EMPLOYMENT TRIBUNALS

Claimant: **Miss N M Dyer**

Respondent: **Network Rail Infrastructure Limited**

Heard at: **Nottingham** On: **18,19 & 20 December 2017**
In Chambers on 24 March 2018

Before: **Employment Judge Clark**
Mrs J Bonser
Mr C Goldson

Representatives:
Claimant: **Mr A Ross of Counsel**
Respondents: **Mr C Stone of Counsel**

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The claim of unfavourable treatment under s.18 of the Equality Act 2010 **succeeds in part**.

2. The claim of suffering detriments under s.47C of the Employment Rights Act 1996 **succeeds in part**.

3. Remedy to be determined if not agreed.

REASONS

1. Introduction

1.1. The claimant claims that she has suffered various detriments relating to her pregnancy, culminating in her not being officially appointed to the secondment post that she had informally occupied for the previous four years. Initially, a number of different claims had been advanced. Those that remain before us are claims under s.18 of the Equality Act 2010 for being subject to unfavourable treatment during the protected period and/or for suffering a detriment under s.47C of the Employment Rights Act 1996.

2. Issues

2.1. The core of the claimant's claim is that she was not officially appointed to the office based secondment. The result was that she returned to her substantive trackside role. That, and matters associated with it, were further broken down into a number of discrete allegations set out at paragraphs 10 a-q of the ET1 [15-19]. At the start of the hearing, Mr Ross further honed that list of issues to withdraw the allegations listed at c, e, f, g, h, j, m and p.

3. Evidence

3.1. We heard from the claimant in support of her own case. For the respondent, we heard from Mr Mike Carr, the claimant's line manager in respect of the secondment; Mr John Elvey, the claimant's line manager in respect of her substantive post; and Mr Chris Gee, Head of Operations (North) who chaired her appeal against the grievance outcome. All witnesses adopted written statements and were questioned on oath.

3.2. We received a bundle running to c.600 pages and considered those pages we were directed to.

3.3. Both counsel made closing submissions in writing which they supplemented orally.

4. Procedural Matters

4.1. At the close of the claimant's case, Mr Ross applied for an order restricting some of the respondent's witnesses from being present during the hearing of other witnesses' evidence. He suggested that there were reasons for being concerned that if that was not done, the evidence they gave would be influenced by what each had heard. We considered this carefully against the default starting point of open justice and public hearings. That can be displaced where the interests of justice require it. We reached our conclusion that Mr Ross's application had not satisfied us of the need to depart form the usual open hearing. If the concerns advanced appeared to manifest, they could be managed within the proceedings without undermining the quality of evidence and without displacing the principal of open and public justice. We therefore refused the application.

4.2. At the close of proceedings an application to amend the claim was intimated but, after some reflection, not pursued.

5. Facts

5.1. It is not the tribunal's function to resolve each and every last dispute of fact between the parties, but to focus on those matters necessary to resolve the issues in the case and to set them in their proper context. On that basis and on the balance of probabilities, we made the following findings of fact.

5.2. The claimant has been employed since 2006. Her substantive role was that of a trackside technician. In April 2011 she was placed on an informal secondment arrangement into an office based role within the Works Delivery Team in Derby. The initial purpose of that transfer was directly related to her first pregnancy. That informal arrangement appears to have been allowed to drift

beyond its initial purpose. Two years later, by around April 2013, that placement had evolved into an acting Scheme Project Manager role ("SPM"). Throughout the time she was working in this role, her substantive post remained vacant.

5.3. In 2013 the claimant sought to vary her working pattern so as to compress her full time working hours over a 4 day week. This formed the basis of a formal flexible working request which was granted by the respondent in December 2013. Her contract of employment was formally varied with effect from January 2014 accordingly.

5.4. We find there is a significant difference in pay between what the claimant earned in her substantive role and what she was paid in the SPM role. Beyond the difference in basic pay, which we understand to be at least £5000, the differential was artificially increased further because of the informal secondment which meant the claimant retained various supplements from her trackside role. We understand those would not be retained on a formal appointment to the SPM role.

5.5. For most if not all of the period of time relevant to the claimant's secondment to the Derby office, a colleague called Richard Berkin was also on secondment. He had been displaced from his substantive role in 2014 and placed in the Derby SPM role but, because the claimant was already effectively in this role, he had then immediately been placed on secondment, first as the Bedford SPM. Mr Berkin's secondment was extended before he was then seconded into a more senior role as Works Delivery Manager. During the 3 years or so that this arrangement was in place, the claimant continued in the SPM Derby role.

5.6. It does not seem to us that any of these secondments for either seconded worker can be easily reconciled with the respondent's published "position statement" on secondments [101]. The significant aspects of which are that:-

a. A secondment is defined as a temporary transfer for a period of between 6 and 12 months. It seems to us, however, that when read as a whole the policy does contemplate secondments of a shorter duration.
b. Secondments longer than 6 months or those being extended beyond 6 months must be advertised internally.
c. Secondments with the potential to become permanent should be stated as such when advertised.

5.7. It is largely common ground that what was happening was not always in line with the respondent's policy on secondments although the version we have seen is relatively new, being dated April 2016. The overall impression we got from the witnesses was that any policy was almost regarded as aspirational only and sometimes a matter of discretion whether it was applied in practice or not as was the decision whether to seek any HR advice or input on any particular secondment opportunity.

5.8. The claimant's line management structure was complicated due to her secondment, but particularly due to the lack of formality in the secondment arrangements. She remained subject to a line management structure relevant to her trackside role. She was also subject to a line management structure relevant to her secondment role. Her two line managers were Mr Elvey and Mr Carr respectively. The fact of having two line managers could have led to an overlap

or duplication in the line management relationship. That was not the case for the claimant and we find it was more often a recipe for neither manager grasping the issues before it and she would often fall between the two of them.

5.9. Mike Carr had started in July 2014 as Project Manager (Signalling South) within the Derby Works Delivery Team. He was not, therefore involved in the previous decisions on secondments into the team. His relative inexperience in management was accepted notwithstanding that he had been in people management roles since around 2000. We found him sometimes to be naïve, that he did not apply the established staff management systems such as appraisals or performance reviews. He was not aware of certain HR policies or where to find them and had never read the grievance procedure. We found there were some events where he seemed to become overwhelmed by the demands of a line management.

5.10.The workplace is predominantly a male environment. We find Mr Carr had even less experience of managing female employees and no previous experience of managing the rights and obligations arising from a worker falling pregnant.

5.11.John Elvey was the claimant's line manager in respect of her substantive trackside role. He retained that role through her secondment. He was subordinate to Mr Carr and reported directly to him. We find Mr Carr met with Mr Elvey regularly albeit not in formal 1:1 meetings. They were in close physical proximity in their day to day roles.

5.12.On the question of the claimant's performance in the SPM role, we have limited direct evidence before us of her work and there was no annual performance review to refer to. However, we do have various points in the evidence including some contemporaneous correspondence and other interviews. We note that Mr Carr reassured her of job security in the face of organisation restructure [346]. In March 2016, the claimant had undergone a selection process for an SPM role at Bedford. She had been encouraged to apply by Mr Carr. We find she gave a good interview and the feedback suggested she was appointable. We have also seen various emails publicly praising the claimant for her work. They lead us to the conclusion that there was a generally positive view of the claimant and her skills and performance during her time working for Mike Carr. That is, until the very end of the period.

