



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

AND

RESPONDENT

Mrs N. Town

**The Chief Constable of Devon
and Cornwall Police**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: EXETER

**On Tuesday, the 18th December 2019
and Wednesday, the 19th December 2019**

Employment Judge: Mr David Harris

**Members: Mr J.H. Williams
Mrs P.J. Skillin**

Representation:

For the Claimant: Ms B. Criddle (counsel)

For the Respondent: Mr J. Arnold (counsel)

JUDGMENT

- 1. There shall be judgment for the Claimant in her claim of pregnancy discrimination under section 18 of the Equality Act 2010.**
- 2. There shall be judgment for the Claimant in her claim of indirect discrimination under section 19 of the Equality Act 2010.**

REASONS

Background and issues

1. The Claimant is a serving Police Constable with the Devon and Cornwall Police. By her Claim Form presented on the 1st May 2018, she brings a claim of discrimination on the grounds of pregnancy and sex against the Respondent. In particular, she brings a claim under section 18(2) of the Equality Act 2010 that she has been the subject of unfavourable treatment because of her pregnancy and a claim under section 19(1) of the Equality Act 2010 that a provision, criterion or practice has been applied to her, which is discriminatory in relation to a relevant protected characteristic of the Claimant's: namely, sex.

2. The alleged unfavourable treatment that forms the basis of the claim of discrimination under section 18(2) of the Equality Act 2010 was the transfer of the Claimant from a frontline and operational role as a Police Constable in the Respondent's "Response Team" to an office-based role in the Respondent's Crime Management Hub as a consequence, on the Claimant's case, of her pregnancy, about which notice had been given to the Claimant's line manager, Sergeant Roper, on the 21st November 2017. The due date in respect of the pregnancy was the 1st July 2018.

3. The claim of indirect discrimination under section 19(1) of the Equality Act 2010 is brought on the basis that the Claimant's transfer to the Crime Management Hub was as a result of the application to her of a provision, criteria or practice that put women at a particular disadvantage.

4. The claims of discrimination are disputed by the Respondent. It is accepted that the Claimant was transferred from the Response Team to the Crime Management Hub some time after she had given notice of her pregnancy but it is asserted by the Respondent that the transfer was not because of the pregnancy but was because of a combination of the Claimant's restrictions occasioned by her pregnancy and the Respondent's business needs. The Respondent contends that it regularly moved police officers who were restricted and that it did so without any regard to the cause of the restriction, whether it be illness, injury, pregnancy or some other reason. On the Respondent's case, it was the Claimant's restrictions and not her pregnancy that was the real reason or core reason that triggered the possibility of a transfer to the Crime Management Hub. In respect of the indirect discrimination claim, the Respondent disputed that there was a provision, criterion or practice which put women at a particular disadvantage and/or contended that if there were such a provision, criterion or practice, then it was a proportionate means of achieving a legitimate aim.

The issues and agreed facts

5. Following a Case Management Preliminary Hearing on the 24th July 2018, the parties agreed a list of issues and also prepared a list of agreed facts.

6. It is helpful to set out the agreed list of issues in this judgment:

Limitation

1. The Respondent accepts that the claim is in time for any act or failure to act after 2 December 2017, including the decision of the Respondent taken around 19-22 December 2017 to move the Claimant from her Response role to the Crime Management Hub and the lack of return of the Claimant to a Response role following the risk assessment on 10 February 2018 (the Posting).

Direct pregnancy discrimination (s.18)

Unfavourable treatment

2. It is accepted that the Posting took part during the protected period.
3. Did either (i) the decision to move the Claimant from her Response role to the Crime Management Hub; and/or (ii) the lack of return of the Claimant to a Response role following the risk assessment on 10 February 2018 amount to unfavourable treatment?

Because of the pregnancy

4. If so, was the unfavourable treatment because of the Claimant's pregnancy?

Indirect sex discrimination (s.19)

PCPs

5. Did the Respondent apply, or would have applied, the following PCPs to male and female front line police officers who for reasons relating to their health or physical or mental conditions are treated as restricted officers:
 - 5.1 transferring restricted officers generally or the Claimant specifically from a response role to the CMH;
 - 5.2 transferring restricted officers generally or the Claimant specifically from a response role to the CMH regardless of the officer's ability and willingness to undertake a response role;
 - 5.3 transferring restricted officers generally or the Claimant specifically from a response role to the CMH or SODAIT;

- 5.4 transferring restricted officers generally or the Claimant specifically from a response role to the CMH or SODAIT regardless of the officer's ability and willingness to undertake a response role?

Particular disadvantage

6. If all or any of the PCPs set out above were applied or would have been applied by the Respondent, did this place women and the Claimant at a particular disadvantage in that
 - 6.1 the Respondent will always treat pregnant officers as restricted officers; and/or
 - 6.2 it is reasonable for pregnant officers to take the view that it is to their disadvantage to be required to do work other than front line duties if a risk assessment does not require them to do that work?

Legitimate aims

7. Whether the following were legitimate aims in moving police officers off front-line duties while restricted:
 - 7.1 Protection of that police officer, his or her colleagues and/or members of the public;
 - 7.2 Compliance with both a common law duty of care and a statutory duty under the Health and Safety Act 1974;
 - 7.3 Protection of the reputation of that police officer and/or the Force;
 - 7.4 A more efficient police service – restricted police officers are better utilised elsewhere than front-line duties?

Proportional achievement

8. If so, were those legitimate aims achieved proportionally by the following:
 - 8.1 The removal of a restricted officer from the greater risk of harm as a front-line duty police officer is appropriate;
 - 8.2 The utilisation of a restricted police officer in a role more suited to his or her abilities during the restriction is appropriate and/or corresponds with a real need of the business. This was met in the Claimant's case with a transfer to the Crime Hub, a critically important role in terms of dealing with victims of crime as a first point of contact;
 - 8.3 The (resource and/or financial) cost of keeping a restricted police officer 'on establishment' where a fully-operational police officer could sit within that establishment is not possible in these times of scarce resources and/or limited budgets;
 - 8.4 Such moves give police officers an opportunity to develop their skills and/or careers in other areas;
 - 8.5 The Claimant's move to the CMH was proportionate – she would continue to work alongside people she already knew, and could align her shift pattern (subject to her restrictions);
 - 8.6 Police officers are liable to posting in any event; and/or
 - 8.7 Such moves are for no more than necessary – once a police officer is no longer restricted, he or she can be considered for front-line duties once again.

9. Whether there was an intention of the Respondent to discriminate?

Schedule 22 – statutory provisions: protection of women

10. Whether the following is acting under statutory provisions (protection of women) within the meaning of Schedule 22, paragraph 2(1)(a) and/or (b), 2(a) and/or (b) and (8):
 - 10.1 The Respondent has a statutory duty under the Health & Safety Act 1974 to protect the health and safety and welfare at work of his police officers and in particular pregnant police officers?

Chagger

11. Insofar as the Respondent could post the Claimant without discriminating, whether she would have been posted upon notification of her pregnancy?
The Respondent contends that insofar that the Tribunal finds that the Respondent exercised a discretion to post the Claimant, and that discretion was exercised in a discriminatory manner, then it is open to the Respondent to argue that he could have exercised his discretion to post the Claimant in a lawful manner. The Claimant contends that this does not identify how the Respondent could, and if so would, have transferred the Claimant without discrimination.
12. If so, what are % chances of such a posting occurring in any event?

