EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss K McKinnell		**Birmingham Metropolitan College**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT	Birmingham	**ON**	28 - 30 November & 1 December 2022 20 December 2022 (Panel Only)
EMPLOYMENT JUDGE GASKELL		**MEMBERS:**	**Mrs I Fox** **Mr J Reeves**

Representation
For the Claimant: **Ms K Moss (Counsel)**
For the Respondent: **Mr P Bownes (Solicitor)**

JUDGMENT

The unanimous Judgement of the tribunal is that:

1 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of discrimination on the grounds of sex and/or pregnancy/maternity, pursuant to Section 120 of that Act, are dismissed.

2 The claimant's claim pursuant to Section 48 of the Employment Rights Act 1996 of detriment contrary to Section 47C is not well-founded and is dismissed.

3 Pursuant to Section 98 of the Employment Rights Act 1996 but not otherwise, the claimant was unfairly dismissed by the respondent by reason of redundancy. The claimant's claim for unfair dismissal is well-founded and the claimant is entitled to a remedy.

4 The claimant's claim for unpaid holiday pay is not well-founded and is dismissed.

5 The case is listed before this panel for a Remedy Hearing by CVP on **28 February 2023** at 10am with a time allocation of 1 day.

REASONS

Introduction

1 The claimant in this case is Miss Krystal McKinnell who was employed by the respondent, Birmingham Metropolitan College, from 24 May 2012 until 25 May 2021 when she was dismissed. The reason given by the respondent at the time of the claimant's dismissal was redundancy. Prior to commencing maternity leave on 21 March 2020, the claimant role was English & Maths Community Coordinator.

2 By a claim form presented to the tribunal on 24 May 2021, the claimant brings claims for unfair dismissal, sex discrimination, discrimination on the grounds of pregnancy and/or maternity, detriment contrary to Section 47C of the Employment Rights Act 1996 (ERA) by reference to Regulation 19 of the Maternity and Parental Leave etc Regulations 1999 (MAPL Regs) and for unpaid holiday pay.

3 All of the claims are denied. It is the respondent's case that the claimant was dismissed by reason of redundancy and that the dismissal was fair. The respondent denies any form of discrimination; and denies that any holiday pay or other payments due to the claimant are outstanding.

The Evidence

4 The Claimant presented her case first. She gave evidence on her own account she called no additional witnesses.

5 The respondent called three witnesses: Ms Emma Wint – HR Advisor; Ms Jan Myatt – Vice Principal and Mrs Louise Jones – Deputy Principal (2013 – 2021).

6 In addition, we were provided with several hearing bundles some of which were provided after the hearing commenced:

(a) The Final Hearing Bundle running to some 306 pages.
(b) A Supplementary Bundle running to some 33 pages.
(c) Additional Disclosure running to some 24 pages.
(d) Further Disclosure running to some 50 pages.

7 The fact that a document is to be found in one of those bundles does not necessarily mean that we have read it. Nor is it automatically adduced as evidence before us. We have considered the documents within those bundles to which we were referred by the parties during the course of the hearing.

8 We found the evidence of the respondent's witnesses to be clear, compelling and consistent. The evidence remained internally consistent during cross-examination; the evidence that was consistent with contemporaneous documentation; and the evidence given by witnesses was consistent with that given by other witnesses. However the tribunal was considerably disadvantaged by the respondent's failure to call Ms Louise Lakin as a witness. It was Ms Lakin who conducted the consultation process prior to the claimant's dismissal. The relevance of evidence which she could give must have been obvious, and yet no explanation the failure to call her was offered.

9 The claimant's interaction with the respondent during her maternity leave and during the consultation process prior to her dismissal was almost exclusively with Ms Lakin. Have not heard evidence from Ms Lakin, we only have the claimant's version of what occurred. This is largely unchallenged and we accept it. But in three important respects we found the evidence of the claimant to be quite inconsistent with contemporaneous documents and in particular with what the claimant said in emails at the time.

10 The three elements of inconsistency are:

(a) The claimant's assertion that it was not until she received the respondent's letter of 9 February 2021 that she was aware that she personally was at risk of redundancy (as opposed to there being a general risk of redundancy). In our judgement, this assertion is patently untrue: the emails passing between the claimant and Ms Lakin prior to 9 February clearly show that the claimant was aware of the distinct possibility that she would be returning to work to immediately face a redundancy consultation.

(b) The claimant's assertion when she was informed of her selection for redundancy that she needed to be in the workplace as she had been absent for so long and wished now to return. The emails are clear that the claimant had always intended that her 46 days accrued annual leave will be added to the end of her maternity leave thus deferring her actual return to the workplace until approximately 18 April 2021.

(c) The claimant's suggestion that she was discouraged in making a flexible working request and that this was a cynical ploy on the part of Ms Lakin who, knowing that the claimant would be dismissed by reason of redundancy, wished to save herself additional paperwork. It is again tolerably clear from the correspondence passing between the claimant and Ms Lakin that Ms Lakin was encouraging the claimant in her proposal for a flexible working request but was concerned that it should not be made too soon. Ms Lakin was concerned that if a redundancy consultation process took place, and the claimant had already secured flexible working at say 0.6 full time hours, then this may be to the claimant's disadvantage

in terms of the calculation of her statutory redundancy payment and payments due to her during any period of notice. Accordingly, it is at least arguable Ms Lakin's reluctance was not to save paperwork but to advantage the claimant. The claimant's suggestion to the contrary is pure negative speculation.

11 The reality is that there is little dispute as to what happened between the witnesses from whom we heard evidence. The real factual fighting ground in this case relates to the correct interpretation of documentation which had generally not been prepared by any of the witnesses from whom we heard.

The Facts

12 The claimant's continuous employment with the respondent began on 21 May 2012. As at 16 April 2018, the claimant's role was described as English & Maths Community Coordinator: the breakdown of her tasks was 0.4 FTE teaching; 0.4 FTE as a Coordinator; and 0.2 FTE studying for her PGCE. The claimant was employed in the Foundation Learning Department under the Deputy Department Manager - Ms Rosina Morris.

