Case Number: 2500888/2017

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs S Clifford	**AND**	**Durham County Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: Teesside Justice Hearing Centre **On**: Wednesday 17 January 2018
Thursday 18 January 2018
Friday 19 January 2018
Monday 22 January 2018

Before: Employment Judge Johnson

Members: Mrs S Don
Mr P Curtis

Appearances

For the Claimant: Mr P Crammond of Counsel

For the Respondent: Mr R Stubbs of Counsel

JUDGMENT

1) The claimant's complaint of unlawful disability discrimination (unfavourable treatment because of something arising in consequence of disability) is well founded and succeeds.

2) The claimant's complaint of harassment related to disability is well founded and succeeds.

3) The claimant's complaint of victimisation is well founded and succeeds.

4) The claimant's complaint of unlawful disability discrimination (failure to make reasonable adjustments) is not well founded and is dismissed.

Parties will be notified of arrangements for a private preliminary hearing by telephone to consider such case management orders as may be appropriate relating to the listing of a remedy hearing

REASONS

1) The claimant was represented by Mr Crammond of Counsel. Mr Crammond called to give evidence the claimant herself and a former work colleague, Ms Penelope Johnson. The respondent was represented by Mr Stubbs of Counsel, who called to give evidence Ms Anne Brown (Deputy Head), Ms L Woodhead (former teaching assistant) and Mr James Walsh (Chair of Governors). The claimant and all of the witnesses had provided formal, typed witness statements which were taken "as read" by the Tribunal, subject to questions in cross examination and questions from the Tribunal.

2) There was an agreed bundle of documents marked R1 and R2, comprising two A4 ring binders, containing a total of 1,166 pages of documents. During the course of the hearing, additional documents were added, namely photographs of parts of the school where the claimant worked and a series of text messages between Penelope Johnson and Lynne Woodhead.

3) By claim for presented on 14 July 2017, the claimant brought claims of unlawful disability discrimination. The respondent defended the claims. In essence they arise out of a deterioration in the working relationship between the claimant (who was employed as a teaching assistant) and the headmaster of Aycliffe Village Primary School in County Durham. The claimant alleges that she was bullied, harassed and victimised by the headmaster and that he also failed to make reasonable adjustments to accommodate her disability. This conduct is said to have taken place over a period of time from mid 2015 to approximately May 2017.

4) a) In a "list of issues" prepared by Mr Crammond, there are set out a total of 14 specific incidents of discriminatory conduct about which the claimant complains. They are as follows:-

   (i) The respondent refusing to allow the claimant to undertake training for ladder handling, paediatric fist aid and fire safety officer. The refusals are said to have taken place from late 2015 through to May 2016.

   (ii) The respondent's head teacher chastising the claimant for the way she handled a class in approximately September/October 2015.

   (iii) The respondent's head teacher subjecting the claimant to scrutiny and stating, "Yes you are right, I have been watching you and waiting for you to slip up. I have been bullying you and I have been waiting to get something on you". This is said to have taken place in October 2015.

   (iv) The respondent failing to inform other teachers with whom the claimant was working about reasonable adjustments which had been advised by Occupational Health in or about July 2016.

(v) The respondent's head teacher telling the claimant in or about July 2016 that there was no money to pay for a step stool, until the claimant said she would pay for one herself.

(vi) The respondent's head teacher removing a reasonable adjustment during a phased return to work by the claimant in or about December 2016 and saying "I can do whatever I like".

(vii) The respondent's head teacher telling the claimant, "we are all under pressure and working hard" in or about February 2017, when the claimant asked to be able to walk around between interventions.

(viii) The respondent's head teacher chastising the claimant for making "mountains out of molehills" in or about February 2017, in so far as she sought working arrangements which would allow her a lunch break.

(ix) The respondent's head teacher telling the claimant that she was causing stress and extra work for her colleagues as well as financial stress for the school by taking sickness absence.

(x) The respondent's head teacher telling the claimant he did not ever want her to return to work when she said her conditions were permanent disabilities, on or about 15 February 2017.

(xi) The respondent's head teacher telling the claimant that she was no longer permitted to attend hospital appointments in working hours and that she was having too much time off, on 16 February 2017.

(xii) The respondent's head teacher berating the claimant for raising her voice to children, when other staff were not challenged, and treating the claimant inconsistently, in or about February 2017.

(xiii) The respondent's head teacher refusing to engage in a discussion concerning a revised timetable as to why the claimant had been timetabled with more interventions and telling the claimant "There is the door" on 6 March 2017.

(xiv) The respondent's head teacher divulging that the claimant had raised a grievance about him, at a staff meeting on 3 May 2017.

b) Although not mentioned in this list of issues, the claimant also complained about an alleged failure by the respondent to allow her time to prepare for her intervention classes and to mark the work done by pupils during those classes.

5) The claimant's case is that each of those incidents took place and each amounted to one or more of the various kinds of unlawful disability discrimination. The respondent accepts that it refused to allow the claimant to undertake the

training set out in paragraph (i) and also accepts that the headmaster disclosed to the other members of staff at the meeting on 3 May 2017, that the claimant had raised a grievance about him.

6) Most of the claimant's allegations related to conduct towards her by the headmaster, Mr Jed Gargen. The claimant raised a formal grievance against Mr Gargen on 24 March 2017. Mr Gargen attended a grievance meeting with the Chair of Governors, Mr Walsh, on 3 May 2017. Mr Gargen tendered his resignation in or about June/July 2017, with effect from 31 December 2017. Mr Gargen commenced a period of ill-health absence in May 2017 and did not return to work until his employment came to an end at the end of December 2017.

7) Mr Gargen did not attend the Employment Tribunal hearing, nor was there any statement from him to either confirm or deny the allegations made by the claimant, or indeed to confirm any of the matters raised by the respondent in its defence. At the beginning of the hearing, the Tribunal enquired of Mr Stubbs to how the respondent proposed to deal with those allegations raised by the claimant which involved things specifically said or done or omitted to be done by the headmaster. Mr Stubbs quite properly conceded that the respondent was not in a position to gainsay what the claimant alleges was said to her by Mr Gargen. In his closing submissions, Mr Stubbs made clear that this did not mean that the respondent conceded that these things had been said, but would leave it to the Tribunal to make its findings based upon the strength and quality of the evidence which was placed before it. Mr Crammond's position on behalf of the claimant was that he originally believed from the start of the hearing that the respondent was conceding that what the claimant alleges to have been said by Mr Gagen, had actually been said. The Tribunal panel checked its notes and were satisfied that the respondent's position was that it could not gainsay what the claimant alleged that the head master had said, but did not formally concede that it had been said.

8) No explanation was given by or on behalf of the respondent as to why Mr Gargen was not present. Mr Crammond's position was that the absence of the headmaster was a fact from which the Tribunal could infer that, in the absence of an explanation (and that the respondent could not gainsay t what the claimant alleges had been said by the head master) then it had been said and also that it amounted to discriminatory conduct. Whilst that interesting evidential point is dealt with below, the Tribunal concluded that the headmaster's absence itself could not and did not amount to a fact from which the Tribunal could infer that unlawful disability discrimination had taken place.

9) The respondent has conceded throughout these proceedings that the claimant is and was at all material times suffering from a disability as defined in **Section 6 of the Equality Act 2010**. The claim suffers from fibromyalgia, chronic fatigue syndrome, hypertension, Reynaud's disease, restless leg syndrome and migraines. The claimant was also diagnosed with rheumatoid arthritis in September 2017.

10) The claimant was diagnosed with fibromyalgia and chronic fatigue syndrome in late 2000/early 2001. It is accepted that since then, the claimant's physical

health has deteriorated. She experiences consistent pain on a daily basis. That pain was originally managed with Ibuprofen and Paracetamol tablets, as well as Tramadol. Her level of Tramadol was increased in 2007/2008. By November 2008 the claimant`s pain had increased to such an extent that she was prescribed Gabapentin. In June 2011 the claimant was prescribed Sertraline, normally an anti depressant, but in the claimant's case prescribed for the purpose of pain relief.

11) Paragraph 14 of the claimant's witness statement states as follows:-

> "In March 2014 my pain had increased to the point that it was affecting my work. This can be seen in the medical record at page 1025 and 1036 of the bundle. I would leave work exhausted and require a couple of hours sleep to recuperate. Despite this, with the aid of pain relief, I managed to perform my contractual hours. At this point I was prescribed with morphine patches by my pain management consultant Dr Thimappa, to control my pain. As the pain was getting much worse, I could no longer perform housework such as ironing and vacuuming. I also slept most of the weekend to recuperate from the working week. I experienced severe pain every single day."

12) At paragraph 16 of her witness statement, the claimant states:-

> "In 2016 I was provided with a blue badge, a PIP, disability status, a disabled bus pass, amongst other things. The head was updated. I stopped driving because of the condition around November 2016."

13) From about September 2005, the claimant worked voluntarily as a teaching assistant at Aycliffe Village Primary School, for up to three days a week. The claimant became an employee of Durham County Council, working as a teaching assistant in Aycliffe Primary School in February 2006. It is accepted that the head teacher was aware of the claimant's condition when she began to work as a volunteer in September 2005 and when she was taken on as an employee in February 2006.

14) At paragraph 24 of her witness statement, the claimant states,

> "Over the course of my employment, the head teacher treated me unfavourably and harassed me because of my disabilities. His conduct towards me worsened over the last year. I considered that requests for reasonable adjustments were not taken seriously and that the respondent was reluctant to or failed to implement them".

15) Whilst the claimant's employment began in February 2006, the first incident upon which she now relies as an act of discriminatory conduct, took place towards the end of 2015. The claimant alleges that she was not allowed to undertake ladder training because of her conditions. The claimant further alleges that in April/May 2016 she was not allowed to undertake training for an advanced paediatric first aid certificate, nor was she allowed to undertake fire safety officer training shortly thereafter. The respondent accepts that the claimant asked to undertake all

three forms of training and that she was refused permission to do so. The claimant raised no formal complaint about any refusal at that time, nor did she mention any such refusal to permit her to undertake training, when she raised a formal grievance, about the headmaster's conduct towards her, on the 24 March 2017.

