EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Aleem	**v**	**E-Act Academy Trust Ltd**

Heard at: Watford **On:** 17-24 May 2018

Before: Employment Judge Manley

Appearances:

For the Claimant: Mr Suhail, claimant's brother
For the Respondent: Mr Powell, counsel

JUDGMENT having been sent to the parties on 25 May 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and Issues

1. This is a claim under the Equality Act 2010 for disability discrimination which includes failure to make reasonable adjustments, victimisation and harassment as well as direct disability discrimination. Preliminary hearings were held in both June and October of 2017 where there was some identification of the issues, the second of those also referred to an amendment application for some of the matters raised by the claimant. For the purposes of easy reference throughout the hearing Employment Judge Manley prepared a document which summarised the issues and that is a document that I will refer to at the end for our conclusions. The provisions, criteria and practices hereinafter known as PCP's for the reasonable adjustment claim were not necessarily agreed but otherwise small amendments were made to that list and it will be referred to later.

2. In summary then this is essentially a failure to make reasonable adjustments claim. Disability is admitted and the claimant is still in the employment of the respondent. For reasonable adjustments there are five suggested reasonable adjustments. As far as victimisation is concerned there is only one protected act which is accepted as being such a protected act by the respondent and that is a grievance presented by the claimant on 18 February. There are then quite a lot of detriments relied upon, some of those are indeed repeats and it will be clear from our conclusions which of

those 21 are made out or not. There is also direct disability discrimination claim; there are eight suggestions of less favourable treatment and there is one matter for the claim of discrimination arising from a disability and one for the harassment claim. There is overlap between all those different heads of claim. There is also a time limit question about whether the claim has been presented in time and that might need us to determine whether conduct extended over a period such as to bring the claim in time and if not, whether it would be just and equitable to extend time. The employment tribunal task is as always to find facts based upon the oral and documentary evidence before us and applying those facts to consider the legal test and determine whether there has been a breach or breaches of the Equality Act.

3. At the hearing we heard from the claimant and from five witnesses for the respondent. We heard from Mr Cahill, who was the Vice-Principal at the time; Ms Khatun, who was the Assistant Vice-Principal; Mr Hatchett, who was the Regional Director of Education London & Buckinghamshire and determined the first level of the grievance; Mr Pike, who is an Academy Ambassador and heard the grievance appeal; and from Mr Ojja, who was the Head of the school at the time. There were two lever-arch files, many of those documents were read and considered and some extra documents were submitted which really went to submissions.

4. Both parties had prepared detailed skeleton arguments but we did not read those until later in the hearing and the respondent had prepared a legal matrix. A chronology was also prepared and handed in at our request and at the end both representatives had detailed written submissions and also added to those with oral argument. We want to express our thanks to the representatives for all the help they gave us, particularly with adjusting their cross-examination after guidance from the employment judge, especially to the claimant's representative who has more limited experience of tribunal procedure. They accepted this with good grace and it meant that we completed the hearing within the time allocated.

5. These then are the relevant facts that we find. We should make it clear that these go to the issues and of course in a hearing lasting a few days, some matters will be raised which we consider may not be necessary for us to find for the issues as set out.

6. The claimant commenced her employment with the respondent's predecessor, which was John Kelly's Boys Technical College as a science teacher on 1 September 2000. She had previous experience of teaching so had a total of 24 years of teaching. The respondent's school, now an academy, was formerly John Kelly's Boys School and became an academy school joining with a girls' school around 2009. The Trust itself has about 24 schools for which it is responsible. It is a charity. It provides state education. The policies which might be relevant for our determination include the grievance policy as there were a number of grievances presented by the claimant and the sickness absence management policy.

7. At this stage we just want to set out short definitions of the different roles which teachers and those doing classroom work might have at the school. First there is a qualified teacher. The claimant is a qualified teacher. This is a person with recognised qualifications and it is a statutory definition

which includes carrying out specified work. There is also an unqualified teacher, again it is a statutory definition. This is someone working towards a qualification as a teacher and again they would be carrying out specified work. A supply teacher is someone who is brought in typically through an agency. It is usually a qualified teacher who is there to cover medium to long term absences. They carry out a whole range of the specified tasks including planning, marking and assessing students' work as well as classroom functions. It could be to cover any subject. There is evidence from one Trade Union document that they could be directly employed by the school but none of the witnesses before us knew of any such arrangement. Their experience was that they came through agencies or that they could be on occasions self-employed directly. There is also cover supervisor, this is a fairly new post. It is a less costly option for schools to cover teacher absence. The cover supervisor uses pre-prepared materials for a specific class, ensures that behaviour of the students is in line with behaviour policy and they collect in work and leave for someone else to mark. People carrying out that work can be qualified or unqualified teachers as well as people with no such qualifications at all. They do not carry out specified work under the definition which we have seen and is agreed to be the definition of specified work at page 458.