13 Around the beginning of January 2020, the claimant notified the respondent of her pregnancy. The claimant and Ms Morris discussed the possibility of the claimant returning to work part-time after pregnancy and also planned "Keeping in Touch" (KIT) days to take place during the claimant's maternity leave.

14 On 21 March 2020, the claimant's maternity leave began. The respondent was advertising for a teacher to cover the claimant's teaching role during maternity leave and the claimant's colleague, Ms Gurpreet Sangha, covered the claimant's coordinator role. The commencement of the claimant's maternity leave coincided almost exactly with the start of the first national lockdown in response to the COVID-19 Pandemic.

15 March each year sees the commencement of the respondents business planning cycle which usually continued through until the final budget sign-off in the summer. The 2020/2021 planning cycle was like no other: during lockdowns, the respondent was unable to provide teaching on a face-to-face basis; much of its normal provision simply could not take place at all; and as much as possible was delivered online. The planning process was particularly difficult because of uncertainty as to the future (measured in terms of weeks rather than years). Effectively, the respondent was left planning on a term-by-term basis.

16 On 3 May 2020, the Community Team of which the claimant was a member moved from the B3 Directorate of Foundation Learning to the B4

Directorate of Commercial Services. On 4 May 2020, the claimant was advised of the restructure: her team was now part of the Job Skills Team within the Commercial Services Directorate and Ms Lakin, Commercial Services Department Director, would henceforth be the claimant's line manager.

17 By August 2020 there was a proposal for a new commercial services team which would involve removing certain positions including the claimant's community coordinator role she and others affected would be offered ring fenced applications for alternative roles although the respondent has candidly provided information about this proposal the proposal was not approved the proposal not in fact approved at the highest levels of management within the respondent

18 The respondent found itself facing another term of highly disrupted business. No teaching was being provided face-to-face in college premises; or being provided face-to-face. Within the community, such provision as there was (with much reduced demand) was being provided online. The community provision, the coordination for which was the claimant's responsibility, had all but disappeared with only one new client coming on board - namely online provision for NHS staff. To respond to this situation one lecturer (from outside the claimant's department) was made redundant and another left voluntarily. Within the claimant's department, a lecturer resigned and the respondent was able to reduce costs and meet the demands of the situation by no longer providing maternity cover for the claimant's coordinator role or her lecturing duties. A lecturer already employed within the department, Ms Rebecca McLaughlin, was allocated to the NHS contract. We should stress that this was not a "new role": Ms McLaughlin was already employed as a lecturer; she was simply allocated hours with a particular client. The suggestion made by Ms Moss that this was a role which was available which should therefore have been offered to the claimant pursuant to Regulation 10 MPLR is misconceived. It is misconceived for two reasons: firstly, for reasons we will elaborate later, we do not accept that, at this stage, the claimant's substantive role had not been identified as redundant and it was fully expected that upon return from maternity leave she would return to her existing role; and, secondly, this was not a new role. To suggest otherwise would be to suggest that each time a new student or group of students enrols with an educational institution the teaching of them is a new role - rather than the obvious deployment of existing staff.

19 From September 2020, the claimant was in regular contact with Ms Lakin. It is clear from emails we have seen that efforts were being made to accommodate the claimant's KIT days and she was kept abreast of developments within the team including the resignation of Ms Rahimah Qureshi. The principal difficulty so far as KIT days were concerned was the conditions under which the respondent was operating with varying degrees of lockdown and

the need for social distancing to be maintained. The claimant did undertake some training for KIT purposes.

20 On 15 October 2020, the claimant mentioned to Ms Lakin her proposed request for flexible working. This had previously been discussed with Ms Morris. Ms Lakin advised the claimant not to submit a flexible working request at that time because she was concerned that there may be further restructures/reorganisations within the college she was anxious that the claimant took no step which might be to her ultimate prejudice. however there is no evidence from which we can conclude all that Ms Lakin was deliberately delaying the flexible working request and no evidence from which we can conclude that at this stage Ms Lakin was proceeding on the basis that the claimant was at risk of redundancy. We accept that the respondent's managers remained hopeful that by the New Year 2021 all restrictions might have been lifted and the respondent could return to its pre-pandemic levels and methods of operation. During evidence the claimant agreed that in the period leading up to Christmas 2020 and in the early part of 2021 Ms Lakin was engaging with her in a positive manner.

21 It is clear from emails exchanged in January 2021, that the claimant was proposing to take her accrued annual leave immediately following the end of maternity leave. Her actual physical return to the workplace would be delayed until 18 April 2021. The claimant and Ms Lakin established that this was the crucial date for any flexible working arrangement to become effective; and that approximately three months lead up would be required from the date of the application. Accordingly, it would not be necessary for the claimant to make a flexible working request until 18 January 2021. In evidence, the claimant made clear that when she made her flexible working request she would have been seeking 0.7 FTE hours.

22 In the event (but this was unforeseen), rather than COVID restrictions being lifted around Christmas 2020 and into the New Year they were in fact further enhanced. In January 2021 the England entered its third national lockdown. The effect of this was that the hoped-for improvement in terms of the respondent's ability to recruit students and to provide community services which would require coordination by the claimant did not transpire. In early January 2021 further planning was conducted which this time involved the writing out of the claimant's role of Community Coordinator. It was only at this time, and not earlier, that the claimant was properly placed at risk of redundancy.

23 By 6 January 2021, it is clear that the claimant was well aware that one possibility was that upon her return to work which was scheduled for 8 February 2021 she would be entering a consultation process because her job was at risk of redundancy. On 29 January 2021 Ms Lakin emailed the claimant to tell her

that the consultation process will begin on 8 February 2021. The claimant was requested to agree a truncated consultation involving just one consultation meeting: Ms Lakin indicated that she felt that any opportunities which there were to avoid redundancy or to redeploy the claimant could be identified in one meeting. Understandably, the claimant did not agree.