16) The Tribunal accepted the respondent's evidence that none of the teaching staff (including the teaching assistants) were required or permitted to undertake ladder training. There was no need for any of the teaching staff to use ladders. Only the caretaker was permitted to use ladders and only the caretaker had undertaken the ladder training. On the claimant's own case, she required as a reasonable adjustment to enable her to undertake display work, a step-stool with a handrail. The Tribunal found that that the respondent's decision not to allow the claimant to undertake ladder training had nothing at all to do with her disability.

17) The claimant insisted in her evidence that she was physically able to undertake the training for fire evacuations and paediatric care. The respondent's evidence from Ms Brown was that there were genuine concerns about the claimant's physical capability to deliver advanced paediatric first aid care and to undertake evacuation procedures in the case of a fire, due to her physical disabilities. The respondents already had employees who had the necessary first aid and fire safety training and there was no need for the claimant to undertake any of those duties. There was no evidence from the claimant as to why she particularly wanted to obtain these qualifications and no evidence as to why or how the respondent's refusal amounted to "unfavourable treatment". The Tribunal found that the claimant's failure to complain at the time or to mention the matters in her grievance, confirmed that they were of little significance to her. The Tribunal found that the claimant's evidence in this regard was somewhat inconsistent with what she says at paragraphs 14, 16 and 18 of her statement, which set out the limitations on what she could do, because of her physical capabilities. By December 2016, Occupational Health were recommending a Personal Emergency Evacuation Plan (PEEP) for the claimant herself. The Tribunal found that the respondent had a legitimate aim in each case, namely to ensure that those trained in advanced paediatric first aid and fire safety were physically capable of attending to injured children and of ensuring that school premises were evacuated quickly and efficiently in the case of fire. Limiting such training to those persons physically capable of undertaking those roles was totally proportionate in all the circumstances.

18) Furthermore, the Tribunal found that the claimant's complaints that she had been denied these forms of training, were out of time. The Tribunal found that these three complaints were specific, discreet allegations about the same subject matter, all of which took place in late 2015 and early 2016. The Tribunal found that they did not amount to a continuation state of affairs or continuing act of discrimination. The Tribunal found that these particular allegations had no reasonable prospect of success and that in all the circumstances it would not be just and equitable for time to be extended so as to permit those claims to be considered by the Tribunal.

19) a) The next complaint raised by the claimant related to an incident which occurred in September/ October 2015. The claimant had been assisting a teacher with a class of children who were preparing for PE lesson. An external contractor, who had been working in the building, complained to the school secretary about the manner in which the claimant had spoken to the children. The school secretary brought the matter to the attention of the headmaster. The claimant alleges that she was "chastised by the headmaster for the way I handled a class whilst they got changed in strict silence for a PE lesson." Nowhere does the claimant allege that the headmaster's behaviour towards her was anyway related to her disability. The claimant does not allege that the manner in which she spoke to the children was in someway related to her disability. The Tribunal found that, having received a complaint from the outside contractor, it was entirely appropriate for the headmaster to challenge the claimant and even "chastise" her in connection with the incident. The claimant alleges that the headmaster's treatment of her on this occasion, amounted to "bullying and harassment". The claimant does not however say that her disability had anything to do with this particular incident. Immediately following the incident, the claimant met with the headmaster and Ms Brown, the deputy head, in the headmaster's office. The claimant was given the opportunity to present her case in relation to the situation and circumstances. Mrs Brown's evidence was that they wanted to help the children and to give her some strategies of how to improve her interactions with the children. The claimant's evidence to the Tribunal about this meeting was that Mrs Brown had to leave the meeting for a short time, during which the headmaster to her:-

> "Yes you`re right. I have been watching you and waiting for you to slip up. I have been bullying you and I have been waiting to get something on you."

b) The claimant said that she was totally intimidated by "this hostile behaviour" and reported it to Mrs Brown as soon as she returned to the room. Mrs Brown's evidence was that she could not recall the claimant saying those words to her and that she was sure she would have remembered, had the claimant done so. Mrs Brown's evidence was that it would have been entirely out of character and not typical of what the headmaster would say. It was put to the claimant by Mr Stubbs in cross examination, that her description of what had been said was "artificial" and simply not something that would have been said by a headmaster in those circumstances. The claimant insisted that those were the exact words that had been used by the headmaster. The Tribunal found that it was highly unlikely that any such words would have been used and that the claimant's description of the incident was highly implausible. Furthermore, there is nothing in what was alleged to have been said that could possibly be connected to the claimant's disabilities. At the time this incident is said to have taken place, there had been no complaints by the claimant to the headmaster about anything to do with her disability. According to the claimants own evidence at paragraph 28 in her statement, it was not until around Christmas time 2015 that she informed the head teacher that she was struggling in reception due to her disabilities and needed to be moved to other work.

20) The Tribunal found that the headmaster was quite entitled to discipline the claimant in all the circumstances surrounding this incident. The Tribunal found that the headmaster's decision to do so was in no sense whatsoever influenced by her disability. Furthermore, this was another "one-off" incident, about which no complaint was made until the claimant mentioned it in her grievance of 24 March 2017. The complaint about the matter is considerably out of time. Again, the Tribunal found that it had nothing to do with her disability and thus had no prospect of success. It would not be just and equitable for time to be extended.

21) At the beginning of 2016, the claimant was working 21.25 hours per week as a learning support assistant, which included 5.5 hours per week as a higher level teaching assistant. The claimant's evidence to the Tribunal was that from about Christmas 2015 she informed the head teacher that she was struggling in reception class due to her disability. The claimant complained that the "cacophony of noise and the constant grabbing of me by the children was difficult because of how it affected by condition". No formal request was made in writing for any reasonable adjustments. However, the headmaster referred the claimant for an occupational health service report in July 2016, towards the end of the summer term. The OH report appears at pages 72 – 73 in the bundle. The substantive part of the report states as follows:-

> "Thank you for referring Mrs Clifford to the occupational health service. At the time of todays consultation I understand she remains at work in her normal substantive post. As I understand you are aware Mrs Clifford has a long term condition and describes some well recognised symptoms related to this condition. She describes a great degree of day to day variability in her symptoms and functionability. On bad days she can sometimes struggle to get up and mobilise. She explains that she has constant pain which limits her ability to do certain activities of daily living at home. She feels most uncomfortable when assuming one position for to long, eg sitting or standing. She also describes some difficulty with rising from lower chairs (eg with the younger age groups at work). She describes fatigue which she explains is worse in the afternoons and later in the working week. She is currently avoiding driving she explains due to a worsening in her symptoms and also due to the side effects of prescribed medications she requires for her condition. Mrs Clifford also describes difficulty when in an environment where there are different loud noises at once and explains that she plays background music when taking whole classes, in order that the children can keep their noise level below that of the music, which she feels helps. In Mrs Clifford with her duties in her post, I would recommend:-
>
> - Keeping Mrs Clifford's working hours as much as possible earlier in the day and week given the afternoon and end of week fatigue she describes.
>
> - Allowing Mrs Clifford to have flexibility in sitting and standing duties, where she can alternate her position for her comfort.
>
> - Considering provision of a step-stool with attached handle to facilitate Mrs Clifford in creating wall displays.

- Allowing Mrs Clifford to have short breaks through the working day if needed, on days when symptoms are particularly bad.

- Ensuring that Mrs Clifford has clear lines of communication at work to a supervisor/manager to whom she can raise any concerns about her heath at work at the earliest opportunity"

22) The claimant alleges that the headmaster failed to inform those teachers with whom the claimant was working, about the recommendations contained in the occupational health report, which the claimant describes as "reasonable adjustments". The evidence from Mrs Brown was that she had been made aware of the contents of the occupational health reports. The evidence of the claimant's own witness, Mrs Penelope Johnson, was that she was made aware of the contents of the occupation health report in July 2016. The report is dated 11 July, which meant that it would have sent to and received by the headmaster only a matter of days before the end of the summer term. The claimant would have returned to work in early September 2016. The Tribunal found that it was more likely than not that those members of staff with whom the claimant frequently worked were made aware of the contents of the occupational health report by the start of the Autumn term 2016.

23) The claimant alleges that she specifically requested the acquisition of a step-stool with a handle, to enable her to continue to produce display work on the classroom walls. It is accepted that the respondent already had a step-stool for this purpose, but that one did not have the kind of handle which the claimant says she required to enable her to use if safely. The Tribunal found from the evidence of Mrs Brown that there was no requirement for the claimant to undertake this display work. She did so because she particularly enjoyed doing it. The teachers knew that the claimant enjoyed doing it and were quite happy for the claimant to continue doing it. The claimant's evidence was that when she requested step stool from the headmaster, his reply was that there was no money to pay for it and he was "clearly irritated by the fact that my disability was a nuisance". The claimant's evidence was that she offered to pay for this stool herselft, whereupon the head master agreed to purchase the new stool. It is accepted that the new stool was purchased. The invoice for the purchase of the stool is at page 74 in the bundle and is dated 5 October 2016. The Tribunal found it likely that the stool was delivered around that time, which would have been approximately four weeks after the start of the Autumn term. When asked by the Tribunal Judge whether she would have complained if the headmaster had said to her in response to her request for the stool to the affect of "we will get one but it may take three or four weeks to do so", the claimant accepted that she would not have had any grounds of complaint. Her case was that the headmaster's initial expression of reluctance/refusal to obtain another step-stool, amounted to unfavourable treatment because of something arising in consequence of her disability, failure to make reasonable adjustments, harassment and victimisation. The Tribunal found that it was none of these. There was no requirement for the claimant to undertake the display work in circumstances where she had to use a step- stool. In any event, the step-stool was acquired within a reasonable period of time. The headmaster telling the

claimant that there were insufficient funds to buy another stool did not amount to unfavourable treatment because of something arising in consequence of the claimant's disability. It was not calculated or likely to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Prior to this incident, there had been no formal complaint by the claimant about any alleged discriminatory conduct by the headmaster or anyone else. The headmaster's reluctance to acquire the new step- stool could not amount to an act of victimisation.

