



## EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Sonia Cunningham

**Respondent:** Mental Health Care (Plas Coch) Ltd

**Heard at:** Wrexham **On:** 20 July, 23 July and 25 to 27 July 2018

**Before:** Employment Judge P Davies

**Members:** Mrs C O Peel  
Mr J C Albino

**Representation:**  
Claimant: In person  
Respondent: Dr E Morgan (Counsel)

## RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is:

- (1) That the claim of pregnancy/maternity discrimination is dismissed.
- (2) The Claimant was fairly dismissed and the claim of unfair dismissal is dismissed.

## REASONS

1. By a claim received on 12 August 2016 the Claimant, Mrs Sonia Cunningham, claimed unfair dismissal, pregnancy or maternity discrimination, sex discrimination, holiday pay, notice pay and other payments. The claim was issued against three Respondents being the limited company named as Mental Health Care (UK) Ltd, Kerry McKeivitt and Graham Hallows. All the claims were denied in their entirety by the Respondents who in their Response denied that the Claimant was entitled to any award from the Respondents. The Response said that the Claimant

was dismissed on the grounds of redundancy following a fair procedure and it is denied the dismissal was unfair or discriminatory in any way.

2. On 17 October 2016 the Tribunal ordered further particulars to be supplied to the Respondents of the Claimant's allegations. In addition a Schedule of Loss was to be sent by the Claimant to the Respondents. A further telephone hearing was held on 21 December 2016 and there were further directions in relation to the allegations made by the Claimant in the Scott Schedule. A Preliminary Hearing was ordered to take place in person to consider a number of matters including possible amendment of the claim and clarification of matters generally. This Preliminary Hearing was held on 10 March 2017 when the name of the Respondent was changed to that as set out above. The claims of detriment pursuant to s.47(b) of the Employment Rights Act and a breach of Regulation 16 of the Management of Health and Safety At Work Regulations 1999 was withdrawn by the Claimant and the Tribunal dismissed these claims. It was clarified the following claims remained to be considered at the full hearing namely the claim under s.18 of the Equality Act 2010, Maternity and Parental Leave Regulations 1999 claims under Regulations 10 and 20, claims under s.74, s.94 and s.99 of the Employment Rights Act 1996. The issue of whether the claims were time barred were to be considered at the Final Hearing. It was recorded that the matters set out in the Scott Schedule are not new discreet claims but to the extent the Scott Schedule raises issues not specifically alleged within the claim form, these issues are set out as evidence to support the claims that dismissal was discriminatory and unfair. The case was listed for hearing in January 2018 but due to the unavailability of Counsel at very short notice the claim was adjourned for hearing to the first available dates.
3. The Tribunal has heard from the following witnesses, the Claimant; Mrs Nicola Johnson, former Hospital Manager, Dr Devan Moodley, former Medical Director of the Respondents; Ms Joanne Ward, former Mental Health Stream Manager; Ms Emma Bilton, Peoples' Services Manager; Miss Linda Hull, Service Manager and now Deputy Hospital Manager; Miss Kerry McKeivitt, Head of Peoples' Services; Mr Michael Morrison of Michael Morrison Consultancy Services, Employment Consultant; Mr Mark Selwyn, Head of Legal Affairs, and Mr Tom Saville, Solicitor for the Respondents. In relation to Mr Saville his witness statement dealt with disclosure matters.
4. The Tribunals findings of fact are as follows: The Claimant Mrs Sonia Cunningham, was working as a Team Leader at Alpha Hospitals Bury, when she applied to be a Service Manager at one of the Respondents establishments, Plas Coch St Asaph, North Wales. The Claimant had previously obtained a diploma in mental health nursing from the University of Manchester. The Claimant's application form for the Plas Coch job indicated that she would be leaving her employment with Alpha Hospitals in

order to have development opportunity. The Claimant was offered employment to commence on 19 August 2013 and signed a contract on 28 January 2014. The heading of the document was "MHC – Ward Manager CONTRACT". The job description supplied said that the job title was Service Manager being responsible to the Hospital Manager. (Page 498(s) of the bundle). In paragraph 2.14 of the job description the following is stated "deputise for the Hospital Managers within the mental health stream".

5. The Respondents operated a filing system called Snowdrop which did not have Service Manager as a heading, only Ward Manager. The Claimant was placed under Ward Manager on this system.
6. The Claimant lives in Lancashire and commuted to her place of work in Wales at Plas Coch. Mr Devan Moodley, who was Medical Director of the Respondents from 2011 to April 2016, wrote an email on 22 January 2014 to John Prior of the Respondents confirming a conversation regarding attaching a "magnet allowance" to the Claimant's salary. Dr Moodley refers to Kelly's suggestion that a £3,000 magnet allowance be given to the Claimant as long as the Claimant remains living at her current address and would be reviewed in 6 months' time. This additional payment to the Claimant was approved and paid. This raised the salary of the Claimant from £38,000 per annum to £41,000 including this travelling allowance.
7. Miss Joanne Ward was a Hospital Manager at Regency Hospitals Ltd, Blackpool, (now called Newton House) when in May 2014 she was transferred as an employee from Regency Hospitals Ltd to the Respondents. She became the Mental Health Stream Manager. Around this time there was discussion about whether the Claimant would go to work at Heswell and move from Plas Coch. There is a memo from Dr Moodley on 5 August 2014 (page 158(q)) about an update on redundancies and restructuring which involved Plas Coch and Blackpool. It is noted in paragraph 6 the redundancy process at Plas Coch for the Service Manager will commence this week. There were three Wards at one time at Plas Coch namely Dinorben, Morfa and Coach House. The Claimant managed two units Dinorben and Morfa and the other unit had another Service Manager. The reference to Service Manager in the note by Dr Moodley was in reference to Amanda Matabane and not to the Claimant.
8. On 9 April 2015 as part of a restructure at Plas Coch, the Claimant agreed to a secondment to Newton House in Blackpool in the capacity of Service Manager. A letter was written by Jo Ward to the Claimant (page 188) in which it said the move is not permanent and will be reviewed monthly and that the terms and conditions of the contract of employment remain unchanged.

9. The secondment finished in July 2015. There were concerns about allegations and referrals made in relation to Plas Coch. Dr Moodley sent a document referring to this on 7 July 2015 to other individuals within the Respondents, and there is a reference to Dr Moodley having spoken to the Claimant who has agreed to return and to go onto shifts (page 237). There is a further communication from Dr Moodley, an email, on the 20 August 2015 saying that he has spoken to the Claimant who has agreed to move permanently to Plas Coch (page 240).
10. In addition to the Claimant there was a request for experienced personnel from the three other Respondent hospitals to assist Jo Ward to turn around Plas Coch because of the critical service improvement plan that had been the result of the inspection by NHS Wales. Peter Carr was to be the Deputy to Jo Ward. In September 2015 there is a note in an email from Dr Moodley to the effect that the Claimant and Mark Swan are to be transferred permanently to Plas Coch. Mark Swan was seconded from a Deputy Hospital Manager position at Newton House to an Interim Deputy Hospital Manager role at Plas Coch in September 2015.
11. On 18 September 2015 there was a request to Jo Ward to give a list of all staff team (page 244(f)). There was provided a list (244(g)) where it named the Claimant as Service Manager. Underneath were three senior staff nurses.
12. Mr Carr was a nurse employed on a consultancy basis and the Claimant says that Mr Carr was not the Hospital Deputy Manager as such. The Claimant did patient care when she returned to Plas Coch and was doing that as well as acting as a Manager to nurses. She supervised other nurses and the senior nursing team but did not manage the Psychologist as it is the Hospital Manager who manages the multi-disciplinary team.
13. On 29 March 2016 Miss Gemma O'Malley was appointed as a Quality Manager by the Respondents. On page 3 of the supplementary bundle in paragraph 1.1 of the Contract of Employment it is stated that "employment shall continue for a fixed term of 12 months continuing until the 28 March 2017." On 16 January 2017 there was further correspondence between Miss O'Malley and the Respondents where there was an offer of employment as Quality Lead based at Highfield Park commencing from 6 February 2017 which was subject to a probationary period of 6 months. Miss O'Malley signed a copy of the letter on 18 January 2017 and a further agreement made on 6 February 2017 headed "Quality Lead Contract" was signed by Miss O'Malley on 23 January 2017 and on behalf of the company by Miss Kerry McKeivitt on 6 February 2017. The relevance of Miss O'Malley's employment as far as this claim is concerned is that the Claimant alleges that this was a job suitable for herself and that when they offered the employment in March 2016 to Miss O'Malley the Respondents were

aware of her pregnancy. For the avoidance of doubt, we find that the Quality Lead appointment was on a fixed term contract (page 672E).