8. We have also heard some reference to teaching assistants. These are people who assist teachers in class, most often with individual students with special needs. We heard very little evidence about them. We heard even less evidence about something which is referred to in the Education Specified Work England Regulations 2012 which is about instructors but this seems to relate to some sort of specialist teaching which does not really apply in this case. As I have indicated, the claimant is and was a qualified teacher.

9. On 5 March the claimant unfortunately commenced a long-term sickness absence for a mental health condition. In January 2015 Mr Ojja began as Head of the school. He had various discussion in 2015 with the claimant about her health and the possibility of returning. On 26 June 2015 the claimant attended a sickness absence review meeting with Mr Cahill, the vice-principal, and after discussion it was agreed that the claimant was fit to return on a four day week basis. Other science teachers within the school would pick up the extra day. There followed discussion and a phased return and later the claimant returned to work on that basis. We have seen the September timetable at page 227; the claimant had 15 lessons to cover, whilst we heard evidence that a full-time teacher would have somewhere between 25 to 30 lessons. As indicated, her lessons were spread over four days with Wednesdays off. She continued to do that until 20 November 2015 when she was signed off work initially with stress.

10. On 24 November the claimant communicated that she was considering requesting a further reduction to two and a half or three days and the further sicknote on 4 December indicated that she was not fit for work indicating stress or anxiety because she was undergoing investigations. On 17 December there was an occupational health report. In essence, that supported her request for a two and a half day working week. I think it is important to quote from that, it is at page 244 of the bundle, and it says this:

> "In light of this lady's vulnerability to perceived stress at work and the fact that she is currently struggling with her current hours I would support a request to reduce her hours from a medical point of view. However, whether this can be accommodated will need to be determined by management based on operational and business factors."

11. The claimant remained on sick leave, as it happens, until early February but in January she was invited to a formal sickness absence management meeting with Mr Cahill on 28 January. Ms Osibogun from HR attended as well. Really there is very little dispute about what was said during the course of that meeting, partly because there is a transcript of it and it appears in the bundle between pages 249A to 249JJ. The claimant deals with it in her witness statement, paragraphs 13-22, and Mr Cahill in his witness statement between 16 and 25. A summary is that Mr Cahill, when asked whether the claimant could return for two and a half days, said that that was not viable. He gave a reason because there were a number of problems with that in relation to the difficulty of getting part-time science teachers or indeed any science teachers at all. Ms Osibogun explained that they were trying to attract science teachers through adverts and it was said that there was a lack of suitable people. No other options were explored at that stage.

12. The claimant was then unfit for work because of her mental health disorder until April and during that time a letter was sent summarising the conclusions from 28 January meeting. I just want to read a little bit from that in relation to what was said about a reduction in hours. Ms Osibogun says this:

> "I explained that though the Crest Academy was keen to support staff with their requests for flexible/part-time working any arrangements can only be agreed with service provision in mind. I explained to you the difficulty the academy has had to date with trying to recruit science teachers and though we currently have an advert out the response has not been very good. Though we are never very specific in our adverts as to whether we are seeking full or part-time staff we have always been prepared to consider part-time requests and where possible agree specific arrangements with applicants. There are currently a number of staff within the academy engaged on a part-time basis that demonstrate this position. In your particular circumstances to agree a reduction from four to two and a half days would mean that we would have to engage supply teachers to cover two and a half days. We are unable to guarantee that we will always be able to secure supply cover or that the standard is of the level that we expect. The quality of teaching and learning available to the children in the academy is paramount and must be a primary consideration with regard to any arrangements that we make regarding part-time working."