7. The issue relating to the application of the provisions of the Health and Safety at Work etc. Act 1974 to the case was not pursued by the Respondent at the final hearing.
8. The Tribunal's decision in respect of the 'Chagger' issue was that that should fall to be considered at a remedies hearing, if required, and that the hearing listed on the 18th December 2018 should be confined to liability.

9. In addition to the list of issues, it is also useful to set out the facts that were agreed between the parties in advance of the final hearing:
1. On 21 November 2017, the Claimant notified her line manager, Sergeant Roper, that she was pregnant, with a due date of 1 July 2018.
 2. On 21 November 2017, Sergeant Roper conducted a risk assessment of the Claimant's role as a response officer in line with the Respondent's Risk Assessment Guide for Expectant Mothers.
 3. In accordance with that Guide, Sergeant Roper advised that the Claimant should be placed on restricted duties as a response officer in line with the control measures set out in the risk assessment (which materially replicate those in the Guide), namely that she should wear plain clothes; each job would be risk assessed and the Claimant should drop back on night shifts to assist with tiredness.
 4. On 21 December 2017, the Claimant was informed that the Respondent's Senior Management Team had decided on 19 December 2017 to move her to work in the Crime Management Hub ('CMH') in a non-operational and sedentary role. This decision (i) was contrary to the Claimant's wishes; and (ii) represented a move to a more restricted role than identified in the risk assessment.
 5. The Claimant sent off sick from 22 December 2017 to on or around 10 February 2018.
 6. On 10 February 2018, a further risk assessment was carried out which identified that the Claimant was complaining of stress and anxiety as a result of her redeployment to another role against her wishes and of suffering migraines which may be stress related.
 7. In or around April 2018, the Claimant raised a grievance about her move to the CMH. That grievance was upheld by Superintendent Downham on 22 April 2018. Superintendent Downham found as a fact that the Local Policing Area in which the Claimant works has a policy of transferring restricted officers from a response role to the CMH or SODAIT.
 8. The Claimant worked in a CMH role from on or around 10 February 2018 to 10 May 2018 when she was returned to a response role. She continued to deal with CMH 'overflow' work after her return to a response role until she went on maternity leave on 1 July 2018.

The chronology of material events from the documentary evidence

10. On the 19th July 2017, when writing to a pregnant officer referred to as 'A' in the Tribunal, Superintendent Samantha De Reya stated that the following principle was set and circulated to the Senior Management Team on the 21st September 2016:

“Restricted duties – If some is on restricted duties beyond two weeks they will be considered for a role in Crime Hub or SODAIT¹ to support reducing demand and crime management for the LPA. If there are exceptional reasons then this will be taken into account ...”

In her email to Officer 'A' dated the 19th July 2017, Superintendent De Reya explained that the above-cited principle had been implemented due to *“resourcing issues across the LPA”* and assurance was given to Officer 'A' that it was not directed at pregnant female officers. Superintendent De Reya, acknowledged, however, that the principle *“can impact upon them”* and so *“we always take individual circumstances in to account as part of decision making around individual moves”*.

11. The risk assessment that was conducted by Sergeant Roper following notification of the Claimant's pregnancy on the 21st November 2017 was to be found at page 61 in the hearing bundle. It recorded that the Claimant wished to remain in an operational role in the Response Team and it identified control measures that would enable that to happen: namely, *“plain clothes, risk assess each job, drop back on night shifts to assist in tiredness”*. It also stated that the Claimant was to be placed on *“restricted duties”* straightaway.
12. Anticipating that she may be moved out of the Response Team and into the Crime Management Hub, the Claimant prepared a letter on the 20th November 2017 (pages 58 to 60 in the hearing bundle) setting out her case as to why she should be permitted to remain in the Response Team in a restricted role. She acknowledged that it would not be suitable for her, whilst pregnant, to carry out her full response role, given that some duties would put her child and herself

¹ Sexual Offences and Domestic Abuse Investigation Team.

at risk, but she nevertheless set out her argument as to why, in her individual case, remaining in the Response Team on restricted duties ought to be considered by the Respondent. In support of her position, the Claimant quoted sections of the Respondent's policy on pregnancy risk assessment, which stated:

**“Total elimination is not necessary. Where an expectant mother wishes to continue with this type of work, the following control measures will reduce risk to a suitable level:
Expectant mothers should adopt plain-clothes dress and use unmarked vehicles. Interviewing victims of crime on Police premises significantly reduces the risk of assault to an expectant mother.
Taking statements in any non-confrontational situations, i.e. victims of crime or those assisting the public/police.”**

The full version of the Respondent's *Risk Assessment Guide for Expectant Mothers* was to be found at pages 62 to 66 of the hearing bundle.

13. Unbeknownst to the Claimant, at a meeting of the Respondent's "People Management Group" ('PMG') on the 28th November 2017 it was decided that the Claimant would be transferred to the Crime Management Hub at the 12-week point in her pregnancy. The minute of the meeting states:

“[The Claimant] pregnant. Issues discussed with Insp Craxford means that [the Claimant] will go to Crime Hub at 12 week point.”

14. The Claimant presented her letter dated the 20th November 2017 to Sergeant Roper on or around the 2nd December 2017.
15. On the 4th December 2017, the Claimant was informed that it had been agreed that she could remain in the Response Team until after her 12-week scan, which was due to take place on the 21st December 2017.

16. On the 5th December 2017, Inspector Craxford sent an email to the Claimant in which she confirmed that she had received a copy of the Claimant's letter dated the 20th November 2017 and that a copy of the letter would be sent to Chief Inspector Johns with a request that it be discussed at the next meeting of the PMG, which was due to take place on the 19th December 2017.
17. On the 13th December 2017, Chief Inspector Johns requested that the Claimant's pending move to the Crime Management Hub be put on the agenda for the PMG meeting on the 19th December 2017 and on the 14th December 2017, Superintendent De Reya sent the following email response to Chief Inspector Johns:

**“That is fine we can discuss it at PMG.
Just to be clear re direction:
Moves to SODAIT and Crime Hub are not blanket decisions so make sure the Inspectors are being careful with wording.
Each case should be considered individually alongside the need of the LPA and service delivery.
The decision stands regarding [the Claimant's] move at this time.
A meeting should be held to discuss the issues [the Claimant] raises – last year Tanya Youngs and Karen Buck were involved and all the issues raised were addressed (I would prefer it involves [the Claimant's] new line manager and a fed rep as supporters).
Please look at how the last case was dealt with as it was best practice and look to emulate that process.
I will be there for any escalation of the issue but think this can easily be dealt with at Inspector level.”**

18. The PMG meeting went ahead on the 19th December 2017. The decision was that the Claimant would be moved to the Crime Management Hub. Chief Inspector Johns set out the reasons for the decision in an email dated the 22nd December 2017 (page 74 in the hearing bundle):

**“In respect of [the Claimant], the decision is that she will work with Crime Management Hub (CMH) whilst she is restricted.
The reason for this is that she cannot complete full front line duties as she is pregnant and there is a need to deploy our people to best meet business demands and provide the best service possible to the communities we serve. The current business need is in the Crime Hub.**

The decision to request [the Claimant] to move to the Crime Hub was, like every case is, discussed at People Management Group (PMG) meeting. The email which [the Claimant] had sent to Insp Craxford was discussed. It was agreed that the restriction on her duties was appropriate and it was not appropriate for her to do some of the things she had listed in her email. In the circumstances it was decided that requiring [the Claimant] to work with Crime Management Hub was a good option – she is able to do all aspects of the work and so her skills will be very much utilised, plus it meets an operational business need for the LPA.