24 On 9 February 2021 the claimant received a letter from Ms Wint formally informing her that her position was at risk of redundancy and inviting her to 3 individual consultation meetings to be held with Ms Lakin on 15 February 2021, 22 February 2021 and 24 February 2021. All the claimant's maternity leave came to an end on 8 February 2021, she did not physically return to work (there was no work for her to do because of lockdown) and certainly Ms Lakin was proceeding on the basis that the claimant would be using her accrued annual leave as had previously been discussed.

25 The consultation process was a perfunctory affair. The claimant was given no information as to how the college had come to the conclusions it had about this despite the fact that a step-by-step document setting out the thinking the changes and the proposed changes since the first lockdown have been prepared and was placed before us in evidence. Even access to this document would have been of enormous help to the claimant in responding to the consultation process.

26 The claimant was placed in a pool of one on the basis that she was the only Community Coordinator. In our judgement, two important matters were overlooked: firstly, that in her role as Community Coordinator, the claimant spent 50% of her time (of her working time, disregarding her study time) as a Lecturer; and secondly, that the claimant had made clear that she wished to make a flexible working request and was looking to return at less than FTE hours.

27 At the first consultation meeting held on 15 February 2021, the claimant was told that she would be given notice of dismissal during the third consultation meeting to be held on 24 February 2021. This is what happened.

28 On 24 February 2021, the claimant was advised that she had been selected for redundancy and was to dismissed with three months' notice, to expire on 25 May 2021. During the notice period the claimant was placed on gardening leave; she was not required to work. She was also told that she must take her accrued annual leave during the notice period. All of this was confirmed in writing in a letter from Ms Ana Ferguson, HR Manager, dated 24 February 2021.

29 The claimant queried the requirement for gardening leave (she does not dispute that this was available in her contract of employment). What the claimant would have preferred is to have been dismissed immediately with a payment in

lieu of notice. We are quite satisfied that what the claimant was hoping to achieve by this was a lump sum payment to notice, together with a lump sum payment in respect of accrued holiday, together with her statutory redundancy payment. We do not accept the claimant's explanations either that she needed to be back in the workplace for mental health reasons (completely inconsistent with earlier indications of wishing to extend her maternity leave); or that she felt that while she was on gardening leave she would be unable to commence alternative employment (the claimant's contract is quite clear on this - she could take alternative employment provided it did not conflict with her duties to the respondent).

30 The claimant appealed against the decision to dismiss her. Her grounds of appeal were set out as follows:

1 That there was no meaningful consultation process. This it was carried out extremely quickly and during this period I was forced to take annual leave which effectively shut me out of the business. I have not been given sufficient time to think about or explore any options.

2 I have had no clarification or detail regarding the redundancy selection process and I have not had sight of the new department structure.

3 Your decision to keep me in contract for the next three months on garden leave and not to release me to start any form of new employment is futile. My need to be in active employment was discussed at my consultation meeting when I cited that this would have a negative impact upon my health and well-being.

31 The appeal was conducted by Mrs Jones. There was an appeal meeting held on 25 March 2021 after which, on 7 April 2021, Mrs Jones wrote to the claimant advising that she had considered the grounds of appeal but her conclusion was that the decision to dismiss for redundancy was correct and the appeal was dismissed.

32 The claimant claims that, at the time of the termination of her employment on 25 May 2021 there was accrued annual leave owing to her for which she should be paid. She has not provided any calculation of what she says is outstanding. The issue here is that the claimant did not in fact formally book her annual leave once she knew was facing redundancy. (As we have indicated earlier, we find that the claimant's strategy was to secure a maximum cash payment including payment for accrued annual leave.) On the claimant's own evidence, she was told by Ms Lakin that she should use her accrued annual leave during the consultation process and then she was told in the letter of dismissal that any remaining annual leave must be taken during her period of

notice. Accordingly, we are satisfied that in the period from 8 February 2021 when the claimant to returned to work to 25 May 2021 when her employment ceased, the claimant had exhausted her entitlement to annual leave.

33 From the date of the claimant's return to work on 8 February 2021 until the date of the termination of employment of 25 May 2021, we are satisfied that regular steps were taken to ensure that the claimant was informed of vacancies within the respondent organisation; and that she would have been given appropriate priority had she applied. Every vacancy which was drawn to her attention was found by her not to be suitable as alternative employment. Of particular note is a vacancy which was advertised by the respondent on 26 May 2021 for an English Lecturer - Maternity Cover. Ms Moss strongly suggests that this was to cover Ms McLaughlin who was herself shortly to commence maternity leave. When the vacancy was drawn to the claimant's attention, she was told that if she accepted it continuous employment would continue and at the end of the period of maternity leave a fresh period of consultation would commence. The claimant rejected the offer because of the level of salary and because it was maternity leave cover.

The Law

34 **The Equality Act 2010 (EqA)**

Section 4: The protected characteristics

The following characteristics are protected characteristics—
age
disability
gender reassignment
marriage and civil partnership
pregnancy and maternity
race
religion or belief
sex
sexual orientation

Section 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.

Section 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).

Section 123: Time limits

(1) Proceedings on a complaint within Section 120 may not be brought after the end of—

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or

(*b*) such other period as the employment tribunal thinks just and equitable.

Section 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.

35 **Maternity and Parental Leave Etc Regulations 1999 (MPLR)**

Regulation 10: 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 available 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) The 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 and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.

Regulation 18: Right to return after maternity or parental leave

(1) An employee who returns to work after a period of ordinary maternity leave, or a period of parental leave of four weeks or less, which was—

(a) an isolated period of leave, or

(b) the last of two or more consecutive periods of statutory leave which did not include—

(i) any period of parental leave of more than four weeks; or
(ii) any period of statutory leave which when added to any other period of statutory leave (excluding parental leave) taken in relation to the same child means that the total amount of statutory leave taken in relation to that child totals more than 26 weeks,

is entitled to return to the job in which she was employed before her absence.