13. The claimant then wrote a grievance which she sent to Mr Ojja on 18 February. In essence that is a grievance about the meeting and the failure to be able to accommodate her on the reduced hours. On 19 February Mr Ojja forwarded the grievance email to Ms Lightburn, who we understand is in HR. She is not in the same building as Mr Ojja. This is an email which the claimant does not accept is a genuine email partly because it was not seen until some way into this process even though it appears that there might have been a request for it contained within a long letter which included a number of other issues. We have now seen that email and we have heard evidence from Mr Ojja. We accept his evidence that he sent that email which forwarded the grievance. There was really no reason for

him not to follow the process which was to send it to HR and we found him to be an entirely credible witness. That email was at 11:32 on 19 February, the claimant's grievance having been sent on 18 February at 17:10. Contained within that is a suggestion that Mr Ojja would meet the claimant informally and that is indeed what he asked her to do as he was aware that she was coming in to meet Ms Khatun on 24 February he suggested that he see her shortly thereafter.

14. The claimant therefore did attend the 24 February meeting with Ms Khatun, his assistant vice-principal, on 24 February accompanied again by her brother. Although there was some difficulty over this, this was also recorded and therefore there is little dispute about what was actually said during the course of that meeting. Ms Khatun gave evidence that she had considered the matter before the meeting to see whether some offer could be made to the claimant to try and get her back to work and that she had looked at the timetable which she was responsible for drawing up for the next academic year and believed that she could not accommodate the request to work two and a half days. The meeting therefore on 24 February started with a discussion about that difficulty and Ms Khatun told her that that request could not be accommodated because of the difficulties that were set out in her witness statement.

15. The conversation then moved on to what Ms Khatun had thought could be offered to the claimant which was the role of a cover supervisor. There was not a vacancy for this role but it was something that the respondent thought they could use and would encourage the claimant back to work. The claimant and her brother during the course of this discussion do make reference to supply teaching or supply and Ms Khatun does not in the early stages of the meeting necessarily correct them on that phraseology. So for example at page 281HH the claimant is recorded as saying: "But as a supply teacher I will be teaching as a supply teacher. I will be teaching I have taught from all four periods." Ms Khatun answers: "But a cover supervisor" and the claimant then said "yes". After further discussion ms Khatun again mentioning the phrase "cover supervisor not as a science teacher", the claimant then makes reference again using the word "supply" and at page 281JJ Ms Khatun says: "Yes let's use the term cover supervisor as it is very different to a supply teacher." The claimant responds: "cover supervisor".

16. It is clear to the tribunal that that is what is then discussed throughout the rest of that meeting and the claimant appears to be content to accept that suggestion that she works as a cover supervisor. There is no real discussion contained within that about rates of pay.

17. That was then the end of that meeting and the claimant then attended an informal meeting with Mr Ojja again with her brother. There is no transcript of that but there is a note of what was discussed in that meeting. It really goes through much of the same ground. The note was prepared by a person who we have not heard any evidence from and there is a rather curious not of what Mr Ojja said at page 286 where there is recorded:

> "She needs to understand that it is not the same pay scale. The role is paid on the same basis as supply teachers (no planning/marking not the same expectations as of a

permanent teacher) and paid during the holidays."

18. As indicated that is a slightly confusing note not clear to the Tribunal weather those were the actual words used by Mr Ojja but it does of course make reference to supply teacher.

19. Something else that was raised by the claimant in her claim is that Mr Ojja in some way changed his mind from saying five periods to six but it is clear from is evidence and the notes that what was said that was that she would work as cover supervisor up to six periods. There was no change in that statement. Mr Ojja also said that he would try to get people to apologise and Mr Cahill and Ms Osibogun but not heard from Ms Osibogun but Mr Cahill gave evidence and he was not cross-examined on this but he did apologise at a later stage to the claimant if she had been upset.

20. There was a formal outcome letter to the discussion with Ms Khatun and that is at page 287 and 8 but that sets out the position of cover supervisor but it does not give any pay details partly because the claimant was to remain on her own teacher's pay for the initial period of working as a cover supervisor. This was said to be a trial period and she returned to work from sickness absence on the 9 March to start as cover supervisor working Monday, Wednesday and Friday. As indicated she was still receiving her pay at teacher's rate at that point.

21. On the 4 May there was meeting between the claimant and Ms Khatun to review her trial period and at this meeting Ms Khatun set out various options for the claimant to consider. There are notes of that meeting at page 295 but again there is not too much dispute about what was said.

22. The claimant complains because one of the matters which was touched upon by Ms Khatun is the suggestion that she might want to consider whether she leaves the school. Ms Khatun accepted that she made reference to that because she said sometimes people do not always think about that but in the context of the options available and the claimant's concern about returning to teaching and so on that comment was made. The tribunal can find nothing inappropriate about making reference to that that in the context of the meeting and the offers made with respect to the cover supervisor role.