The Crime Hub is a critically important role in terms of dealing with victims of crime at the first point of contact. Before it was set up much of the work would have fallen to the response teams. The work is therefore very much within the remit of a response officer. The CMH offers a positive and friendly environment without any risk to her health. In addition, the office is in Heavitree Road station so she will continue to be around people she knows and there is flexibility to agree a shift pattern to suit her needs. She could continue with her current shift pattern if she so wished.

The CMH also presents [the Claimant] with an opportunity to continue to use and develop her skills. I propose that you set up a meeting with yourself, DI Adrian Hawkins, [the Claimant] and her Federation representative to discuss the personal development this opportunity presents and how [the Claimant] will be supported in the role. I am aware that [the Claimant] was expected to start with the CMH on 22 December. Having support in this role is important and as this may be difficult over the Christmas and New Year period I suggest that she now starts in the New Year.

I have not copied [the Claimant] in to this email because I know that she is unhappy with being asked to work from the CMH. Please therefore meet with her and personally discuss the contents of this email. I have no objection if you then forward it to her.”

19. On the 20th December 2017 the Claimant had been informed by her Police Federation Representative, Ashley Steer, who had been present at the PMG meeting the day before, that she was to be moved to the Crime Management Hub.

20. On the 21st December 2017 the Claimant was seen by an occupational health nurse, at the request of Sergeant Roper. The nurse reported as follows (pages 77B to 77C in the hearing bundle):

“Thank you for your referral for [the Claimant] who I met with today in Occupational Health. [The Claimant] has given me her consent to update you following our consultation.

You advised in your referral about [the Claimant’s] pregnancy and I note that she is also getting headaches.

[The Claimant] confirmed to me today that she has only struggled once previously with low mood which was when she miscarried previously. She is now 12 weeks pregnant again. You ask me to advise on the impact of stress on [the Claimant] at this time and also ask me to make recommendations about [the Claimant’s] headaches. [The Claimant] tells me that she only started to have headaches at the onset of the stress which she says is only present in work. She tells me that the stress relates to her being asked to move job role for the remainder of her pregnancy. I note you mention a potential move to crime hub.

[The Claimant] has seen both her GP and her Midwife about the headaches. She tells me that both have attributed the headaches to stress in the workplace and her Midwife has made a referral to the perinatal mental health team. The headaches are somewhat difficult to manage now that she is pregnant again as she can only take over the counter remedies.

[The Claimant] tells me that a pregnancy risk assessment has been undertaken and that she is aware that one of the things that needs to happen is that she be non-operational to reduce any risks of injury. She tells me that she has been working alongside her section at the Station in a support role. She tells me that working alongside her section is very important to her at this time as it is they that really supported her whilst she went through her prior miscarriage. We would agree that [the Claimant] needs to work in a non-operational capacity at present. [The Claimant] is aware that it is for management to determine where this might be as service needs are also a consideration.

I understand that [the Claimant] currently works to shifts of 2 earlies, 2 lates and 2 6-3 shifts.

Nature/extent of condition – [the Claimant] is 12 weeks pregnant. She is getting regular headaches that she and her GP/Midwife attribute to being related to stress at work.

Are stress/headaches linked to work – [the Claimant] advises that her GP/Midwife believes that they are.

Recommendations and fitness (driving and shift work) – [the Claimant] has been experiencing sickness (this tends to last during the day and is not just impacting in the mornings). This is improving as the pregnancy progresses. She is fit to drive. I would recommend cutting her shifts back by 2 hours if management can accommodate this as this may help her headaches. I think it will also help if

**management could meet with [the Claimant] to allay some of her concerns over work location and to set any expectations.
I have organised a further review with [the Claimant] on 25 January so that she can update me on her perinatal mental health appt progress
Recup duties – reduce shifts by 2 hours each.
EA – unlikely.”**

21. On the 22nd December 2017 the Claimant saw Chief Inspector John’s email (quoted above) setting out the reasons for the decision to transfer her to the Crime Management Hub and on the same day the Claimant went on sick leave. On the 27th December 2017 her GP certified her absence as being due to depression and anxiety.

22. The Claimant remained absent from work until the 9th February 2018. She attended a meeting on that date with Inspector Craxford and was informed that the decision that she be moved to the Crime Management Hub had not altered. She was told, however, that she could do her work from the Response Team’s office so that she would be working in close proximity to her former colleagues. After undertaking some training in the work of the Crime Management Hub, the Claimant then took up the Hub role.

23. On the 10th February 2018 a second risk assessment relating to the Claimant was undertaken, at her request. It was noted that she had suffered stress and anxiety as a result of the deployment to the Crime Management Hub against her wishes and that she had been referred for cognitive behavioural therapy by her midwife and general practitioner.

24. On the 19th February 2018 the Claimant submitted a formal grievance in respect of her transfer to the Crime Management Hub. The grievance was adjudicated upon by Superintendent Craig Downham. His report, which is dated the 22nd April 2018, is to be found at pages 142 to 146 in the hearing bundle. Superintendent Downham’s findings were as follows:

“In reviewing the documentation provided to me and meeting with parties concerned I have found that:

[the Claimant] is keen and enthusiastic around her role as a response officer and intends to develop herself within that environment as best she can taking into account her forthcoming period of maternity leave. This is to be commended in an LPA where the stress on the response function is accepted at this current time.

[the Claimant] has conducted herself and constructed her written complaints and rationales very effectively and respectfully, which is to her credit.

The managers in LPA have retained extremely clear and detailed accounts from personnel management meetings, listing decisions and rationale, which is to their credit. The emails to [the Claimant] and her federation representative; other managers and supervisors in LPA and in communication with PC Follett (on a similar issue) are balanced, polite and conciliatory, offering a detailed rationale and positive options which, although they have not delivered entirely the outcome sought, are to the credit of the managers involved. Notwithstanding that there remains an area of disagreement, the LPA managers have flexed the arrangements round [the Claimant’s] working shifts and location to try to accommodate her wishes which is also to their credit.

The documentation provided shows that the LPA had applied their policy on numerous occasions to officers on ‘restricted/recuperative’ duties across a wide range of causation factors, hence this was not a policy which applied only to pregnant officers. There was occasional evidence of officers being allowed to remain on their existing team or remain at a given location but this was generally for specific reasons other than the officer’s choice – it was not apparent that due regard was given of the officer’s wishes as a priority in application of this policy.

In considering the specifics of this grievance the status of [the Claimant] as a pregnant officer is paramount. The advice from the E&D Department listed above is key to determining my recommendations as the pregnant officer benefits from a greater degree of ‘protection’ than those who may, for instance, be recovering from a musculo-skeletal injury. I do not think the LPA have given this due regard in their application of their management of pregnant officers, specifically [the Claimant].

Whilst it may require some re-engineering of the SODAIT/CMH staffing structure to manage any staffing issues, the views of the pregnant officers should be taken into account prior to a significant change in their role, where these changes cannot be supported by the risk assessment process as necessary and proportionate, and the officers are reluctant to accept those changes. It may be that the vast majority of pregnant officers would be content with the adjusted duties and concessions granted to [the Claimant], however it is my belief that each case of a pregnant officer should be dealt with on a case by case basis, and where there is a disagreement the officer should be allowed to retain as much of their original role as they wish, within the risk

assessment. However, this does not mean that all restricted/recuperative officers in the LPA enjoy the same level of self-determination and protection, as they will not generally come within the protected characteristics set out within the equality act.”