14. The Claimant says that in October or early November 2015 she became aware that she was pregnant and told Jo Ward about her pregnancy. We accept that evidence of the Claimant. The Claimant also says that she phoned payroll on 23 March 2016 in particular Jane Jones about her pregnancy. The Claimant then obtained a MAT B1 form following an examination on 6 April 2016 (page 291) and on 14 April 2016 emailed this to Jane Jones. There was then an email exchange about the intended start date and maternity leave which was suggested by the Claimant as being 11 July 2016. The Claimant says that there was a risk assessment undertaken by Jo Ward as soon as she was informed of the Claimant's pregnancy. There was no other risk assessment after submission of the MAT B1 form. We note that in the bundle on page 284 is an email from Jane Jones to Sian Jones, Hospital Administrator, Plas Coch, on 22 March 2016 which says "Sian, I had a phone call from Sonia a while ago. Saying she was pregnant, I have not received a MAT B1 form. Do you know anything regarding this I think her due date was July". The response from Sian Jones on 22 March 2016 is "Hi Jane I have copied Sonia into this email and will ask her for this today". (Page 284).
15. On 4 April 2016 Miss Jo Ward, who was the Hospital Manager at Plas Coch in addition to her role as Mental Health Manager, was placed by the Respondents on a period of absence. As a result Mr Mark Swan was asked by Kim Moore to act up into the Interim Hospital Manager position which he began to do so from that date. Mr Swan had accepted the position as acting as an Interim Hospital Manager to ensure a consistent figurehead and presence for the staff team and to provide clinical and operational leadership on the patients discharge care pathway. It was confirmed by Mr Moore on 7 April 2016 that Mr Swan's substantive post as Deputy Manager at Newton House has not changed and that they would be able to agree the return to Newton House when they were further down the process.
16. By an email from Kerry McKivett on the 5 April 2016 sent on behalf of the Executive Management Team, the staff were informed of the appointment of Ms O'Malley to work in the Quality (Governance) Team, and were also informed that Mr Moodley, Medical Director, had left the business. On the same date on 5 April 2016 the Hospital Manager at Newton House, Nicola Johnson, resigned.
17. This was against the background of a strategic review of the Respondents operations. As part of that review there was a meeting of the Executive Management Team on 6 April 2016 which discussed with other attendees, including Mark Swan, the severe operational difficulties facing Plas Coch, which included financial matters arising from partly the high cost of agency

- workers, and it was decided that the only viable proposition for the Respondents was to close Plas Coch. Subject to any alternative proposals being put forward during a redundancy consultation that was the decision in principle of the Respondents.
18. On 7 April 2016 Miss Kerry McKivett made a confidential announcement to all staff at Plas Coch regarding the proposed closure of the workplace. There was set up a process of selection of staff representatives and a meeting was arranged with those representatives on 11 April 2016.
  19. Mr Mark Swan sent an email on 9 April 2016 encouraging staff to contact their representatives to ensure they prepared for the meeting and the meeting was for the staff side representatives only. (Page 299). The staff representatives did not include the Claimant.
  20. On 11 April 2016 Kim Moore (Director of Operations) informed Mr Swan that he was seconded into the Interim Manager's post at Plas Coch that his substantive post was Deputy at Newton House and that he would be paid £50,000 for the interim post.
  21. Also on 11 April 2016 Miss Johnson emailed, amongst others Mr Swan, to say that as they were probably aware she had tendered her notice as Registered Manager at Newton House and her last working day would be 29 April 2016. Shortly after receiving that email Mr Swan forwarded the email to the Claimant (page 301).
  22. On 11 April 2016 there was the first collective redundancy consultation with the five elected representatives. Mr Mark Swan did not stay for the meeting. Miss McKivett says that Mr Swan was not comfortable in staying in the meeting because he had not undertaken a process like that before. It was only Miss McKivett that remained as the employer representative during the meeting. The Claimant says that she went to the meeting on the basis if she was going to be made redundant she had a right to be there and that Mark was there as a manager and she was a manager. The Claimant considered that she was most affected. The Claimant was asked by Miss McKivett if she was a staff representative, Miss McKivett not having met the Claimant before, as the Claimant was not, Miss McKivett asked the Claimant to leave the meeting. There is a dispute of fact about whether the Claimant said words to the effect was this not a managers meeting, which she denies, but there clearly was a feeling on the part of the Claimant that she should have been present as, amongst other things, she considered herself the more senior person on site. Also the Claimant believed that Mr Swan was given the role which she should have been given namely, the role of Manager at Plas Coch. We find on balance that the Claimant did query if this was a managers meeting as she considered she should be there. The Claimant was surprised about the closure of Plas Coch and concerned about her

- position. After the meeting had concluded Miss McKivett went to find the Claimant who was in fact in Mark Swan's office and asked her if she wanted any further information to which the Claimant said no. The Claimant says that it was obvious that she was pregnant and that this would have been known to Miss McKivett. Miss McKivett says that she did not appreciate that the Claimant was pregnant at this time. As nothing was said about pregnancy, we accept Miss McKivett's evidence.
23. Miss McKivett wrote to the Claimant on 11 April 2016 regarding the possibility of closing Plas Coch and said "we appreciate that this will have come as a shock to you and that you will have concerns so please feel free to speak to Mark Swan or the Peoples Services Team at any time with any concerns.". On 14 April 2016 Miss McKivett wrote again to the Claimant saying that following the recent meeting and subsequent consultation with employee representatives appointed for the purpose "we regret to confirm that a decision has now been taken to close the unit at Plas Coch.". The letter goes on to say "as the unit as a whole will close, we regret to confirm that unfortunately you are therefore at risk of redundancy. In addition to consultation with employee representatives, we will also be consulting individually with employees regarding their own potential redundancy. As previously set out, we are hopeful that there will be very few dismissals on the grounds of redundancy as we envisage that we will be able to offer alternative employment at another unit for the majority of employees. We are arranging for an Independent Consultant, Andrea Goodridge, to carry out individual consultation on behalf of the company and would like to arrange a meeting with you for this purpose on Thursday 21 April 2016 at 1.20pm at Plas Coch...."
24. On 18 April 2016 Angharad Beale, Recruitment Officer, emailed Mark Swan to say that Kim Moore has asked her to advise him that on the MHC website is an advert for a Registered Manager role at Newton House. Mr Swan forwarded this email to the Claimant saying "Hi Sonia hope you are OK. Not sure if you're aware but they Newton House Manager job is advertised on MHC website. Details have been sent through from recruitment. Cheers".
- Claimant's grievance of 19 April 2016
25. On 19 April 2016 the Claimant wrote to Kim Moore and Kevin Shields (Head of Regulation and Compliance) to express concerns regarding her treatment from the Executive Management Team based within the company and the impact the current situation was having on the staff team and patient group based at Plas Coch Hospital. (Pages 329 to 333).
26. In the letter of complaint the Claimant says that her initial concern regarding her treatment by the Executive Management Team occurred when she received an email correspondence on 4 April 2016 to say that the Mental Health Stream Manager was taking time out of the company and that the