23. A letter was then sent on the 9 May which set out the four options available to the claimant. This letter made it clear that the rate of pay for cover supervisor whether the claimant took it as a temporary or a more permanent role was considerably less than that of a teacher. The letter sets out a rate of pay and says where that rate of pay is drawn from, mainly the Brent Council rates. The claimant is also given options of returning as a four day a week science teacher.

24. The claimant responded to that asking for further details of the pay for cover supervisor role and all her questions are answered and the claimant is asked to decide by the end of May.

25. On the 24 May the claimant emailed Mr Ojja saying that her February grievance had not been addressed and she wanted to proceed formally. Mr

Ojja replied expressing his belief that the matter he thought had been resolved but of course indicating that it could then proceed. On the 27 May the claimant presented an initial grievance. The claimant at this point was still being paid four days as a science teacher whilst working as a three day a week cover supervisor.

26. Because she had presented a grievance Ms Khatun indicated that she could continue to work in that way whilst the issues were resolved. The claimant presented a further grievance on the 23 June and Mr Turner, who was an external investigator, was appointed to investigate all the grievances to date. Mr Turner, on the face of the documents (we have not heard from him), appears to have carried out a thorough investigation, spoke to a number of people and set out what he considered, what documents he looked at and so on in a grievance report which appears between 367 and 373.

27. The claimant criticizes only one aspect of Mr Turner's grievance, that is that he did not ask to see the email which would prove that Mr Ojja had forwarded the first grievance to HR and indeed he did not do so.

28. A summary of Mr Turner's grievance report is that he to some extent criticized the school for the lack of clarity with the claimant but he did find in favour of the respondent with respect to the request to do more part-time science teaching and I referred what he said in our conclusions on that matter. In any event, in line with the procedure, a grievance hearing was set up and this was to be with Mr Hatchett who put in his witness statement what occurred and we have of course seen the minutes of that meeting. Again, there is very little dispute about what actually happened during the course of that hearing.

29. There as an outcome on the 20 September, an outcome letter which was sent to the claimant. This said that she would be paid "appropriate pay" for cover supervisor. There is some criticism of Mr Hatchett that he did not say exactly what that appropriate pay was but the tribunal are in no doubt that the claimant was by that time completely clear what that referred to as she had been told some months earlier what the rate was for the cover supervisor role.

30. The claimant appealed that grievance outcome on the 25 September. She raises concerns about the pay that she was expected to receive for cover supervisor, the pressure she was being put under she says to accept that role and repeated that the respondent should consider part-time science teaching. There was a grievance appeal hearing that Mr Pike gave evidence as he was one of the panel members. Again, we have seen a transcript and we have read the witnesses witness evidence on this. Again, it is largely not in dispute what was discussed in that meeting.

31. A grievance appeal outcome was sent on the 1 November. That suggested that the claimant's teacher's pay which had been paid throughout this process should be maintained until the 21 November. There was, therefore, an expectation that her pay would be reduced to that over cover supervisor on the 22 November but it seems that there was a mistake in payroll and in fact it was not so reduced.

32. In early 2017, therefore, Ms Mapani who seems to be in at least partly in charge of payment tried to contact the claimant to talk to her about the overpayment of salary. Some gaps where the claimant did not respond there is no evidence that Ms Mapani had any knowledge of the grievance which had been presented back in February of '16. In any event that continued. The claimant began the ACAS early conciliation process for coming to the tribunal on the 26 January. That was completed. The claimant was formerly told that there would be a recoupment of overpayment of salary in late January and that began to happen and she presented the claim form on the 11 April.

33. As indicated, there were then two preliminary hearings, the first one in June. It would appear that the claimant got the message that she might have some difficulty in succeeding in the argument that she should be paid in the teaching role when carrying out cover supervisor role and she therefore asked to return to a four day teaching role on the 6 July. In August an occupational health report supported that and said that she was fit to return to that role but by that time the respondent said there we no vacancies. We have no evidence about what happened after that.

34. Those are the relevant facts then that we need to determine these matters. The law, it all comes under the Equality Act and I do not intend to set it out here. The respondents have accepted that the claimant was a person with a disability and that those people taking the decisions have the required knowledge at where it is needed for discrimination matters.