(2) An employee who returns to work after—

(a) a period of additional maternity leave, or a period of parental leave of more than four weeks, whether or not preceded by another period of statutory leave, or
(b) a period of ordinary maternity leave, or a period of parental leave of four weeks or less, not falling within the description in paragraph (1)(a) or (b) above, is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.

(3) The reference in paragraphs (1) and (2) to the job in which an employee was employed before her absence is a reference to the job in which she was employed—

(a) if her return is from an isolated period of statutory leave, immediately before that period began.
(b) if her return is from consecutive periods of statutory leave, immediately before the first such period.

(4) This regulation does not apply where regulation 10 applies.

Regulation 20: Unfair dismissal

(1) An employee who is dismissed is entitled under section 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 principal reason for the dismissal is of a kind specified in paragraph (3),
(b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

(a) the pregnancy of the employee.
(b) the fact that the employee has given birth to a child.
(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave.

36 **Employment Rights Act 1996 (ERA)**

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(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.

(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.

Section 99: Leave for family reasons

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or
(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) pregnancy, childbirth or maternity,
(b) ordinary, compulsory or additional maternity leave.

Section 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.

37 **Decided Cases: Pregnancy/Maternity Discrimination**

O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor **[1997] ICR 33, EAT**.

The protected characteristic only has to be an effective cause of the treatment. It does not have to be the main or only reason The EAT found that there were always 'surrounding circumstances' to a pregnancy. For example, the fact that an employer's reason for dismissing a pregnant woman was that she would become unavailable for work did not make it any the less a dismissal on the ground of pregnancy.

R (on the application of E) -v- Governing Body of JFS **[2009] UKSC 15 (SC)**

The "but for" test should not be used to determine whether discrimination has been proved, unless the factual criteria applied by the respondent are inherently discriminatory.

Interserve Limited -v- Tuleikyte **[2017] IRLR 615 (EAT)**

When considering allegations of unfavourable treatment because of absence on maternity leave under Section 18(4) EqA, the correct legal test is the "reasons why" approach; it is not a "criterion" test.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Shamoon -v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

Employment tribunals can usefully commence their enquiry by asking why the claimant was treated in a particular way: was it for a prescribed reason? Or was it for some other reason?
If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Amnesty International -v- Ahmed **[2009] IRLR 884 (EAT)**

The fact that [a protected characteristic] is part of the circumstances in which the treatment complained of occurred, or the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

Johal -v- Commission for Equality and Human Rights **[2010] All ER (D) 23 (Sep) (EAT)**

Where an employee on maternity leave was deprived of the opportunity to apply for promotion due to an administrative error, it was the administrative error and not the fact of the maternity leave which was the reason for the treatment. Maternity leave was the occasion for the treatment complained of; it was not the reason for the treatment.

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**

There can be no question of direct discrimination where everyone is treated the same.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) 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 the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis, it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

The Law Society -v- Bahl **[2003] IRLR 640**

A tribunal is not entitled to draw an inference of discrimination from the mere fact that an employer has treated an employee unreasonably. It is a wholly unacceptable leap to conclude that whenever the victim of unreasonable conduct has a protected characteristic then it is legitimate to infer that the unreasonable treatment was because of it. All unlawful discriminatory treatment is

unreasonable, but not all unreasonable treatment is discriminatory. To establish unlawful discrimination, it is necessary to show that the employer's reason for acting was one of the proscribed grounds. Discrimination may be inferred if there is no explanation for the unreasonable behaviour, it is not then the mere fact of unreasonable behaviour which entitles the tribunal to infer discrimination, but rather the fact that there is no reason advanced for it.

38 **Decided Cases: MPLR**

The Secretary of State for Justice -v- Slee **UKEAT/0349/06/JOJ (EAT)**

The question of whether it is not practicable to continue to employ a woman under her existing contract of employment "*by reason of redundancy*", is to be answered by reference to the standard definition of redundancy in Section 139 ERA. It was held that Regulation 10 was engaged even though, under the employee's contract, the employer was entitled to move her to an alternative role which it intended to do. The redundancy situation did not therefore bring an end to the contract, but she was nevertheless redundant for the purposes of the Regulation. An employee on maternity leave is not just entitled to vacancies available at the time that she is due to return to work, but also to vacancies which may arise during the employee's maternity leave, once redundancy has caused her job to be no longer available for her:

Sefton Borough Council -v- Wainwright **[2015] IRLR 90 (EAT)**

The respondent decided to abolish two roles including that of the claimant who was on maternity leave and replace them with one new job. The claimant was not offered the new job and succeeded in a claim of automatically unfair dismissal on the basis that the new role was a suitable vacancy. On appeal to the EAT, the respondent argued that Regulation 10 was not engaged until the decision had been taken as to who was the best candidate for the new role - in effect, the claimant was not "redundant" until the respondent had determined who would be slotted into that role and only at that point would the respondent become obliged to offer a suitable vacancy. It was held that this interpretation would undermine the protection offered by Regulation 10. Applying the Section 139 ERA definition, the tribunal was entitled to conclude that the claimant was redundant when the respondent decided that two positions would be replaced by one.
Unfavourable treatment of a claimant whilst on maternity leave does not of itself amount to unfavourable treatment "because of" pregnancy or maternity leave as Section 18 EqA requires.

Philip Hodges & Co v Kell **[1994] IRLR 568 (EAT)**

The EAT found that it is not necessary that the employee is dismissed because of the redundancy situation in order for her thereafter to be protected by Regulation 10, once it is clear that it will not be practicable for her to return to her old job because of the redundancy situation affecting it.

Simpson -v- Endsleigh Insurance Services Limited **[2011] ICR 75 (EAT)**

Regulation 10(3)(a) and (b) must be read together in determining whether an available vacancy is "*suitable*". It is for the employer to decide whether a vacancy is suitable knowing what it does about the employee in terms of the employees work experience and personal circumstances. If a suitable vacancy exists, the employer must offer it. There is no obligation on the employee to engage with the process. The EAT expressed doubt as to whether an employer would choose to test suitability by assessment and interview.