- Medical Director had left the company. The Claimant says she feels her role as the Service Manager was completely overlooked during this process in favour of the Executive Management Team meeting with her male equivalent contracted to another hospital. She felt that her role as a service manager was being undermined with the knowledge and experience she has within the role at Plas Coch completely overlooked. The Claimant mentions many unanswered questions regarding her eligibility for redundancy and her concerns about previous agreements regarding her pregnancy which had been to work from home from June and to commence the second year of an MSC in Personality Disorder while on maternity leave.
27. The Claimant says also that the Interim Hospital Manager position was not offered or even discussed with her despite prior to her pregnancy and in times of change at Plas Coch on five occasions she has deputised for the Hospital Manager in their absence and supported the transition process of managers. The Claimant refers to two male consultancy workers put in post by the Executive Management Team and that will add to the other males within a heavily dominated male Management Team. The Claimant says she feels her pregnancy and gender has been detrimental to her career progression and her current status and role within the team at Plas Coch and Respondents as a whole. The Claimant says that on 15 April 2016 she was informed that Mark Swan had been officially offered the post of the Interim Hospital Manager despite her being the clinician with the most experience and training working with patients with the diagnosis of personality disorder. She had been overlooked for promotion and discussion surrounding the availability on the post on account of her gender and pregnancy. This further adds to her distress that she has been discriminated against due to being pregnant and or female. The Claimant also refers to the email on the 18 April 2016 which was sent to Mr Swan but that no email was sent to her regarding the position despite her fully meeting the criteria and living locally to Newton House. The Claimant says "this corruption and unfair process further adds to the discrimination and unfair treatment I am subjected to".
28. The Claimant informed the Respondents that she was unable to attend the redundancy consultation meeting scheduled for 21 April and so an alternative date of 27 April was arranged by the Respondents.
29. On 26 April 2016 Miss McKivett wrote to the Claimant regarding her grievance and suggested a meeting take place on 5 May 2016. The purpose was to review the information provided to ensure that the Respondents fully understand all aspects of the grievance. The Claimant said she was unable to attend the meeting on 5 May as she has university on Thursdays and could an alternative time be rearranged. The Claimant was sent by the Respondents the Respondents Grievance Policy and Procedure (page 321 of the bundle).



30. Mr Kim Moore emailed Mr Swan on 26 April 2016 and mentioned that it had been raised by the Claimant that she is senior and experienced though it sounds like “you should have been including her from the beginning. Somehow you missed her as you were saying that the nurses were not experienced enough to do on call. You need to include her in the on call. Is there anyone else that should be included? Can you look at rota between you so that you can have breaks?”. Mr Swan replied on the same date 26 April 2016 to say “in response to your email could you please let me know how and when Sonia has raised this information because as the “Interim Hospital Manager” I am unaware of this. I can confirm that Sonia is a very experienced practitioner and a colleague whom I have worked with for a considerable amount of time. Therefore in response to your comments of “including her from the beginning” and “somehow you missed her” I am deeply shocked by this accusation and insinuation and wish to clarify that I have never overlooked Sonia. She is someone who for clarity I respect and value both as a practitioner and colleague... In view of the fact that Sonia is in her third trimester of pregnancy and has not partaken in any on call responsibility since becoming pregnant, I would like to ask you whether you think including her is still a viable option? It may be worthwhile to review Sonia’s risk assessment again?”. Kim Moore replies “it would be helpful for us to look at Sonia’s risk assessment as I wasn’t aware that it stated she couldn’t be on call so we will need to find a different solution for you to have a rest this weekend.”

First individual consultation meeting between the Claimant and Andrea Goodridge

31. On 27 April 2016 the Claimant met with Miss Andrea Goodridge to discuss the redundancy exercise. There is a note on page 344 of the bundle prepared by Miss Goodridge which the Claimant said was a fair record although it was not a verbatim account because Miss Goodridge could not answer questions. The Claimant said that she would not discuss with Miss Goodridge clinical issues but raised the issue of the Hospital Manager position at Newton House which Miss Goodridge could not answer but indicated that a question could be put forward via the FAQ process to which the Claimant indicated she did not want to discuss this anymore because it is not a productive process. Reference was made by the Claimant to the grievance process. It is clear from this note and the Claimant’s own evidence that the Claimant did not wish to engage in the consultation as such on this occasion.

32. On the 28 April 2016 Sian Jones, Hospital Administrator, sent an email to the Claimant and others at Plas Coch with attached updated question and answers regarding the redundancy exercise together with a list of vacancies. On page 350 is the list that was circulated of permanent

vacancies and one of them is Registered Manager at Newton House. The Claimant did not apply for that position.

33. On 28 April there was a meeting in the afternoon between Helen Bilton, Peoples' Services Manager, and Kerry McKivett about potential super numery posts. In an email (page 358) Miss McKivett says to Kim Moore that she and Helen Bilton had looked at potential re-deployees from Plas this afternoon and at present there are no vacancies for the following staff which includes 4 senior staff nurses. Miss McKivett says the potential to go super numery with them in the hope there is sufficient "churn" within the system to absorb them at some future point but clearly there is a financial implication if this is the decision. Miss McKivett says they are interviewing nurses to obtain a preference ranking so that if vacancies do arise they can be slotted in.
34. Miss Bilton explained that where she identified there was only one at risk employee suitable for one alternative role that employee would be ranked 1, would be offered the role without the need for an assessment centre or interview. Where she identified that more than one employee was suitable for the same alternative role, the affected employee was invited to an assessment centre where they would be interviewed for the role. Invitations were then sent out to the relevant employees. Miss Bilton was using a spreadsheet (page 146) to assist and a letter was sent to the Claimant on 3 May 2016 inviting her to attend an assessment centre. This was for the post of Senior Staff Nurse. The available post of Registered Manager Newton House was not considered to be suitable alternative employment for the Claimant. In Miss Bilton's view the only broadly comparable role across the business was a Senior Staff Nurse. There was not included on the list Service Manager. The Claimant points out that on the 18 September 2015 Miss Jo Ward was asked to send a list of the staff team to Lisa Bessell, which she did. That identified the Claimant as a Service Manager and also had the names of 3 Senior Staff Nurses. It is noted that on that list compiled by Miss Ward there was reference to Support Worker as well as a Staff Nurse being on maternity leave. In her reply Miss Ward identified the management as being herself Interim Manager and Mark Swan Deputy Manager. There was no reference under the heading Management to the Claimant. (Page 244D).
35. On page 416A there is the spreadsheet that was used by Miss Bilton. On the spreadsheet the Claimant is identified as being a Ward Manager and her name is identified with a red background which is also in common with some other individuals on the spreadsheet who are also identified with a red background as being individuals who are pregnant or on maternity leave.

36. Mr Mark Swan applied to be the Hospital Manager at Newton House on 28 April 2016. On the same date Mr John Broomfield sent an email about interim cover arrangements for Newton House. In it it is said that he and Sean Holcroft will cover for the next few weeks and that Dudu Ngwenya has kindly agreed to offer a day a week's cover to fill in should either Mr Broomfield or Mr Holcroft be unavailable to cover one of the days. Mr Broomfield says an Interim Manager is being sought until a substantive Manager can be identified. He says he is currently reviewing suitable CV's for an Interim Manager and will keep people posted.
37. On 30 April 2016 Miss McKivett sent an email to Kim Moore saying that she has been doing benchmarking and has concluded that there should be an increase in Hospital Manager salaries to £60,000. She asks for Kim Moore's views about this salary level. There is a reference to the fact that roles offer between £55,000 and £60,000 and that they need to recognise and reflect the managers experience and loyalty.
38. On 4 May 2016 a meeting took place between the regulators in the Care and Social Services Inspectorate Wales and various Respondent representatives, including Kerry McKivett, and there was a discussion about the future of Plas Coch. Redacted minutes of the meeting are on page 361 of the bundle. Miss McKivett said that Mark Swan was then suspended pending an investigation on 4 May 2016. The letter sent to Mr Swan is dated 5 May 2016 but we accept the evidence of Miss McKivett that it was on 4 May 2016 that Mr Swan was actually suspended.
39. On the same date the 4 May 2016 Dudu Ngwenya was seconded on a post in a placement team appointed Interim Hospital Manager at Newton House. Miss McKivett said that Mr Ngwenya had a previous experience as Deputy Manager at the New Hall facility in Wrexham and that was the reason he was temporarily seconded to the post of Hospital Manager. The vacancy for a permanent Hospital Manager was advertised on the Respondents website and in NHS jobs and specialist recruitment agencies but the Claimant did not apply for that vacancy.
40. On 6 May 2016 the Claimant sent an email to Miss McKivett saying that she was still waiting to be contacted by the appointed investigator of her grievance to arrange a time and date and asked when she could be expected to be contacted. Miss McKivett said in an email on 6 May in response that she would expect that the investigator would have communicated the current position to her. The Claimant said that she has had no contact from anyone and wanted to be advised of the current position. On 9 May 2016 Miss McKivett said that Michael Morrison and External Consultant has been appointed to deal with the grievance and would be in touch with her in due course.