25. Superintendent Downham made the following recommendations in the Claimant’s case:

- “1. [The Claimant] to have the added flexibility of tasking through her response supervisors rather than CMH as per her request; with duties commensurate with an up to date risk assessment agreed between her and a response supervisor.**
- 2. LPA management to consider a change to working practices to enable the views of pregnant officers to be the guiding principle when deciding on their location and duties prior to taking maternity leave.**
- 3. LPA management to consider formalising any custom and practice models for dealing with officers who are temporarily restricted in their duties into a working practice/LPA policy for transparency. I would recommend that the federation and an E&D representative are engaged with this.”**

26. On or about the 10th May 2018 the Claimant returned to her role in the Response Team where she was tasked by the Response Sergeant, Alex Kennedy. She still found, however, that she continued to be tasked, from time to time, with Crime Management Hub work because of an overflow of work from the Hub. That remained the case until she started her maternity leave.

The witness evidence

27. In addition to witness evidence from the Claimant and Chief Inspector Johns, there were witness statements from two additional witnesses: namely, Ashley Steer (for the Claimant) and Sergeant Roper (for the Respondent). Their statements were agreed and so they were not called to give oral evidence. Their statements were read by the Tribunal.

28. The Claimant's witness statement stood as her evidence-in-chief. She was asked one supplemental question relating to the role that she had left in the Response Team when she was transferred to the Crime Management Hub. She stated that she had not been "back filled", which the Tribunal understood to mean that no-one had taken over her in the Response Team after she had been moved.

29. In cross-examination, the Claimant accepted that the Police is a disciplined service and that officers are required to obey lawful directions. She accepted that officers can be posted to positions where they are most needed and she agreed that officers could not pick and choose their tasks. She also agreed that the LPA had to align its resources to its needs. She accepted that it is for management to determine where she might be posted, based on service needs. She agreed that it was not just pregnant officers who were moved to the Crime Management Hub. Other officers, such as those recuperating from injury or those with a disability were moved to the Crime Management Hub.

30. It was put to the Claimant that the principle of moving officers on restricted duties to the Crime Management Hub did not mean that such officers would automatically be transferred and that exceptional reasons would be taken into account. The Claimant stated that she had put forward exceptional reasons but they had been ignored.

31. It was put to the Claimant that it was her restricted duty status, not her pregnancy, that was behind the move to the Crime Management Hub to which she responded that there had been a risk assessment undertaken, which had indicated that she could remain in the Response Team with certain adjustments to her role. When asked to comment on the proposition that there had been a need to deploy her in order to better meet the LPA's business needs, the Claimant accepted that she did not have strategic oversight of the business needs and was not a member of the senior management team. She accepted that there were certain tasks that she could not do in the

Response Team, because of her pregnancy, and that she was able to do all aspects of the role in the Crime Management Hub.

32. She stated that she did not necessarily agree with the proposition that the Crime Management Hub was critically important. She said that they dealt with low level crime. She nevertheless agreed that the work was important. She accepted that the people working in the Hub were friendly but working there was not a positive experience for her. It was a role that she had never aspired to when she joined the Police. She confirmed that the Crime Management Hub was in the same building as the Response Team but on a different floor. She was not working with people that she knew and it was difficult to meet up with former colleagues during the working day. She maintained that the Hub did not provide her with meaningful work but accepted that there was no obligation on the part of management to provide her with work that she regarded as meaningful.

33. She accepted that the work in the Hub had to be done and accepted that there had been no suggestion that she remain in the Hub after her maternity leave. She stated that she had hoped to have a tutor role in the future and that she felt that working in the Hub would not assist in developing her career. Had she been permitted to stay in the Response Team, there were non-confrontational tasks she could have done such as going to see victims of crime and witnesses and gathering evidence. She agreed it could be legitimate to remove an officer from a confrontational role. She did not accept the proposition that the Force's reputation could have been damaged if she had remained in the Response Team.

34. In re-examination, the Claimant explained that she was concerned about becoming de-skilled as an operational officer whilst working in the Crime Management Hub. She felt that the move was of no benefit to her and that she was being taken away from work in the Response Team that she had enjoyed. She also found that she suffered from feelings of anxiety about the prospect of the return to the Response Team after her absence from her operational role. When asked about the statistical information produced by Chief Inspector Johns, the

Claimant said that it was her belief that the evidence showed that pregnant officers were always liable to be moved because of a misplaced assumption that they could not be kept safe in an operational role.

35. The Tribunal then heard evidence from Chief Inspector Johns. Her witness evidence stood as her evidence-in-chief. Before she was cross-examined, she gave some further evidence about the role of the Crime Management Hub and its importance. All reported crime is filtered by the Hub. A tool, referred to as 'Eclipse', is used to determine whether the crime is to be investigated or whether no action is to be taken. If the crime is to be investigated, it can remain in the Hub or be transferred to the Response Team where it is up to a sergeant to allocate the crime. Chief Inspector Johns stated that the Hub is an effective and efficient service and that it screens out 35-40% of reported crime, freeing up busy sergeants for their day-to-day work.

36. In cross-examination, Chief Inspector Johns stated that there were staffing issues across all the Response Teams and there were a number of vacancies, including in the Crime Management Hub. At the time with which the Tribunal was concerned, there were vacancies in every single team and time was spent managing resources because of the vacancies. She accepted that there was probably work in the Response Team in December 2017 but they had felt that the priority was with the Crime Management Hub. She stated that where officers were restricted, they were moved to roles that did not require them to be fully operational. She stated that a pregnant officer will be regarded as a restricted officer because they cannot do their full duties. She did not accept that all pregnant officers are sent to work in the Crime Management Hub. She stated that there had been occasions when a pregnant officer had remained in a response role because of business needs and personal circumstances. She stated that where any officer is restricted, they have to think about how to use them most efficiently, bearing in mind operational demands.

37. It was put to Chief Inspector Johns that in practice, pregnant officers go to the Crime Management Hub. She replied that that was not necessarily the case. She said that there were occasions when an officer, due to business needs and personal circumstances, had remained in the response role. She disagreed with the proposition that pregnant officers are made to do sedentary roles. She was asked whether others had complained about the treatment of pregnant officers and she said that she was not aware of such complaints without checking notes and emails. She stated that if officers cannot do a fully operational role, for whatever reason, then they will be put in a role where they do not need to be fully operational, which then releases operational officers. In the Claimant's case, however, she confirmed that no officers had been released to do operational work by reason of the Claimant's transfer to the Crime Management Hub.
38. There was then discussion about some statistical information that Chief Inspector Johns had produced regarding the deployment of officers on restricted duties. She stated that the records showed that not all pregnant officers were transferred to the Crime Management Hub. Some stayed in their station in a response role. In the case of any officer who could not do a full response role, for whatever reason, the question as to their deployment was based on business needs. Chief Inspector Johns recalled that there was a pregnant officer in the Rural East Sector who stayed in her station rather than move to the Crime Management Hub, which would have been a difficult geographical move for her due to her family circumstances. She stated that everyone was considered on a case-by-case basis. There was no definition of 'exceptional reasons'.
39. In relation to the PMG meeting on the 19th December 2017, Chief Inspector Johns confirmed that a copy of the Claimant's risk assessment dated the 21st November 2017 was not available. She stated that she would not have looked at it and that she did not get involved with the risk assessment. She stated that the job of the PMG was to look at roles and it relied upon a verbal update regarding officers who were on restricted duties. Chief Inspector Johns nevertheless agreed that the Claimant, when pregnant, was fit to do her operational job with suitable control measures. She understood that the Claimant felt that a move to the Hub would have a negative

effect upon her mental health but, as a management team, they had to look at where their resources were best placed. They needed the Claimant's input at the Crime Management Hub at that time and she stated, "*we all have to do work we might not want to do*".

