 11 November 2020. Ms. Akinkuolie had emailed Mr. Nusl prior to this and he had provided answers to the specific questions raised. Ms. Akinkoulie also attached the following: the notes from the first consultation meeting, the Claimant's email dated 20 October 2020 confirming interest in the full-time position and Mr. Nusl's email to the Claimant dated 27 October 2020.

82. Mr. Bindon did not review the scoring sheets, and did not consider any other documentation when undertaking the appeal.

83. Mr. Bindon sent the Claimant a short email setting out the outcome of her appeal on 20 November 2020, namely confirming that her appeal had been unsuccessful.

84. Mr. Bindon set out that he considered the redundancy situation to be genuine. He told the Claimant that he was: *"satisfied that the process, scoring and decision making in relation to the job in question was fair. The process was carried out thoroughly and diligently and decisions made have been justified."*

85. Mr. Bindon was not aware that the Claimant was pregnant when considering the appeal.

Law

86. Sections 94 and 95 (1) Employment Rights Act 1996 (ERA) are set out below.

94 The right.
(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

95 Circumstances in which an employee is dismissed.
(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—
(a) the employer gives notice to the employee to terminate his contract of employment, and
(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

87. Section 98 ERA states:

98 General.
(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b)relates to the conduct of the employee,
(c)is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
(3) In subsection (2)(a)—
(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

Under section 98(1) ERA, the potentially fair reasons for dismissal include redundancy.

88. In *Williams v Compair Maxam Ltd [1982] ICR 156,* the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stated that it was not for the tribunal to impose its own standards and decide whether the employer should have acted differently. Instead, it should ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The factors which a reasonable employer might be expected to consider were:

    a. Whether the selection criteria were objectively chosen and fairly applied.
    b. Whether employees were warned and consulted about the redundancy
    c. Whether, if there was a union, the union's view was sought
    d. Whether any alternative work was available

89. In *Polkey v AE Dayton Services Ltd 1988 ICR 142*, their lordships decided that a failure to follow correct procedures was likely to make the ensuing dismissal unfair unless the employer could reasonably have concluded that doing so would be futile. This meant that the employer would not normally act reasonably unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment. Further, on the issue of quantum, the decision holds that whether procedural irregularities actually made any difference to the decision can be taken into account when calculating compensation.

90. Section 139 ERA defines redundancy as set out below:

139 Redundancy.
(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
(a) the fact that his employer has ceased or intends to cease—
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.
(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).
(3) For the purposes of subsection (1) the activities carried on by a local authority with respect to the schools maintained by it, and the activities carried on by the governing bodies of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).
(4) Where—
(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and
(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,
he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).
(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.
(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

(7)In subsection (3) " local authority " has the meaning given by section 579(1) of the Education Act 1996.

91. Section 13 Equality Act 2010 states:

13 Direct discrimination
(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.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
(6) If the protected characteristic is sex—
(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
(8) This section is subject to sections 17(6) and 18(7).

92. **Direct discrimination**

> *(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.*
> *(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*
> *(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*
> *(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.*
> *(6) If the protected characteristic is sex—*
> *(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*
> *(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*
> *(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).*

(8) This section is subject to sections 17(6) and 18(7).

93. Section 18 of the Equality Act 2010 states:

18 Pregnancy and maternity discrimination: work cases
(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —
(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it.
(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4).

94. **Section 136 of the Equality Act 2010 states:**

136 Burden of proof
(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 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.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
(5) This section does not apply to proceedings for an offence under this Act.
(6) A reference to the court includes a reference to—
(a) an employment tribunal;
(b) the Asylum and Immigration Tribunal;
(c) the Special Immigration Appeals Commission;
(d) the First-tier Tribunal;
(e) the Education Tribunal for Wales;
(f) the First-tier Tribunal for Scotland Health and Education Chamber.

95. Under section 13(1) of the Equality Act 2010 read with section 11, direct discrimination takes place where a person treats the claimant less favourably because of age than that person treats or would treat others.
96. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

97. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of sex. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was. (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285).*

98. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport [1999] IRLR 572, HL*).

99. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

100. There are two stages to the burden of proof test as set out in section 136 of the Equality Act 2010.

101. Stage 1: There must be primary facts from which the tribunal could decide – in the absence of any other explanation, that discrimination took place. The burden of proof is on the claimant (*Ayodele v (1) Citylink Ltd (2) Napier [2018] IRLR 114, CA; Royal Mail Group Ltd v Efobi [2021] UKSC 22*). This is sometimes referred to as proving a prima facie case. If this happens, the burden of proof shifts to the respondent.