24) The claimant had a period of absence from 10 October 2016 until 7 December 2016. The claimant attended an attendance management interview on 21 October. Notes appear at pages 75 – 77 in the bundle. In answer to the question, "is the absence work related?" appears the words "possibly – increases due to stress and worry due to current TA situation". That is understood to refer to an ongoing dispute between Durham County Council and its teaching assistants, relating to their terms and conditions of employment. On the second page of the interview form is a box headed "details of current state of health and impact of absence". Next to that appears the words, "increased work load on other TAs due to SC's absence. Three day financial impact before cover can be arranged though the insurance." The next box on the form refers to "detail support and/or reasonable adjustments to overcome barriers". The adjoining box recites, "breaks – (to be negotiated with the staff" not always practical to take breaks at a moments notice). Music – soothing music (when SC is covering the class.

25) The claimant was accompanied at that meeting by her trade union representative. At no stage did she raise any issues relating to alleged discriminatory behaviour by the headmaster and there is no mention of that in the occupational health report. The claimant was told at this meeting that she was not subject to any attendance targets in the school's attendance management policy, due to her underlying medical condition which amounted to a disability.

26) The claimant attended another occupational health assessment on 2 December 2016. The report appears at pages 87 – 90 in the bundle. Recommendations include:-

- Consideration should be given to flexible working hours.
- Additional rest breaks.
- Pacing activities and task rotation.
- Arranging the work place so less physical exertion is necessary, particularly as Mrs Clifford uses a walking aid to assist her mobility.
- Any adjustments or modifications would need to be reviewed periodically.

If returning to work after a period of absence, a return to work plan should be agreed and the following should be considered:-

- Building up work or work related skills at home if possible before returning to work.
- Starting with shorter hours and gradually building the hours back up again.
- Starting with a reduced work load and gradually increasing it.
- Ensuring that regular breaks are taken.
- Reducing physical tasks.
- Changing the location of work where possible (eg working from home for some of the time if there is appropriate work available such as a project etc).
- Flexibility in working patterns.

The report then recites:-

> "As a result I would advise that you consider and discuss the operational feasibility of implementing the work place adaptations above and talk to her about how modifications will work practically in the school environment in order to support any job role modifications you might make, informing her colleagues of changes would be helpful (this does not need to include discussion about Mrs Cliffords condition); however I do suggest you confirm with her the information you will be sharing prior to doing this.
>
> Secondary to using a walking aid, I have discussed with her the reasons for implementing a PEEP. (Personal Emergency Evacuation Procedure)."

27) No mention is made anywhere in the occupational health report of the claimant complaining about any discriminatory or other unreasonable conduct by the headmaster. At a sickness absence interview on 6 December (page 90), it is recorded that the claimant's sick note was to expire on 7 December and goes on to state:-

> "Phased return commenced on 8 December 2016. This will continue after the return in January – increasing incrementally in the third and fourth week. Different working environment offered. (Support for statemented pupil)"

The note then states:-

> "No non-medical issues".

28) The claimant returned to work on 8 December. In weeks one and two, she worked one half of her normal hours, in week three the claimant left after lunch and in week four she finished at 2.00pm. Because the claimant was finding it difficult to work in reception class, she was taken from that class and given different duties. The occupational health report recommended a reduction in hours, but the claimant did not wish to reduce her hours. Rather than work in the reception class, the claimant was given a number of "intervention" classes, which involved her taking between six and eight pupils for a short, concentrated lesson in particular topics. The claimant was also providing SEN (special educational needs) support to an individual child over the remainder of her working hours. The claimant had wanted to spend as much time as possible with this child, but the child's parents had expressed concern that it may adversely effect their child if she was to spend all of her time with one teacher. To accommodate the recommendation of the occupational health report, the claimant's working hours did not include Friday afternoon, which was also in accordance with the claimant's request. The Tribunal found that the claimant had been removed from reception class and instead was working in the intervention classes and with the individual child. The claimant completed the phased return. Her hours were not reduced as she had requested and as far as possible her hours were early in the day and did not include Friday afternoons.

29) At paragraph 38 of her witness statement, the claimant alleges that approximately half way through the phased return, the head teacher had told her that she would have to return to the reception class to finish her phased return to work. The claimant's evidence was that she challenged this decision and was told by the headmaster, "I can do whatever I like". The claimant's evidence was that this "really upset her because, he was changing things for no apparent reason. This was another failure to make reasonable adjustments, an act of harassment and/or unfavourable treatment arsing as a consequence of my disability". It was accepted by the claimant that as things turned out, she was not actually required to return to work in the reception class. The reasonable adjustment which she had requested therefore continued to be implemented. There was no evidence from any of the respondent's witnesses to contradict the claimant's version of what she had been told by the headmaster. The Tribunal was satisfied that the headmaster informed the claimant that he proposed to put her back in the reception class and had probably said words to the effect that he was entitled to do so. The Tribunal accepted the claimant's evidence as to how she felt when told that by the headmaster. The Tribunal found that it amounted to an act of harassment.

30) In January 2017 the claimant was permanently moved out of working in the reception class. The claimant hoped to spend all of her working hours dealing with the SEN child which she felt would be the most suitable role for her, taking into account her disabilities and the recommendations of occupational health. The Tribunal accepted the respondent's evidence about the concerns expressed by the child's parents, to the effect that they did not want the child to spend all of her time with the same teacher. This meant that other duties had be found for the claimant to fulfil her contractual hours. Because the claimant could not work in reception class, she was given two afternoons each week where she carried out "back to back interventions". The claimant described these as "where groups

of children are removed from the classroom and taught in groups, usually because they are high or low achievers". At paragraph 43 of her witness statement, the claimant said that she found it easier to work with a whole class in the classroom rather than intervention work, as this "provides greater space and opportunity for me to keep mobile while I work. The intervention area is very small. I have been knocked by the children pulling their chairs out and have been pushed into the wall. My walking stick has been knocked from my hand due to the restricted space available. I made the head teacher aware the working in a class room situation is better for my disability, on a couple of occasions during February. I gave it some time first to see if it was feasible because I did not want to cause any problems. I told him it was difficult to work in such a tight space. His reply was basically "tough" and that I had to do whatever he told me."

31) The Tribunal was provided with a copy of a plan of the intervention area (page 229) and also some photographs which were taken on the evening of the first day of the hearing and submitted on the morning of the second day. Having examined the plan and the photographs and having heard the evidence of the claimant and Mrs Brown, the Tribunal found that there was adequate space in the intervention area for the claimant to perform her duties without being subjected to the risks which she describes. The claimant insisted that it was "best practice" for the teaching assistant to be able to stand behind each pupil and to look over the pupil's shoulder to assist them with their work. It is clear from the plan and photographs that the table at which all the pupils sit is in a corner, with one long side, at which three chairs are placed close to a wall. The claimant would not be able to stand behind a pupil sat in the chair in the middle of those three. The claimant could easily access all of the other pupils. Mrs Brown accepted that whilst it was "best practice" for the teacher to stand behind each pupil, it is not an absolute requirement. Mrs Brown suggested that the claimant could have either moved the pupil in the middle to one end of the table, or asked the pupil to go and stand with the claimant at her seat. The Tribunal found that the space generally around this table contained more than sufficient space for the claimant to walk around the table either with or without her walking stick, except for that side next to the wall. The Tribunal found that the claimant was placed at no particular physical disadvantage by working in the intervention area, when compared to working in a normal classroom.

32) At paragraph 45 of her statement the claimant says as follows:-

> "On Monday 6 February 2017 I asked the head teacher for two minutes to walk around between teaching interventions sessions to loosen by body. He said he would discuss it with Mrs Brown. A couple of days later I asked if there was any outcome. He responded that "We are all under pressure and working hard". I explained that I was prepared to work to the best of my ability. He told me that I knew what I could do if I did not like it, "There's the door". I felt humiliated that I was so worthless in my employers eye. At no time did he ever discuss letting me have some time for this. This meant I was in paiN for the whole time of the two afternoons I was teaching intervention groups."

33) In the absence of any evidence from the respondent to contradict what the claimant said she had been told by the headmaster, the Tribunal found it likely that the claimant had raised the matter with the headmaster and that he had responded in the way described by the claimant. The Tribunal accepted that the manner in which the headmaster spoke to the claimant on this occasion amounted to an act of harassment. However, the Tribunal did not accept that the claimant was not given two minutes or so around either during or between teaching intervention sessions, to loosen her body. The agreed procedure was that those pupils involved in an intervention would have to leave their classroom to go to the intervention area at the end of a lesson, whilst those pupils who had been involved in an intervention, would return to their classroom. That could not be done instantaneously. The Tribunal found that there was no reason why the claimant could not stand, stretch and walk around whilst changeover took place. The Tribunal found it highly unlikely that the changeover could be carried out in less than two minutes. Furthermore, there was adequate space alongside the table where the interventions took place, for the claimant to walk up and down and stretch during the course of the interventions themselves, if she so required.

34) The claimant and one of her colleagues used to work on a one to one basis with a SEN child, who had a swimming lesson with her class. In early February 2017, the claimant's colleague indicated that was no longer comfortable getting into the pool with the child and asked if the claimant would be prepared to do so. The claimant agreed, but realised that the time taken to do so would impact upon her lunch break. The claimant initially swapped days with her colleague, but this impacted upon timetabling. At paragraph 46 of her witness statement the claimant states as follows:-

> "A few days later the head teacher pulled me out of class because the deputy head had complained about the impact that the shift swap was having on the timetable. The head teacher was annoyed, asking aggressively, "Why are you causing so many problems? You are making mountains out of molehills over this". The following week, the claimant was asked to go swimming as a one-off to help out with this child. She asked the head teacher when she would be able to take her lunch break, as she was working with another child during lunch time right up to the point of taking the children to the swimming pool by bus for their swimming lesson. The head teacher told me that he eats his sandwich on the bus, "Why can't you".

35) The claimant regarded this behaviour by the head teacher to be unfavourable treatment arising as a consequence of her disability and harassment. In the absence of any contradictory evidence from the respondent, the Tribunal found it more likely than not that the headmaster had spoken to the claimant in this way on both occasions. The Tribunal accepted the claimant's evidence as to how she felt when she was spoken to in this manner and the Tribunal was satisfied that this conduct amounted to harassment.