5.13.The interview for the Bedford SPM was undertaken in unusual circumstances. Firstly, Mr Carr interviewed the claimant alone. Secondly, he did so at his home as he was waiting for a washing machine to be delivered. Thirdly, by the time of the interview the claimant knew she could not take up the Bedford SPM role due to its physical location. Nevertheless, they agreed to go through the motions as a practice run for other SPM roles. The outcome was that the claimant was appointable, had she wanted the role. Mr Carr accepted she was qualified and gave good feedback on the interview.

5.14.In the summer of 2016, the claimant discovered she was pregnant again. She made an announcement of her news on 7 July 2016. We find from that date the respondent, through its managers, had knowledge of her pregnancy.

5.15.We find in the circumstances of that announcement, the claimant was subject to an uncomfortable exchange with Mr Carr. She alleges he laughed in

response to the news and said "should I be happy for you". The claimant found this upsetting and offensive. She contacted her colleague and friend, Jade Berkin. She stated how she felt "pissed off" with Mike and questioned why he would laugh. Jade suggested he may have felt awkward to which the claimant stated "maybe, judgmental prick lol".

5.16.In his evidence to us Mr Carr accepted he did laugh although he had bluntly denied this in the course of the subsequent internal grievance investigation. We find his answer given to that process was not true. He described it as a nervous laugh. He explained this was due to it being what he described as a naturally awkward moment and a normal reaction. He was not able to explain to us what it was about the announcement that made it awkward for him or why a nervous laugh was a normal reaction. We explored with Mr Carr during his evidence whether there was any sense of feeling awkward because the claimant had fallen pregnant only recently after starting a new relationship. This could have formed a basis for a natural enquiry as to whether she was happy with the news. He firmly denied this was the case. On balance, we preferred the claimant's account of the exchange against Mr Carr's differing accounts and his acknowledgement that his memory of the encounter was not that good.

5.17.The formal announcement was made on 11 October 2016 when the claimant completed the respondent's internal "Employee notification of maternity leave" form [471]. Her MAT B1 is dated 1 November 2016. The expected week of confinement was 10 February 2017. The claimant indicated an intention to start her maternity leave on 3 Feb 2017. We reject the suggestion expressed in some of the documentation that knowledge of the pregnancy (and the duties that may flow from that fact) only arises once there has been some sort of formality in the notification (See for example Mr Elvey's email to Mr Gee in the course of the grievance appeal which seeks to rely on the official date of notification [467]). That formal notification may trigger some statutory maternity leave rights, but it does not prevent there being earlier knowledge of the state of affairs for other obligations and, particularly, in how the employer makes decisions affecting the pregnant employee.

5.18.An expectant mother's risk assessment was completed by Mr Carr and Mr Elvey on 8 November 2016 [116]. It is inaccurate insofar as it records the date of notification of pregnancy as 4 November 2016. It is a symptom of both managers' inexperience of dealing with pregnant workers.

5.19.On the evening of 18 July 2016, the claimant experienced some concerning symptoms with her pregnancy. She feared she was miscarrying. She attended hospital. During the night, she realised she would be absent from work the following day. We accept her evidence that she did not have a contact number with her for Mr Carr. She did have the details for Jade and she decided to text her just after 3 a.m. to ask that she pass on the fact and reason for her absence from work the following day. It read.

> ***"Sorry to text at this time I don't have Mike's number on me would you be able to pull him aside in the morning for me please and just explain im at the hospital possibly something wrong with baby and I will ring him when I can… Thanks xx"***

5.20.Jade did speak with Mr Carr that morning but we find the message she actually conveyed was limited to the fact that the claimant was in hospital. In

other words, it did not convey any link to her pregnancy. The sickness absence reporting procedure required employees to telephone their line manager, not to text or have a message relayed. Mr Carr contacted the claimant in response, also by text, saying:-

> ***"Nickayla you need to give me a call if you are going sick. Just telling jade to pass the message on is not the procedure."***

5.21. The claimant contacted Jade again asking what she had told him. It became clear he had not been told the reason she was off sick. Full facts were then conveyed to him during the course of the day and he contacted the claimant again to say:-

> ***"Hi Nickayla. Really truly sorry for my previous message about procedure. I genuinely did not realise your personal situation. Please take the time you need. Kind regards Mike."***

5.22. Eamon Barr is a local TU rep and worked in the same trackside team that the claimant's substantive role was based. He and Mr Carr had a good relationship.

5.23. On or around 17 August 2016 there was a discussion between Mr Carr and Mr Barr about a potential collective grievance from the trackside teams. We find Mr Barr was not aware of the claimant's pregnancy. The meeting related to the use of informal secondments generally but more specifically to the claimant's situation. There are no notes of this meeting but the subsequent email exchanges show the tone and topics of the discussion. At or around the time of this meeting, Mr Carr received a draft of the potential grievance [105]. We find this was no more than a draft prepared by Mr Barr to further his agenda at the meeting. It was a threat of the formal process that would be adopted if an informal resolution could not be found. Consequently, there are in fact no signatures despite it opening with "we, the undersigned". The meeting was therefore to discuss the intention to raise a collective grievance and to seek to influence Mr Carr to act now so as to avoid it.

5.24. Having said that, we did not find helpful the distinction advanced by the claimant that the grievance was not formally lodged. We find there was a grievance in its general sense that was articulated to the employer by Mr Barr. The fact that it wasn't yet lodged under the formal collective grievance procedures does not take the underlying discontent out of the factual matrix relevant to why later events then take place. It was useful for us to see the matters of concern set out in writing.

5.25. Whilst the grievance is about informal secondments generally, it is clear that the claimant is targeted in this grievance and it is mainly about the fact she has enjoyed an extended informal secondment to an office role that others on the trackside teams have been deprived of. It targets her four day work pattern and other benefits she enjoys in the Works Delivery Team the corollary of which is that the trackside team is one worker short and unable to recruit to it because it is not officially vacant.

5.26. We considered whether this threat of a collective grievance was based on any personal motive of Eamon Barr as he did later apply for the formalised secondment but then withdrew his application. On balance, we dismissed that,

largely on the basis that there is force in the fact that the secondments in these teams had been operated on a very ad hoc basis and arguably outside the respondent's own policy. There seemed to be some justification for the underlying grievance, if not some of the personal attack on the claimant's circumstances.

5.27.The outcome of the meeting is recorded in a series of emails between Mr Carr and Mr Barr. In the first, dated 23 August 2016, Mr Carr made certain promises to Mr Barr [110]. He acknowledged the unsatisfactory state of affairs caused by not following any official process. He recorded the following matters had been agreed at the meeting which had a direct impact on the claimant. They were:-

a. The claimant would be issued with a 4 week roster asap.
b. The SPM Derby post to be advertised.
c. That HR approval would be needed for *such a short period of secondment* (our emphasis).
d. The claimant's technician post be made available should she be appointed and, if not, that she would return to it.