102. Stage 2: The respondent must then prove that it did not discriminate against the claimant.

103. In other words, where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.

104. The burden of proof provisions requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (*Hewage v Grampian Health Board [2012] IRLR 870, SC.)*

105. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258.* Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is

necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

106. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states: *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof*. (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.)*

107. In *Glasgow City Council v Zafar 1998 ICR 120, HL*, Lord Browne-Wilkinson said that in the context of a discrimination claim *'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".*' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that *'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.* It follows that mere unreasonableness may not be enough to found an inference of discrimination. Unfair treatment itself is not discriminatory.

108. In *Amnesty International v Ahmed UKEAT/0447/08/ZT* the EAT stated, paragraph 36, *"…the ultimate question – is – necessarily – what was the ground of the treatment complained of (or – if you prefer – the reason why it occurred)…".*

109. Evidence of discriminatory conduct and attitudes in an organization may be probative in deciding whether alleged discrimination occurred: *Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425.*

Conclusions

110. The Tribunal reached the unanimous conclusions set out below by applying the relevant law to the findings of fact having considered submissions from the parties.

Issue 1 – Was the Claimant unfairly dismissed?

111. We find that the reason for dismissal was redundancy. As set out in the findings of fact above, we accept that there was a redundancy situation in accordance with section 139 Employment Rights Act 1996 as there was a reduced requirement for work of a particular kind.

112. We next went on to consider it the dismissal was fair, and as indicated by the Issues above, this involves consideration of a number of matters:

a. Did the Respondent adopt selection criteria that were fair and reasonable;
b. Did it apply those criteria fairly and reasonably and arrive at scores that a reasonable employer could have arrived at?
c. Was the procedure adopted by the Respondent in other respects a procedure that a reasonable employer would have adopted? This includes warning and consulting and taking steps to find suitable alternative employment.
d. If the procedure adopted by the Respondent was not a fair procedure under s98(4) would the adoption of a fair procedure have made any difference to the outcome of the process (Polkey v AE Dayton Services [1988] ICR 142)?

Selection Criteria and Pool

113. Dealing firstly with whether the selection criteria were fair and reasonable, we concluded that on the face of it, the selection criteria used – as set out in the Checklist and Guidance were fair.

114. We also considered that the correct pool for selection had been identified, namely both Fitness Instructors at the Croydon Leisure Centre were identified as being at risk and put in the selection pool.

115. It was necessary to consider if the selection criteria had been applied fairly and reasonably. We concluded that they had not.

116. We consider there to be several difficulties with the application of the selection criteria, and with reference to the findings of fact, we noted the following.

117. The information used to score the Claimant was sparse. The scorer's made decisions based on what was contained in the Respondent's HR system, this was the case for both the Claimant and Montell Williams. This was incomplete and didn't fully record the Claimant's qualifications or experience. The Claimant was not spoken to about the selection criteria – and therefore not able to give detail that was missing from the Respondent's system. The scoring was done by two persons, one of which had limited dealings with the Claimant. Absence information that should have been excluded was taken into account and information from a file note outside the 12 month reference period was used.

118. On balance, we concluded that the application of the criteria was not fair and reasonable and therefore resulted in scorings based on incomplete and inaccurate information.

Warning and Consultation

119. As set out above, the Claimant was warned about the risk of being made redundant. However, we conclude that no meaningful consultation took place. The discussions with the Claimant are not considered to amount to meaningful consultation for various reasons. The Claimant was not given any clear information about the scoring criteria. She wasn't given a copy of the scoring criteria in advance and was not given an opportunity to comment. She wasn't given any clear detail about her actual scoring and the information that was being relied on to score her. She wasn't given the FAQ documents and was not asked to confirm meeting notes were accurate. There was no meaningful opportunity for the Claimant to make representations or comment on her scores, make suggestions or comment on the process more widely.

Alternative work

120. It is noted that there were two Fitness Instructors and there was only 1 FTE Fitness Instructor post at Croydon Leisure Centre. There were no other vacancies at the Claimant's place of work and other sites were also making redundancies.

121. On the limited information available, we conclude that there were not significant problems with this aspect of the process.

Appeal

122. We concluded that a proper appeal process was not undertaken. The appeal was undertaken based on only on the information provided in an email from Ms. Janet Akinkuolie. The appeal officer did not review the scores or the information relied upon and did not speak to the Claimant or the managers involved.