40. Chief Inspector Johns confirmed that the Response Team were based on the ground floor and the Crime Management Hub was upstairs in the same station. She stated that the Claimant could work the same shift as she had been working before and she did not think that the Claimant was being asked to do something unreasonable. She stated that they tried to support the Claimant. The reason why the Claimant was moved was because she could not do full time duties and the management team wanted to make use of officers in such a way as was compatible with the needs of the business. Chief Inspector Johns drew attention to the fact that the Claimant was not moved as soon as she gave notice of her pregnancy and that she would not have needed to stay in the Hub unless there was some reason for her to do so. She stated that there were four vacancies in the Crime Management Hub at the relevant time. She stated that the Claimant could have done developmental work whilst she was based in the Hub and she did not agree that the work was not meaningful. She also did not agree that there would have been times when the Claimant had no work to do. The Claimant would have been expected to go and ask for work from a sergeant if she needed work to do. The work in the Hub would also have been of value to the Claimant because other officers in the Response Team would not have had experience of the 'Eclipse' tool.

41. Chief Inspector Johns was aware that the Claimant was signed off work for depression and anxiety and that what the Claimant had warned about had come to pass. Chief Inspector Johns saw it as an irony that the Force got no work from the Claimant for about 2 months because of her sick leave.

The parties' submissions

42. The closing submissions by both counsel were helpfully set out in writing and were supplemented with oral submissions at the close of the evidence.

43. Mr Arnold, on behalf of the Respondent, set out his closing submissions in a document dated the 19th December 2018. In respect of the claim under section 18 of the Equality Act 2010, his central submission related to the issue of causation. He identified the two lines of authority set out in the cases of *James v. Eastleigh Borough Council* [1990] IRLR 288, HL and *Nagarajan v. London Regional Transport* [1999] IRLR 572 HL and the guidance on how to reconcile those two lines of authority given in the case of *Amnesty International v. Ahmed* [2009] ICR 450.

44. Mr Arnold submitted that it would be wrong, on the facts of the case, to apply a “but for” test to the question whether the Claimant had suffered unfavourable treatment because of her pregnancy. He submitted that the correct approach was to use what he termed “*the reason why approach*” to the issue of causation and, he further submitted, that on the basis of that approach it is clear, on the evidence, that the Claimant was not subjected to any unfavourable treatment because of her pregnancy. He submitted that the “*reason why*” the Claimant was transferred from the Response Team was multi-factorial. She was a restricted-duties officer (the cause of which was irrelevant) and there was a business demand for her skills in the Crime Management Hub. Her transfer to the Hub was therefore not because of the pregnancy. It was because she was a restricted officer and there was a business need for her to be deployed in the Crime Management Hub. The fact that there was evidence that some pregnant officers had remained on Response, with suitable restrictions, indicated that the Claimant’s transfer to the Crime Management Hub must have been for reasons other than her pregnancy. The real reason for her transfer was either business need and/or because of her restricted status. The pregnancy was simply the occasion of the restrictions and not the cause of the transfer.

45. Mr Arnold also submitted (with reference to *Williams v. Trustees of Swansea University Pension & Assurance Scheme* [2018] UKSC65) that the Claimant's transfer to the Crime Management Hub could not amount to unfavourable treatment. Mr Arnold submitted that transferring the Claimant out of danger from an operational role to a safe role in the Crime Management Hub where her career could be developed, and where, as a police officer, she could have been posted in any event, could not amount to unfavourable treatment. Mr Arnold submitted that the Claimant's view that remaining in the Response Team would have been more favourable to her is not sufficient to meet the definition of unfavourable treatment.
46. In relation to the claim of indirect discrimination, Mr Arnold submitted that there was no discernible provision, criterion or practice ('PCP') that could form the basis of such a claim and that, in any event, the Claimant had led no evidence that women were particularly disadvantaged by the PCP alleged by the Claimant. He further submitted that the Respondent had shown, through the evidence, that the alleged PCP was a proportionate means of achieving a legitimate aim: namely, meeting the needs of the Respondent's business.
47. Ms Criddle's submissions were set out in a skeleton argument dated the 17th December 2018 and were supplemented by oral submissions. In relation to the claim under section 18 of the Equality Act 2010, her primary submission was that the Claimant's transfer to the Crime Management Hub was self-evidently unfavourable treatment because of pregnancy. She submitted (with reference to *Interserve FM Limited v. Tuleikyte* UKEAT/0267/16/JOJ, *Williams v. Trustees of Swansea University Pension and Assurance Scheme* and the EHRC Code of Practice on Employment (2010)) that the question of "unfavourable treatment" is a question of fact for the Tribunal to decide.
48. On the causation issue, Ms Criddle relied on *Fletcher v. NHS Pensions Agency* [2005] ICR 1458, *O'Neill v. Governors of St. Thomas More Roman Catholic Voluntarily Aided Upper School* [1997]

and *Commissioner of Police for the Metropolis v. Keohane* [2014] ICR 1073 ICR 33 in support of her submission that treating a pregnant woman unfavourably because of her pregnancy, even if others who are not pregnant would have been treated in exactly the same way, still amounts to pregnancy discrimination.

49. In relation to the claim of indirect discrimination, which is put in the alternative to the claim under section 18 of the Equality Act 2010, Ms Criddle relied on the definition of indirect discrimination given in *Essop v. Home Office (UK Border Agency)* [2017] 1 WLR and the case of *Chief Constable of West Yorkshire Police v. Home* [2012] ICR 704 in support of the proposition that a statistical approach to the question of particular disadvantage is not essential.

50. In relation to the question of “*proportionate means of achieving a legitimate aim*”, Ms Criddle relied upon *R (Elias) v. Secretary of State for Defence* [2006] 1 WLR 3213, *Hardy & Hansons plc v. Lax* [2005] ICR 1565 in support of her submissions that the Respondent has failed to identify any legitimate aim relevant to the case and/or failed to demonstrate that the decision to transfer the Claimant to the Crime Management Hub was a proportionate means of achieving its legitimate aims.

Findings of fact

51. The Tribunal made the following findings of fact:

- 51.1 The Claimant joined the Police Force on the 29th June 2015. She joined the Police with the ambition of serving as an operational police officer in a response role. In February 2016 she achieved her then ambition when she became a Police Constable in the Response Team. Her role in the Response Team was that of a front line and operational officer. She found tremendous job satisfaction in her role, enjoying each and every aspect of the varied tasks that she

was required to undertake. She found her work to be rewarding.