41. On 9 May 2016 the Claimant began a period of sick leave and submitted a sick note (page 382). The FitNote cites work related stress. The Claimant did not return to work for the Respondents from that date.
42. Mr Michael Morrison has his own consultancy business Michael Morrison Consultancy Services, which does project work in the employment field for matters such as hearing grievances and appeals against dismissal. He retired as a partner with Hill Dickinson LLP in January 2010. Mr Morrison was approached by Knights Solicitors to investigate the Claimant's grievance on 9 May 2016. Mr Morrison said that he was independent of the company and that he acted independently throughout the process of dealing with the Claimant's grievance. We accept that evidence on the part of Mr Morrison. Part of the reason we accept that evidence is that he demonstrated his independence by refusing to make alterations to the report that he put in when he was asked to do so by the Respondents. Mr Morrison said that it was a matter for the Respondents to accept his report or not and that in the absence of any compelling evidence there was no need to reconsider what he had found and his recommendations.
43. Mr Morrison wrote to the Claimant by letter dated 13 May 2016 to invite the Claimant to meet him at a hotel on 26 May 2016 so that the Claimant could fully explain to him the nature of her grievance and the facts upon which it was based. The Claimant was told she could bring a fellow worker or representative of a Trade Union. Mr Morrison said he intended to record the discussion and would let the Claimant have a copy of the transcript of the recording as soon thereafter as is practicable if the Claimant requested such a transcript.
44. Shortly before the letter from Mr Morrison, the Claimant received a letter dated 10 May 2016 from Helen Bilton regarding the consultation meeting. Miss Bilton asks the Claimant to attend the second consultation meeting to take place on 20 May 2016 at Plas Coch with Andrea Goodridge. The purpose of the meeting will be to provide the Claimant with a further opportunity to ask any further questions or raise any concerns. They will explore the opportunities of suitable alternative employment within the company and provide details of internal vacancies.
45. On the 15 May 2016 Mr Dudu Ngwenya was offered the job of permanent Hospital Manager at Newton House. The interviews and selection of Mr Ngwenya were conducted by Kim Moore and Abdul Okoro. We accept the evidence of Miss McKivett that she was not involved in the appointment but that there was prepared a scoring pack for the use of Kim Moore and Abdul Okoro.
46. The Claimant had been invited to an assessment centre to take place on 12 May but did not attend. By email of 16 May 2016 the Claimant asked Helen

Bilton about being provided with details of the second consultation and also enquired about further information in regards to her need to attend the assessment centre.

47. On 19 May 2016 Miss Helen Bilton replied to the Claimant's email setting out an update on the redundancy process and attached a letter which is on page 429 to 430 of the bundle which indicated that the next consultation meeting with Andrea Goodridge was 20 May. The letter indicated there is now a Senior Staff Nurse vacancy based at Newton House in Blackpool at a basic salary of £35,000 per annum. There was a 3 month pay protection period that would be treated as being falling 3 months from the Claimant's return to work from this current period of sickness absence. It was indicated that the date of the closure of the service at Plas Coch was currently anticipated to be 20 May.
48. The Claimant said she was unable to make the consultation meeting on 20 May and so ultimately it was agreed that there be a telephone consultation with Andrea Goodridge on 23 May 2016.
49. On the 23 May 2016 there was the second consultation meeting with Andrea Goodridge. The notes prepared by Andrea Goodridge indicate that the Claimant did not wish to discuss anything with her particularly in relation to the match of Senior Staff Nurse at Newton House in Blackpool. Therefore very little was actually discussed in this short conversation.
50. On the 24 May 2016 Miss Belinda Whitehead, RCN Regional Officer, sent an email to Miss McKivett about the Claimant. Miss Whitehead said she was representing the Claimant and asked for an extended time frame to make an informed decision regarding the post at Newton House. On 25 May 2016 the Claimant informed Mr Morrison that Mr Devan Moodley would be accompanying her to the meeting.

#### Grievance Meeting 26 May 2016

51. The Claimant together with Mr Devan Moodley met with Mr Morrison on 26 May 2016. A transcript of the meeting is on pages 464 to 478. The Claimant explained that her concerns began on 5 April when Jo Ward and Dr Moodley had been withdrawn from the company and that the Claimant believed she should have been consulted because it had happened several times to different managers at Plas Coch and she has been liaised with and it has been communicated so that she could manage the safety of patients the environment what is happening within the staff team and it was not very professional for junior staff to ring her and say that they have just seen this email and what has happened and for her to say she had no awareness of it. The Claimant says that her experience and qualifications were a lot more than Mark Swan's qualifications are and that his input was valued but hers was cast aside. The Claimant says the only difference from Mark that could

- be seen as negative for other people within the company was her pregnancy and the fact that she was female and that she is female. She refers to the fact that after the private meeting with the representatives of the staff that Kerry McKivett came to see her and said did you want to see me sweetie pie which she said was patronising. Mr Morrison says at one time that the picture he is getting failings that the Claimant is pointing to are a lack of communication to her from whomever it should have come from in what was happening and it affected her role as Service Manager to which the Claimant agreed. The Claimant refers to the fact that the future prospect for development of female staff within the Respondents are limited but the male dominant management team had been developed reflects that. Mr Morrison says that he will be speaking to Kim Moore and Kerry McKivett and asked the Claimant is there anybody that she feels or she would like him to particularly speak to in addition to Kim Moore and Kerry McKivett.
52. Mr Morrison then conducted a series of interviews with Kerry McKivett, Kim Moore, Mark Swan, Kevin Shields and Peter Carr. The notes of his interviews at pages 730A to Q.
53. Mr Morrison came to the view that the Claimant's role was as a Service Manager at Plas Coch. He accepted the evidence of the Claimant about this, which was supported by the job description which was sent to him by the Claimant. The Respondents could not supply any evidence by way of contract of employment or a job description to support their assertion that the Claimant was only a Senior Staff Nurse. Mr Morrison's view as obtained by interview of the Claimant and others was that the Claimant only deputised for the Hospital Manager when both she and the Deputy Hospital Manager were off site. The Claimant was clearly junior to both the Hospital Manager and Deputy Hospital Manager in the opinion of Mr Morrison. The Claimant's role was exclusively clinical in the sense that she managed the delivery of the nursing care to the patients. The Claimant had no responsibility for other matters involved in the running of the hospital generally.
54. On 11 July 2016 the Claimant began maternity leave.
55. On 15 July 2016 the Respondents wrote to the Claimant regarding the issues of the magnet allowance and the personal perception of the Claimant regarding the status of the suitable alternative role. It was noted that the representations regarding promotion opportunities from part of the formal grievance has been dealt with separately. The letter from Miss Bilton says that regarding the status of the suitable alternative role the company could find no evidence on its system to support this and there are no Service Managers employed within the business. The letter goes on to say that even if the Claimant were a Service Manager at Plas Coch the role of Hospital Manager is a completely different role and much more senior and is not a

role that would be a suitable alternative to the Claimant's role. It was contended that the Senior Staff Nurse role at Newton House was a suitable alternative role. The options outlined were to accept redundancy or accept a suitable alternative role and start this when the maternity leave came to an end.