5.28.The reference to "such a short period of secondment" is to the fact that the preferred option arrived at between the two at the meeting was to offer the secondment formally for only 3 months. We find that the reason for this short secondment would be that the claimant would be placed in the formal secondment without the need for a competition, it would start sooner with the logical consequence that it would come to an end sooner, at which point she would return to her substantive role. Mr Barr expresses this in terms that "it will bring a resolution sooner". We find therefore, that the shared desire to appoint the claimant without competition was not for her benefit.

5.29.That plan was scuppered once HR were approached to approve it. Perhaps by reference to the respondent's secondment position statement, Mr Carr was told it had to be for a period of at least 6 months and that it would have to be advertised. He emailed Mr Barr to tell him. In that email, he also confirmed that Mr Berkin's secondment would be kept at 3 months. This difference is difficult to understand. Not only does his secondment seem to be managed under different rules to that of the claimant, but the substantive role to which he would return at the end of any secondment is the Derby SPM post that she was hoping to be officially seconded into. The obvious question was why the Derby SPM was subject to a different period than that of the substantive post holder whose own secondment creates the temporary vacancy in the first place. At this stage, the process still seemed to be ad hoc.

5.30.Mr Barr asked for confirmation that just putting the claimant in the role could be done for a 3 month placement. He did not receive a reply and had to chase him. He was concerned by the change of plan from the 3 month secondment agreed. Mr Carr replied on 9 September 2016 stating that "it's been complicated". He stated that there would be an advert, anyone could apply and that it now had to be for a minimum of 12 months. It seems by now someone had identified the obvious link between Mr Berkin's secondment in the Bedford WDM role and the substantive Derby SPM role he left behind to be filled. The two secondments were then set at 12 months. Mr Carr closed stating how he "*hoped this satisfies the 'members'* ".

5.31.It did not satisfy Mr Barr who again referred to the 3 month secondment being one which would “bring things to a head sooner”.

5.32.By 28 September 2016, Mr Berkin’s secondment had been authorised for a further 12 months. There was no interview or selection process for this secondment. Mr Carr emailed Mr Barr to update him that the SPM role would shortly be advertised for a 12 month secondment. [115d]

5.33.In October 2016, Mr Carr imposed a new 5 day work rota on the Claimant. We find this decision flowed from one of the matters agreed with the TU. They had requested him to “firm up Nickayla’s rosta” as the TU members viewed her work pattern as someone who was working “to suit their own private life and not the companies (sic)”. In many respects, they were correct to say her hours were worked to suit her private life and they were wrong to say it did not suit the company as, in fact, the claimant had applied and the company had agreed to these working hours formally as a result of a flexible working request agreed in December 2013. That seems to have been granted without consideration of the fact that her substantive role was trackside, and only considering the reasonableness of accommodating it within the office environment of her informal secondment. Nevertheless, it was agreed as a formal variation to contract and she had worked that pattern ever since. Whilst Mr Carr was not aware of that variation as he did not take over the team until later in 2014, neither did he make any enquiries as to her contractual position.

5.34.There was a discussion between the claimant and Mr Carr. The claimant challenged the proposed change but was told that flexible working was something that had to be reviewed every year, even though it had not previously been reviewed. That may be the position generally with informal arrangements but not where there has been a formal variation to the contract of employment. It seems more likely than not that Mr Carr proceeded on the basis of his own experience whereby he benefitted from an informal flexible working arrangement allowing him to work from home at certain times which did have to be reviewed annually. The claimant could not locate any documentation confirming the variation and she was, in any event, concerned by this time not to rock the boat in view of the upcoming formalisation of the secondment. Mr Carr accepted she would not want to complain at that sensitive time. She therefore acquiesced in the change. She took steps to change her child care arrangements to allow her to work 5 days an incurred the additional nursery costs. The change of working pattern was a unilateral variation of contract.

5.35.We find this change was directly linked to the promises Mr Carr made to Mr Barr at the meeting of 17 August. We are satisfied that neither of them was aware that the work pattern had arisen as a formal variation to contract

5.36.The respondent has a formal system of proposals for training. Nominations can be rejected by the training providers or the nominated individual’s manager. We have seen examples where the claimant was nominated for courses and then cancelled. In some cases, it is directly related to the difference needs of her secondment and substantive roles in which case the cancellation reason given is “not eligible” (309). We cannot find the reasons shown on these courses always accurately reflects the true reason. We were told that there are a limited number of options and that they are not always selected consistently nor may the circumstances cover all possible reasons. For example, the same course for which the claimant was said to be “not eligible” was cancelled on another

occasion for a different reason, namely "replaced". Nevertheless, we do find the claimant was due to attend a first aid course on 3 to 5 October 2016. It was an automatic requirement that she undergo this refresher course every three years. We understand she was close to the end of her current three year period and was automatically nominated for the course. Mr Elvey removed her from the course. The official reasoning was "cancelled – required to work". It is not disputed that that this was not the true reason. As we set out above, the range of available reasons does not cover every eventuality. The real reason was that the claimant was to commence maternity leave in about 4 months' time. Mr Elvey puts it in clear terms during the grievance investigation that the reason was that "she was going on maternity leave soon after, it seemed wasteful for her to attend" [302]. In his written evidence, his reasoning is expressed in a rather more nuanced way. It is clear to us that the reason for the claimant being taken off the first aid course was the fact of her pregnancy. We are not satisfied that the other potential reasons that might exist for a course being cancelled would have happened had she not been pregnant. In other words, on balance we are satisfied that had she not been pregnant, she would have attended the course. In the subsequent grievance appeal hearing, any other possible reasons for cancellation that might have been were not adavnced. Instead, Chris Gee broadly adopted Mr Elvey's analysis that the cancellation was a "value for money" issue which can only be interpreted by reference to her future absence on maternity leave (454).

5.37.Around this time there were some changes made to the local operation of the respondent's team briefing process. In short, the claimant changed from signing off Mr Carr's cascade to that of Mr Elvey. We consider this only as it became one matter of complaint in the subsequent grievance. The claimant suggested it was indicative of a prior decision to return her to her technician role. Whilst we are suspicious, we are not able to make that finding. The investigation concluded it was simply a question of efficient management delegation as Mr Carr had a large team to brief, Mr Elvey fewer.

5.38.We turn then to the allegations that the claimant's performance was failing. We accept that the SPM workload continued to increase throughout the time the claimant worked in the WDM team. There is no suggestion there was any concern over the claimant's performance at any time prior to the middle of 2016. What references exist are confused and, if they arise at all, they appear to be very much later in the year. Mr Carr stated he could not remember when he first had concerns. On 5 October 2016, Mr Carr sent the claimant a template of objectives [369]. This was stated as being the objectives for the year commencing April 2016 and was, therefore, 6 months late. We find the reason for this delay was that Mr Carr had recently been on a management course but setting annual objectives does not necessarily indicate performance concerns. This same course would ultimately lead to him instigated the formal PIP. Despite this recent management course, we were unable to identify anywhere in the recent chronology or documentation where Mr Carr had actually articulated to the claimant any concerns he may have had about her performance. He did not use "smart" targets in any discussions or meetings with the claimant. In cross examination, he accepted that there may have been times when he wanted to raise a work issue, had it in his mind, but engaged with the claimant in such a manner that she would have left their meeting without any idea that he thought her performance was lacking. In short, we find that if he ever did genuinely have concerns of any nature he failed to raise them with her. This also leads us to conclude that whatever concerns there may have been were not particularly

serious. Mr Carr accepted that he didn't take into account the effect the pregnancy might have been having on how he viewed her performance at work.