36) The claimant then took a period of ill-health absence from 9 February to 15 February for "work related stress". The claimant returned to work on 16 February. There is a "return to work declaration form" at pages 93 – 94 in the

bundle. The reason for absence is stated to be "work related stress". At page 94 it states:-

> "Mrs Clifford believes that Mr Gargen is speaking to her in a way that causes her stress. Mrs Clifford wants her point to be fully heard and listen to all sides. Mr Gargen assures Mrs Clifford that she is doing her job properly when working with pupils and the other tasks she has to deal with".

The box marked "summary of discussion and action plan" states,:-

> "Mr Gargen to speak to Mrs Clifford in a way that does not cause her stress. The school to look how the intervention group can be arranged to allow planning and marking. Class teacher to deal with CM after break so that SC gets her break entitlement."

37) The claimant had telephoned the school secretary the day before this return to work meeting, to advise that was her intention to return to work the following day. At paragraph 49 of her witness statement, the claimant states as follows:-

> "Almost immediately after that call, the head phoned me and told me that he did not want me to come back to work until my condition had subsided. When I explained that the condition was a disability and was permanent, the head teacher responded that he did not ever want me back. I was dumbfounded and severely upset. The school secretary told me she had tried to stop him phoning me at home because she knew he would cause a problem."

38) In the absence of any contradictory evidence from the respondent, the Tribunal accepted the claimant's version of this telephone call between herself and the headmaster. The Tribunal accepted the claimant's evidence as to how the headmaster's comments affected her. The Tribunal found out this amounted to an act of harassment. The Tribunal was satisfied that it was also unfavourable treatment because of something arising in consequence of the claimant's disability. The "something" was the claimant's series of absences and her inability to perform all of the normal duties performed by a teaching assistant, all of which arose in consequence of her disability

39) At page 94 b of the bundle is the claimant's copy of the "return to work declaration form" signed by her on 16 February 2017. At the bottom of that form, the claimant has written:-

> "At the end of this meeting – after signing this but whilst were all still in his office – JG said I could no longer have any hospital appointments during work time. I explained I had to take them when they were offered but that I do my best."

Again, the Tribunal found in the absence of any contradictory evidence from the respondent, that this had been said by the headmaster to the claimant. It was accepted by the claimant that she was never actually prevented from attending

hospital appointments during work time, but the Tribunal was satisfied that the headmaster's conduct amounted to both harassment and unreasonable conduct because of something arising in consequence of the claimants disability. The "something" was the requirement to attend hospital appointments during work time, which clearly arose as a consequence of the claimant's disability.

40) At paragraph 50 of her statement, the claimant states:-

> "The head teacher had also told me on many occasions during my sickness absences, that I was causing stress and extra work for my colleagues and that I was costing the school money due to those absences. This was hostile, intimidating and humiliating."

It was suggested by Mr Stubbs that this could not have been the case, as the school had an insurance policy whereby the cost of employing supply teachers was covered for all but the first three days of any absence. The Tribunal noted from P.76 (the attendance management interview form from 21 October 2016) the words, "three day financial impact before cover can be arranged through the insurance". The Tribunal was satisfied that there was indeed a financial impact upon the school, caused by the claimant's absences. In the absence of any evidence to contradict the claimant's version of events, the Tribunal found it more likely than not that the headmaster had indeed informed the claimant that her absences were causing stress and extra work for her colleagues, as well as financial stress for the school. The claimant's absences were a consequence of her disability. The Tribunal found that the headmaster's conduct towards the claimant amounted to both harassment and unfavourable treatment because of something arising in consequence of her disability.

41) At paragraph 52 of her witness statement, the claimant says as follows:-

> "I have a very sensitive response to noise due to my conditions and medication. In or around February 2017 I was reprimanded for shouting above the noise of the children, although the head teacher does not reprimand other staff for doing the same. When I challenged him due to his inconsistent behaviour, he told me that it had nothing to do with me and that he was telling me off, not them. The fact that he was treating me differently to others was very humiliating and intimidating. This had happened on several occasions over the last few years. Other members of staff had screamed at the children at times and had been heard by the head teacher and other members of staff and visitors. The head teacher did not challenge other staff when they did it, though he did challenge me. This I believe was because he viewed me as in irritant because of the demands I had to make of him."

This matter was raised by the claimant in her grievance in March 2017. That part of the grievance was upheld by Mr Walsh, the Chair of Governors who carried out the investigation into that grievance. Taking that into account, the Tribunal was satisfied that the head teacher had spoken to the claimant in this way, and that there was no explanation for the difference in treatment. The Tribunal found that it amounted to unfavourable treatment because of something arising in

consequence of the claimant's disability and harassment. The "something" is the claimant's absences and the requests for reasonable adjustments, all of which arose in consequence of her disability.

42) a) On 6 March 2017 the claimant says that she was handed a revised timetable, prepared by the headmaster, when she arrived at work. The difference for the claimant was that she had been allocated another afternoon of interventions on a Wednesday afternoon. Another teacher had previously been undertaking those interventions, but she had been allocated classroom based work, which the claimant considered would have been easier for her to undertake, because of her disability. The claimant described in her witness statement how she was "devastated and couldn't believe that the head teacher had put the colleague in the place which would have been suitable for her and had given her the intervention work. That was a third afternoon of interventions for me to do."

b) The claimant alleges at paragraph 44 of her statement that she had insufficient time to prepare for her intervention classes and to mark the work of the pupils who took part in those classes. She says that, due to her disability, she "needed extra break times to stretch and get mobile, but had to use the normal break times to complete work." Mrs Brown's evidence was that the claimant was not required to prepare for the intervention lessons, as it was not part of her contracted role, nor was it ever recommended by Occupational Health. Mrs Brown said that "Intervention work is given, overseen and monitored by the class teacher so that there was no planning for (the claimant) to do." Furthermore, the claimant "would have to do some marking for the small groups of children in her intervention groups, but she should get all of the marking done during the session, and from an educational perspective it is better to give children with special needs immediate feedback on work during the session, rather than delay feedback to a later time." The Tribunal accepted Mrs Brown's evidence and found that the claimant was not required to carry out any preparation for the intervention lessons and that there was no reason why she could not carry out any marking as part of and during, the intervention lessons. There was no evidence that the claimant was ever unable to do so, or that any inability to do so was related to her disability.

c) The claimant went to see the head teacher to query why she had been allocated further intervention work, when she had already indicated on earlier occasions that she was struggling with the timetable and the interventions. The claimant's evidence was that the headmaster had said to her, "There's the door". The claimant alleged that this was not the first time the headmaster had spoken to her in this way and that whenever she queried a decision with the headmaster he would tell her, "You know where the door is". The claimant described this as an intimidating and humiliating way to be treated, which upset her greatly. The claimant raised this matter in her grievance and her complaint was "partially upheld" by Mr Walsh. The headmaster's version of his discussion with the claimant was that he could not recall saying "There's the door", but may well have said something to the affect "No-one is forcing you to stay." In the absence of any contradictory evidence from the respondent, the Tribunal was satisfied that the headmaster had spoken to the claimant in the way she describes. The Tribunal found that this amounted to unfavourable treatment because of something arising in consequence of the claimant's disability and harassment.

43) The last complaint raised by the claimant is that the headmaster had informed members of staff at a staff meeting on 3 May 2017, that the claimant had raised a grievance against him. It was accepted by the respondent's witnesses that the head master had done so. The claimant described this as "demonstrative of his contempt for me and another act to humiliate and intimidate me". The Tribunal found that the head teacher, in disclosing to members of staff at the staff meeting that the claimant had raised a grievance against him, amount to unfavourable treatment because of something arising in consequence of the claimants disability, harassment and victimisation. The protected act was the raising of the grievance.

44) The claimant raised her grievance on 24 March. A copy of the completed formal grievance form appears at pages 97 -103 in the bundle. The grievance was investigated by the Chair of Governors, Mr James Walsh. This was the first grievance in which Mr Walsh had ever been involved in his capacity as Chair of Governors. Mr Walsh met with the claimant on 6 April in the presence of her trade union representative. Thereafter, Mrs Clifford raised two further issues by e-mail dated 18 April 2017 and 3 May 2017. Those related to the refusal of the claimant's requests to undertake ladder training, first aid training and fire safety training and the latter was a complaint regarding the breach of confidentiality after the headmaster had disclosed to other members of staff that she had raised a grievance against him.

45) Mr Walsh identified 16 separate elements of the grievance. Having interviewed Mrs Clifford on 6 April, Mr Walsh then interviewed Mr Gargen on 3 May and the school secretary and deputy-head on 12 May. Mr Walsh accepted that he did not give the claimant the opportunity of commenting on what had been said to him by Mr Gargen, Mrs Dolan or Mrs Brown.

46) Mr Walsh prepared the grievance investigation report on 16 June 2017, a copy of which appears at pages 126 – 136 of the bundle. The following allegations were upheld:-

Allegation 2 – that Mr Gargen reprimanded the claimant for shouting at pupils, but did not reprimand other staff for that.

Allegation 5 – that the claimant found out in a staff meeting that a decision had been remove SENCO duties from her without her being consulted and about being told the reasons why.

Allegation 12 – that Mr Gargen rang Sandra at home in February 2017 while she was absent due to work related stress and told her "I don't want you back at work".

Allegation 16 – that Mr Gargen breached confidentiality by disclosing in a staff meeting that the claimant had submitted a grievance about him which was being investigated and that he would inform them of the out come.

Mr Walsh partially upheld the following four allegations:-

Allegation 1 – Mr Gargen had not followed attendance management procedures correctly by using incorrect paperwork and failing to make reasonable adjustments as recommended by the occupational health service.

Allegation 3 – that Mr Gargen reprimanded the claimant following a complaint from a contractor within school about the atmosphere in the reception class while children were getting changed in silence despite the fact that Sandra was following the instruction of the class teacher.

Allegation 9 – that Mr Gargen regularly tells the claimant "if you don't like it there's the door" if she raises an issue with him about work.