56. The Claimant responded that she was not able to accept the position on the basis that it was not suitable alternative employment and in the absence of any other suitable alternative employment and in the absence of any other suitable alternative role being offered she says "I feel that I have no option but to accept that my position is redundant and thus accept you will proceed with option 1 in your letter".

#### Termination of Employment

57. On 9 August 2016 Helen Bilton said she would liaise with payroll to confirm sums due to the statutory redundancy pay and that she would be treated as being dismissed by reason of redundancy with effect from 20 May 2016. However by email of the 26 August 2016 Helen Bilton says that the Respondents had not backdated the date of the redundancy and the effective date of termination is being treated as being 8 August 2016 which was the date upon which the Claimant confirmed she wished to accept redundancy and that she would receive a payment in lieu of the contractual notice period. The reference in the earlier communication from the Respondents about the redundancy date of 20 May 2016 solely for the purpose of calculating statutory redundancy pay entitlement.
58. On 12 August 2016 the Claimant issued this claim in the Employment Tribunal.

#### Grievance Outcome

59. Mr Morrison provided his report to Knights Solicitors, who were advising the Respondents at the time, on 20 July 2016. Knights Solicitors queried Mr Morrison's findings on the Claimant's job role and there was further communication by email in August and September 2016.
60. However it was not until 20 December 2016 that Mr Morrison's report was sent to the Claimant by special delivery post under cover of a letter from Mr Mark Selwyn, Head of Legal Affairs. (Page 524 to 527 of the bundle).
61. Mr Mark Selwyn became employed by the Respondents on 1 August 2016 as Head of Legal Affairs. He had been working with the Respondents since December 2015 when he was engaged on a consultancy basis. He is a member of the Executive Management Team. Mr Selwyn reviewed Mr Morrison's report and produced his own internal report (page 554 to 557 of the bundle). This report of Mr Selwyn was sent with Mr Morrison's report to the Claimant on 20 December 2016. Mr Selwyn made suggestions to Mr

Morrison regarding amendments but did not insist that Mr Morrison make changes. Mr Selwyn accepted that it took longer than it should have done to have sent the reports to the Claimant. Mr Selwyn denied that the delay was meant to cause pain to the Claimant and stressed that there was a need to take their time and be careful in relation to the matter. It was Mr Selwyn who felt it appropriate to engage Mr Morrison when he first became aware of the Claimant because of the grievance that she had submitted.

62. We accept the evidence of Mr Selwyn that it was unfortunate that matters were delayed regarding the sending of the report to the Claimant and the fact that there was no express reference to a right of appeal when the report was sent to the Claimant. We accept that Mr Selwyn did not treat the Claimant the way that he did because of her pregnancy and that he would not have condoned any bad treatment of the Claimant because of her pregnancy.

63. The report of Mr Morrison was detailed and considered. Mr Morrison concluded that the Claimant did not have any reasonable expectation that she should be consulted either in regard to the matters which resulted in Dr Moodley or Jo Ward leaving the business or the consequences thereof. Mr Morrison concluded that upon Jo Ward's departure that Mr Swan was the natural and obvious appointment as Deputy to step up to the role. Mr Morrison considered the complaint about the Claimant deputising as Hospital Manager really was about lack of communication from the Executive Management Team with her and providing support. That complaint was not accepted and additional support had been put in by the Respondents. Mr Morrison did not accept the Claimant's complaint about not being consulted individually in regard to the decision to close Plas Coch Hospital. It was reasonable of the Executive Management Team and of Kerry McKivett and Kim Moore in particular to communicate with the hospital via its Acting Manager in regard to the proposal to close the hospital and to deal with him with regard to the measures to be put in place to deal with the consequences of that decision for the staff and patients. Mr Morrison did not think it appropriate that the Claimant attend the meeting on 7 April 2016 as she was not an elected representative. In relation to the patronising comment by Kerry McKivett Mr Morrison said he had spoken to both Mr Carr who was unwilling to cooperate, and Mr Swan who had no recollection and Mr Morrison was satisfied that nothing was said either in tone or content which could objectively be judged offensive. In relation to the two Management Consultants who were engaged to provide additional support for Mr Swan during the period leading up to the closure of Plas Coch Mr Morrison thought it reasonable to conclude that Mark Swan did not properly communicate with the nursing staff and with the Claimant in particular in regard to Abdul Okoro. Mr Morrison found that the Claimant was rightly aggrieved about not being consulted regarding Abdul Okoro's engagement. Mr Morrison said that the Claimant with other members of the



- team at Plas Coch were affected by failures on the part of Mark Swan to effectively manage the hospital following his appointment as Interim Hospital Manager. Mark Swan was aware of the Claimant's ability and experience and professed to hold her in high regard yet he resisted Kim Moore's recommendation that he give her responsibility for example providing on call cover. Mr Morrison found that the Claimant's grievance may be upheld but he was satisfied that appropriate action had been taken to address the issues that the Claimant raised such as the Executive Management Team taking steps to possible disciplinary action against Mr Swan.
64. Mr Morrison considered it reasonable and natural for Kim Moore to alert Mark Swan to the vacancy at Newton House because of his position at Newton House and the role he was undertaking and Mr Swan's concerns about his future role. Mr Morrison said that any application by Mr Swan would be subject to a competitive interview process in which Mr Swan and any other candidate would be subject to equal scrutiny and of equal opportunity to satisfy the panel appointed as to their suitability for the role. The job was widely advertised but the Claimant did not apply. Mr Morrison notes that other employees did and that in the circumstances he does not believe the Claimant has reasonable cause to complain. Mr Morrison says "it seems to me that NHC cannot be criticised for not re-opening the position to offer it as suitable alternative employment to SC on the occasion of her redundancy".
65. Save in respect of the matter on the failure of Mark Swan to effectively manage the hospital, which was a grievance upheld by Mr Morrison, in respect of other grievances these were not upheld. On a general basis Mr Morrison commented about poor communication between senior management and "ordinary" staff being a constant criticism. He recommended that the Claimant who had recently begun a period of maternity leave would be in receipt of regular communications from the company to reflect the fact they continue notwithstanding the absence from work to be full and valid employees. Such communication should include details of any vacant situations arising in order that the employee may have the opportunity to apply should they regard themselves as suitably qualified and experienced for the role in question.
66. For the avoidance of any doubt we should record the fact that Mr Morrison's investigation of the grievance was free of any bias against the Claimant that he reached reasonable conclusions based on his interviews with the Claimant and with others together with the documents that ultimately he had available to himself. We reject any criticism of Mr Morrison in the way that he conducted the grievance and his reasonable findings based on the evidence put before him.