5.39.We do not accept Mr Elvey had raised any concerns about the claimant's work despite suggesting in his evidence to us that he himself had held concerns for all of 2016. We do accept, however, that the two managers discussed the claimant's performance in the SPM role a week or two before her interview for the official secondment and, at that time, each shared concern about her capability. This was around the same time as Mr Carr had intimated to her that he was putting her on a formal PIP.

5.40.Around this time, Mr Carr began seeking advice from HR about the pregnancy and then, later, performance. We regard these exchanges as significant in understanding what was in Mr Carr's mind at the relevant time and we set out the notes of the key contacts. Each contact created a new HR advice "case". The notes remained available to Mr Carr after each discussion and very often he would revisit the same case. There is no hint that he reverted to HR at any time to say they had misunderstood him or otherwise to correct the information contained in the notes of their discussions. We regard the notes of the exchanges as accurately reflecting the points of discussion, albeit in bullet point form.

5.41.The first contact with HR is on 28 July 2016 when Mr Carr received advice from an HR adviser Eleanor Thompson [104n]. This follows the claimant's period of maternity related sickness absence. He is advised to undertake a return to work interview and monitor with a view to referring to Occupational Health if further maternity related issues arise. We note there is no mention of poor performance within the exchange yet there does seem to have been some discussion about the job requirements.

5.42.On 2 November 2016 Mr Carr contacted an HR adviser called Zohaib Ali. The notes are again recorded [115(hh)]. Mr Carr reported how the claimant was pregnant, worked in a technician role, no risk assessment had been undertaken and he wanted to know "what adjustments can be made as she worked on track". Pausing there, we find in this conversation Mr Carr must have already formed a view that the claimant would be returning to her trackside technician role. The report to HR makes no mention of either the fact she was informally undertaking the SPM role or, significantly, any underperformance concerns he had. Mr Ali advises about the need for a Mat B1 form and that Mr Carr should follow the maternity related advice on the "Connect website" and undertake the maternity risk assessment.

5.43. Mr Carr returns for further advice on 8 November 2016 [115gg]. The notes now refer to her "current role being temporary and she has been under performing". It records how Mr Carr was "considering moving her to an alternative role which involves working trackside". No risk assessment had been undertaken. Whilst Mr Carr gives a little more context to his question and refers to the claimant's current informal secondment, it is clear that the view remains that she will not be continuing in the SPM role. Mr Ali advises he should undertake a risk assessment and review it periodically, that he should manage the underperformance, to meet with her before looking to relocate her and to speak with her informally about all these matters. Mr Carr stated what he did was following HR advice. We cannot see that he followed this advice.

5.44.On 23 November 2016 Mr Carr obtained further advice from Mr Ali [512-513]. He states how the claimant had been underperforming for the last 6 months. We understand that to mean from around May 2016. It describes this underperformance in terms of "missing deadlines and not being proactive enough". He confirms he has not been managing her underperformance to date. Mr Ali advises that he hold an informal meeting, document his concerns from which he should be able to decide if a formal performance improvement plan ("PIP") is required. Again, we cannot see that events unfolded as HR had advised.

5.45.Mr Carr reported back to HR on 6 December 2016. He had that day held an informal meeting with the claimant. We find this meeting was not a two way exchange to informally discuss performance, but simply for the purpose of Mr Carr informing the claimant that he had already decided to implement the formal PIP. In other words, whatever concerns he may have had, he never sought to raise them with the claimant or otherwise manage them in any way short of the formal PIP process. We find it particularly significant that in this record, his concerns about poor performance are expressed as having arisen only since October 2016. This is at odds with his account to HR only 2 weeks earlier that he had been concerned about her performance for 6 months. The nature of the concerns are now put in very serious terms which we find at odds with the fact he has not raised anything with the claimant before this date and also the inconsistency of the age of these concerns. He expresses how matters have not been progressed on certain jobs, materials had not been ordered and that she has been ill a number of times which he acknowledges was maternity related but suggest she should have delegated her tasks during her absences. He concludes with a statement that the severity of his concerns was such that "he does not feel confident in her and has asked other people to deliver projects due to her unreliability". Despite this extreme vote of no confidence, he then seeks to reassure her that this would not have any impact on the interview for the SPM secondment. Bizarrely, his reasoning for this was that the interview was competency based (described variously as "competency" or "capability" based). We did not understand how that could be a basis for separating the two. If anything, it seems to us that a competency based interview would be likely to bring into sharp focus any perceived deficiencies in displaying those competences in the workplace. Mr Carr informed HR that he has "recommended" a PIP to the claimant, as if it was her choice or something that an employee may request or voluntarily seek out. Mr Carr was not able to explain to us what he meant by recommend. We find this is symptomatic of Mr Carr's naivety as a manager.

5.46.There was no further discussion about Mr Carr's concerns until he handed the written PIP to the claimant on 20 December 2016, the day of the SPM interviews. We find Mr Carr's view of the claimant will have come as a complete shock to her and we accept her evidence that it knocked her confidence significantly and, particularly, in her dealings with Mr Carr. This effect was continuing at her interview for the post 2 week later. We find there is a causal link between this state of affairs and what the interviewers would describe as her being "lacklustre".

5.47.The respondent has a comprehensive performance improvement policy and procedure [100(a)] which is supplemented with managers guidelines. Both open with a general principal that informal discussion with the employee is the best way to resolve issues and should be exhausted before embarking on the formal

stages.

5.48.In evidence before us, there was challenge to the substance of the alleged performance issues relied on by Mr Carr. We were not satisfied by Mr Carr's evidence or that his answers pointed to any evidence that substantiated his concerns on any reasonable grounds – particularly to the extent that he latterly described losing confidence in her. Where there was some suggestion of work not being done by certain deadlines or attending certain meetings, it seemed to be related to episodes of sickness absence which Mr Carr acknowledged was maternity related and was likely to have had an impact. The period of time these concerns were now said to have been present coincided with a number of emails to the claimant and the wider team in which the work and efforts of the claimant seemed on any objective reading to be being praised by him and held up as examples of good practice. Overall, we found Mr Carr's evidence of poor performance to be unconvincing. Something else was causing him to act as he did. We found that to be partly in the promises he had made to the TU to return the claimant to the trackside team and partly in the fact of her pregnancy and the consequences of her maternity leave.

5.49.The advert for the formalised SPM secondment went live on 17 October 2016 [115e] with a closing date of 31 October. There was some sort of technical hitch in publishing the advert and it had to be re-advertised which extended the closing date to 9 Nov 2016 [115(ff)]. We find this was unrelated to the issues in this case and unavoidable.

5.50.The claimant applied for the post. She was one of five candidates. Mr Barr the TU representative also applied although he would later withdraw. The interviewers were Mr Carr and Mr Elvey and the interviews took place on 19 and 20 December 2016.