Allegation 10 – suggesting that Sandra eat her lunch on the bus while supporting a SEND child to attend swimming lessons with her class.

Mr Walsh found that there was one allegation in respect of which it was impossible for him to draw conclusion, namely that Mr Gargen refused the claimants request for ladder, first aid and fire training safety, because he did not feel she could do it giving her underlying medical conditions.

The other seven allegations in the grievance were not upheld.

47) By letter dated 16 June (page 138 – 140) Mr Walsh informed the claimant of the outcome of her grievance. In the grievance report, Mr Walsh's recommendations were as follows:-

(i) Mr Gargen and Mrs Clifford undergo a period of mediation

(ii) Attendance procedures in relation to Mrs Clifford should continue to be carried out by the deputy head teacher.

(iii) Mrs Clifford does not have any meetings (formal or informal) with Mr Gargen without another member of staff present.

(iv) That all meetings between Mr Gargen and Mrs Clifford are written up, even when they are informal meetings and signed by all parties.

(v) That outcomes of any meetings are provided in writing to Mrs Clifford.

(vi) That Mr Gargen attends a training session in effective communication.

(vii) That any recommendations from OHS referrals are documented in terms of how they can or why they can't be addressed.

(viii) That the PEEP is revisited and implemented as soon as possible.

48) The claimant appealed against the grievance outcome and set out her grounds of appeal in a letter dated 30 August 2017, a copy of which appears at page 152 in the bundle. Her complaint was that she had engaged fully in the respondent's policies whereas the head master had only partially co-operated with the investigation into her grievance, before handing in is notice. The claimant goes on to say:-

> "I would nevertheless like to specifically appeal on three of the allegation outcomes:-
>
> Allegation 1
>
> The PEEP document which JG has submitted as evidence has not been previously shared with me and there is no record of it being signed. Although JG made reference to it in one of my attendance meetings, this is the first time I have seen it and I am concerned it has been completed retrospectively to satisfy the investigation. In my interview (appendix 2) I also specifically cited that when I was offered additional hours because of the TA dispute, JG would only offer me gardening club, despite full knowledge of my disabilities and occupational health recommendations. There isn't any evidence that this was raised with JG.
>
> Allegation 7
>
> I can provide evidence that, contrary to JGs response, I had been assigned to other duties in the times he has indicated. I feel he did this deliberately to make my working day more difficult and he has misled the investigating officer.
>
> Allegation 8
>
> I believe there is evidence that JG was dismissive about this request in appendix 5 where he wrote, "not always practical to take breaks at a moments notice". This is not an accurate representation of what I was asking and it contradicts his interview with the investigating officer.

49) Mr Walsh prepared a "management statement of case", which he presented to the panel of Governors who were to hear the appeal. A copy appears at page 153 – 156 in the bundle. The appeal took place on 3 October 2017. The Governors dismissed the claimants appeal on all of the three grounds she had raised. Their reasons appear in a letter dated 4 October, which appears at page 157 – 159 in the bundle.

50) The claimant had commenced a period of sick leave on 6 March 2017 and did not in fact return to work thereafter. The headmaster handed in his notice at the end of the summer term to take effect from 31 December 2017. He also did not return to work from the date when he handed in his notice as he was absent on long term sick leave.

51) The claimant presented her claim form to the Employment Tribunal on 14 July2017. The claimant's employment was terminated on 16 December 2017, with three months notice. At an attendance meeting on 11 October 2017, the claimant confirmed that she was now suffering from rheumatoid arthritis and that

due to her ill-health, it was impossible for he to continue to work. The claimant stated that there were no adjustments which could be made which would enable her to return to work.

The Law

52) The statutory provisions engaged by the claims brought by the claimant are contained in the **Equality Act 2010**.

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in

relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	**Applicable Schedule**
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

26 Harassment

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if--

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if--

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are--

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)--

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)--

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)--

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)--

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A--

(a) from doing that thing, or

(b) from doing anything of that description.

(5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).

123 Time limits

(1) [Subject to section 140A] Proceedings on a complaint within section 120 may not be brought after the end of--

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

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

(2) Proceedings may not be brought in reliance on section 121(1) after the end of--

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

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

(3) For the purposes of this section--

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

53) a) Mr Crammond had prepared a document headed “list of issues”, which he invited the Tribunal to utilise in considering his closing submissions. Mr Crammond submitted that all 15 factual allegations set out in paragraph 4 above, amounted both to acts of unfavourable treatment because of something arising in consequence of disability and harassment.

b) Mr Crammond submitted that allegations 2 – 14 inclusive were acts of victimisation, the claimant having made six separate “protected acts”, namely;

i) Complaining about being bullied in October 2015

ii) Requesting a step-stool in July 2016

iii) Complaining about the removal of the reasonable adjustment during her phased return to work

iv) Asking to be taken out of Reception class and to be given dedicated marking and preparation time in January 2017.

v) Complaining about failure to make reasonable adjustments relating to interventions on 6th March 2017.

vi) Submitting a grievance on 24th March 2017.

c) Mr Crammond alleges that there were five separate incidents where the respondent had failed to make reasonable adjustments, namely;

i) Requiring the claimant to work in Reception class during her phased return to work in December 2016

ii) Requiring her to undertake display work without a step-stool and/or refusing to provide one from July 2016-October 2016

iii) Requiring her to work in afternoons undertaking group interventions and/or not placing her in a class setting where it was easier for her to move, not be pushed over; and or not giving her the opportunity to stretch, from January 2017

iv) Requiring her to attend/undertake intervention classes without taking a break and/or refusing the opportunity to walk around between interventions from approx. January 2017

v) Requiring her to undertake planning/marking in her own time and/or failing to provide appropriate time for planning and marking from approx. January 2017.

Time Limits

54) The effect of **S.123 (3) of the Equality Act 2010** is that, where there is alleged to be a continuing act of discrimination, the three-month time limit does not start to run until the discrimination ceases. The concept of "continuing acts" of discrimination has generated considerable case law in recent years. Continuing acts are distinguishable from one-off acts that have continuing consequences – time will run from the date of the one-off incident complained of. In **Hendrick –v- Commissioner of Police for the Metropolis (2003 IRLR 96**) the Court of Appeal held that the test is whether the employer is responsible for "an on-going situation or a continuing state of affairs" which should be contrasted with a "succession of unconnected or isolated specific acts". It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. Where there is a break in contact of several months, the Tribunal may be entitled to conclude that continuity is not preserved. The Court of Appeal confirmed the Hendricks approach in **Lyfar –v- Brighton and Sussex University Hospitals Trust (2006 EWCA-CIV 1508),** emphasising the need to focus on the substance of the complaints when assessing whether they form a continuous act. In order to establish the existence of a policy or practice, the claimant must establish some degree of "co-ordination".

55) The Tribunal may consider a complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so. The correct approach is for the Tribunal to bear in mind that Employment Tribunal time limits are generally enforced strictly. The claimant must make out a sufficient case so that the Employment Tribunal may exercise is discretion in favour of extending time. It is not a question of extending time unless a good reason can be shown for not doing so. **(Robertson –v- Bexley Community Centre 2003 EWCA-CIV-576).** The discretion to extend time is not at large and the time limit will operate to exclude otherwise valid claims, unless the claimant can displace it. This does not however mean that the discretion has to be used sparingly. In deciding whether or not it is just and equitable to grant an extension of time, the Tribunal must take care first to consider the reasons why the claim was brought out of time and then the reasons why the claim was not presented sooner than it was. Failure to put forward a good reason for not having submitted the claim in time (or sooner) does not necessarily mean that time should not be extended – all of the relevant factors, including the balance of prejudice and the merits of the claim, must be considered**. (Rathakirshnan –v- Pizza Express Restaurants Limited (2016) IRLR 278).**

The Section 15 Claims

56) The Employment Appeal Tribunal gave guidance on the meaning of "unfavourable" in **Swansea University Pension Scheme Trustees –v- Williams (2015 IRLR 885)** and said that "unfavourable" should be measured against an objective sense of what is adverse, as compared with that which is beneficial. On appeal to the Court of Appeal, it was held that an employee was not unfavourably treated because of something arising in consequence of his

disability, if he was not treated as advantageously as a person with a different disability or medical history would have been treated. The claimant thus cannot complain where they have been favourably treated but feel that they could have been treated more favourably still. However, no comparator is required, as would be the case with direct discrimination where the test is of "less favourable treatment".

57) **Section 15 (1) (a)** contains a double causation test. The unfavourable treatment must be "because of" the relevant "something" and that "something" must itself "arise in consequence" of the disability. It is not a question of whether the complainant was treated less favourably because of their disability. In respect of the first element of causation ("because" issue) the test is the same as that in respect of direct discrimination and focuses upon the alleged discriminator's reasons for action. The "something" must more than trivially influence the treatment, but it need not be the sole or principal cause. **(Hall –v- Chief Constable of West Yorkshire Police – UK EAT/0057/15).** In respect of the second element ("in consequence" issue) there is no need to look at what was in the mind of the alleged discriminator. **(Pnasier –v- NHS England UK EAT/0137/15).** In that case, the Employment Appeal Tribunal provided guidance on the correct approach to Section 15 cases as follows:-

(a) The Tribunal must first identity whether there was unfavourable treatment and by whom. In other words, it must ask whether A treated B unfavourably in the respects relied upon by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so to there may be more than on reason in a Section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.

(d) The Tribunal must determine whether the reason/cause (or if more than one) reasons or causes, is "something arising in consequence of B's disability." That expression "arising in consequence of" could describe a range of causal links. Having regard to the legislative history of Section 15 of the Act, the statutory purpose which appears from the wording of Section 15, namely to provide protection in case where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that

causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case that the "something" can properly be said to have arisen in consequence of disability.

(e) However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) It does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal may ask why A treated the claimant in the unfavourable way alleged, in order to answer the question whether it was because of "something arising in consequence of the claimants disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment.