Submissions

67. Both the Claimant and the Respondent made written submissions as well as giving oral submissions to the Tribunal. It is not the intention here to repeat all the details of the submissions that were made.
68. On behalf of the Respondent it was said that the Tribunal was required to determine two matters namely the unfair dismissal claim, and whether there was a single act of less favourable treatment contrary to s.18 of the Equality Act 2010 namely the act of dismissal. In dealing firstly with unfair dismissal, it is said that the Respondent relies upon redundancy being a potentially fair reason within s.98 of the Employment Rights Act 1996. The fact there was a redundancy situation at Plas Coch cannot reasonably be challenged. There was both individual and collective consultations and there is no potential scope for challenge relative to the procedure adopted by the Respondents. The sole ground relied upon by the Claimant concerns an alleged failure to offer suitable alternative employment. The Respondents say that the Claimant was offered alternative employment which was in its reasonable belief consistent with the status experience qualifications and capability of the Claimant. The alternative roles put forward by the Claimant cannot be so classified. There is one theme in relation to both unfair dismissal and alleged discrimination and that is what was in the mind of the decision maker. The decision maker being Miss Bilton. It is said that it is clear that the dismissal was both substantively and procedurally fair.
69. Many of the points in relation to unfair dismissal have application to the discrimination claim namely the non-suitability of posts identified by the Claimant as being allegedly suitable. Miss Bilton allocated the Claimant to a group of equivalents namely a Senior Staff Nurse position. The consultation and decisions concerning potential termination of employment took place during the protected period and the Claimant was not at any time exercising any maternity leave entitlement such that Regulation 10 Maternity and Parental Leave Regulations 1999 had not arisen. There is no obligation on the employer to offer every vacancy and in truth the Claimant was saying that she should have been given a promotion. Reference was made to a number of Authorities and there is no right to demand a role. The guidance given for pregnancy and maternity discrimination being key points for the workplace are aspirational. The suitability is a value judgment. The Claimant was offered a suitable alternative role with a trial period. The Claimant's employment would have been preserved for the entirety of any maternity absence. The Respondent has been able to satisfy the Tribunal that the dismissal in this case was not because of her pregnancy and has discharged any burden of proof. Although the Claimant declined the proposals given to her the Respondents nevertheless paid her redundancy

money. It should be stressed that the Regulation 10 date where it becomes relevant is from the 11 July 2016.

70. If there is any procedural steps that should have been taken the outcome would have been the same as far as any Polkey dispute is concerned. It should be noted that the Royal College of Nursing did not make any representations regarding the manager post as tendered for by the Claimant. The claim should be dismissed and the Claimant has no loss.
71. The Claimant submitted that the process leading to dismissal through redundancy, was flawed and was not fair. The Respondents had failed to get an organisation structure and there was no meaningful consultation but a pre-determination regarding who was given roles. The spreadsheet had interview skills and stand alone roles. There was a failure to give a right of appeal and reasons were not offered except that the Claimant was pregnant. This was not a case where Polkey principles applied. Regarding suitable employment the Respondents would have had some awareness of her skills but made no enquiries and it was not reasonable to say that the roles were not suitable for the Claimant since they had no evidence. It was Miss McKivett as part of the Executive Management Team that made the decisions. There has been withholding of information by the Executive Management Team. There was a failure by the Respondent to conduct an open and transparent process in relation to scoring matrixes and criteria for success and obtaining vacant posts. The conclusion of Mr Morrison's grievance was flawed. The chronology of events does not support the conclusion drawn by Mr Morrison that the Respondents cannot be criticised for not reopening the position of Newton House Hospital Manager to offer it as suitable alternative employment to the Claimant on the occasion of her redundancy. It is incorrect also that Mr Swan had been employed for some time as Deputy Hospital Manager at Newton House.
72. It is pointed out on behalf of the Claimant that there had been previous legal cases involving the Respondents and it can be seen that the Respondent has repeated the same mistakes it has been criticised for in the past particularly in relation to redundancy processes.
73. The Claimant's grievance relating to her allegation of a discriminatory act was not treated in accordance with the Respondents own policy nor the ACAS Code of Practice on Disciplinary and Grievance. Mr Selwyn amended Mr Morrison's report. Mr Morrison was in correspondence with the legal firm Knights engaged by the Respondents. Timing of correspondence and proceedings initiated by the Respondents was intended to cause maximum distress to the Claimant. In short the Claimant is a hard-working and ambitious individual who successfully fulfilled a number of roles with the Respondent gaining experience in different aspects of its operations but the Executive Management Team ensured that the Claimant missed out on

promotion opportunities and ultimately was unfairly and discriminatorily dismissed as a result of suitable vacancies being withheld from her. The Claimant has had 2 years of stress and anxiety as a result of the Respondents behaviour and to say that there is no impact as the Respondents say is unfathomable. There have been a series of continuous acts of a discriminatory nature which have led to the unfair dismissal of the Claimant.

The Law

74. S.98 of the Employment Rights Act 21996 says

- “(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 reason falling within sub section (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 sub section if it –
- (a) .....
  - (c) is that the employee was redundant
- (4) where the employer has fulfilled the requirements of sub section (1), the determination of the question whether a 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 employers 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.”

75. In the case of **Royal Mail Limited -v- Kamaljeet Jhuti [2017] EWCA Civ 1632** Lord Justice Underhill giving the Judgment said in paragraph 54 “I therefore accept Mr Gorton’s submission that for the purpose of determining “the reason for the dismissal” under s.98(1) of the 1996 Act the Tribunal is obliged to consider only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss.” In paragraph 65 Lord Justice Underhill said this “it may at first sight seem wrong that Royal Mail should not be liable for unfair dismissal in circumstances such as the Employment Tribunal found here. But there is an important point of principle involved. The statutory right not to be unfairly dismissed depends on there being unfairness (as defined) on the part of the employer; an unfair or even unlawful conduct on the part of individual colleagues or managers is immaterial unless it can properly be attributed to the employer. A principle has to be identified as to how to draw the line

between those whose conduct can and cannot be so attributed. That was done, in *Orr*, on a careful and fully reasoned basis, and we must abide by that decision. In the case of *Coombs and others -v- Compair Maxam Limited* [1982] ICR 156 Mr Justice Browne-Wilkinson, as he then was, considered reasonableness in the context of a redundancy dismissal. On page 6 of the Judgment Browne-Wilkinson J said when considering the predecessor statutory test to s.98 of the Employment Rights Act 1996,

“for the purposes of the present case there are only two relevant principles of law arising from that sub section. First, that it is not the function of the Industrial Tribunal to decide whether they would have thought it fairer to act in some other way: The question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the Tribunal must be satisfied that it was reasonable to dismiss each of the applicants, on the ground of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy “as a sufficient reason for dismissing the employee” that is the employee complaining of dismissal. Therefore if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee for dismissal”.

The Judgment then goes on to consider set out a number of principles regarding fairness, the last of which is that the employer will seek to see whether instead of dismissing an employee he could offer him alternative employment. In the case of *Samsung Electronics (UK) Limited -v- Mr K Monte-de’Cruz* [UK EAT/0039/11/DM] Mr Justice Underhill said in paragraph 39 that good faith assessments of an employee’s qualities are not normally liable to be second guessed by an Employment Tribunal. In paragraph 41 the learned Judge said this

“Conclusion on alternative employment issue. For the reasons given above, we believe the Tribunal took the wrong approach to the question whether the Appellant’s decision not to appoint the Claimant to the role of Business Region Team Leader rendered his dismissal unfair. If it had avoided the vice of substitution, and had followed the approach now helpfully restated in *Morgan*, we do not believe that it could have found the dismissal of the Claimant to be unfair on that basis. The Appellant’s suitability for the job was assessed in a formal interview process by two senior managers, who applied identified criteria and made a systematic evaluation of his suitability in good faith. To the extent there were flaws in the process, they were in no sense egregious or such that the Appellant, who was

the victim of a genuine redundancy situation, can complain that his dismissal was unfair”.

76. Section 18 of the Equality Act 2010 under Pregnancy and Maternity Discrimination: Work Cases says as follows

“(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 her pregnancy refers, (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, her right to ordinary or additional maternity leave  
(5) for the purposes of sub section (2), if the treatment of a woman is an implementation of a decision taken in a 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) s.13, so far as relating to sex discrimination, does not apply to treatment of a woman insofar as
- (a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or
  - (b) of sub section (2) or
  - (c) it is for a reason mentioned in sub section (3) or (4).”

77. Regulation 10 of the Maternity and Parental Leave Etc. Regulations 1999 says as follows

**“redundancy during maternity leave**

- (1) This Regulation applies where, during an employee’s ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.
- (2) Where there is a suitable alternative vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer

or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).

- (3) A new contract of employment must be such that –
- (a) The work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and
  - (b) Its provisions as to the capacity in place in which she is to be employed, and as to the other terms and conditions of employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract”.