Range of reasonable responses

123. In reaching our conclusions we have considered all of the circumstances, noting that the Respondent was a large national employer, but redundancies were managed locally at sites.

124. Accordingly, we conclude that the dismissal was on the grounds of redundancy but the dismissal was procedurally unfair due to the lack of consultation and poor scoring process which is a key element of a fair redundancy process. We conclude that Respondent's conduct in managing the redundancy process did not fall within the band of reasonable responses.

Unfair dismissal – Polkey – what was put forward re Polkey?

125. The Respondent argued, on the basis of Polkey, that the Claimant would still have been selected for redundancy. We do not I agree with this.

126. The procedural failings were extensive, as set out in the findings of fact above. If a proper and fair procedure had been undertaken there was every possibility that the Claimant could have scored higher than Mr. Williams if she had chance to comment on the scoring criteria and reasons for scoring, either during the selection phase or at appeal.

127. Accordingly, we do not consider that any Polkey deduction is appropriate in this case.

Issue 2 – Direct sex discrimination

128. Did the Respondent treat the Claimant less favorably than her comparator Montell Williams by not appointing her to the full-time fitness instructor role and instead dismissing her for redundancy?

129. If so, was the reason for that the Claimant's sex?

130. We considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that the decision to not appoint her to the full-time fitness instructor role and instead dismiss her for redundancy was 'because of' the Claimant's.

131. We concluded that no evidence sufficient to discharge the burden on the Claimant had been provided, there was no evidence from which we could reasonably conclude that sex played any part in the reason for dismissal.

132. There is no prima facie case of sex discrimination.

133. The Claimant failed to show that the Respondent treated her less favourably than Montell Williams.

134. In particular, in reaching this conclusion we have considered the reason why the Claimant was dismissed for redundancy.

135. Mr. Bennett said very little in relation to the direct sex discrimination complaint in submissions. We noted that it is often the case that there is no direct evidence of sex discrimination. We considered whether there was any evidence from which we should draw an inference that the decision was influenced by sex. We noted that upon the Claimant's return to work in February 2019 some colleagues may have made some comments about the Claimant managing juggling work and having children and whether she would have any more children. However, as noted, this was before Mr. Nusl joined Croydon Leisure Centre and there is no evidence that as the lead manager he held any stereotyped assumptions.

136. We concluded that the scoring was based on information held on the HR files and the scorers view that Montell Williams worked harder than the Claimant. We do not consider this perception was influenced by sex on the evidence presented.

137. We did not consider there to be something more in this case that shifted the burden of proof to the Respondent.

138. In any event, the Respondent has shown a non-discriminatory explanation for the Claimant's dismissal. The Claimant was dismissed due to achieving a lower score that Montell Williams. It is noted that the redundancy procedure was unfair, and there were procedural shortcomings, which we consider were influenced by lack of experience in conducting the consultation process, but we reminded ourselves that something can be unfair but not discriminatory.

139. Accordingly, the sex discrimination complaint fails.

Issue 3 – Pregnancy/Maternity discrimination

Pregnancy discrimination – section 18 Equality Act 2010

140. Did the respondent treat the claimant unfavourably by doing the following things:

a. The Claimant says in October 2020, she received a phone call from Dan Nusl in which she told him that she was pregnant. She says he told her not to mention this to other colleagues until after the redundancy consultation was complete, as this probably would not go in her favour if she openly disclosed it at that time. The Claimant's daughter Ariyah-Trinity was born in April 2021, so she believes she fell within the protected period at the relevant time.

b. In the redundancy process because she had exercised the right to take maternity leave, which she returned from in February 2019.

141. Dealing first with allegation (a), it is accepted that the Claimant was pregnant at the time of the alleged unfavourable treatment. However, as set out in the finding of facts above, we found there was not a conversation in which the Claimant told Mr. Nusl that she was pregnant and Mr. Nusl did not make any comments to her in this respect. Accordingly, there was no unfavourable treatment. Accordingly, this complaint fails.

142. In relation to allegation (b), it is noted that the Claimant took maternity leave in and returned to work in February 2019. This was well before the start of the pandemic and before Mr. Nusl began working at Croydon Leisure Centre.

143. We have found various procedural failures in relation to the redundancy process. However, there was no evidence to suggest that the failures, in particular the scoring exercise, had any link at all with the Claimant having taken maternity leave some 18 months earlier. Accordingly, this complaint fails.

144. A remedy hearing will be listed and case management directions have been made.

_____
Employment Judge Cawthray
Date: 3 December 2023

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/