58) **Section 15 (1) (b) of the Equality Act 2010** permits a respondent to show that its treatment of the claimant was a proportionate means of achieving a legitimate aim and thus not an act of discrimination. "A proportionate means of achieveing a legitimate aim" use to be called "justification" In **Hampton –v- Department of Education and Science (1989 ICLR 179)** it was held that "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. The Tribunal must seek to weigh the justification against its discriminatory effect. Once a finding of the condition having a disparate and adverse impact in an employee has been made, what is required as a minimum, is a critical evaluation of whether the respondent's reasons demonstrate a real need to apply the condition. If there is such a need, consideration of the seriousness of the disparate impact must be undertaken together with an evaluation of whether the real need is sufficient to outweigh the disparate impact. The principal of proportionality requires the Tribunal to take into account the reasonable needs of the business. But the Tribunal must make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the condition or proposal is really been necessary. Justification is about striking a balance. It is not enough for the respondent to merely justify the PCP or practice itself. Showing that the practice was a proportionate means of achieving a legitimate aim in general is not quite the same as justifying whether the application of the practice in the particular circumstances of the claimant`s case was justified. The questions to be asked by the Employment Tribunal are:

(i) Whether the measure in question has a legitimate aim, unrelated to any discrimination based on any previous ground;

(ii) Whether the measure is capable of achieving that aim;

(iii) Whether in the light of all the relevant factors and taking into account the possibility of achieving by other means the aims pursued by the provisions in question, the measure is proportionate. A measure has to be both an appropriate means of achieveing the legitimate aim and a reasonably necessary means of doing so **(Homer –v- Chief Constable of West Yorkshire (2012 UK SC15).**

59) The test to be applied by the Tribunal is an objective one. The Tribunal should take into account the reasonable needs of the respondent`s business, but must make its own judgment as to whether the provision criterion or practice applied by the respondent is reasonably necessary. There is no scope for a "margin of discretion" or "a range of reasonable responses" approach, when considering whether the practice is justified**. (Hardys and Hanson Plc –v- Lax 2005 EWCA-CIV-846).** The Tribunal must demonstrate that is has critically evalued any defence of justification.

Reasonable Adjustments

60) In **Environment Agency –v- Rowan (UK EAT/0060/07**) it was held that the Employment Tribunal **must** identify:-

(a) The provision criterion or practice applied or the physical feature or the auxiliary aid not supplied;

(b) The identity of non-disabled comparators (where appropriate);

(c) The nature and extent of the substantial disadvantage suffered by the claimant;

That approach was endorsed by the Court of Appeal in **Newham Sixth Form College –v- Sanders (2014 EWCA-CIV-734).**

61) The phrase "provision criterion or practice" should be construed widely and include formal and informal policies, rules, one-off decisions and actions. The duty to make reasonable adjustments will apply, for example, to selection an interview procedures as well as to job offers, contractual arrangements and working conditions. The Tribunal must not adopt "an overly technical approach" to the identification of the PCP. The is adequate guidance in the EHRC Code of Practice, which makes it clear that a PCP should be construed broadly. "Adopting a real world approach, whist "requirement" might be taken to imply some element of compulsion, an expectation or assumption placed upon an employee might well suffice." **(Carreras –v- United First Partners Research – UK EAT/0266/15).**

62) In **Archibold –v- Fife Council (2004 IRLR 651)** the House of Lords as it then was, identified how the non-disabled comparator should be identified. In that case, the employee had minor surgery which gave rise to complications, leaving her virtually unable to walk and therefore unable to do her job. The House of Lords identified the correct comparator as those employees who were not disabled, could carry out the functions of their job and were therefore not at risk

of dismissal. In **Smith v Churchills Stairlifts Limited (2006 IRLR 41)** the Court of Appeal considered the judgment in **Archibold** and concluded that "the comparator is readily identified by the disadvantage caused by the relevant arrangements." The Employment Appeal Tribunal made it clear in **Fareham College –v-Walters (UK EAT/039/08)** that in many cases the facts will speak for themselves and the identity of the non-disabled comparator will be clear from the PCP found to be in place.

63) Once a comparison has identified a substantial disadvantage, the question will be whether the employer has made reasonable adjustments – the onus is on the employer to show this. This will depend on the circumstances of each case. In the case of **Smith –v- Chuchills Stairlifts** the position was summarised as follows:-

> "There is no doubt that the test required by Section 20 is an objective test. The employer must take such steps as it is reasonable in all the circumstances of the case to take. The objective nature of the test is further illuminated by the draft Code. Thus in determining whether it is reasonable for an employer to have to take a particular step, regard is to be had amongst other things to the financial and other costs which would be incurred by the employer in taking the steps and the extent to which taking it would impact upon any of its activities. It is significant that this concerns the extent to which the steps would disrupt any of his activities, not the extent to which the employer reasonably believes that such disruption would occur. The test of reasonableness under Section 20 must be objective. Section 21 speaks of "such steps as it is reasonable for him to have to take." The Code provides that, in determining whether it is reasonable for an employer to have taken a particular step in order to comply with the duty, the following factors might be taken into account:-
>
> (a) Whether taking any particular steps would be effective in preventing a substantial disadvantage;
>
> (b) The practicability of this step;
>
> (c) The financial and other costs of making the adjustment and the extent of any disruption caused;
>
> (d) The extent of the employer's financial or other resources;
>
> (e) The availability to the employer of financial or other assistance to make an adjustment (such as advice through Access to Work);
>
> (f) The type and size of the employer.

Harassment

64) The definition of harassment has a relatively wide scope, in that it covers harassment which "relates" to the relevant protect ground and not merely harassment which is "because of" the characteristic. In **GMB –v- Henderson**

(2016 EWCA-CIV-1049) the Court of Appeal suggested that deciding whether the unwanted conduct "relates to " the protected characteristic, will require a "consideration of the mental processes of the putative harasser". In determining whether the conduct has the effect of violating the employee's dignity or creating the relevant environment for the purposes of **Section 26 (1) (b),** the Tribunal must take into account the perception of the employee, the other circumstances of the case and whether it is reasonable for the conducts to have that effect. In **Land Registry –v- Grant (2011 ICR 1390)** Elias LJ focused on the words "intimidating, hostile, degrading, humiliating or offensive" and observed that:-

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets, being caught by the concept of harassment."

65) The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity merely because the complainant thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the Tribunal is obliged to take the complainant's perception into account in making that assessment. The intention of the alleged harasser may be relevant in determining whether the conduct could reasonably be considered to violate a complainant's dignity. However, it is not necessary that the alleged harasser should have known that his behaviour would be unwanted. **(Reid and Bull Information's Systems Limited –v- Steadman [1999] IRLR299)**.

Victimisation

66) The provisions of **Section 27 of the Equality Act 2010** are designed to prevent employees who complain from being subjected to retaliatory action by their employer. The complainant only needs to show that she has been treated badly, not that others have been treated better than her. The employer must subject the employee to a detriment "because" the employee has performed a "protected act." The protected act has to be an effective and substantial cause of the employer's detrimental actions, but does not have to be the principal cause. **(Chief Constable of West Yorkshire Police –v- Khan 2001 IRLR 830).** However, there is no victimisation where the reason for the unfavourable treatment or detriment is the destructive manner in which complaints are made, rather than the contents of the complaints themselves **(Martin –v- Devonshire Solicitors – 2011- ICR 352).**

Submissions

67) Mr Crammond for the claimant submitted that **section 136 of the Equality Act 2010** should be interpreted in such a way that the Employment Tribunal is entitled to infer discrimination by the respondent from the fact of the headmaster's absence from these proceedings. Mr Crammond referred to that as being a "glaring absence" as all of the claimant's allegations were against him personally and there was no meaningful explanation from the respondent as to the headmaster's absence. Mr Crammond submitted that, in those circumstances, where there is any conflict between the evidence of the claimant

and the respondent, then the claimant must be believed. Mr Crammond particularly referred to the Employment Tribunal's need to examine the mindset of the putative discriminator if it was to be invited by the respondent to find a non discriminatory reason for the headmaster's actions. Mr Crammond submitted that the headmaster's absence was itself a primary fact from which the Employment Tribunal could draw principles about his behaviour. Mr Crammond's secondary position was that the respondent could only be speculating on what the headmaster might have had in his mind and that without the headmaster's attendance, there was no evidence as to what was actually going on in his mind. Mr Crammond invited the Tribunal to accept the claimant's evidence about the 15 separate incidents, and to infer from the headmaster's absence that each amounted to an act of unlawful disability discrimination.

68) Mr Stubbs' submission on this point was that **section 136** still requires the claimant to prove facts from which the Tribunal could infer, in the absence of an explanation, that the respondent had contravened the relevant provisions. Mr Stubbs submitted that the absence of the headmaster was not itself a fact from which any inference could be drawn. The simple absence of the headmaster to rebut any allegation could not be treated by the Tribunal as evidence that a particular incident had in fact taken place. It remained for the Tribunal to assess the quality of all of the evidence and, if satisfied that incident had taken place, then to draw such inferences as were appropriate on the basis that there was no explanation from the respondent. The Tribunal acknowledged that, pursuant to **Madarassy v Nomura International Plc**, that the Tribunal is entitled to take into account evidence (albeit not explanations for allegedly discriminatory treatment) presented by the respondent at the first stage of the two-stage burden of proof test. It should be considered at the first stages all the evidence, from whatever source, and not only the evidence adduced by the claimant. The Tribunal notes the decisions of the Court of Appeal in **Igen v Wong, Hewage v Grampian Health Board** and more recently **Ayodele v Citylink Limited & Another** as Lord Hope said in the **Hewage** case, shifting the burden of proof rules in **section 136** have little relevance in a case where the Tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against.

69) The Tribunal found that the absence of the headmaster from the Tribunal was not itself a fact from which the Employment Tribunal could draw an inference that all of the allegations raised by the claimant must amount to acts of unlawful disability discrimination. It remains for the claimant to prove facts from which the Tribunal could draw that inference, in the absence of an explanation from the respondent.

70) Mr Stubbs submitted in his skeleton argument that "the behaviour of the former headmaster towards the claimant fell below that which should have been expected of him". Mr Stubbs submitted that this was due to "a very unfortunate personality clash and deterioration in relations from approximately the first time that the headmaster had to address the claimant following a complaint from the contractor in October 2015". Mr Stubbs put forward a formal apology from the respondent to the claimant for this conduct but continued that many of the allegations raised by the claimant were "speculative" and arose not from a

discriminatory motive by the headmaster, but through an understandable sense of frustration on both sides caused by a number of non discriminatory factors.