5.51.The respondent operates a very formalised selection process. The interview notes are recorded in a pre-printed booklet completed for each candidate by each interviewer. Each candidate is scored against 7 competencies (also referred to as criteria or capabilities in the interview documentation). Each is scored out of 5 where 1 indicates strong negative evidence of the competency and 5 strong positive evidence. Each competency is made up of a number of sub-factors, also scored on the same scale. The overall competency score is arrived at as a mean of all the sub factors of that particular competency. Some competencies have more sub-factors than others. For example, the competency of "motivational fit" is made up of 9 sub-factors. Others have 12 sub-factors. The capability scores then inform the overall interview score for the candidate. The evidence for each of the 7 competencies comes from the answers given to one open question asked of the candidate save in respect of "motivational fit", where 5 set questions were asked, and "technical expertise" where two technical questions were asked. There is no weighting between competencies.

5.52.As we describe it above, there is a high face validity in this process. It is well structured and appears semi-scientific. It appears to produce an objective outcome. However, as with all interviewing process, it is no more than a means structuring and evidencing a series of inevitably subjective assessments made by the interviewers towards an outcome which is then capable of some explanation. The claimant took issue with how she was scored compared to the other four candidates. We were invited by Mr Ross to embark on a detailed analysis of the scores attributed to various candidates based on the answers recorded and to

consider how the individual candidates *ought* to have been scored based on their answers in order to arrive at a different outcome to the recruitment process. We declined to do so in that level of detail. The process is necessarily subjective and it would be wrong for us to begin to substitute our assessment of candidates based on the notes of their answers to import different scores. We further observed that the 1-5 scale being applied without weighting had a statistical bias towards the mid-point such that the candidates were likely to end up in a narrow band as, in fact, they did. However, Mr Ross's argument was not without force in the context of us being satisfied that the selection process was a genuine assessment, albeit subjective, of the four candidates' capabilities. Our view on that could become particularly important should the legal burden shift to the respondent. We therefore did find the analysis a useful means of testing in evidence the apparent objectivity of the end result. In that regard, we found that the process did not stand up to a great deal of enquiry before the initial high face validity of the process was undermined.

5.53.In the first instance, there were some examples where a candidate's score and the record of their answer invited some questions. Whilst we had declined Mr Ross's invitation to re-score the process, it was immediately apparent to us why this point was taken. In one such comparison for the competency "communicating and understanding others" the question sought examples of changing the opinions of a manger or stakeholder. One candidate answer was that she didn't think she had changed anyone's mind but hoped to change the minds of the interviewing panel. The claimant gave an example from experience which the interviewers described in evidence as an acceptable answer. The other candidate scored higher than the claimant.

5.54.Secondly, we rejected the assertion that the two interviewers' scoring was undertaken independent of each other. We were struck by the similarity of the scoring. We found it more likely than not that there was discussion about the candidates throughout the process and including the scoring process. There may not be anything inherently wrong in such a joint approach but to the extent that an independent approach to scoring could point away from any individual bias, we do not find that to be the case here.

5.55.Thirdly, there were some competencies where the questions asked of the candidates simply did not provide any evidence either way of some of the sub-factors that were being assessed. Nevertheless, those sub factors were all given a score. That means, contrary to the intention of the selection process, the interviewers must have formed a view based on some pre-existing opinion of the candidate imported from outside the selection process. Both interviewers accepted this and that it made the process highly subjective.

5.56.Fourthly, there were examples where the claimant was recorded as giving essentially the same answer as another candidate to the questions posed by the "motivational fit" competency. The witnesses accepted there was "no discernible difference in their answers". One might expect the scores to be equally comparable but the claimant scored 2.5, the other candidate 4. Both interviewer maintained that they had scored as they felt the candidates merited. There was no convincing explanation for the difference. Mr Carr described it as being because of the way the claimant came across in interview. Similarly, Mr Elvey described her as lacklustre, no enthusiasm or positivity from the claimant. In understanding those comments, we found it significant that the claimant had been told only 2 weeks earlier that she was seriously underperforming to the

point that Mr Carr had lost confidence in her and the interview date itself was the very day that Mr Carr would formally issue the claimant with the PIP. Her previous level of self-confidence had been significantly depressed by those events and we accept her evidence that it affected the way she came across.

5.57. We cannot ignore the fact that both interviewers held negative views about the operational effect of the claimant's maternity. Either that it rendered training "wasteful" or that her appointment to the secondment was "unsuitable". Mr Carr had by then stated to HR on more than one occasion how the claimant was returning to trackside work imminently. We see no reason for not inferring that the same opinions were not present and influential during the process of scoring the claimant at interview.

5.58. For each interview, the aggregate headline scores out of a maximum 35 were as follows (shown as the overall average score, then Mr Carr's and Mr Elvey's individual scores):-

a. Cath Falder 27 (27, 27)
b. Lisa Bruce 24.25 (24, 24.5)
c. Jade Berkin 23.5 (23.5, 23.5)
d. The claimant 20.25 (20.5, 20)

5.59. There was more to the interview process than the scoring of the 7 competencies. The competency questions were topped and tailed with introductory comments and closing questions. One of the closing questions asked the candidates:-

> ***"Is there any additional information about you that would affect your suitability to perform in the role you have applied for?"***

5.60. The claimant's answer was "no". Mr Carr then pressed her, asking if she was sure and to think very carefully. We accept the claimant's interpretation of this pressing of her initial negative answer. We find it was because he had something in mind that would affect her suitability. She then answered that she was going on maternity leave on 3rd February for 11 months. Mr Carr did not press any further and we are satisfied that that was the issue in Mr Carr's mind. We can be confident in that conclusion as he would say as much to the later grievance investigation that the fact she was pregnant and going on maternity leave made her unsuitable for the appointment.

5.61. On 22 December 2016, the claimant was informed she was unsuccessful. The successful candidate was Cath Falder. In February 2017, she then declined the secondment offer. By 1 April 2017, Mr Berkin's secondment to the Bedford WDM role had ended early he returned to his substantive role as Derby SPM.

5.62. The claimant had commenced her maternity leave on 3 February 2017 after a period of sickness absence due to work related stress. As a result of her no longer being in the secondment position, her maternity pay was calculated on the lower earnings from her substantive post. The events had created an awkward relationship between the claimant and her colleagues and she was unable to share the joy of her new arrival with work colleagues as she had done previously with her first child.

5.63. The claimant lodged a grievance on 12 February 2017. She raised concerns

in substantially like terms to the claim now before us. An independent manager called Andy Lucas was appointed to investigate the grievance. We have not heard from him in evidence. He met with the claimant, Mr Carr, Mr Berkin Mr Elvey and Jade Berkin.

5.64. During the investigation interview, we note certain inconsistencies between Mr Carr's evidence to us and what he told the investigation. In some cases, they relate simply to the chronology of what happened when. In other cases, the variation is more significant. In the investigation, he denied laughing in response to the claimant's announcement which in evidence he accepts happened. During the same interview Mr Carr confirmed that he pushed the claimant to rethink her answer in response to her initial negative response and suggested her pregnancy may be a reason for her to be unsuitable for the post.

5.65. Mr Elvey confirmed that he removed the claimant from the first aid course because she was going on maternity leave and it would be wasteful. Which we understand to mean because part of its 3 year certificate would be when she was on maternity leave.