35. The respondents do dispute that all periods of absence were necessarily a consequence of the mental health disability, especially in November 2015 where some of the absence might have been because of the claimant's pain in her lower leg. Of course, the burden of proof provisions as set out in section 136 apply. The initial burden of proof lies on the claimant but there is some circumstances in which it switches to the respondent. There are of course time limits as set out in section 123 so we have to consider whether the claimant has presented her claim in time.

36. We are also concerned to consider guidance contained in the Equality Human Rights Commission Code of Practice on Employment 2015. We took a special notice of that in relation to provisions criteria in our practices for the reasonable adjustment claim. Of course, there are a number of cases that are well known which guide us with respect to discrimination cases generally. I will not quote them here but they are not particularly in dispute. The two cases that we were asked to look at with respect to the question of whether the claimant's pay should have been maintained at its teacher level was G4S Cash Solutions (UK) Limited v Powell UK EAT/0243/15 which is a 2015 EAT case and O'Hanlon v Commissioners for HMR Revenue and Customs [2007] IRLR 404 which is a 2007 Court of Appeal case. Those cases deal with circumstances in which it might or might not be appropriate for it to be a reasonable adjustment to maintain a pre-existing rate of pay while a disabled employee carries out other work. As indicated the representatives handed in detailed written submissions which were helpful to us in our deliberations. I will not summarise them now as the parties of what the other party was saying. It should be clear from our

conclusions where we accept various arguments in relation to separate parts of this claim.

Conclusions

37. These then are our conclusions. As indicated, the claimant was disabled at the material time because of her mental illness and the likelihood that that might recur. Going then through the summary list of issues we deal first with the failure to make reasonable adjustments claim. The first question is whether the respondent applied the following PCPs. The first is requiring the claimant to work four days a week as a science teacher and be paid at teacher rate. We find that there was such a PCP, at least from time to time. This is slightly difficult because the claimant could occasionally comply with that PCP in that in September of 'May, May of '16 and July of '17 she said that she could indeed work four days a week as a science teacher, however, there were other times when she could not and we do accept that that was a provision criteria and our practice applied to the claimant.

38. A second possible PCP is requiring her to work as cover supervisor and be paid at lower rate. We have found that this is likely to be a PCP. The respondents have argued that it was a reasonable adjustment and also that it could not be a PCP because the claimant had agreed to it and it was therefore not a requirement, however that could also be said of the requirement to work four days a week which had already been an initial reasonable adjustment. Our view is that it is right that we accept that was a PCP in order to look through the reasonable adjustments suggested although we accept that there is a possibility that it was not. I think it matters not given our findings we will come to on reasonable adjustments.

39. Turning then to the next question which is whether the PCPs have put the claimant at a substantial disadvantage in comparison with people who are not disabled. The first PCP did put the claimant at a substantial disadvantage as she was unable to work at least most of the time for four days a week as a science teacher because of her disability. The second PCP is more problematic because the claimant could and did carry out work of a cover supervisor. The difficulty for her was the reduction in pay and conditions which do not necessarily relate directly to her disability. However, on balance again we find that such a reduction would amount to a substantial disadvantage and it was a PCP. We, therefore, consider whether the respondent have failed to make reasonable adjustments and we look at the first one which was permitting to work as a three days or possibly two and a half days per week science teacher.

40. This was the area which was most difficult for the tribunal to determine. The claimant had asked for two and a half days or three days in January 2016 with some support from the occupational health report. We are satisfied that if the adjustment could have been made it would have alleviated the disadvantage. We have considered carefully the respondent's explanation when deciding whether that would have been a reasonable adjustment. The respondent's witnesses – Mr Chahill, Ms Khatun and Mr Ojja - have given consistent evidence about why the reduction in days of work was not feasible. In summary, they are that there were already two vacancies in science teaching where adverts had not

attracted appointable candidates, that such a reduction would have led to split classes which was a particular concern as the school was in special measures and the timetable was already set up for four days under the previous reasonable adjustment and Ms Khatun had looked to see whether there could be a possibility of moving it to accommodate the claimant. Details of this are contained within Mr Rogers witness statement paragraphs 41 to 45, Mr Cahill's between 18 and 19 and Ms Khatun's at paragraph 7. There were also severe financial difficulties.

41. This was a matter that was considered in some detail by the external Grievance Investigator, Mr Turner. As indicated he concluded that the grievance should be upheld in part because what he called a failure to maintain an effective dialogue with the claimant but on the question of the claimant returning to teach science on the further reduction, he said this and this is at page 372:

> "In the main narrative of the press being unable to make the adjustment required to allow this employer to achieve her stated aim of returning to teach there, the balance of the argument falls in favour of the academy. This is in light of their imperative to sustain a high standard of education in the longer term and the need to reduce part-time and supply teaching for this reason.