Reasonable adjustments

71) Mr Crammond submitted that there was an expectation, amounting to a provision, criterion or practice, for the claimant to work in Reception during her phased return to work in December 2016. Whilst the headmaster did mention to the claimant that she may be required to work in Reception during that period, she was not in fact required to do so. The Tribunal found that the respondent did not apply that provision, criterion or practice to the claimant. Accordingly there was no obligation on the respondent to make any reasonable adjustment to prevent any potential disadvantage caused by the implementation of that provision, criterion or practice.

72) Mr Stubbs submitted that the respondent applied a requirement for the claimant to undertake display work without a step stool which had a handle. The Tribunal found that no such requirement was imposed upon the claimant. Furthermore, there was no "expectation" that the claimant should undertake display work at any time. She was free to do so if she so wished, but at no stage was she required to undertake it. Furthermore, the Tribunal found that a step stool with a handle was ordered within a reasonable period of time after the claimant's request was made. Insofar as that amounted to a reasonable adjustment, the Tribunal found that it was made and would therefore have removed any disadvantage caused to the claimant.

73) Mr Stubbs submitted that the claimant was required to work in the afternoons undertaking group interventions and that this put her at a disadvantage because she was removed from a classroom setting where it was easier for her to move, not to be pushed over and have the opportunity to stretch from time to time. Mr Stubbs' submission was that the respondent had implemented a reasonable adjustment by giving the claimant intervention classes to deal with as an alternative to being in a noisy, busy classroom where she was liable to be bumped or knocked over. The Tribunal found from the evidence that in the intervention area there was plenty of room for the claimant to move, plenty of room her to stretch and that it was not necessary for her to squeeze behind any pupils to undertake her work. The claimant was no more likely to be knocked or pushed over in the intervention area than she was in the classroom area. The claimant had made it clear that she did not wish to work in Reception and would have preferred to work solely with the SEN child. That was impossible due to the demands of the child's parents about the child not working with one teacher all of the time. The Tribunal found that there was no substantial disadvantage caused to the claimant by her working in the afternoons undertaking group intervention.

74) Mr Crammond submitted that the respondent implemented a requirement for the claimant to attend and undertake intervention classes without being able to take a two minute stretch break and without having the opportunity to walk around between interventions, from approximately January 2017. The Tribunal found that the respondent did not implement this PCP. The Tribunal found that there was ample room in the intervention area for the claimant to walk around and

stretch at any time. The Tribunal found that there would have been adequate time between each intervention class for the claimant to walk around and stretch. Accordingly, the provision, criterion or practice alleged by the claimant was not applied by the respondent.

75) Finally, Mr Crammond submitted that the claimant was required to undertake planning for intervention classes and marking work arising from those classes, in her own time and that the respondent failed to provide appropriate time for both planning and marking from approximately January 2017. The Tribunal accepted Mrs Brown's evidence that there was no such requirement for the claimant to prepare for intervention classes, nor was there any expectation that she should do so. Preparation was the responsibility of the class teacher. The Tribunal accepted Mrs Brown's evidence again to the effect that any marking of work carried out in intervention classes was to be done during the classes themselves and there was no need for the claimant to do any such marking in her own time. The Tribunal found that the respondent did not apply any provision, criterion or practice in this regard thus that the claimant was not placed at any substantial disadvantage as a result.

76) The Tribunal acknowledged the guidance given in **Environment Agency v Rowan**, **Newham Sixth Form College v Sanders** and **Carreras v United First Partners Research**. In the absence of any provision, criterion or practice which placed the claimant at a substantial disadvantage, then the obligation to make the reasonable adjustment proposed by the claimant would not and did not arise. All of the claimant's complaints of failure to make reasonable adjustments are therefore dismissed.

Unfavourable treatment because of something arising in consequence of disability

77) Mr Crammond submitted that each of the 15 incidents set out in paragraph 4 above amounted to an act of unfavourable treatment because of something arising in consequence of the claimant's disability. Mr Stubbs urged the Tribunal to exercise caution when assessing whether any of these incidents amounted to "unfavourable treatment" and whether each could properly be described as because of something arising in consequence of the claimant's disability.

78) With regards to the allegations of failing to permit the claimant to undertake ladder training, paediatric first aid training and fire safety training, the Tribunal found that none of these could fairly or reasonably be described as "unfavourable treatment". The Tribunal accepted that the claimant must have wanted to undergo the training, otherwise she would have not requested to do so. However, the Tribunal was not satisfied that the respondent's refusal caused any sense of loss, detriment or disadvantage to the claimant whatsoever. The refusal for her to undertake ladder training was in no sense whatsoever influenced by her disability. In simple terms, none of the staff members were required or permitted to undertake ladder training as that was limited to the caretaker. Furthermore, taking into account the claimant's deteriorating physical health the Tribunal found that the respondent was entirely justified in allocating training for paediatric first aid and fire safety to those members of staff who were physically

capable of undertaking those roles. The respondent had a legitimate aim in providing paediatric first aid care to the children and fire safety for everyone within the school. Limiting training to those persons physically capable of undertaking those roles was entirely proportionate in all the circumstances of this case. Accordingly the respondent's refusal to permit the claimant to undertake this training could not and did not amount to unfavourable treatment because of something arising in consequence of the claimant's disability, it was not a proportionate means of achieving a legitimate aim. Furthermore, it could not and did not amount to harassment as the refusals could not properly be described as conduct which violated the claimant's dignity or which created an intimidating, hostile, degrading, humiliating or offensive environment for her.

79) The Tribunal found that the headmaster chastising the claimant for the way she spoke to pupils in the class in approximately October 2015 had nothing whatsoever to do with her disability. Whilst the claimant may well have preferred not to have been spoken to in that manner, and thus viewed it as unfavourable treatment, it had no connection whatsoever with her disability. The headmaster's reprimand was entirely due to the manner in which the claimant spoke to the children. The claimant has never suggested that disability impacted in anyway whatsoever upon the way she spoke to the children.

80) Immediately following this incident, the claimant alleges that she was told by the headmaster in a meeting where no one else was present, "Yes you are right, I have been watching you and waiting for you to slip up. I have been bullying you and I have been waiting to get something on you." The Tribunal found it highly unlikely that any headmaster would speak to a member of staff in that manner. The Tribunal accepted Mrs Brown's evidence in this regard. There was no evidence from the claimant about anything which had happened prior to this incident which could possibly lead the headmaster to wait for her to "slip up" or "waiting to get something on you". The Tribunal found the claimant's evidence in this regard to be totally implausible.

81) The claimant alleges that the respondent failed to inform those teachers with whom the claimant worked that occupational health had recommended certain reasonable adjustments to be implemented in or about July 2016. The Tribunal found that it was more likely than not that those teachers had been informed about the proposed reasonable adjustments for the claimant. The Tribunal accepted the evidence of Mrs Brown and the claimant's witness Ms Johnson, in this regard. Accordingly, there was simply no "unfavourable treatment" relating to this incident.

82) In July 2016 the claimant requested a step stool with a handle to enable her to continue to undertake display work in the classroom. It is accepted that the step stool was acquired by October. The Tribunal has already found that there is no failure to make reasonable adjustments with regard to this step stool. It is accepted that there is a considerable overlap between failing to make reasonable adjustments and treating an employee unfavourably because of something arising in consequence of their disability. In most cases, a breach of the duty to make reasonable adjustments will inevitably amount to unfavourable treatment because of something arising in consequence of disability, and vice versa.

However, the statutory provisions are not _____ inclusive. It is not impossible for the claimant to succeed in a complaint pursuant to **section 15**, but not succeed on a complaint pursuant to **sections 20 and 21**. In the present case however, the Tribunal found that there was no "unfavourable treatment" of this claimant. She asked for a stool and was given a stool. The Tribunal found that the stool was acquired within a reasonable period of time. In any event there was no requirement or expectation upon the claimant to undertake the kind of display work which required utilisation of such a stool and certainly not before the stool was obtained. The Tribunal accepted the claimant's evidence to the effect that the headmaster only relented when asked to provide the step stool, when the claimant indicated that she would be willing to pay for it herself. The Tribunal found that this initial reluctance by the headmaster _____ amount to "unfavourable treatment". Furthermore, the Tribunal found that the headmaster's reason was more likely to be due to the financial constraints imposed upon the school at that time, the fact that the school had already acquired one step stool and that it was reasonable for the headmaster to conclude that there was no requirement or expectation for the claimant to undertake the kind of work that would require the step stool.

83) In December 2016, whilst the claimant was undertaking a phased return to work and working in intervention classes, the headmaster indicated that he would require the claimant to return to the Reception class and when challenged by the claimant, he replied to her "I can do whatever I like". The Tribunal accepted the claimant's evidence that the headmaster did speak to her in this fashion. Whilst the reasonable adjustment was never in fact removed and the claimant was not required to return to work in Reception class, the Tribunal accepted the claimant's evidence that she was genuinely upset both by the way the headmaster had spoken to her and at the prospect of having to return to work in Reception class. The Tribunal found that this did amount to "unfavourable treatment" of the claimant by the headmaster. The "something" was the implementation of the reasonable adjustment to permit the claimant not to have to work in Reception class, which itself arose in consequence of her disability. This therefore did amount to a breach of the provisions of section 15. The Tribunal also found that it amounted to unwanted conduct which had the effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It therefore amounted to harassment.