5.66. Mr Lucas prepared a grievance outcome report dated 28 June 2017. The claimant received this on 12 July 2017. It appears to be a thorough report summarising the process, evidence and his analysis and conclusions although at both this stage, and the appeal that would follow, the allegation of discrimination appears to be premised on the bases of the claimant's sex, and not her pregnancy. Mr Lucas concludes that he had found multiple failings in the management of the claimant and, in particular, identified the following 5 points:-

a. The claimant should not have been given a formal PIP. He rationalises this as being due to Mr Carr's misunderstanding, rather than discrimination and bases it principally on the fact that the claimant was not in a substantive post.
b. Mr Carr should not have conducted the earlier interview at his home and on his own.
c. That the pregnancy risk assessment was not carried out correctly due to misunderstanding.
d. That compliance with team briefs had lapsed.
e. The changes to the claimant's work pattern was attempted as a result of a lack of understanding of the family friendly process.

5.67. Mr Lucas concluded that he had found no evidence of direct sexual discrimination but did find a need for action to improve the competence of managers of staff. He did not explicitly address his conclusions in respect of discrimination due to pregnancy or maternity. Overall, the grievance was rejected.

5.68. The claimant appealed against Mr Lucas's conclusions to reject the grievance. On 16 August 2017, she set out her grounds of appeal [447]. In summary, she sought to show how the multiple failings identified were not simply misunderstandings but discrimination. Perhaps most notable was the fact that the explicit acknowledgment by Mr Carr that her maternity leave rendered her unsuitable for appointment was not mentioned in the outcome at all when he concluded there was no discrimination.

5.69. The grievance appeal took place on 12 September 2017 before Mr Gee.

Again, for the purpose of testing whether the claimant had been discriminated against he initially adopted a comparator of the gender of the other candidates at interview, all of whom were female. Mr Gee took time to explore the points further with Mr Carr. In respect of his comments about the claimant's pregnancy rendering her unsuitable, he did not challenge whether Mr Lucas had accurately recorded Mr Carr's views or not. We find he must have accepted Mr Carr did say this. Mr Gee's approach was instead to ask him whether he would have offered her the role if she had had a good interview and whether her going on maternity soon into the secondment would have had a baring effect. Unsurprisingly, Mr Carr answered yes and no respectively. Mr Gee told us how he accepted Mr Carr's honesty in the answers he gave him having been able to stare him in the eyes. We note that the whole rationale presupposes the integrity of the underlying interview scoring process.

5.70.Some further documentation was obtained before the grievance appeal was reconvened on 28 September 2017 for Mr Gee to deliver his decision. He agreed with Mr Lucas' conclusions in that he dismissed any sexual discrimination and went further to dismiss pregnancy related discrimination. In evidence, he characterised Mr Carr as incompetent but not malicious. He differed from Mr Lucas in finding that imposing the PIP was reasonable and relied in part on the fact that the claimant had signed the documentation which he interpreted to mean she had accepted it. Similarly, he took the view the claimant had agreed to the change in working hours, albeit finding Mr Carr was wrong to impose it. He found Mr Elvey's decision to remove her from the first aid course to have been reasonable as some of the 3 year duration would cover her maternity leave. The claimant's TU representative pressed Mr Gee about Mr Carr's explicit statement concerning her unsuitability for the post being due to her pregnancy. Mr Gee repeatedly said how having looked through the documents "he did not see that", meaning he did not interpret it in that way. He preferred to accept Mr Carr's explanation to him that pregnancy did not feature in her interview and relied on the fact that it was a competitive interview process which did not have regard to the PIP. Although Mr Gee was critical of Mr Carr in his evidence, the impression we formed of the appeal process was that it overlooked matters that raised the issue of pregnancy, was protective of Mr Carr and relied on the outcome of the interview process as if it were an independent objective measure that could not be tainted by subjective views or opinions, including discriminatory views.

6. <u>Law</u>

6.1. Section 18 of the Equality Act 2010 provides, so far as is relevant:-

> **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) ...
> (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)..

6.2. Section 47C of the Employment Rights Act 1996 provides, so far as is relevant:-

47CLeave for family and domestic reasons.
(1)An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.
(2)A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—
(a)pregnancy, childbirth or maternity,
…
(b) ordinary, compulsory or additional maternity leave,
…
(3)...
(4)Regulations under this section may make different provision for different cases or circumstances.
(5)..

6.3. The reference to regulations is to the Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312) which, by regulation 19, defines further the prohibited reasons for which a detriment claim under s.47C will be made out.

6.4. We accept Mr Stone's analysis that whilst the two statutory tests are not identical, and there are differences in the respective burden of proof provisions, the differences are unlikely to be significant in this case. If the claimant satisfies us that the reason why the treatment/detriment occurred was in some material sense because of the pregnancy, the claim will succeed. In respect of the s.18 claim, if she establishes facts from which we could conclude that the treatment was because of maternity or pregnancy, the burden shifts to the respondent to show it was in no sense whatsoever because of the maternity or pregnancy. In respect of the s.47C claim, by s.48(2) it is for the respondent to show the ground on which any act or deliberate failure to act was done.

6.5. We remind ourselves that the test of causation is not a but for test, but a reason why test. It is not enough that the treatment happens during the protected period or that there are circumstances that would not exist but for the pregnancy, but instead that the detriment or unfavourable treatment occurs because the pregnancy influenced the decision making in some material way. It is not enough that there has been unreasonable or unfair treatment. There must be a causal connection between the treatment and the pregnancy/maternity.

6.6. We must also consider the question of time limits in respect of some of the earlier allegations which are prima facie out of time, having been presented more than three months after the matter complained of. The claim was presented on 11 April 2017 following early conciliation between 12 February and 12 March. Consequently, events occurring before 13 November are prima facie out of time. The tests for applying a judicial extension of time are different for each claim but the claimant does not seek this. Instead, she relies on the earlier acts forming part of conduct extending over a period (s.123(3)(a) Equality Act 2010) or an act extending over a period (S.48(4)(a) Employment Rights Act 1996) the last/end of which was in time.

7. Discussion and Conclusions on the Issues

7.1. Against those directions and findings of fact, we consider the remaining allegations as they support the core issue in the case, namely whether the claimant's non-selection was tainted by the prohibited reasons.

7.2. There is no dispute that all the allegations arise during the protected period for the purpose of s.18 of the 2010 Act. We are satisfied the employer, through Mr Carr in particular, had knowledge of the pregnancy from 7 July 2010.

Para 10a – Mr Carr's Response to the Claimant's Announcement

7.3. We have found that Mr Carr's response to the claimant's announcement of her pregnancy was to laugh and to ask her whether he should be happy. What appeared to be a potential reason for his alleged awkwardness, relating to the claimant's new relationship, was dismissed by Mr Carr. We had to assess whether this amounted to unfavourable treatment and/or a detriment and we were divided. The majority (Clark & Bonser) were satisfied the treatment in the form of this public response in front of others was capable of amounting to unfavourable treatment and a detriment. The majority was not satisfied that Mr Carr had been able to explain why this news caused him shock or embarrassment. An objective view of unfavourable treatment, taking into account the claimant's perception, led to the conclusion it was unfavourable treatment because of the pregnancy. The majority note that pregnancy and maternity are protected characteristics which are excluded from the scope of harassment under s.26 Equality Act 2010. The concept of unfavourable treatment under s.18 is wide enough to incorporate treatment that, in other contexts, could be brought as harassment. The minority (Golding) was not satisfied that the conduct amounted to unfavourable treatment or a detriment principally on the basis that the news was out of the blue and there was scope for a natural, if clumsy, response in a moment of awkwardness which should not give rise to liability under either Act.