42. It was also considered thoroughly at the grievance hearing and I will read from the outcome letter at page 389 where Mr Hatchett says this:

> "As you will also be aware science teaching is a national shortage occupation and trying to recruit another part-time science teacher would not in the academy's view be possible and the cost incurred could not be justified."

43. The tribunal accept that this is an objective test that must apply taking into account guidance and case law and EHRC Code. We appreciate that it can be a difficult balance for an employer when it tries to accommodate the needs of an employee with a disability and the need to continue to run its business. In this case, the business was providing state education where there were problems with standards of teaching in a particular subject area where it is difficult to recruit. On balance, balancing the needs of the employee and the particular circumstances of the respondent, we found that this was not a reasonable adjustment. In fact, it became even less likely to be a reasonable adjustment once the claimant was offered and accepted an alternative role of cover supervisor albeit she appeared to believe that she might be continued to be paid at her teacher's rate. That was not a reasonable adjustment.

44. Turning then to the other reasonable adjustments these can be dealt with a little more quickly. The first is permitting her to work as a part-time supply teacher. The tribunal struggled to understand this suggested adjustment as stated in the facts the claimant and her brother did make references to supply teacher but it does not seem clear to us that the claimant was really suggesting she could work as a supply teacher employed by the school. We accept as we must that the NASUWT have commented in a document that supply teachers exist as employees of schools but we accept the evidence of the teachers we heard that a supply teacher is typically sourced from an agency or employed on a self-employed basis. We cannot see how it could have worked as it would have caused the same issues as described

above with regard to split classes. If the claimant is suggesting she could have worked more days, that would not have alleviated the disadvantage to her. We cannot see how this could have been a reasonable adjustment.

45. We take the next two suggested reasonable adjustments together that is designated or treating her cover supervisor role as a teacher role and paying her according to teacher's terms and conditions including pension contributions as they amount to essentially the same thing. This argument in fact took up the majority of the time at the employment tribunal hearing and after the claimant began to carry out work as a cover supervisor in March 2016 the majority of time in discussions in the grievances and so on.

46. To some extent this was a reasonable adjustment which was applied in the early days. The claimant did remain on teacher's terms and conditions from March 2016 to the 21 November 2016. In the circumstances that was a reasonable adjustment as it was designed part particularly in the early stages as a way of getting the claimant back to work and perhaps to her substantive post of four days a week science teaching. What was being suggested was that the claimant should be retained on teacher's pay and conditions including pension indefinitely when working as a cover supervisor.

47. This has been argued to some extent by the claimant's brother, Mr Suhail, as some sort of contractual or part statutory entitlement of the claimant but we do not agree with him on that point. We accept that teacher's pay and conditions apply to qualified and unqualified teacher's when carrying out specified work, namely the whole range of teaching duties. The cover supervisor obviously has some but she does not have all of those elements as the claimant herself accepted.

48. We have considered the case law as indicated of O'Hanlon v Commissioners for HMR Revenue and Customs [2007] IRLR 404 and G4S Cash Solutions (UK) Limited v Powell UK EAT/0243/15 but this is a case which can be distinguished on the facts from both those cases, in fact we have taken into account the likely cost which would run if it ran to retirement to the many thousands of pounds for a publicly funded educational establishment already facing financial difficulties. Again, a balance has to be struck. Being offered the cover supervisor role was itself a reasonable adjustment. Retaining her pay and conditions for some months was also a reasonable adjustment but retaining her pay and conditions indefinitely was not a reasonable adjustment.

49. The last reasonable adjustment is suggesting as follows: offering her any role other than that of a four day a week science teacher at the meeting on the 28 January. It is factually correct that Mr Cahill did not consider any other role, however, the claimant was still away from work on sick leave, offer of an alternative role was made very soon thereafter in February. This was not a reasonable adjustment giving that it was the beginning of a process which included dialogue with the claimant and consideration of many alternatives. The claimant, therefore, does not succeed in her claim for failure to make reasonable adjustments.