84) In February 2017 the claimant asked the headmaster for permission to walk around and stretch during and between intervention classes. The Tribunal accepted the claimant's evidence that the headmaster's reply to this request was, "We are all under pressure and working hard". Mr Stubbs submitted that the headmaster's comments were likely to be caused by stress, exhaustion and frustration due to various issues at the school, together with the claimant failing to apply commonsense to her own situation. Mr Stubbs submitted that the claimant's failure to apply commonsense could not be and was not linked to anything arising from her disability. The Tribunal found that this comment amounted to both unfavourable treatment because of something arising in consequence of the claimant's disability and harassment. The Tribunal has found that the claimant was not in fact prevented from walking around and

stretching during the intervention classes, but that does not mean that the claimant was not reasonably entitled to explore with the headmaster the possibility of specific time being made available for her to do so. The Tribunal found that the claimant's request was made because of her perceived difficulties in walking and stretching during the intervention classes and was thus something which arose in consequence of her disability. The manner in which she was addressed by the headmaster amounted to both unfavourable treatment and harassment, as it was unwanted conduct which had the effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

85) In February 2017 the claimant asked for clarification about working arrangements relating to swimming lessons which would have impacted upon the length of the claimant's lunch break. The Tribunal accepted the claimant's evidence that the headmaster had informed her that she was "making mountains out of molehills" with regard to this matter. The Tribunal found that the headmaster's comments were in no sense whatsoever influenced by the claimant's disability or the fact that she had earlier made requests for reasonable adjustments. This was simply a timetabling issue which the claimant and her colleague had attempted to resolve between themselves but which had ultimately required the intervention of the headmaster. It was accepted that it was the headmaster himself who eventually took the children swimming so as to allow the claimant to have her full lunch break. Whilst the claimant may well not have preferred to have been spoken to in that manner, the Tribunal found that it was not because of anything which arose in consequence of the claimant's disability. The headmaster's comments were not related to the claimant's disability. The comment did not amount to unfavourable treatment contrary to **section 15**, harassment contrary to **section 26** or victimisation contrary to **section 27**. The claimant has alleged that she was told by the headmaster on a number of occasions that her regular sickness absences were causing stress and extra work for her colleagues and also costing the school money. The claimant found that it was highly likely that the claimant's absences would indeed cause stress and extra work for her colleagues. The Tribunal found that the first three days of each absence were not covered by the respondent's insurance policy and therefore that there was indeed a financial impact caused by her absences. The Tribunal accepted the claimant's evidence as to how she had been addressed by the headmaster. The Tribunal found the comments to be unfavourable treatment because of her absences which were a consequences of her disability. They also amounted to unwanted conduct which had the effect of violating her dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The Tribunal was not satisfied that the headmaster's comments amounted to victimisation. Whilst the comments may have been a detriment, the Tribunal was not satisfied that it was likely that the claimant's earlier requests for reasonable adjustments had impacted upon the headmaster's decision. The cause of the comments was the claimant's absences, the stress and extra work imposed upon the other members of staff and the financial cost to the school.

86) During a telephone call on 15 February 2017, the headmaster said to the claimant that he did not want her to return to work until her condition had subsided. When the claimant explained that her condition was a permanent

disability, the headmaster informed the claimant that he did not ever want her to return to work. The Tribunal accepted the claimant's evidence as to exactly what was said to her by the headmaster. Mr Stubbs valiantly sought to persuade the Tribunal that it was more likely that the headmaster had simply informed the claimant that he did not want her to return to work until she was well enough to do so, which is what the headmaster stated in his grievance interview (page 114). Mr Stubbs conceded that, if the Tribunal found that the headmaster had said what the claimant alleges was said, then it would amount to a breach of both **section 15 and section 26**. On that basis, those allegations are well-founded. The Tribunal however found that the headmaster's comments did not amount to victimisation contrary to **section 27 of the Equality Act 2010**. The Tribunal found it unlikely that the headmaster's comments were in anyway influenced by the fact that the claimant previously requested reasonable adjustments for her disability. The Tribunal found it likely that the headmaster's comments were borne out of frustration caused by the claimant's absence and its impact upon the school.

87) The claimant alleges that she was told by the headmaster on 16 February that she would no longer be permitted to attend hospital appointments during working hours as she was having too much time off. Mr Stubbs submitted that it was highly unlikely that the headmaster had said any such thing, particularly because the claimant was thereafter never actually prevented from attending hospital appointments during work time. The Tribunal accepted the evidence of the claimant as to what had been said by the headmaster. Again, the Tribunal found that this amounted to unfavourable treatment because of something arising in consequence of the claimant's disability. The "something" was the claimant's requirement to attend hospital appointments during work hours. Those hospital appointments were a consequence of her disability. The Tribunal accepted the claimant's evidence that she was distressed by what the headmaster had said and the manner in which it had been said. That amounted to unwanted conduct which had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. However, the Tribunal was not satisfied that the headmaster's behaviour was materially influenced in anyway by the fact that the claimant had previously requested reasonable adjustments because of her disability. It therefore did not amount to victimisation.

88) The claimant alleged that in February 2017 she was berated by the headmaster for raising her voice to children, when other members of staff were not challenged in the same circumstances. This allegation was upheld by the Chairman of Governors when he conducted his grievance investigation. The Tribunal found that there was a difference in treatment of the claimant when compared to the other teachers and that there was no explanation from the respondent as to that difference in treatment. It was certainly unwanted conduct which had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. On the basis that the claimant was being singled out and treated less favourably than the other teachers, the Tribunal found that the burden of proof shifted to the respondent to explain the difference in treatment. In the absence of any such explanation, the

Tribunal was satisfied that it amounted to both harassment and victimisation, the protected act being the earlier requests for reasonable adjustments.

89) On 6 March 2017 the claimant challenged the headmaster about his proposed implementation of a new timetable which would have led the claimant to undertake more interventions. The Tribunal accepted the claimant's evidence that she was told by the headmaster "There's the door". Mr Stubbs in his submissions accepted that the respondent could not gainsay that this was what was said to the claimant by the headmaster. The Tribunal found that the headmaster had used those words to the claimant in those circumstances. Whether or not the revised timetable was implemented, the Tribunal found that it was not unreasonable for the claimant to challenge the headmaster about his proposals. The manner in which the headmaster spoke to the claimant was unwanted conduct which had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It was unfavourable treatment because of something arising in consequence of her disability, namely a request that the revised timetable should not be implemented because it would mean the removal of the reasonable adjustments implemented because of her disability. The Tribunal found that the claimant's earlier requests for reasonable adjustments had a material influence upon the way the headmaster spoke to her. The headmaster's conduct therefore amounted to a breach of **sections 15, 26 and 27 of the Equality Act 2010**.

90) The respondent accepts that on 3 May 2017 the headmaster divulged to other members of staff that the claimant had raised a grievance against him. Mr Stubbs conceded that the headmaster should not have done so, but sought to explain the headmaster's conduct by saying it was due to frustration at a grievance being raised and due to frustration at not knowing what the grievance was about. The Tribunal did not accept that submission, nor did it accept Mr Stubbs' submission that the "core" or "real" reason for his action was not causally linked to any earlier protected act. The raising of the grievance itself was a protected act. The headmaster's conduct therefore amounted to victimisation contrary to **section 27**, harassment contrary to **section 26** and unfavourable treatment contrary to **section 15**.

Time points

91) The first incident of unlawful disability discrimination found by the Employment Tribunal is that which occurred in December 2016 when the headmaster informed the claimant, "I can do whatever I like". Before that date, none of the allegations raised by the claimant amounted to a breach of any of the provisions in the **Equality Act 2010**. In particular, the allegations that she was refused permission to undertake training at the end of 2015 were found by the Tribunal to be specific, discreet allegations about the same subject matter, all of which were considerably out of time. The Tribunal found that they did not amount to a continuing state of affairs or continuing act of discrimination. They had no reasonable prospect of success in any event. They are so far out of time that it would not be just and equitable for time to be extended to permit those claims to proceed. Similarly, the allegation relating to the incident where the claimant was chastised for the manner in which she spoke to a class in September/October

2015 was found by the Tribunal to be in no sense whatsoever influenced by the claimant's disability. Again, it was a one off, discreet incident which h as no reasonable prospect of success. That allegation is out of time.

92) The first incident in respect of which the Tribunal finds that the respondent committed an act of unlawful disability discrimination is that when the headmaster informed the claimant in or about December 2016 that "I can do whatever I like". Thereafter, the Tribunal was satisfied that the headmaster's conduct towards the claimant amounted to an ongoing situation or a continuing state of affairs, whereby the claimant was subjected to various acts of unlawful discriminatory conduct by the headmaster. The Tribunal found that there was an element of coordination about the headmaster's treatment of the claimant in respect of those incidents where the respondent has been found to have committed breaches of the **Equality Act 2010**. The Tribunal found that all of the allegations after December 2016 were therefore presented within the appropriate time limit. All of the allegations before then are out of time and it would not be just and equitable for time to be extended in respect of those allegations.

Summary

93) In respect of the 15 specific allegations raised by the claimant, the Tribunal's findings are that the following amount to unlawful discriminatory conduct:-

93.1 The headmaster saying "I can do whatever I like" in or about December 2016 is a breach of **section 26**, harassment.

93.2 The headmaster telling the claimant "We are all under pressure and working hard" in February 2017 was a breach of **section 26**, harassment.

93.3 The headmaster telling the claimant that she was causing stress and extra work for her colleagues as well as financial stress for the school by taking sickness absence – **section 15, section 26 and section 27** – unfavourable treatment because of something arising in consequence of disability, harassment and victimisation.

93.4 The headmaster telling the claimant he did not ever want her to return to work on 15 February 2017 – **section 15**, unfavourable treatment because of something arising in consequence of disability and harassment.

93.5 The headmaster telling the claimant she was no longer permitted to attend hospital appointments in working hours on 16 February 2017 – **section 15**, unfavourable treatment because of something arising in consequence of disability and harassment.

93.6 The headmaster berating the claimant for raising her voice to children in February 2017. Harassment contrary to **section 26** and victimisation contrary to **section 27**.

93.7 The headmaster saying to the claimant "There is the door" on 6 March 2017. **Section 15**, unfavourable treatment because of something arising

in consequence of disability, **section 26** harassment and **section 27** victimisation.

93.8 The headmaster divulging that the claimant had raised a grievance about him on 3 May 2017. **Section 15**, unfavourable treatment because of something arising in consequence of disability, **section 26**, harassment and **section 27**, victimisation.

94) A remedy hearing will be listed in due course to consider what if any remedy should be awarded to the claimant.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
23 March 2018