39 **Decided Cases: Redundancy**

Taymech Limited –v- Ryan **EAT 633/94**
Thomas and Betts Limited –v- Harding **[1980] IRLR 255 (CA)**
Hendy Banks City Print Limited –v- Fairbrother **EAT 0691/04**

In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from whom those who are to be made redundant will be drawn. In assessing the fairness of a dismissal, a tribunal must look to the pool from which the selection was made since the application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal. If an employer simply dismisses an employee without first considering the question of a pool the dismissal is likely to be unfair. Employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. They need only show that they have applied their minds to the problem and acted from genuine motives. However, tribunals must be satisfied that an employer acted reasonably. A tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances.

Williams and Others –v- Compair Maxam Limited **[1982] IRLR 83 (EAT)**
Polkey –v- AE Dayton Services Limited **[1987] IRLR 503 (HL)**
R –v- British Coal Corporation and anr ex parte Price **[1994] IRLR 72**
King and Others –v- Eaton Limited **[1996] IRLR 199 (CS)**
Graham –v- ABF Limited **[1986] IRLR 90 (EAT)**
Rolls-Royce Motor Cars Limited –v- Price **[1993] IRLR 203 (EAT)**

In a case of redundancy in the employer will 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.
The employment tribunal must be satisfied that it was reasonable to dismiss the individual claimants on grounds of redundancy. It is not enough to show that it was reasonable for the employer to dismiss *an* employee. It is still necessary to consider the means whereby the claimant was selected to be the employee to be dismissed.
Fair consultation means (a) consultation when the proposal is still at a formative stage, (b) adequate information on which to respond, (c) adequate time in which to respond, (d) conscientious consideration by the employer of any response.
If vague and subjective criteria are adopted for the redundancy selection there is a powerful need for the employee to be given an opportunity of personal consultation before he is judged by it.

40 **Decided Cases – General test of fairness**

Iceland Frozen Foods Limited –v- Jones **[1982] IRLR 439 (EAT)**
Sainsbury's Supermarkets Ltd. –v- Hitt **[2003] IRLR 23 (CA)**

In applying the provisions of Section 98 (4) ERA the employment tribunal must consider the reasonableness of the employer's conduct, and not whether the tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band of reasonable responses to a given situation within which one employer might reasonably take one view, another quite reasonably take another. The function of the employment tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, then the dismissal is fair. If the dismissal falls outside the band it is unfair.
The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee is fairly and reasonably dismissed.

41 **Holiday Pay**

Craig & Others -v- Transocean International Resources Limited
UKEATS 0029/08

Regulation 15 of the WTR does not require that employers communicate the directions they are entitled to give to their employee about the timing of their leave or the days that they are to refrain from taking leave, in any particular form. Any such notice that the employers decide to give must tell the employees what days they may or may not take leave but neither the WTD or WTR suggest that actual

dates require to be specified by the employers.

The Claimant's Case

42 Ms Moss prepared a detailed List of Issues running to some 25 paragraphs (with many sub-paragraphs). This was not formally agreed as the definitive List of Issues but it serves as a useful statement of the claimant's case. We set out the list in full:

Automatically Unfair Dismissal – s.99 Employment Rights Act 1996 ("ERA") / Reg.20 Maternity and Parental Leave etc. Regulations 1999 ("MAPLE Regs") Dismissal (s.99 ERA / Reg 20(1)(a) MAPLE Regs 1999):

(1) Was the reason or principal reason for the Claimant's dismissal connected with:

a) her pregnancy.
b) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave.
c) the fact that she took or sought to take additional maternity leave?

Dismissal due to redundancy (Reg 99 ERA / Regs 20(1)(b) and 20(2) MAPLE Regs 1999)

(2) Was the reason or principal reason for the Claimant's dismissal that she was redundant?

(3) Did the circumstances constituting the redundancy apply equally to one or more employees in the same undertaking who held positions similar to that held by the Claimant?

(4) Had those other employees not been dismissed by the Respondent?

(5) Was the reason (or, if more than one, the principal reason) for which the Claimant was selected for dismissal a reason connected with:

a) her pregnancy.
b) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave.
c) the fact that she took or sought to take additional maternity leave?

(6) If the reason or principal reason for the Claimant's dismissal was that she was redundant, did the dismissal end the Claimant's additional maternity leave period?

(7) If so, has Reg.10 MAPLE Regs 1999 been complied with, in that:

a) during the Claimant's ordinary or additional maternity leave period, was it not practicable by reason of redundancy for the Respondent to continue to employ her under her existing contract of employment (applying Sefton v Wainwright ?
b) Was there a suitable available vacancy?
c) Was there a failure for that alternative employment to be offered to the Claimant?

Automatically unfair dismissal – Flexible Working – s.104E ERA

(8) Was the Claimant dismissed for the reason (or, if more than one, the principal reason) that she proposed to make an application under section 80F ERA?

Ordinary unfair Dismissal – ss.94, 98 ERA

(9) Was the Claimant dismissed for a potentially fair reason pursuant to s.98(2)(c) ERA, namely redundancy?

(10) Did the Respondent act reasonably in treating redundancy as a sufficient reason for dismissing the Claimant, in that:

a) Was there a genuine reduction in the need for employees to carry out work of the kind carried out by the Claimant?
b) Did the Respondent warn the Claimant of the redundancy situation?
c) Did the Respondent carry out a meaningful consultation process with the Claimant?
d) Did the Respondent identify the correct pool of employees potentially affected by the redundancy situation?
e) Did the Respondent fairly select the Claimant for redundancy?
f) Did the Respondent consider suitable alternative employment for the Claimant?

(11) Was the dismissal of the Claimant substantively and procedurally fair in all the circumstances? In particular, was the dismissal within s.98(4) ERA and the band of reasonable responses available to the Respondent?