- 51.2 On the 21st September 2016, the Respondent introduced a policy to the effect that a person on restricted duties beyond two weeks would be considered, in the absence of exceptional circumstances, for transfer to the Crime Management Hub or SODAIT.
- 51.3 When explaining the above policy to a female officer, referred to as 'A' in July 2017, Superintendent De Reya acknowledged that the policy could impact upon pregnant female officers although that was not the intention of the policy.
- 51.4 In the early part of 2017 the Claimant suffered a miscarriage. At the time she found the support that she received from her colleagues in the Response Team to be invaluable in helping her through a difficult period.
- 51.5 On 21 November 2017, the Claimant notified her line manager, Sergeant Roper, that she was pregnant, with a due date of 1 July 2018.
- 51.6 On 21 November 2017, Sergeant Roper conducted a risk assessment of the Claimant's role as a response officer in line with the Respondent's Risk Assessment Guide for Expectant Mothers.
- 51.7 In accordance with that Guide, Sergeant Roper advised that the Claimant should be placed on restricted duties as a response officer in line with the control measures set out in the risk assessment (which materially replicate those in the Guide): namely, that she should wear plain clothes, each job would be risk assessed and the Claimant should drop back on night shifts to assist with tiredness. It follows that the Claimant had been assessed, as a pregnant officer, as

being fit to remain in an operational role in the Response Team with certain adjustments to her role.

51.8 At a meeting of the PMG on the 28th November 2017, it was decided that the Claimant “*will go*” to the Crime Management Hub at the 12-week stage in her pregnancy. The decision was noted in the minutes of the meeting. The Tribunal noted that Chief Inspector John’s evidence about the meeting on the 28th November 2017 appeared to be inconsistent with the minute of the meeting. Chief Inspector John’s recollection was that it was simply agreed at the meeting that the Claimant could remain in the Response Team until the time of her 12-week scan. The Tribunal, however, found as a fact that which was recorded in the minute of the meeting: namely that a decision was made on the 28th November 2017 that the Claimant “*will go*” to the Crime Management Hub at the 12-week stage of her pregnancy. The Tribunal took the view that the contemporaneous minute of the meeting was likely to be more reliable than the evidence, based upon memory, given by Chief Inspector Johns in her statement dated the 6th December 2018 and her oral evidence to the Tribunal regarding the discussion at the meeting on the 28th November 2017.

51.9 On the 4th December 2017, the Claimant was informed by Inspector Craxford that she could remain in the Response Team until after her 12-week scan (due on the 21st December 2017) and was reminded of the Respondent’s policy regarding restricted officers in the following terms: “... *the current LPA direction is that any officer who is unable to complete full front-line duties for a period of time is directed to work from CMH*”. The Tribunal found as a fact that the Claimant was not informed by Inspector Craxford at their meeting on the 4th December 2017 that a decision had been made at the PMG meeting on the 28th November 2017 that the Claimant “*will go to Crime Hub at 12 week point*”. No explanation was given by the Respondent at the final hearing as to why the Claimant was not informed on the 4th December 2017 that a decision had already been taken on the 28th November 2017 that she was to be transferred to

the Crime Management Hub at the 12-week stage in her pregnancy. Instead the Claimant was given the impression by Inspector Craxford that the decision would be taken at the PMG meeting on the 19th December 2017 and that the decision-makers would have regard to her written representations on why she should be permitted to remain in the Response Team.

- 51.10 On the 8th December 2017, the Claimant's written representations as to why she should be permitted to remain in the Response Team (set out in her letter dated the 20th November 2017) were received by Chief Inspector Johns.
- 51.11 At a meeting of the PMG on the 19th December 2017, the decision that had already been taken on the 28th November 2017 to transfer the Claimant to the Crime Management Hub (as documented in the minutes of that meeting), was essentially re-confirmed. It was made clear to the members of the PMG at the meeting on the 21st December 2017 that the Claimant was against being transferred to the Crime Management Hub for the detailed reasons that she set out in her letter dated the 20th November 2017.
- 51.12 The decision to transfer the Claimant to the Crime Management Hub (at the meetings on the 28th November 2017 and the 19th December 2017) was taken without any regard to the risk assessment conducted by Sergeant Roper that had confirmed that the Claimant was fit to remain in an operational role in the Response Team with certain adjustments. No explanation was offered by the Respondent at the Tribunal final hearing as to why the risk assessment had not been considered at the PMG meeting on the 19th December 2017. The impression given to the Tribunal was that the Respondent had simply ignored the fact that a risk assessment had been undertaken when deciding to transfer the Claimant from her role in the Response Team to the Crime Management Hub and was disinterested in knowing whether the Claimant had been

assessed as being fit to remain in the Response Team with control measures.

- 51.13 The Claimant was informed of the outcome of the PMG meeting that took place on the 19th December 2017 by her Police Federation representative on the 20th December 2017.
- 51.14 The Respondent's given reasoning for transferring the Claimant to the Crime Management Hub was set out in an email from Chief Inspector Johns, who had been present at the meeting, dated the 22nd December 2017. Chief Inspector Johns stated that the reason for the transfer was because the Claimant cannot complete full front line duties because she is pregnant and there was a need to deploy officers to best meet business demands and to provide the best service possible to the public. She stated that the current business need is in the Crime Hub without explaining what was meant by that. She also stated that the restriction on the Claimant's duties was appropriate but that it was not appropriate for her to do some of the things that she had listed in her letter dated the 20th November 2017.
- 51.15 The Tribunal accepted that there were four vacancies in the Crime Management Hub at the time of the Claimant's transfer to the Hub. The Tribunal also accepted Chief Inspector John's evidence that there were staffing issues across all of the Respondent's Response Teams, including the Response Team in which the Claimant worked. The Tribunal was unable to make a finding, based on Chief Inspector Johns' evidence, that there was a greater demand in the Crime Management Hub than in the Claimant's Response Team. There was plainly a demand for staff in both the Crime Management Hub and the Response Team. The Tribunal also accepted Chief Inspector John's evidence that there was work for the Claimant had she remained in the Response Team. Chief Inspector Johns made a bald assertion that she regarded the Crime Management Hub as a priority but there was no explanation as to why that was, when it was clear from her evidence that there was demand

in the Response Team. There was also somewhat of a contradiction in Chief Constable John's position in that in her email dated the 22nd December 2017 she had stated that "*the current business need is in the Crime Hub*" but in her evidence to the Tribunal she stated that there were staffing issues across all of the Response Teams but that the demand in the Crime Management Hub was seen as a priority. The true position appeared to be (and this was the finding of the Tribunal) that there were business needs in both the Response Team and in the Crime Management Hub, which was not what had been stated by Chief Inspector Johns in her email dated the 22nd December 2017. The Tribunal also found that the vacancy in the Response Team created by the Claimant's transfer to the Crime Management Hub was not filled after her departure. It followed that the Claimant's transfer to the Crime Management Hub had not enabled a non-restricted officer to be moved from the Hub to the Response Team. It also followed, as a matter of logic, that the pre-transfer staffing demands in the Claimant's Response Team must have been increased as a result of the Claimant's transfer to the Hub. In the circumstances, it was difficult for the Tribunal to see and understand the business need for the transfer of the Claimant from the Response Team to the Crime Management Hub. The effect of the transfer was to move an officer who had been assessed as fit to remain in the Response Team, with certain adjustments, from a team in which there were staffing demands to another department where there were competing staffing demands.

- 51.16 Though the Crime Management Hub is undoubtedly a vital part of the structure of Devon and Cornwall Police, the work undertaken in the Hub is very different from the work undertaken in the Response Team. It was understandable to the Tribunal that an ambitious front line Police Constable would be likely to view an enforced transfer to the work of the Crime Management Hub as a retrograde step in their career notwithstanding the obvious importance of the work undertaken in the Hub. The Respondent presented no evidence to indicate that non-restricted front line officers ever sought transfers to the Crime Management Hub. The evidence from Chief Inspector Johns was that there were

four vacancies in the Crime Management Hub in or around December 2017 but there was no evidence that non-restricted operational officers had applied for those positions. In the Claimant's case, her work in the Response Team had a value to her that was not replicated by the work in the Crime Management Hub, whatever opportunities for career development it might have offered. In her evidence, the Claimant said that the work in the Crime Management Hub was not meaningful. That was plainly a subjective assessment, made by someone who had not wanted to be transferred away from the work that she enjoyed and valued. The work in the Crime Management Hub obviously had meaning but not in the eyes of the Claimant who wanted to go back to her Response work.