78. Regulation 20 of the Maternity and Parental Leave Etc. Regulations 1999 is headed unfair dismissal and states

- (1) An employee who is dismissed is entitled under s.99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if –
- (a) The reason or principle reason for the dismissal is of a kind specified in paragraph (3) or
  - (b) The reason or principle reason for the dismissal is that the employee is redundant, and Regulation 10 has not been complied with.
- (2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if
- (a) The reason (or if more than one, the principle reason) for the dismissal is that the employee was redundant
  - (b) It is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking held positions similar to that held by the employee and who have not been dismissed by the employer and
  - (c) It is shown that the reason (or if more than one, the principle reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).
- (3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with
- (a) The pregnancy of the employee.....”.

79. The reference to s.99 of the Employment Rights Act 1996 is because s.99 of the Act says

- “(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if

- (a) The reason or principle reason for the dismissal is of a prescribed kind.....
  - (2) in this section “prescribed” means prescribed by Regulations made by the Secretary of State and
  - (3) the reason or set of circumstances prescribed under this section must relate to
    - (a) Pregnancy, childbirth or maternity....”
- And it may also relate to redundancy or other factors”.

80. Section 136 of the Equality Act 2010 is headed burden of proof and states
- “(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 sub section (2) does not apply if (A) shows that (A) did not contravene the provision.”.

81. In the case of ***Mental Health Care (UK) Limited -v- (1) Mrs C Biluan (2) Mr A Makati [UK EAT/0248/12/SM]*** a decision of Mr Justice Underhill, the case concerned the redundancy exercise at Plas Coch arising out of the closure of one of the wards at Dinorben ward. Nineteen redundancies were required and the decision was taken not simply to make redundant the staff who worked wholly or mainly in the Dinorben ward but treat the pool for redundancies all the nursing and support staff at the hospital. Those numbered 58 in total comprising 17 nurses and 41 support staff. Staff were selected on the basis of a marked assessment by reference to three criteria – (1) competency assessment (2) disciplinary record and (3) sickness absence record. The competency assessment was sub-divided into 3 elements, each attracting 20 points – a written assessment; an interview (involving 5 pre-set questions, each attracting 4 points) and a “verbal group assessment” which took the form of a group discussion of a hypothetical scenario presented to the employee. These methods of assessing competency were those used by the Appellant for the purposes of recruitment. The Employment Appeal Tribunal found in paragraph 36 of the Judgment that the Appellant chose an elaborate and HR driven method which deprived it of the benefit of input from managers and others who actually knew the staff in question, and which by its very elaborativeness was liable to be difficult to apply consistently. That method produced results which were acknowledged to be very surprising but which were persisted in because the processes were thought to be so robust we are not surprised that the Tribunal thought that a blind faith in process – the characteristic deformation professionnelle of HR departments – had in this case led to the Appellant losing touch with common sense and fairness. The goal of avoiding subjectivity and bias is of course desirable but it can come at too



high a price; and if the fear is that Employment Tribunals will find the procedure unfair only because there is an element of “subjectivity” involved that fear is misplaced (see (f) what we say in ***Samsung Electronics (UK) Limited -v- Monte de’Cruz***).

### **Conclusion**

82. The Claimant relies upon evidence from witnesses called by herself namely Joanne Ward, Dr Moodley and Nicola Johnson. All three witnesses have their own disputes with the Respondents and have issued proceedings in the Tribunal or Courts against the Respondents. Joanne Ward’s evidence was that the Claimant worked as part of management and that due to her pregnancy the Claimant was excluded from the positions of Interim Deputy Hospital Manager, Hospital Manager and Quality Lead. Miss Ward confirmed the role of Mr Mark Swan which was not to have worked therapeutically, as the Claimant did with patients, because he was not able to do that. It was Miss Ward who asked the Claimant to work on the units. Miss Ward confirmed that Mark Swan was the Acting or the Deputy Hospital Manager. She was never the registered Manager and she made representations on behalf of Mr Swan regarding a bonus. Reference has already been made to the document prepared by Miss Ward regarding management structure at Plas. Whatever may be the views of Miss Ward now, the reality was that the Claimant was not undertaking the role of Deputy Manager on an interim basis under Miss Ward at any time.
83. Mrs Nicola Johnson brought a case in the Employment Tribunal which was determined on 24 May 2018 resulting in a finding that although the Claimant made a number of protected disclosures it was not found the Claimant was subjected to any detriment either during her employment or following its termination done on the ground she made protected disclosures. The Claimant was not unfairly dismissed because she had made a protected disclosure. However a like work claim was found for the period 15 March 2015 until 2 May 2016. Mrs Johnson progressed within the Respondents organisation to that of Registered Manager. Mrs Johnson’s view was that the Claimant should be considered as a manager and the only reason that she was not was because the Claimant was pregnant. Mrs Johnson said that when the Claimant worked under her management about four months. Mr Swan was acting as a Deputy at one time and they had no Service Managers but two Senior Nurses. Mrs Johnson said there was a straight swap when the Claimant came doing the role of Mr Swan. Mrs Johnson referred to her offer letters that the role of Service Manager was changed to Deputy Manager in June 2015. Like Miss Ward Mrs Johnson supported the Claimant’s claim that the role of Hospital Manager was suitable alternative employment for the Claimant. Mrs Laura Mackie was identified by Mrs Johnson as her Deputy as recorded in the Judgment of the Tribunal in paragraph 219. This was in April 2016. Mrs Johnson’s assessment of Mr Ngwenya’s suitability for hospital management must be considered in the

light of Mrs Johnson's assertions that Mr Ngwenya had made reports about her management on account of the Claimant having made protected disclosures was rejected by the Tribunal during Mrs Johnson's case. We consider that the evidence of Mrs Johnson must be regarded with a great deal of caution to its accuracy and reliability particularly with the assessment of the Claimant's capabilities as regarding suitable alternative employment.

84. Dr Moodley is engaged in High Court litigation and as pointed out by the Claimant this Tribunal is asked not to consider the matters in the High Court nor those of Dr Moodley's Tribunal claim against the Respondent as these are not relevant to the discreet issues put before the Tribunal by the Claimant and until those proceedings are concluded no inference should be drawn from them. In short Dr Moodley supported the Claimant's claim that the role of Hospital Manager was suitable alternative employment for the Claimant. Dr Moodley considered the Deputy and Service Manager role to be comparable. Dr Moodley referred to what he said were examples of discrimination involving individuals other than the Claimant. Dr Moodley referred to an email from Miss McKivett which demonstrated a strategy regarding pregnant staff and issues regarding their cost but this email could not be produced by him because he had no copy to produce. Dr Moodley had limited information about the other individuals he named as being victims of discrimination. He was cross examined about the claims that individuals had made which did not support in many respects what Dr Moodley thought was the case. We did not consider that Dr Moodley assisted the Tribunal in respect of the case being advanced by the Claimant although clearly he wished to support the Claimant by giving evidence. For example in relation to employees mentioned by Dr Moodley, Miss Roberts and Miss Sisson exercised maternity related rights and had remained in employment and returned post maternity. It is noted that Miss Sisson brought Tribunal claims against the Respondents but did not raise any allegation of pregnancy or maternity related discrimination. Another individual mentioned by Dr Moodley Ms Clarke had resigned her employment and there was no issue regarding pregnancy or maternity related entitlement.

85. A witness for the Respondent, Miss Linda Hull said she did not know the Claimant personally but she had visited Plas and spoken to the Claimant. Part of her role of going to Plas was to help audit and improve standards because Plas was struggling and needed help. In relation to the Claimant Miss Hull said that the Claimant was not able to make the change and there were elements that could have been improved such as the case files. It was the lack of signs of improvement that Miss Hull said she could not find. The Claimant is right to point out that Miss Hull's statement is strongly suggestive that the Claimant was struggling in her role but in oral evidence Miss Hull clarified what she meant was as set out above.