50. We turn then to the victimization claim. The first question is whether she

has carried out a protected act and it is accepted that the protected act was agreed and it is on the 18 February. The next question is whether she has been subjected to a detriment because she did that act and then there follow a number of suggestions of what those detriments might be. In summary, some of those factually are correct, some of them less so and I am going to go through them now as quickly as I am able.

i. First, it is Mr Roger failing to process her grievance. Our findings of act make this clear. That matter did not occur and it cannot therefore amount to a detriment.

ii. The second is Ms Khatun issuing a formal warning and offer cover supervisor role only. This did occur. The tribunal are unsure whether Ms Khatun knew of the grievance. Even if she did, the process was being followed because there was sickness absence. Ms Khatun was trying to see if the claimant could return and if so, in what role. It has nothing to do with the grievance.

iii. Thirdly, the suggestion that Mr Turner failed to properly investigate the grievance, we have already found there was no such failure, this was a proper investigation. If this is about some failure to ask to see one email which might have proven that Mr Ojja forward an email, it is minor matter and does not amount to a failure to investigate. There is no detriment there.

iv. Fourthly, this is Ms Khatun offering four options including an option to leave. This did occur as stated in our findings of fact, however, we accept that Ms Khatun was trying to resolve matters so that the school could be run properly and the claimant return if at all possible. It is not connected to the grievance even if Ms Khatun knew of it.

v. Fifthly, the rejection of the grievance on the 12 September. This did occur, of course, but it is a strange argument to say that it was because of the grievance. It was because of the grievance that it was considered but it was not rejected because of it. We are satisfied by Mr Hatchett's evidence that he considered the grievance. It was not raised against him and it was not, therefore, because of the grievance that it was rejected.

vi. Sixthly, we have rejecting the grievance appeal again on the 21 October. Again, of course, this did occur but it cannot be said that it occurred because of the grievance. It was considered but it was not rejected because of it. This is a full panel decision. The people considering were considering grievances not raised against any one of them and it is not a detriment.

vii. Seventhly, the respondent rejecting the appeal without considering the claimant's comments on the draft minutes. This did occur but the tribunal have accepted that decision was arrived at without considering those minutes. There is no significant issue of dispute anyway and there is really no connection to the fact that a grievance had been made when the panel meet to make their decision.

We have then got a number of suggested detriments from the 28 June amendment documents as follows:

viii. Ms Khatun avoiding the role of supply teacher on the 24 October. Any reference to supply teaching was by the claimant and her brother, not by Ms Khatun. Ms Khatun's clear offer was cover supervisor. In any event, this is not connected to the grievance in anyway, this is simply as stated Ms Khatun trying to find ways to accommodate the claimant and get her back to work so that the school could continue to run.

ix. At item X, we've already dealt with this is Mr Ojja not referring the grievance that did not occur.

x. Similarly, our facts make it clear that item xi changing from five to six periods also did not occur. Those can, therefore, not amount to detriments.

xi. At item xii this is Mr Ojja failing to secure apologies from Mr Cahill and Ms Osibogun. We have heard evidence and we accept that Mr Ojja asked Mr Cahill to apologise and we heard Mr Cahill say that he did do so. He was not cross-examined, as I said on that point. Mr Ojja was trying to resolve the grievance informally as so of course it is in some way linked to the grievance but it cannot be said to be connected to it and it is certainly not a detriment to ask for apologies. That cannot amount to a detriment.

xii. At item xiii this is failing to inform her that the cover supervisor will be paid at a different rate on the 24 February. There was a failure to inform the claimant of that in very clear terms but that could well have been because the claimant was being retained on her salary for a period of time in any event. It has no connection to the grievance.

xiii. At number xiiii this is Mr Ojja being untruthful about forwarding the grievance. We have already dealt with that and there was no such untruthfulness.

xiv. At number xv this is about Ms Khatun offering four options and stating the claimant could just leave. Again, we've dealt with this, this did occur but in the context of the discussion at that time was an entirely appropriate comment and unconnected to the grievance.

xv. At item xvi this is Mr Turner failing to investigate properly. We have already decided this. There is no such failure.

xvi. At xvii the respondent's failure to inform claimant of the precise details of the cover supervisor pay. This did occur initially but the claimant was in an event aware that the cover supervisors were paid less. It was clarified very shortly after she asked questions about it. It has not connection to the grievance. The claimant lowering her pay even more we think must be a reference to it being lowered on the 21 November because it was not lowered until then but that simply cannot be because of the grievance. If anything, the grievance delayed the reduction for some months. The reason for lowering her pay was that that was the

rate for cover supervisor, the role.