- 51.17 Though the move to the Crime Management Hub was contrary to the Claimant's wishes, she accepted that the police service is a disciplined service and that police officers are subject to lawful postings. She also accepted, rightly, that it is not up to individual police officers to pick and choose the tasks that they perform at work.
- 51.18 Though the Claimant was against being transferred to the Crime Management Hub, there was, nevertheless, a positive and friendly working environment in the Hub without the risks associated with the role of a front-line officer. In the Claimant's case, however, the move to the Crime Management Hub presented a risk to her mental health, which had been foreshadowed in the Claimant's written representations dated the 20th November 2017 as to why she should be permitted to remain in the Response Team. In her written representations the Claimant stated that she had discussed the prospective move to the Crime Management Hub with her GP and midwife and their view had been that it would be better for the Claimant's mental health and her pregnancy if she remained in the working environment with which she was familiar.

- 51.19 The Claimant went on sick leave from the 22nd December 2017. She returned to work on the 9th February 2018. Her ill health, in the form of depression and anxiety, and resultant absence from work had been caused by the decision to transfer her to the Crime Management Hub. The Tribunal rejected the implication in paragraph 5.5 of Mr Arnold's submissions that the Claimant went sick instead of attempting the role in the Crime Management Hub and seeing what it could do for her. The Tribunal found that the Claimant's ill-health was genuine and that her mental health had been adversely affected, at an extremely unfortunate time given the fact of her pregnancy, by the decision to transfer her from her role in the Response Team to the Crime Management Hub.
- 51.20 When the Claimant returned to work on the 9th February 2018, she commenced her role in the Crime Management Hub. There was a slight variation to the decision that she be transferred to the Crime Management Hub in that she was to be permitted to complete the majority of her new role from a desk in the offices of the Response Team.
- 51.21 On the 10th February 2018, a further risk assessment was carried out which identified that the Claimant was complaining of stress and anxiety as a result of her redeployment to another role against her wishes and of suffering migraines which may be stress related.
- 51.22 On the 19th February 2018 the Claimant lodged a grievance about her enforced transfer to the Crime Management Hub. The grievance was upheld by Superintendent Downham on the 22nd April 2018. Superintendent Downham found as a fact that the Local Policing Area in which the Claimant works has a policy of transferring restricted officers from a response role to the Crime Management Hub or SODAIT.

- 51.23 The Claimant worked in a Crime Management Hub role from the 9th February 2018 to the 10th May 2018 when she was returned to a response role. She continued to deal with CMH 'overflow' work after her return to a response role until she went on maternity leave on 1 July 2018.
- 51.24 In respect of the impact of the move to the Crime Management Hub on the Claimant's career development, the Tribunal found, notwithstanding the Claimant's fears and anxieties at the time that it was a backward step in her career, that there was no long-term adverse effect upon her future career development within the Police Force resulting from her time doing Crime Management Hub work from the 9th February 2018 to the 10th May 2018. The Tribunal could not accept, however, the Respondent's assertion that the time spent in the Hub was of positive benefit to the Claimant's future career development: that is to say, that her future career prospects were positively enhanced to some degree that would not have occurred if the transfer had not taken place. It certainly gave her an experience of doing the work that is undertaken in the Crime Management Hub but it was not possible for the Tribunal to find, on the evidence before it, that that experience would be of measurable benefit to the Claimant's future career path.

The applicable law

52 Section 18(2) of the Equality Act 2010 provides as follows:

- "(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."*

53. Section 18(6) of the 2010 Act provides the following definition of the 'protected period':

- "(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and end-*
- (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."*

54. Section 19(1) of the 2010 Act provides the following definition of indirect discrimination:

- "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-*
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
 - (c) it puts, or would put, B at that disadvantage, and*
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.*
- (3) The relevant characteristics are-*
- ...*
 - sex;*
 - ..."*
 - ...*

55. The Tribunal was grateful to both counsel in the case for setting out, in their written and oral submissions, the authorities concerned with sections 18(2) and 19 of the 2010 Act. Mr Arnold cited 20 authorities and Ms Criddle cited 11. The Tribunal was assisted in the task of identifying the relevant law in the authorities by the fact that each counsel identified the propositions from each of the cited cases that were relevant to the present case.

56. On the issue of unfavourable treatment, Mr Arnold relied on *Williams v. Trustees of Swansea University Pension & Assurance Scheme* [2018] UKSC 65 in support of his submission that it was open to the Tribunal to find that the Claimant had been treated favourably by removing her from her confrontational front-line response role to a position in the Crime Management Hub where she was, using Mr Arnold's phrase, out of danger. On the causation issue under section 18 of the 2010 Act, Mr Arnold drew the Tribunal's attention to *James v. Eastleigh Borough Council* [1990] IRLR 288, *R (on the application of E) v. The Governing Body of JFS and the Admissions Appeal Panel of JFS and others* [2010] IRLR 136, *Nagarajan v. London Regional Transport* [1990] IRLR 572, *Chief Constable of West Yorkshire v. Khan* [2001] ICR 1065, *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, *Johal v. Commission for Equality and Human Rights* UKEAT/0541/09 and *Amnesty International v. Ahmed* [2009] ICR 450.
57. In relation to the claim of indirect discrimination, Mr Arnold cited the following cases: *Essop and others v. Home Office (UK Border Agency)*; *Naeem v. Secretary of State for Justice* [2017] IRLR 558, *Eweida v. British Airways plc* [2010] IRLR 322, *Trayhorn v. Secretary of State for Justice* UKEAT/0304/16/RN, *Perera v. Civil Service Commission and Department of Customs and Excise* [1982] IRLR 147, *Games v. University of Kent* [2015] IRLR 202, *Bilka-Kaufhaus GmbH v. Weber Von Harz* [1984] IRLR 317, *Rainey v. Greater Glasgow Health Board* [1987] ICR 129, *Homer v. Chief Constable of West Yorkshire Police* [2012] IRLR 600, *Hardy's & Hansons plc v. Lax* [2005] IRLR 726, *Hensman v. Ministry of Defence* UKEAT/0067/14/DM, *Kapenova v. Department of Health* [2014] ICR 884 and *Seldon v. Clarkson Wright and Jakes* [2012] IRLR 590.
58. On the issue of unfavourable treatment, Ms Criddle relied upon *Interserve FM Limited v. Tuleikyte* UKEAT/0267/16/JOJ, *Fletcher v. NHS Pensions Agency* [2005] ICR 1458, *O'Neill v. Governors of St. Thomas More Roman Catholic Voluntarily Aided Upper School* [1997] ICR 33, *Commissioner of Police for the Metropolis v. Keohane* [2014] ICR 1073, *Amnesty International v. Ahmed* [2009] ICR 1450 and *Williams v. Trustees of Swansea University Pension and Assurance*

Scheme [2018] UKSC 65. In addition, Ms Criddle also relied upon the EHRC Code of Practice on Employment (2010).