7.4. However, this matter took place on 7 July 2016 and the tribunal is agreed that it is out of time unless it forms part of conduct/an act extending over a period of time the end of which is in time.

Para 10b – Mr Carr's Response to the Claimant's Sickness Absence

7.5. We are not satisfied that this allegation is made out. We have found that Mr Carr did not receive the full message and did not have the full context of the reason for the claimant being off sick. In any event, it is common ground that there is an established procedure for reporting absences which was not followed in this case. There is no exception for pregnancy related absence and every reason to conclude that a materially similar response would have happened irrespective of the claimant's pregnancy.

7.6. We are satisfied therefore that the pregnancy was not a material reason why he contacted her about the procedure. The reason for the response is the failure to report an absence in accordance with the procedure and not the pregnancy even though, but for the pregnancy, the claimant would not have been absent on that day. Mr Carr's response can be seen in that context and states no more than the need to follow the procedure. We have considered whether the fact the absence occurs shortly after the announcement that the claimant was

pregnant should have caused him to pause for reflection before contacting the claimant about her failure to follow the procedure. That may have been a better course in hindsight but it does not mean that the reason why or material cause of the failure to do it in this case was the pregnancy. We also have in mind Mr Carr's profuse apology later that day when he does learn of the reason why she was in hospital which reassures us that the message sent in the morning was not in any way because of her pregnancy.

Para 10d - Increasing the Duration of the Secondment from 3 to 6 to 12 Months

7.7. The claimant alleges that the increase in the duration of the secondment was only done in order to ensure that the majority of the period coincided with her maternity leave.

7.8. We have been left with some concerns about the motives and proposals for the formalisation of the secondment arising from the agreement between Mr Carr and the TU Rep, Mr Barr. Both preferred a short secondment duration of 3 month's. To that end, the claimant and Mr Carr would appear to have wanted the same thing. However, we see the motives as being quite different. The reason Mr Barr wanted the shortest secondment was because it would bypass any formal selection process and whilst this would enable him to put the claimant in post immediately, it carried the consequence that after 3 months the secondment would come to an end and the claimant would then return to her trackside role. That was the essence of the agreement he struck with the TU. There does therefore, seem to us to be some pernicious intention to bring about that aim, but it is not what this allegation raises nor do we conclude that it was in any event related to the claimant's pregnancy. It was simply a response to the TU concern that the informal arrangement had gone on for four years and the team were both (a) deprived of similar opportunities and (b) suffering in their own workload as they were one of their number down.

7.9. In our judgment, we do not find any basis for establishing a prima facie case that the reason for the increase in secondment duration was in any way relating to the claimant's pregnancy. The reason why the proposed secondment stretched from 3 to 6 to 12 months is because of a combination of the involvement of HR seeking to bring the process into line with the respondent's 2016 secondment policy and also what was happening with Mr Berkin's own secondment. Whilst the two secondments seemed to be operating on different timescales to start with, notwithstanding their obvious close interconnection, the respective lengths of secondment were harmonised during the preparatory stages and eventually both operated on a 12 month placement. It seems to us that there was an obvious practical need to make the two secondments coterminous and that is what eventually happened. Indeed, it seems Mr Carr eventually acknowledged the fact that they both interlink and the early conclusion of the WDM role could have the effect of cutting the SPM secondment short also. There is nothing before us to fix the remote HR advisers, who steered the process in this direction, with any discriminatory intent and we have concluded that the increase in the secondment duration was not in any way because of the claimant's pregnancy

Para 10i – Removing Flexible Working Hours

7.10.The imposition of a change of work pattern in these circumstances is properly characterised as a detriment or unfavourable treatment. This was a

situation that arose out of Mr Carr's inexperience as a manager and his failure to establish the contractual basis of the working pattern being undertaken by the claimant. He imposed a unilateral variation of terms on the claimant.

7.11.It seems to us likely that he approached her working arrangement by reference to his own informal flexible working pattern which had not resulted in a contractual change. His reference to needing to renew it every year is drawn from his own experience and indicative that he did not consider whether she had the benefit a contractual variation confirming the work pattern. He was no doubt reinforced in his approach by what he perceived as his business need to have the claimant in work 5 days per week and the fact that she did not stand on her rights.

7.12.We accepted that she acquiesced in the change albeit out of a sense of not wanting to rock the boat at this sensitive time and also because she could not locate any of the official documentation but, in any event, whether an employee goes along with the treatment or not, does not prevent it from being a detriment.

7.13.Having considered the surrounding circumstances, we are not satisfied that this arose because of the pregnancy. We are satisfied it was mishandled but was linked to his commitment to the TU to resolve the threat of the collective grievance. Whilst that brings with it many negative implications, it is a state of affairs that had been building for some time and would have occurred whether or not the claimant was pregnant. The coincidence of pregnancy with the change does not mean it is the reason for it. We are satisfied this is not pregnancy related.

Allegation K – Raising Performance Concerns with the Claimant
Allegation N – Placing the Claimant on the PIP

7.14.These two allegations are two parts of the same issue and we have considered them together.

7.15.We accept the respondent's submission that, in a general sense, a PIP has a supportive objective to help an underperforming employee improve their performance to an acceptable standard. This does not mean that there can be no detriment in a PIP which, to be fair, the respondent accepts. We are satisfied that it can present a detriment or unfavourable treatment either by virtue of its proper operation which exposes an employee to a risk of formal warnings and dismissal and/or, as in this case, where there is a detriment in bypassing the initial informal stages and going straight to the formal procedure.

7.16.We have so far identified in our findings reasons for the various allegations which are not in any way materially related to the fact of the claimant's pregnancy. In large measure, much of what happens through the second half of 2016 arose as a result of the TU complaint about the use of long term informal secondments for the claimant's benefit. In fact, it is central to the respondent's case that everything that the claimant complains about only happened in response to the collective grievance, and not her pregnancy. We have reached the conclusion that whilst it was indeed the threatened collective grievance which started matters along the path they took, somewhere along that path the pregnancy began to materially influence Mr Carr's decision making as the formalisation of the secondment progressed and increasingly became something different to the preferred 3 month placement. The advert was initially delayed

through no fault of Mr Carr but this pushed the secondment back. All the time the claimant's impending maternity leave was getting closer and it became clear that this would substantially overlap with the period of secondment, something we know Mr Carr regarded as rendering her unsuitable.