Pregnancy and Maternity Discrimination – s.18 Equality Act 2010 ("EqA")

(12) Was the Claimant unfavourably treated in the following ways:

a) During the Claimant's period of maternity leave the Respondent carried out a re-structure, she was not warned, consulted, offered an alternative role or kept up to date with advertised vacancies.
b) The restructure was proposed in August 2020, but the Claimant was only informed of her redundancy in January 2021 before she was due to return from maternity leave.
c) The Claimant was not informed that her role was being considered for redundancy, she was only informed that her role was to be made redundant.
d) No other employees were considered for the redundancy, the Claimant was the only employee away on maternity leave.
e) The Respondent refused to accept the Claimant's right to put forward a statutory flexible working request / sought to dissuade the Claimant from making such an application.
f) The Respondent failed to keep in touch with the Claimant sufficiently during her maternity leave despite her requests for 'keeping in touch days.'
g) The Respondent did not offer the Claimant suitable alternative employment options upon her return from maternity leave, despite other employees being re-deployed to new roles.
h) The Respondent failed to give the Claimant adequate warning of the redundancy situation.
i) The Respondent failed to undertake a genuine consultation procedure.
j) The Respondent failed to identify the correct pool affected by the redundancy situation.
k) The Respondent failed to select the Claimant fairly from the applicable pool.
l) The Respondent told the Claimant she had to book all her accrued but untaken holiday “now”, within the consultation period and garden leave;
m) The Respondent placed the Claimant under pressure to waive consultation.
n) The Respondent refused to give the Claimant pay in lieu of notice and instead forced the Claimant to go on garden leave instead.
o) The Respondent refused to allow the Claimant to be accompanied by someone other than a team member / trade union representative, despite knowing that the Claimant had been on maternity leave for a year so did not know anyone in her team and was not a union member.
p) The Respondent booked the Claimant’s holiday during the consultation / garden leave period without the Claimant’s approval or knowledge.

(13) Did the Respondent treat the Claimant unfavourably in the ways set out above, because of her pregnancy?

(14) At the time of the above unfavourable treatment was the Claimant in the protected period in relation to a pregnancy of hers?

(15) If not, was the unfavourable treatment in implementation of a decision taken in the protected period (even if the implementation was not until after the end of that period)?

(16) Whether or not the unfavourable treatment was in or decided in the protected period, was the Claimant unfavourably treated, in the ways set out above, because she was on compulsory maternity leave?

(17) Whether or not the unfavourable treatment was in or decided in the protected period, was the Claimant unfavourably treated, in the ways set out above, because she was exercising or was seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

Direct sex discrimination - s.13 EqA

(18) If the unfavourable treatment, listed at para.12 above, because of pregnancy, was not in or decided in the protected period, was the treatment less favourable than the treatment of a hypothetical man, because the Claimant was a woman, contrary to s.13 EqA?

(19) Was the Claimant treated, in the ways alleged at para.12 above, less favourably than a hypothetical man in circumstances not materially different, because the Claimant was a woman, contrary to s.13 EqA?

Unlawful Detriment – Pregnancy / maternity – s.47C(1) ERA and/or Reg.19 MAPLE Regs

(20) Was the Claimant subject to a detriment by any act, or any deliberate failure to act, by the Respondent, as listed in paragraph 12 above, done for the following reasons or any of them, the Claimant:

(a) was pregnant.
(b) had given birth to a child and the act or failure to act took place during the Claimant's ordinary or additional maternity leave period.
(c) took, sought to take or availed herself of the benefits of, ordinary maternity leave.
(d) took or sought to take additional maternity leave?

Unlawful detriment – Flexible Working – s.47E ERA 1996

(21) Was the Claimant subjected to a detriment, as listed at paragraph ** above because she proposed to make an application under Section 80F of ERA?

Holiday pay

(22) Had the Claimant accrued untaken holiday by the effective termination date?
(23) Was she paid appropriately for accrued but untaken holiday?
(24) If not, how much holiday pay is owing?

Unlawful deduction from wages – s.13 ERA / Breach of contract

(25) Was the Claimant paid what was properly payable for her KIT days during her maternity leave?

43 During closing submissions, Ms Moss confirmed that allegations 12 (n),(o) & (p) from the list were no longer pursued.

44 Specifically it is the claimant's case that her role became redundant in August 2020. Further that at that time there was a vacant role - to give remote tuition to NHS employees which was suitable for her. Applying Regulation 10 MPLR, the role should have been offered to the claimant; it was not offered to the claimant but instead given to Ms McLauchlin. Hence, pursuant to Regulation 20(1)(b) MPLR, the claimant was automatically unfairly dismissed. Ms Moss rightly submits that it is not permissible for the respondent either deliberately or by neglect to ignore the claimant because she was absent on maternity leave and thus only identify her redundancy later if this were permissible then Regulation 10 would be pointless.

45 More generally, the claimant's case is that there were extensive reorganisations during the period of her maternity leave but she was not consulted or given an opportunity to partake. This meant that she missed out on opportunities which might have saved her employment. As Ms Moss puts it she was made redundant as she was "the last man standing".

46 In any event, it is the claimant's case that the consultation process was inadequate. She was not provided with documentation which was clearly available by January and which was provided to us to explain the changes. Further the process was carried out entirely on the basis that the only role available for the claimant's continued employment was her existing role of full-time Community Coordinator - no consideration was given to the fact that she had indicated an intention to make a request for flexible working. She wished to

continue on a 0.7 FTE basis and accordingly consideration should have been given to placing her in a comparable pool of fractional FTE lecturers.

The Respondent's Case

Discrimination

47 The respondent denies any form of discrimination or unfavourable treatment of the claimant arising from her pregnancy or maternity leave. Crucially, it is the respondent's case that the correct time for the identification of the claimant's role as being at risk of redundancy came in January 2021 at the start of the new term. This happened to coincide with the ending of the claimant's maternity leave. At any time prior to that, it was the respondent's reasonable expectation that the claimant would be able to return to work in February 2021 to her previous role as full-time Community Coordinator. Everyone was expecting COVID-19 restrictions to be lifted and no one was expecting a third national lockdown commencing in January.