59. In relation to the claim of indirect discrimination, Ms Criddle drew the Tribunal's attention to the following authorities: *British Airways plc v. Starmar* [2005] IRLR 862, *Essop v. Home Office (UK Border Agency)* [2017] 1 WLR 1343, *Chief Constable of West Yorkshire Police v. Homer* [2012] ICR 704, *E (Elias) v. Secretary of State for Defence* [2006] 1 WLR 3213 and *Hardy & Hansons plc v. Lax* [2005] ICR 1565.

Decision

The Section 18 claim

60. The Tribunal found in favour of the Claimant for the following reasons:

- 60.1 The Tribunal was satisfied that the transfer of the Claimant from the Response Team to the Crime Management Hub amounted, in the Claimant's case, to unfavourable treatment. The transfer put the Claimant to a disadvantage. It removed her from a working environment that she found particularly supportive, against the background of the miscarriage that she had recently suffered, and removed her from work that she valued and enjoyed. Indeed, it was the very work that the Claimant had joined the Police to be able to do. The transfer, on the Tribunal's findings, also put the Claimant at risk of injury to her mental health. The Tribunal rejected the Respondent's contention that the transfer to the Crime Management Hub was, in reality, an advantageous move for the Claimant. That argument was based on the premise that the work in the Response Team was potentially dangerous for a pregnant woman whereas the work in the Crime Management Hub was, in the Respondent's eyes, safe and suitable for a pregnant woman. The difficulty for the Respondent with that argument, and it was a difficulty that the Respondent, in the Tribunal's judgment, was not able to overcome, was the risk assessment made by Sergeant Roper on the 21st November 2017 that had found the Claimant to be fit to remain in the

Response Team with certain adjustments. Those adjustments had the effect of reducing the dangers of operational work to an acceptable level for the Claimant in her condition. It could not be said that the risk-assessed role for the Claimant in the Response Team continued to present a real source of danger for her (there being no argument from either party that Sergeant Roper's risk assessment was flawed or inadequate in some way).

60.2 The Tribunal next considered the question whether the unfavourable treatment that it had found to have occurred (namely, the transfer of the Claimant from the Response Team to the Crime Management Hub) was because of her pregnancy. The question that the Tribunal posed itself was whether, on an objective consideration of all the surrounding circumstances, the unfavourable treatment had been on the ground of pregnancy. The answer that the Tribunal was driven to, on the basis of its findings of fact, was that the unfavourable treatment had indeed been on the ground of pregnancy. Any other conclusion, in the judgment of the Tribunal, would have had an air of artificiality about it. The Respondent placed the focus on the Claimant being restricted in what she could do (with a submission that the cause of the restriction be ignored) and that the Respondent's business needs dictated that the Claimant, with her restrictions, would be better placed, in terms of meeting the Respondent's duties in fulfilling its public service role, in the Crime Management Hub. The Respondent saw it, as Chief Inspector Johns stated in her evidence, as a reasonable instruction to move the Claimant from the Response Team to the Crime Management Hub. The Tribunal, however, was not prepared to ignore the plain and obvious fact that the sole cause of the Claimant's restricted status was her pregnancy. Using the language of Mummery J. in the case of *O'Neill*, the Claimant's pregnancy "*precipitated and permeated the decision*" to transfer her to the Crime Management Hub. The fact that the Respondent may have believed that there was a business need to transfer the Claimant to the Crime Management Hub did not get away from the fact that the context for the discussion about the Claimant's proposed transfer was her pregnancy. The causative role of the

Claimant's pregnancy in the decision to transfer her to the Crime Management Hub was clear and obvious to the Tribunal. In its overt language, the Respondent had not decided to transfer the Claimant to the Hub simply because she was pregnant but in its approach to its decision-making on the question of the transfer, the Respondent seemed to have lost sight of the fact that the Claimant was pregnant and viewed her, instead, simply as a person with certain physical restrictions. In the judgment of the Tribunal, however, the Claimant's pregnancy was part of the reasoning why the Respondent acted as it did in deciding to transfer her to the Crime Management Hub. This was not a case where the Claimant's pregnancy could be viewed simply as the occasion for the unfavourable treatment, and thereby non-causative of the unfavourable treatment, but was a case where it could properly be said that the unfavourable treatment was because of the pregnancy. The reason why the unfavourable treatment occurred was because of the pregnancy. The other factors for the decision to transfer the Claimant to the Hub given by the Respondent did not have the contended for effect of reducing the Claimant's pregnancy to a non-causative role in the decision to transfer her.

The Section 19 claim

61. The Tribunal found in favour of the Claimant for the following reasons:

61.1 The Tribunal found that the policy to consider a person for a role in the Crime Management Hub or SODAIT if that person had been on restricted duties for two weeks or more was a PCP within the meaning of section 19(1) of the Equality Act 2010.

61.2 The Tribunal was satisfied that women were particularly disadvantaged by the PCP in that pregnancy would be an automatic trigger for the application of the policy to a pregnant woman. Whether the pregnant officer would be transferred depended upon whether she was able to satisfy the Respondent that there were exceptional circumstances

in her case as deemed by the Respondent. The fact that the Respondent gave no information or examples as to exceptionality, it was difficult to see what would or would not be regarded by the Respondent as exceptional circumstances justifying a departure from the policy position of transferring restricted officers to the Crime Management Hub or SODAIT. The statistical information before the Tribunal, which was extremely limited, did appear to show that some pregnant officers had succeeded in persuading the Respondent that they should be permitted to remain in an operational role despite their pregnancy. The same statistical information also appeared to show that the majority of pregnant officers, during the period to which the statistics related, were transferred to the Hub or SODAIT. In any event, the Tribunal was satisfied that pregnant officers, and therefore women, were at a particular disadvantage (in the form of susceptibility to an enforced transfer from an operational role to a non-operational role), when it came to the application of the PCP.

- 61.3 The Tribunal was satisfied that the Respondent had not shown that the PCP was a proportionate means of achieving a legitimate aim. The fundamental difficulty here for the Respondent related to the risk assessment carried out by Sergeant Roper on the 21st November 2017. Sergeant Roper assessed the risks to the Claimant arising from an operational role using the Respondent's "*Risk Assessment Guide for Expectant Mothers*". The Guide indicated that total elimination of risks was not necessary and that where a pregnant officer wishes to continue in an operational role, certain control measures should be considered and implemented. Sergeant Roger, using the risk assessment tools provided to him by the Respondent, assessed the Claimant as being suitable for an operational role with certain adjustments. Furthermore, as set out in the Tribunal's findings of fact, the Respondent had not been able to demonstrate that there was a greater business need in the Crime Management Hub than in the Response Team. Against that background, the Tribunal was satisfied that the Respondent had not shown that the PCP, which, on the Tribunal's findings, put women as a group at a particular disadvantage, had been a proportionate means of achieving

a legitimate aim (namely, the protection of an officer with restrictions). The Respondent's own risk assessment tools for operational officers were designed to protect an officer with restrictions from risks of injury arising from an operational role. In the judgment of the Tribunal, the enforced transfer of a restricted officer to a non-operational role was not a proportionate means of achieving what was undoubtedly a legitimate aim when the Respondent's own risk assessment tools provided an alternative means of achieving the same aim and which might result in a particular officer, including a pregnant officer, being able to remain in an operational role albeit with adjustments to the role.

62. The claim shall now be listed for a remedies hearing on the first available open date after the 25th February 2019 with a time estimate of 1 day. The parties are to notify the Tribunal if terms of settlement are reached before the remedies hearing.

Employment Judge David Harris
Dated: 17th February 2019