7.17. Until then, the claimant was someone who had previously been a good fit for the post and this would have been apparent to anyone who knew the circumstances. She had been doing it for four years as the role had grown and had been regarded as appointable to the post after the earlier dummy run interview for the Bedford SPM. There was significant confusion and inconsistency in Mr Carr's evidence concerning the nature of the alleged failings, their duration and their seriousness. We have rejected as a fact that there were performance concerns in May 2016. We have found nothing was raised informally with the claimant. By the time matters are raised with the claimant in December 2016, they are described in particularly serious terms. If they genuinely did exist, we struggle to understand why even a novice or inexperienced manager would have sought to raise them with the worker in some sort of way before embarking on the formal PIP. The respondent's policy accords with the tribunal's experience of industrial good practice in that it encourages managers to raise performance concerns informally before embarking on a formal procedure. Mr Carr had done nothing. He is inconsistent with his accounts to HR as to how long these concerns have lasted. When he does articulate the nature of his concerns, they are in part related to absences due to pregnancy related illness. Mr Lucas' view was that Mr Carr was wrong to imposes the PIP. Significantly, We found Mr Carr had formed a settled view that the claimant would be returning to her trackside role before the interviews took place. She could not have been successful.

7.18. We are satisfied that it is appropriate to draw from these facts the inference that the pregnancy was now a material factor getting in the way of the claimant being appointed to the post and that Mr Carr needed to justify her not being appointed. He sought to do so by way of the allegations of poor performance. The concept of her unsuitability was discussed with Mr Elvey two weeks before the interviews. He had his own views of the impact of the maternity on operational needs. We are satisfied that all those facts mean we could conclude a material reason was the claimant's pregnancy and as such we must so conclude unless the respondent established it was in no way whatsoever the reason.

7.19. We conclude that the respondent has not shown the reason for the performance concerns was in no way whatsoever by reason of the pregnancy or not materially influenced by the pregnancy. We acknowledge that there were differing internal views of the appropriateness of the PIP between Mr Lucas and Mr Gee but we did not find Mr Gee's approach to the grievance appeal and his reasoning to be sufficient to displace our conclusion. For that reason this element of the claim succeeds.

Allegation L – Being pressed on anything that could affect her ability to do the job
Allegation O – Not understanding the feedback after her unsuccessful interview.
Allegation Q – Not being offered the post as second choice

7.20. We have considered these matters together as part and parcel of the circumstances surrounding the core issue in the case, namely the claimant not being selected for the secondment post. As discrete allegations of detriment/unfavourable treatment, we did not find all of them easy to follow. For

example, it seems to us that not being offered the post as a second choice does not mean that the claimant accepts she was second choice, but that she was deprived of appointment on two occasions. First at the December interview, then in February after Kath Calder declined the post. Similarly, in respect of allegation O, the fact she does not understand the reason given for her not being appointed seems not to be a detriment in its own right, but an argument in support of her case that her pregnancy influenced the decision not to appoint her.

7.21. There can be no dispute that not being selected for a position applied for is detrimental and unfavourable treatment. As is usually the case, the real issue is the reason why.

7.22. The obvious issue in this case is why it was that she was pressed to consider the impact her pregnancy would have on her ability to undertake the role. That was answered explicitly by Mr Carr during his interview with Mr Lucas. It was because the pregnancy made her unsuitable for the role. We don't see how we can go behind that frank statement. However, it could be that that was not determinative of the outcome and we have gone on to consider whether Mr Carr's opinion can be separated from the fact that the claimant scored the lowest in the interview so that it could be said had she not been pregnant she would, in any event, have not been selected. We are not able to accept that proposition. Whilst we declined Mr Ross's invitation to effectively rescore the interviewees, we found force in the points he took in cross examination of the two interviewers and the nature of their answers did not dispel the concern that the scoring of the claimant was itself negatively influenced, directly or indirectly, by the fact of her pregnancy. Both interviewers held a certain negative view about her pregnancy. Mr Carr's was that it rendered her unsuitable for the secondment. Mr Elvey had already decided it was wasteful to renew her first aid training. Mr Carr had made clear in his contacts with HR that the claimant would be returning to the Trackside role imminently. The two men worked closely together and maintained a common position in their evidence, particularly in terms of their recent exchange about her capability in the role, at least part of which was accepted as being related to pregnancy absence. The examples of where the claimant seemed to answer either better or as well as the other interviewees, yet scored lower, were left without credible explanation. The view that she was lacklustre, has to be seen against the very recent notification that Mr Carr had lost confidence in her and she was being placed on a formal PIP. We are satisfied that her pregnancy was the reason for her scoring as she did and we would hold that that is materially the reason why she received the scores that she did and, consequently, was not appointed. Alternatively, expressing that in terms of the shifting burden, the facts as we have found and inferred are such that we could conclude discrimination has occurred. The respondent's route to rebutting that prima facie case is through the integrity of the interview process. For the reasons already given, we do not accept the integrity of the scoring remains intact and available to be relied on to show the outcome was in no way whatsoever materially related to pregnancy or maternity.

7.23. We do not take the view that it adds anything to deal with these three allegations individually. Instead, we take an overall position that the claimant's interview scoring for the secondment and therefore the selection decision made was materially influenced by the fact of her pregnancy and impending maternity leave.

8. <u>Time Limits</u>

8.1. The matters that we have found made out relate firstly to the decision not to appoint the claimant following the interview on 20 December 2016. That is in time.

8.2. Secondly, we have found the decision to instigate poor performance procedures with the claimant leading to the implementation of the formal PIP to be made out. Notice of the PIP was first given on 6 December and put in writing on 20 December 2016. Both those dates are in time.

8.3. Thirdly, the majority concluded that there was unfavourable treatment and detriment in Mr Carr's response to the announcement of the claimant's pregnancy on 7 July 2016. That is out of time. There is no over-arching state of affairs which links his spontaneous response on that date to what we have found to be later acts of discrimination/detriment which are in time. The only fact which links them is that they all involve Mr Carr and we have found he was materially influenced by the fact of her pregnancy in his later management decisions. The fact that there is a common player in a series of acts or omissions will often be enough to establish a continuing act where they are fixed with a discriminatory motive or intention. However, we do not regard that as being so in this case despite our findings about Mr Carr's later actions. We accept Mr Stone's submission drawing on *Hendricks v Commisioner of the Police of the Metropolis [2003] ICR 530* that a distinction must be drawn between matters that form part of continuing discrimination and isolated events. In this case the later discriminatory events arose because of the alignment of other factors. They were principally the relationship between the plans for the formalisation of the secondment and the claimant's pregnancy and maternity leave which evolved from late August onwards. Despite our criticisms of Mr Carr as a manager, we reach no findings that he harboured any underlying discriminatory motive in respect of pregnancy or maternity. We do not see any basis for linking the later events to the spontaneous response he made on 7 July. It was an isolated event and not part of an act extending over a period nor a continuing act. It is therefore out of time.

9. Conclusions

9.1. The consequence of these conclusions is that the claims brought against the respondent succeed in part. We are conscious that there has been unavoidable delay in deliberating and promulgating our decision and that, during that time, the claimant will have returned to work to her substantive trackside role after her maternity leave. There is an ongoing relationship between the parties and we hope that the parties are able to agree an appropriate remedy between themselves. In case that is not possible, a remedy hearing will be listed before this tribunal.

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Employment Judge Clark
Date 29 May 2018

JUDGMENT SENT TO THE PARTIES ON

04 June 2018

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FOR THE TRIBUNAL OFFICE