48 It is the respondent's case that there is no evidence at all that the claimant was detrimentally treated or dismissed because she was proposing to make a flexible working request. To the contrary, the evidence suggests that Ms Lakin was concerned that the claimant should not act prematurely and to her detriment. During evidence, the claimant agreed that on this subject Ms Lakin had been working with her positively. The claimant also agreed that the respondent employs many fractional FTE workers. She could advance no reason why the respondent would not want her working on a fractional basis if suitable work was available.

49 So far as KIT days are concerned, the respondent concedes that these were not as effective as anyone would have hoped. But KIT days were difficult to arrange when the respondent was working through lockdown and social distancing. Staff working from home; learning was provided online; and very few of the claimant's colleagues were actually in the workplace.

Unfair Dismissal

50 The respondent's case is that Regulation 10 MPLR was never engaged. At no time during the claimant's maternity leave did it appear impractical for the respondent to continue to employ the claimant in the same role and on the same terms as before. Accordingly, the Regulation 10 duty not arise. But, in any event, there was no new role: Ms McLauchlin was employed as a lecturer and she was deployed to provide learning to a newly enrolled group of students. Pre-COVID she would have done this in the community on NHS premises. From August 2020, she did this remotely on-line.

51 Once the claimant had been identified as being at risk of redundancy, the respondent's case is that all available vacancies were shared with her and that she would have been given due priority in any for which she was qualified. But it was the claimant who consistently responded that the vacancies were unsuitable.

52 With specific reference to Ms McLauchlin, the respondent is sceptical about whether the claimant would have been willing to be pooled with Ms McLauchlin for the purposes of redundancy selection in February 2021. When Miss McLauchlin's role was offered to the claimant (albeit as maternity cover), the claimant declared the role unsuitable.

53 The respondent's case is that it gave proper consideration to the question of pooling - but the claimant's role was unique; and it was quite appropriate for her to be placed in a pool of one. The respondent's case is that the consultation process was adequate and that all efforts were made to avoid redundancy. Accordingly, the respondent argues that the dismissal was fair.

Holiday Pay

54 The respondent's case is that it was entitled to specify when the claimant should take her accrued annual leave. The claimant had already indicated an intention to take this immediately following her maternity leave. When she returned to work and the consultation process began, it was made clear to her that she needed to use annual leave immediately. When she was told of her dismissal she was again told of the need to use annual leave during her period of notice.

Unpaid Wages

55 Although listed in the claimant's list of issues, the claimant did not induce at any time during the hearing any evidence to support a case that her wages had not been paid in full.

Discussion/Conclusions

Findings of Fact

56 The most significant factual finding which we are required to make in this case is when did the redundancy situation arise? Put another way, and for the specific purposes of a claim pursuant to Regulation 10 MPLR, we need to consider at what point it was not practicable by reason of redundancy for the respondent to continue to employ the claimant under her existing contract of employment.

57 We are unanimous on this and we have no hesitation in finding that the redundancy situation affecting the claimant, or the point at which it was impracticable by reason of redundancy to continue to employ her, was in January 2021 immediately prior to the claimant's return to work from maternity leave. This situation did not arise August 2020 as argued by Ms Moss. In August 2020, the respondent was dealing with what it genuinely and reasonably expected was a temporary situation occurring whilst the claimant was absent on maternity leave. The respondent fully and reasonably expected that by the early part of 2021 when the claimant was due to return from maternity leave her existing role would be available for her to return to.

58 Another important factual finding is the nature of the work done by Ms McLauchlin from August 2020 onwards. We were told in evidence that effectively a new contract had been obtained around that time to provide education to NHS staff. The teaching hours involved in fulfilling this contract were allocated to Ms McLaughlin who was already employed by the respondent as a 0.6 FTE lecturer. This was not a new role. It was merely a new customer. The role - that of lecturer already existed and the duties were being performed by Ms McLaughlin. On the evidence before us, we are unaware of any vacancy arising at that time which even if the Regulation 10 duty had otherwise been engaged was a suitable vacancy to offer the claimant.

59 We make the following specific findings with regard to the claimant's claims as set out in her list of issues:

(a) **Pregnancy and Maternity Discrimination – s.18 EqA**

(i) In our judgement the claims of unfavourable treatment set out in Paragraphs 12 - 17 of the list of issues are entirely misconceived and in some cases quite inconsistent with the claimant's own evidence. They only restructure which affected the claimant and which took place during her period of maternity leave was that in May 2020 (Paragraph 16 above) on the claimant's own case she was informed of the structure and her continued employment was not prejudiced by reason of it. There was a proposal for a further restructuring August 2020 which was not approved and did not proceed.

(ii) We do not accept that the claimant was not informed of the proposal to make her redundant. It is clear from the communications passing between her and Ms Jones that the claimant was well aware of this possibility. We accept however that this was not done during a formal consultation process. However the idea that this was detrimental because of pregnancy or maternity leave is nonsense.

(iii) At the time of the claimant's redundancy, her role was the only one to be made redundant. It may be that she was the only one to have been recently absent on maternity leave but the explanation for the claimant's role being made redundant is that she was the only English & Maths Community Coordinator. The claimant's own case on the unfairness of the selection depends on the respondent having to consider the fractional breakup of her role

(iv) We entirely reject the proposition that the respondent refused to accept the claimant's right to put forward a flexible working request or sought to discourage her from doing so. In her evidence, the claimant accepted that Ms Jones was working with her on this and that Ms Jones was concerned that a premature application (the claimant was not planning to return to the workplace until April 2021) might be to her disadvantage.

(v) We accept that the claimant's access to KIT days was unsatisfactory. But this was not a detriment because of her absence on maternity leave this was caused because of the unique situation during the COVID-19 pandemic and national lockdowns. (The very existence of which the claimant seems reluctant to acknowledge.)

(vi) The claimant was offered alternative options. She was the sole determinator of whether these options were suitable alternatives. There is no evidence of other staff being deployed to new roles at any relevant time.

(vii) In our judgement, the claimant was warned of the redundancy situation as soon as it became clear to the respondent. This is something which must be judged on the basis of what was known to the respondent at the relevant time. It cannot be judged with the benefit of hindsight. Until January 2021, the respondent genuinely and reasonably believed that lockdown measures would be lifted and the claimant would be able to return to her pre-maternity leave role.

(viii) We have concerns about the consultation procedure and the pooling. We deal with these concerns below. However we do not accept that these failings are attributable to the claimant having been pregnant or absent on maternity leave.

(ix) The claimant had made it clear that she wished to take her accrued annual from February - April 2021. The claimant only changed her position on this when she thought it might be to her advantage to do so. In our judgement, the respondent was entitled to insist that the claimant took her accrued annual leave and certainly did not treat the claimant unfavourably in this regard because of pregnancy or maternity leave.

(x) The claimant was not placed under pressure to waive consultation. There was a suggestion made to her that a three-meeting process was unnecessary. In our judgement, what this demonstrates is that the claimant was well aware of the redundancy situation when she returned to work.

(b) **Direct sex discrimination - s.13 EqA**

We reject the proposition that any of the matters listed in paragraph 12 of the list of issues were unfavourable treatment based on pregnancy or maternity leave (or at all) it therefore follows that we find that there was no less favourable treatment than that which would have been afforded to a hypothetical male comparator.

(c) **Unlawful Detriment – Pregnancy / maternity – s.47C(1) ERA and/or Reg.19 MAPLE Regs - Flexible Working – s.47E ERA 1996**

In our judgement there is no evidence to support the proposition that the claimant was subject to unlawful detriment by reason of pregnancy or maternity or her proposed request for flexible working.

(d) **Discriminatory Dismissal**

(i) The claimant was dismissed by reason of redundancy. She was not dismissed because of pregnancy or maternity leave.

(ii) The claimant was selected for redundancy because, in the light of the third national lockdown which commenced in January 2021, her role as English & Maths Community Coordinator simply could not continue. She was not selected for redundancy because of pregnancy or maternity leave.

(iii) Regulation 10 was not engaged. It did not become “not practicable” to continue to employ the claimant in her substantive role until she was due to return from maternity leave in February 2021. This was because of the lockdown. This was not a case of the respondent wilfully choosing not to recognise the redundancy situation. The respondent could not have anticipated the third national lockdown and as previously stated the respondent’s decisions must be judged on the basis of what was known at the relevant time and not with the benefit of hindsight. In any event, there was no suitable role which could or should have been offered to the claimant pursuant to Regulation 10 either in August 2020 or in February 2021. As stated above we find that Ms McLaughlin was not offered a new role in August 2020 she merely continued in her existing role.

(iv) The claimant was not dismissed nor selected for redundancy because she proposed to make an application for flexible working. The proposition is absurd and quite inconsistent with the claimant’s case that she could/should have been identified as redundant as early as August 2020.

(e) **Ordinary unfair Dismissal – ss.94, 98 ERA**

(i) We find that the sole reason for the claimant's dismissal was redundancy this is a potentially fair reason pursuant to Section 98 ERA.

(ii) However we find that the respondent did not fulfil its duties in relation to consultation prior to the claimant's dismissal. There should have been a greater explanation as to how the situation had arisen including explaining to the claimant the various steps which had been taken during her absence to deal with the effect on the respondent's business of the COVID-19 pandemic and the national lockdowns. There should also have been discussion as to the pool for selection: consideration should have been given to pooling the claimant on a fractional time basis (especially in the light of her indication of a wish to return on a fractional basis). And if the decision had then been that the claimant was pooled with others there would have needed to be a transparent and fair selection procedure.

(iii) On the basis of this failure, but on no other basis, we find that the claimant's dismissal was unfair.

(f) **Holiday pay**

The respondent was contractually entitled to require the claimant to use her accrued holidays during the period of her notice. The claimant had earlier indicated that she did not intend to physically return to work at the end of maternity leave in February 2021 but would then use her accrued annual leave. The claimant changed her position when she thought that she may be able to secure a lump sum payment of notice and holiday pay. Our judgement is that the claimant has not established that any holiday pay is outstanding to her. Her claim for unpaid holiday pay is not well-founded and is dismissed.

(g) **Unlawful deduction from wages – s.13 ERA / Breach of contract**

The claim for unpaid wages/breach of contract has not been actively pursued before us. The claimant has adduced no evidence or calculation with regard to such a claim. Accordingly we find that this claim is not well-founded and it is dismissed.

NOTES FOR REMEDY HEARING

60 We find claimant was unfairly dismissed because a lack of effective consultation; a lack of explanation as to the redundancy situation; and a lack of discussion about the appropriate pool for selection.

61 Assuming that the claimant has received a statutory redundancy payment which extinguishes her basic award for unfair dismissal, it does not follow from our findings that the claimant will be entitled to any substantive remedy.

62 The parties need to address the following at the remedy hearing:

(a) If there had been more effective consultation when the redundancy situation arose in January 202,1 could it have made any difference to the respondent's decision?
(b) Was there a suitable pool into which the claimant could have been placed? The only potential employee so far identified was Miss McLaughlin. But our understanding is that maternity leave covering Ms McLaughlin was offered to the claimant and rejected by her as unsuitable. This was in part due to the fact that it was maternity cover, but that was not the sole reason. Accordingly it could well have been that the claimant would not have found pooling with Ms McLaughlin to be acceptable.
(c) Even if there had been a decision to pool the claimant with Ms McLaughlin or others, it does not follow that the claimant would have been the successful candidate.

63 The claimant's case on unfair dismissal is heavily dependent on the fact that her role could be broken into sections and her continued employment as a Lecturer rather than as a Community Coordinator should have been considered. It follows that any compensatory award can only be calculated on the basis of a fractional appointment.

64 The claimant was offered maternity cover before her employment ended. She declined this. We will have to consider whether this amounted to a failure to mitigate her losses.

Employment Judge Gaskell
13 February 2023