xvii. At xviiii this is the respondent trying to recover pay for the two month period. This did occur but it was progressed by someone who was almost certainly not aware of the grievance in February as they had had no involvement. Even if she had, the reason that she was trying to recover the overpayment was because it was just that, an overpayment.

xviii. Twenty, twenty-one and twenty-two are all about the same matter, namely the recovery of overpayment and clearly that was not connected to the grievance of February of '16. Therefore, the claimant has shown no detriments arising from the protected act. Either matters did not occur or they did not amount to detriments and there was no connection with the majority of them with the grievance raised.

xix. Turning then to section xiii, this is the direction discrimination complaint. The first question is whether the claimant has shown facts from which the tribunal could conclude that the respondent treated the claimant less favourably than a person without her disability.

- The first one is refusing to offer any role other than four day a week science teacher. It is clear that no other role was offered.
- The second one is about the failing to process her grievance. We have already decided that point. Mr Ojja honestly believed that the matter had been resolved informally.
- The third is issuing a formal warning and offer cover supervisor only. This did occur.
- We have not accepted a number four but there was a failure to properly investigate the grievance.
- We do accept that only four options and option to leave occurred is number five and six and seven occurred which is the rejection of the grievance and the rejection of the appeal and eight the rejection of the appeal without the claimant's comments on the minutes.

51. So, for those matters above that did occur does the tribunal think it could conclude that the respondent treated the claimant less favourably it would have treated someone whose circumstances were not materially different but without the claimant's disability? The Employment Tribunal simply cannot find this on the evidence before us. That comparator would be someone returning from a long absence, unable to fulfill the role that they had been appointed to and had represented a grievance. There is no evidence at all that such a person would have been treated any differently than the claimant had. She cannot therefore succeed in that direct discrimination claim.

52. The next question is whether the burden of proof shifts to the respondent and it would be clear from our answer that it does not shift, however, we do say this for completeness even if the burden of proof had shifted a tribunal are satisfied that the respondents have given reasonable and fair reasons for the actions its took which are without any discrimination so that claim must fail.

53. Turning to the section 15 claim which is a discrimination arising from disability claim, the question is again whether the claimant has shown facts on which we could conclude that she had been treated unfavourably because of something arising in consequence of her disability. The claimant here relies on Ms Khatun issuing a formal warning and offering cover supervisor only role. This did happen. The question for us is whether it arose in consequence of her disability. We find that it did so arise. It was because the warning was under the sickness/absence policy and is clearly related to her disability and the offer of cover supervisor was an offer of reasonable adjustment.

54. The next question is therefore whether the burden of proof has shifted and we find that the burden of proof does shift on this matter for the respondent to explain what it did. The respondent has to show that they had a proportionate means of achieving a legitimate aim and in this case, it has done so. The first written warning was clearly within the sickness/absence policy, there is no general rule that somebody with a disability should have no warnings given to them. The claimant had had very long absence without such a warning and it is clearly a legitimate aim that a sickness/absence policy should be adhered to.

55. The offer of a role of cover supervisor was understood and accepted very quickly by the claimant. There is clearly a proportionate means of achieving the legitimate aim of the respondent to continue to deliver better quality education and try to get the claimant back to work. There was no discrimination and the claimant must therefore fail in that section 15 claim also.

56. Turning then to the harassment claim, I will not read them out but the claimant has to show unwanted conducted which had the purpose of the effect of violating her dignity and so on but we have to take into account her perception and whether it was reasonable. The claimant here has relied upon Ms Khatun's four options including the option to leave on the 4 May. In essence, this centers on Ms Khatun's comments about the option of leaving the respondent altogether. This may well have related to the claimant's health and her disability and we accept that the claimant was concerned by the suggestion, however, in the context of the whole discussion including an offer of cover supervisor at a protected pay for a period for the claimant to consider rather than being imposed upon her, it was not reasonable for the claimant to consider that it have that effect and her claim must therefore fail. It therefore means that all the claimant's claims under the Equality Act must fail.

57. I just want to deal finally with the time limits point as it is still an outstanding point. Our view is that the claim was brought in time. There was conduct extending over a period between January '16 and November '17 but the claimant went to ACAS within time and we therefore do not need to consider whether there was any just and equitable reason to extend time. Our view is the claim was made in time but as indicated all her claims must fail and are dismissed.

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Employment Judge Manley

Date: 23 August 2018…….

Judgment sent to the parties on
....23.08.18.....

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For the Tribunal office