86. The Claimant alleges that there were acts of discrimination in that posts were given to other non-pregnant individuals for which the Claimant was a suitably more qualified to undertake namely Mark Swan given a role of Interim Hospital Manager at Plas Coch; Sean Halcroft and John Broomfield given the shared role of Interim Hospital Manager at Plas Coch following the suspension of Mark Swan; Dudu Ngwenya given the post of Interim Hospital Manager at Newton House; Gemma O'Malley given the post of Quality Lead; and Dudu Ngwenya given the substantive post of Registered Manager at Newton House.
87. The interim position at Plas was going to terminate when Plas itself closed. At the time that Miss Ward was relieved of her responsibility, her deputy was Mr Swan. We accept the evidence of the Respondents that Mr Swan was asked to take up the interim management role since he was on site and familiar with the operation of the facility at the time and was the most senior manager at the site. We accept that the pregnancy of the Claimant had nothing to do with the decision made to appoint Mr Swan to that position.
88. When Mr Swan was suspended Sean Halcroft and John Broomfield were Hospital Managers at other hospitals in the group and were asked to oversee Plas Coch on a temporary basis pending the closure after Mark Swan was suspended on 5 May 2016. We accept the evidence of Miss McKivett as to the rationale for the appointment of these Hospital Managers that it had nothing to do with the pregnancy of the Claimant. Miss McKivett said that it was 3 or 4 weeks later that it was either Helen Bilton or Kim Moore that told her about the Claimant's pregnancy.
89. Mr Ngwenya was given the post of Interim Hospital Manager at Newton House. He was later appointed the Registered Manager at Newton House. Miss McKivett said that the Hospital Manager vacancy interim or otherwise, at Newton House would have represented a significant promotion for the Claimant as it would be 2 grades above her current post. As a result of the Hospital Manager at Newton House resigning on 5 April 2016, the role was notified to Mark Swan since he had managerial experience at the site and it was his substantive Deputy Hospital Manager role at Newton House. Mr Ngwenya had previous experience as Deputy Manager at the New Hall facility of the Respondents and was seconded from the post in the Placement Team to that of Hospital Manager. The Claimant herself as noted by Mr Morrison accepted that the post of Hospital Manager at Newton House would be a promotion. We accept the evidence of the Respondents witnesses as to why Mr Ngwenya was appointed on an interim basis to the role. The role on a permanent basis was advertised on the Respondents websites on NHS jobs, and specialist recruitment agencies. It was advertised to open competition. The Claimant chose not to apply. The process was administered by Peoples' Services and interviews and selection conducted by Kim Moore and Abdul Okoro. As a result of this

competitive process Mr Ngwenya was appointed. We accept the evidence of the Respondents as to the procedure adopted which had nothing to do with conscious or unconscious discrimination in respect of or against individuals who were pregnant.

90. The post that Gemma O'Malley was given had been the subject of much comment during the evidence. We have accepted that it was a fixed term post. The Quality Department of the Respondents ensures compliance with the regulatory framework. The process of recruitment was done at a time which meant there was not a vacancy at the time of the redundancy selection or the effective date of termination of the Claimant's employment.
91. An important point is whether at the time when the vacancy lists were created by Angharad Beale and Miss Bilton did the methodology resulting in the Claimant being allocated to a group of equivalents whether Miss Bilton or Miss McKivett were aware of the Claimant's pregnancy. The fact that the Claimant had told Miss Ward of her pregnancy does not mean that Miss Bilton and Miss McKivett would have been aware of the pregnancy. We do not accept that Miss McKivett would have been aware of that from seeing the Claimant at the first meeting with employee representatives in Plas Coch. We accept the evidence that when it was identified of pregnancy that there was an indication of this on the document highlighted in pink together with others who were in a similar position. The fact that this was done does not lead to the inference that there was discrimination against these individuals.
92. We find there was no discrimination because of the pregnancy of the Claimant whether on a conspiracy or cultural basis on the part of the Respondents or by any individual concerned in the redundancy exercise. We accept the evidence of Miss Bilton and Miss McKivett as to how the process was undertaken and that they considered existing vacancies and what they considered to be the job role of the Claimant for the purposes of identifying suitable alternative employment.
93. We find that there was no discrimination because of pregnancy or maternity in relation to the treatment of the Claimant as alleged. There was no conscious or unconscious bias in the minds of any of the Respondents individuals who had to manage and make decisions in relation to any pre-redundancy posts or any posts after the redundancy exercise commenced.
94. We should also record that we accept the submissions of the Respondents regarding the non-applicability of Regulation 10 to the facts of this case. This Regulation applies in an employee's ordinary or additional maternity leave period and the Claimant had not exercised that maternity leave during the relevant period where this discrimination is alleged. Ultimately the

question would be whether there has been discrimination because of the pregnancy of the Claimant being unfavourable treatment.

95. In relation to the claim for unfair dismissal, we find that there was a redundancy situation at Plas and that the whole workforce was placed at risk of redundancy. Employee representatives were elected and consultations on an individual and collective basis undertaken. We find that the procedure was a fair procedure and that the Claimant was offered individual consultation on two occasions. It was a matter for the Claimant how actively or otherwise she was engaged in those consultations. It is clear that the Claimant considered that she should have been offered what she considered suitable alternative employment as set out above. We accept the general proposition that the determination of suitability of alternative employment is a matter for the employer. We considered the point which has been made by the Claimant that other managers were in a better position than Miss Bilton or Miss McKivett or others to evaluate the skills and responsibilities of the Claimant. However some have not been directly involved with the Respondents at particular times as set out in the chronology of events. Miss Bilton managed the Peoples' Services Team through the redundancy process and referred to Miss Kerry McKivett for advice when required. Miss Bilton used the electronic data base called 'Snowdrop'. It had basic details only on the system. We accept that this showed the Claimant's role as being Ward Manager but that was an anomaly as that role did not appear in any other establishment. Miss Bilton created a spreadsheet which went through a number of revisions. It was her discussions with Kerry McKivett that resulted in the Claimant being put into the Senior Staff Nurse group. There is no other Ward Manager in the business so Miss Bilton found the broadly comparable role. Miss Angharad Beale the Recruitment Officer identified what vacant roles would be available across the organisation and this was incorporated by Miss Bilton in her spreadsheet. The Claimant was invited to attend the Senior Staff Nurses Assessment Centre but she did not. When a Senior Staff Nurse role arose in Newton House in May 2016 Miss Bilton ringfenced this for the Claimant. Pay was adjusted in relation to this vacancy and time allowed for consideration. Miss Bilton said at the time she did not have information about the Claimant being a Service Manager and the only broadly comparable role across the business was a Senior Staff Nurse. The promotion opportunity, which is an expression used by the Claimant, regarding Hospital Manager at Newton House was not regarded as suitable alternative employment. We accept the evidence that this was a promotion and was not reasonably regarded as suitable alternative employment by the Respondents.

96. It is clear from the application form that was submitted when the Claimant joined the Respondents that she was an ambitious individual who was seeking to achieve career progression. It was also clear on the evidence

that the Claimant was well regarded by the Respondents and by others in the organisation, such as her witnesses, for her capacity for work and dedication. It may well have been a great disappointment to the Claimant not to be offered promotion to Hospital Manager due to the various changes which have taken place in the Respondents organisation. However in the context of a redundancy exercise we are satisfied that that was not a role which could be said to be suitable alternative employment that should have been offered to the Claimant. In view of our findings in relation to the other jobs which were mentioned by the Claimant, they were also not suitable alternative employment regarding the period and timescale that needs to be considered in relation to the redundancy process and the dismissal of the Claimant. We are satisfied, having regard to the burden of proof in relation to discrimination matters and our findings above, that there was no discrimination in the decision making process regarding the assessment of suitable alternative employment.

97. In the circumstances the claims for pregnancy and/or maternity discrimination, and the claim for unfair dismissal have to be dismissed. This is the unanimous Judgment of the Tribunal. This is of course in many respects a sad case because the Claimant left a job that she was well qualified to undertake in the field of care of vulnerable patients.

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Employment Judge P Davies  
Dated: 16 November 2018

JUDGMENT SENT TO THE PARTIES ON

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.....16 November 2018.....  
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS