EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 23 June 2021
Judgment handed down
On 28 July 2021

Before

HIS HONOUR JUDGE AUERBACH

MR M SMITH OBE DL

MISS S M WILSON CBE

MRS S ALEEM APPELLANT

E-ACT ACADEMY TRUST LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS JOANNA KERR Of counsel
For the Respondent	MR RICHARD POWELL Of counsel Instructed by Browne Jacobson LLP 15th Floor 6 Bevis Marks Bury Court London EC3A 7BA

SUMMARY

DISABILITY DISCRIMINATION – DUTY OF REASONABLE ADJUSTMENT

The claimant is a science teacher. On account of mental ill health amounting to a disability she became unable to continue in her teaching role, and had significant periods of sickness absence. In March 2016 the claimant returned to work in the distinct role of cover supervisor which attracted a lower rate of pay. However, she continued to be paid at teachers' rates temporarily while she tried out the cover-supervisor role for a three-month probation period, and then until a grievance, and grievance appeal, regarding the respondent's handling of matters had run their course in November 2016.

Thereafter OH advice indicated that the claimant remained long-term unfit to return to the teaching role, but was fit to carry out the cover supervisor's role. She accepted an offer to continue in that role going forward, at the rates applicable to it. The Tribunal dismissed a claim that it was a failure to comply with the duty of reasonable adjustment not to continue to pay the claimant at teachers' rates from November 2016 onwards. The claimant appealed.

There was also a cross-appeal against the Tribunal's finding that the relevant PCP had been applied and placed the claimant at a disadvantage because of her disability, as at November 2016. The cross-appeal was dismissed in particular having regard to the contents of the November 2016 OH report indicating that the claimant was unfit to take on the particular responsibilities of a teacher at that time.

The claimant's appeal was also dismissed. The Tribunal had correctly directed itself as to the law, and properly concluded, in light of its findings of fact, that it was not reasonable to expect the respondent, by way of an adjustment, to continue to pay the claimant at the rates associated with the old role, once the probation period and grievance processes had been completed. The Tribunal had properly found that it was a reasonable adjustment to do so, during the currency of those processes, in order to support her return to work; but that these considerations thereafter no

longer applied. The Tribunal was not wrong to take account of the significant additional cost that would be involved in continuing to pay the claimant at teachers' rates indefinitely. It had not erred in also taking account of the evidence of a witness that the respondent was facing financial pressures at the time, among other factors, when concluding that the proposed adjustment was not reasonable. The Tribunal's reasoning in this regard had been properly clarified in what amounted to a response to a *Burns/Barke* reference from the EAT. The overall conclusion was, in any event, wholly justified, and in line with the guidance in the authorities.

The judge had also not erred in refusing to accept the evidence of published accounts of the respondent as justifying a reconsideration under **Ladd v Marshall**. This was not a case where the respondent had won on the basis of an unanticipated line of argument about cost, such that it could not have been foreseen that the evidence might be needed (if the claimant thought it relevant). The judge was in any event entitled to conclude that it was not the case that this material would probably have had an important influence on the result of the claim.

All of the grounds of appeal against the original decision and reconsideration, and the cross-appeal, were therefore dismissed.

HIS HONOUR JUDGE AUERBACH

Introduction and Factual Background

1. We will refer to the parties as they were in the Employment Tribunal (the "Tribunal"), as claimant and respondent. We start with an overview of the factual background. We draw this from the liability decision of the Tribunal, and primary documents that were before it.

2. The respondent is a charity which runs some 24 schools providing state education. The claimant is a science teacher. She joined the respondent's predecessor in 2000 and, we were told, remains employed by the respondent to this day. The particular school at which she works has, since 2009, been known as Crest Academy.

3. In March 2014 the claimant began a period of sickness absence on account of her mental ill health. Prior to the start of that absence she had been teaching five days per week. In June 2015 it was agreed that she was fit to return to teaching four days per week, with other science teachers picking up the fifth day. She did so until November 2015 when, unfortunately, she was signed off again and a further period of absence began.

4. Subsequently the claimant asked if she could return to teaching two and a half days per week; but at a meeting in January 2016 the respondent rejected that as not feasible, essentially because it could not be confident of being able to get, and maintain, supply cover for the other two and half days.

5. The claimant remained off sick. In February 2016 she instituted a grievance. There was also an absence review meeting in February. At that meeting she was offered, and accepted, the option of returning to work three days per week as a cover supervisor. This was to be initially for a trial period of three months. The role of cover supervisor attracted a lower rate of pay than

the teachers' pay rate. However, her salary continued to be paid at the rate applicable to a four-days-per-week teacher for the initial probation period in the new role. The claimant returned to work in the role of cover supervisor on 9 March 2016.

6. Following a review meeting in May 2016 the respondent offered the claimant four options: continue as a cover supervisor on the rate for that role until the end of the summer term, or, alternatively, permanently; resume working as a four-days-per-week science teacher until the end of the summer term, or, alternatively, permanently. The claimant was asked to give the respondent her decision by the end of May. In her reply she opted to return to working as a four-days-per-week teacher for the summer term. However, she also indicated that she still wished to pursue formally the grievance that she had raised in February.

7. In view of that, the respondent thereupon indicated that the claimant could, for the present, remain in her current cover-supervisor role, continuing to receive the teachers' rate of pay, until the issues raised by the grievance had been formally resolved. That is what then happened. The claimant also raised a further grievance in June. A grievance investigator, Mr Turner, produced a report in July. There was a grievance hearing before Mr Hatchett, a Regional Director of Education, and his decision was issued on 20 September 2016. Although he made certain recommendations, the substantive grievance was not upheld. He recommended that the preservation of the claimant's salary at the teachers' rate continue for a short further period, to enable the options going forward to be reviewed.

8. The claimant appealed the grievance decision, and, pending the outcome of the appeal, her teachers' pay rate was maintained. Following a hearing, the appeal committee's decision was conveyed in a letter of 1 November 2016. It upheld the original grievance decision. It was decided to maintain the claimant's current pay until 21 November 2016, to permit the options as

to the way forward to be reviewed, with the benefit of a further Occupational Health ("OH") report. The appeal panel indicated that, if the claimant decided to continue as a cover supervisor after that date, it would be at the cover supervisors' pay rate. But it would also be an option for her to return to working as a science teacher on teachers' terms.

9. An OH report of 6 November 2016 indicated that the claimant was not fit for a full-time teaching role, but was fit for a part-time cover-supervisor role, and that her health condition was long term. The claimant continued as a part-time cover supervisor. By mistake the change in her pay rate was not implemented in November; but in January 2017 she was informed that the respondent would be taking steps to recoup the overpayment. In July 2017, by which time her Tribunal claim was under way, and following a Preliminary Hearing in the Tribunal at which the judge made some observations on the prospects of her claim, the claimant asked the respondent if she could return to a four-day teaching role. That request was supported by an OH report in August 2017. However, the respondent indicated that there were at that time no such vacancies.

The Employment Tribunal and EAT litigation; the Tribunal's decision

10. The claimant presented a claim form on 11 April 2017. At internal meetings she had been supported by her brother, Mr Mohammed Suhail. He also acted as her representative in the Tribunal and the EAT, save at this full appeal hearing. The respondent has throughout been represented by solicitors and counsel. At this appeal hearing Ms Kerr of counsel appeared for the claimant and Mr Powell of counsel appeared, as he did in the Tribunal, for the respondent.

11. The matter came to a full merits hearing in the Tribunal over six days in May 2018, before Employment Judge Manley, Mrs C M Baggs and Mr I Sood. An oral decision was given on the last day. Written reasons were requested, and promulgated in August 2018. There was no dispute

A that the claimant was at all relevant times a disabled person. The Tribunal identified that there were multiple complaints of failure to comply with the duty of reasonable adjustment, victimisation, direct discrimination, discrimination arising from disability and harassment.

B 12. All of the complaints failed on their merits. In a final paragraph, however, the Tribunal also held (notwithstanding that they had all failed on merit) that all the claims were all in time.

13. The complaints of failure to comply with the duty of reasonable adjustment were said to C arise from the application of the provision, criterion or practice ("PCP") of requiring the claimant to work either four days per week as a science teacher, or as a cover supervisor at the lower rate applicable to that role. The Tribunal found that this PCP was applied. It continued:

> D **"62. The next question is whether the application of that PCP put the claimant at a substantial disadvantage in comparison with people who are not disabled. This is slightly difficult for us to answer because the claimant could comply with the requirement to work four days a week as a science teacher between September and November 2015. In July 2017 she said that she could indeed work four days a week as a science teacher. However, there were other times, through most of 2016 when she supplied sufficient evidence that she could not work four days as a science teacher because of her health. That was a substantial disadvantage. The second limb of the PCP is more problematic because the claimant could and did carry out work of a cover** E **supervisor for three days per week. Until November 2016 she suffered no reduction in pay. The difficulty for her was the proposed reduction in pay which was ultimately imposed in November 2016. However, on balance we find that such a reduction would amount to a substantial disadvantage.**
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> **63. We therefore consider whether the respondent has failed in its duty to make reasonable adjustments. The first (at (i)) is *"permitting her to work as a three days (or possibly two and a half days per week) science teacher."***
>
> F **64. This was the issue which was most difficult for the tribunal to determine. The claimant had asked for two and a half days or three days in November 2015 and January 2016 with some support from the occupational health report. We are satisfied that, if the adjustment could have been made, there is sufficient evidence that it would probably have alleviated the disadvantage. We have considered carefully the respondent's explanation when deciding whether that would have been a reasonable adjustment. The respondent's witnesses – Mr Chahill, Ms Khatun and Mr Ojja –** G **have given consistent evidence about why the reduction in days of work was not feasible. In summary, they are that there were already two vacancies in science teaching where adverts had not attracted appointable candidates; that such a reduction would have led to split classes which was a particular concern as the school was in special measures; the timetable was already set up for four days under the previous reasonable adjustment and Ms Khatun had looked to see whether there could be a possibility of moving it to accommodate the claimant. Finally, there were serious financial concerns.**
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> **65. The Tribunal must apply an objective test when assessing whether an adjustment would be reasonable. We take account all the evidence, before us, the guidance in case** H **law and EHRC Code. We appreciate that it can be a difficult balance for an employer when it tries to accommodate the needs of an employee with a disability and the need**

> **to continue to run its business. In this case, the business was providing state education where there were problems with standards of teaching in a particular subject area where it was difficult to recruit. On balance, balancing the needs of the employee and the particular circumstances of the respondent, we found that this was not a reasonable adjustment. In fact, it became even less likely to amount to a reasonable adjustment once the claimant was offered and accepted an alternative role of cover supervisor. Whilst she might have erroneously believed for a short time at the beginning of the discussion, that she might be continued to be paid at her teacher's rate, she was told unequivocally of the lower rate before she started. The respondent made a reasonable adjustment in that it continued to pay her at teacher's pay rate for four days a week whilst she tried the cover supervisor role.**
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> **66. It was not a reasonable adjustment to continue that arrangement indefinitely beyond the nine months before the pay was reduced."**

14. The Tribunal then decided, at [67], that it would not have been a reasonable adjustment to permit the claimant to work as a part-time supply teacher. That decision, as such, is not challenged. The Tribunal then continued:

> **"68. We take the next two suggested reasonable adjustments together (iii and iv) – "*designating or treating her cover supervisor role as a teacher role*" and *"paying her according to teacher's terms and conditions including pension contributions"* as they amount to essentially the same thing. This argument in fact took up considerable time at the employment tribunal hearing as it had in the internal discussions after the claimant began to carry out work as a cover supervisor in March 2016.**
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> **69. In fact, as previously stated, this was a reasonable adjustment when it was applied in the early days. The claimant did remain on teacher's terms and conditions from March 2016 to 21 November 2016. In the circumstances that was a reasonable adjustment as it was designed in part particularly in the early stages as a way of getting the claimant back to work and perhaps to her substantive post of four days a week science teaching. What was being suggested was that the claimant should be retained on teacher's pay and conditions including pension indefinitely when working as a cover supervisor.**
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> **70. This has been argued by the claimant's brother, Mr Suhail, as some sort of contractual or statutory entitlement for the claimant but we do not agree with him on that point. We accept that teacher's pay and conditions apply to qualified and unqualified teachers when carrying out specified work, namely the whole range of teaching duties. The cover supervisor carries out some, but by no means all, the elements of specified work as the claimant herself accepted.**
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> **71. We have considered the case law as indicated of O'Hanlon v Commissioners for HM Revenue and Customs [2007] IRLR 404 and G4S Cash Solutions (UK) Limited v Powell UKEAT/0243/15. We have taken into account the likely cost to the respondent. If the arrangement continued to retirement which is what was suggested, it would cost the employer many thousands of pounds. The respondent is a publicly funded educational establishment facing financial difficulties. Again, a balance has to be struck. Being offered the cover supervisor role was itself a reasonable adjustment. Retaining her pay and conditions for some months was also a reasonable adjustment but retaining her pay and conditions indefinitely would not have amounted to a reasonable adjustment."**

15. The claimant's appeal against the liability decision relates to the application of this PCP with effect from 21 November 2016, and, specifically, to the Tribunal's decision that it was not

a reasonable adjustment to continue to pay her at the teachers' rate in the role of cover supervisor going forward from that date. The first two grounds of appeal contend, in summary, that the Tribunal erred, as the respondent had provided no evidence that it could not afford to protect the claimant's pay indefinitely. Alternatively, the reasons were not **Meek** compliant.

16. Ground three contends that the Tribunal had erred in making a finding of fact at [12] of its reasons when it said: "There were also significant financial pressures with the academy running with a deficit of over £2.5 million." The ground asserts that that finding was not supported by any evidence, and then, wrongly, formed part of the basis for the Tribunal's decision on this particular complaint, at [71]. Moreover, it is contended by this ground, the respondent's accounts for 2015/2016 showed a very different picture. In her notice of appeal, the claimant sought to introduce those accounts as new evidence.

17. Ground four contends that the Tribunal erred by failing to conclude that the claimant in fact had a right, under the applicable regulations, to be paid at the teachers' rate, when working in the cover supervisor role.

18. Upon initial consideration of that notice of appeal, HHJ Richardson stayed it to enable the claimant to seek a reconsideration from the Tribunal. He considered that to be the most suitable route for the claimant to apply to introduce the accounts as new evidence. He also noted an issue as to whether the Tribunal's finding at [12] did or did not inform the conclusions at [71], which the Tribunal might be able to clarify. Further, it might assist the EAT, for the Tribunal to indicate what evidence it had for that aspect of its conclusions at [12] and/or [71].

19. The claimant did indeed apply for a reconsideration. By agreement this was considered by the judge alone at a hearing held in October 2019, leading to a reserved decision. The claimant

now sought to rely upon information contained in the respondent's published accounts for the four years ended 31 August 2014 to 2017. The judge decided that the application had no reasonable prospect of success. She held that the accounts could have been made available at the original hearing and would not, in any event, have led to the original decision being varied or revoked. In any event, upon considering that evidence, the original judgment was confirmed.

20. In the course of her reasons, the judge reviewed the evidence relating to the matter of a £2.5m deficit. This had come from three of the respondent's witnesses who had referred to it in oral evidence. At paragraph [13] of the reconsideration decision the judge said that paragraph [12] of the original decision was a factual finding, based on that evidence. It referred to Crest Academy, as opposed to the respondent as a whole, having had such a deficit as of January 2015. The judge said that the "new evidence" of the accounts did not help on this point, and the finding at [12] was, in any event, not relevant to what the Tribunal had said at [71].

21. The judge observed that the reasoning culminating in [71] needed to be set in the context of the consideration of the reasonable adjustment claims generally. In particular, what the Tribunal had said at [65], about the test of reasonableness, applied to this complaint. The conclusion, at [70], was that it was a reasonable adjustment to continue paying the claimant at the teachers' rate for the period from March to November 2016, in part, particularly in the early stages, as a way of getting her back to work, and perhaps back to her substantive post of four-days-per-week teaching. The judge continued, at [18] of the reconsideration decision:

> **"At paragraph 71 there is a summary of why we found that suggested adjustment not to be reasonable. That paragraph does, on the face of it, appear to concentrate on financial considerations which would face the respondent if the claimant was paid indefinitely at a teacher's salary when carrying out a cover supervisor role. I accept that the words used in the middle of that paragraph *"the respondent is a publicly funded education establishment already facing financial difficulties"* differ from the words actually used by Mr Hatchett in evidence, which were that there were "*financial pressures*". However, financial pressures might also be argued to amount to financial difficulties."**

22. In the concluding section the judge first decided that it was not in the interests of justice to grant a reconsideration. Applying **Ladd v Marshall** [1954] 1 WLR 1489, the 2014 – 2017 accounts should not be admitted. These were published accounts that could have been obtained and put before the Tribunal with reasonable diligence. The judge was also "not convinced" that this evidence would have probably had an important influence on the outcome, though she could "see the argument that it might". Allowing this evidence in would not be proportionate. The finding at [12], which related to Crest Academy, was not "taken forward" into [71], which related to the respondent as a whole.

23. That said, the judge then continued as follows.

> **"37. However, I have decided it might be helpful to provide an alternative answer, in case that decision is wrong and also to assist the EAT should the matter continue there.**
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> **38. Now I have looked at the documents that the claimant relies upon, I can see that the respondent in the years which preceded and included the decision not to continue paying the claimant at a higher rate, had substantial cash at the bank. There were also considerable net assets. This was suggested by Mr Suhail to be evidence that the respondent has a surplus, but I have no evidence of a surplus before me. As I pointed out in this hearing, the mere fact of the balance sheets showing substantial money in the bank does not mean, on its own, that it is available to be spent on anything over and above what it might already be earmarked for and which might amount to legal obligations. I have no evidence about what responsibilities or outgoings the respondent would have to meet, but common sense dictates that an educational trust including 24 state schools would be likely to have to meet substantial ongoing liabilities. The fact that the respondent has "*considerable financial resources*" does not indicate anything over and above the money received from the Department of Education to run the 24 or 25 academies providing state education. Whilst it might have been better put around paragraph 71, we heard evidence that the Trust had financial pressures, and the balance sheets do not show that that was not the case.**
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> **39. The financial statements show a solvent trust running a charitable educational institution on public funds. I was not taken by either representative to any other part of the voluminous documentation to indicate anything other than a perfectly ordinary stable financial situation. If I had allowed the new evidence and reconsidered the judgment, it would simply have been confirmed on all the available evidence.**
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> **40. The question of the deficit for the Crest Academy upon which we head oral evidence was not relevant for the question of the later reasonable adjustment relied upon in 2016. The evidence that we heard was that the respondent had financial pressures. The extent of the potential financial investment if the claimant was paid at the teacher's salary indefinitely, as set out in paragraph 71, as "*many thousands of pounds*", is not in dispute.**
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> **41. Although we did not repeat our observations at paragraph 65 about matters to be taken into account when considering whether an adjustment was reasonable in**

paragraph 71, it was the case that those were the sorts of balancing questions which we applied to each of the reasonable adjustments relied upon.

42. The application to reconsider is refused. If there had been a reconsideration the judgment would have been confirmed."

24. The claimant instituted a second appeal in respect of the reconsideration decision. Seven numbered grounds were put forward. We will return to them.

25. The net result of further paper sifts and a rule 3(10) hearing was that all four grounds in the first notice of appeal, and all seven grounds of the second, were permitted to proceed together to a full appeal hearing.

26. In its Answer the respondent advanced three grounds of cross-appeal. Ground one related to the Tribunal's approach to the time point. However, this was abandoned by Mr Powell during argument, as it was accepted that the only complaint that was the subject of this appeal was in time. Ground two related to the finding, at [62], that the PCP placed the claimant at a substantial disadvantage, because she could not, at the relevant time, comply with the requirement to work four days per week as a science teacher. The Tribunal's finding in this regard was said to be erroneous or, alternatively, by ground three, to be not **Meek**-compliant.

The Law

27. Section 20 **Equality Act 2010** defines the duty to make reasonable adjustments, as consisting of three requirements. Other provisions together have the effect that a failure to comply with that duty by an employer in respect of an employee during employment amounts to an act of discrimination by an employer. For the duty to be actionable the employer must also have actual or constructive knowledge of the disability and the claimed disadvantage, but these requirements were not at issue in this case. Section 20(3) provides:

> **"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."**

28. The Equality and Human Rights Commission ("EHRC") adopted a Code of Practice on Employment in 2011. Section 15 **Equality Act 2006** requires a Tribunal to take its provisions into account where they appear to be relevant.

29. **Environment Agency v Rowan** [2008] ICR 218 reminds Tribunals of the need to take a structured approach to such complaints, including identifying whether the PCP claimed has factually been applied, and determining whether it has placed the employee at a disadvantage by comparison with a non-disabled person, and, if so, its nature and extent, before considering what steps it would be reasonable to take to avoid that disadvantage.

30. In **O'Hanlon v HM Revenue and Customs** UKEAT/0109/06, 4 August 2006, the disabled employee was off long-term sick, leading to her pay falling to half-pay after six months. She contended that it was a reasonable adjustment to maintain her pay at full pay. The EAT, at [67]-[75], held that it would be a very rare case in which such an adjustment was reasonable. It would require exceptional circumstances. That was, in part, because this would be a usurpation of the management function of considering the costs implications. But it was also because "the purpose of the legislation is to assist the disabled to obtain employment and to integrate them into the workforce." It was not "simply to put more money into the wage packet of the disabled" but to "enable them to play a full part in the world of work." Further, the decision in the earlier case of **Meikle** [2005] ICR 1, did not bespeak a different analysis. In that case the underlying liability was for a failure to accommodate a sick-absent and disabled teacher back into the classroom. Liability in respect of her pay had flowed from *that* failure. The EAT's decision in **O'Hanlon** was upheld by the Court of Appeal [2007] ICR 1359.

31. In **G4S Cash Solutions (UK) Limited v Powell**, UKEAT/0243/15, 26 August 2016, the disabled employee returned to work in a new role but with his old (higher) pay rate maintained. The Tribunal found that he was led to believe that the new arrangement was long-term. Some months later, following a review, the respondent ultimately concluded that it could only keep the employee on in the new role permanently at a lower rate of pay. The Tribunal held that it was a reasonable adjustment to continue to maintain the previous rate. The EAT could see no reason *in principle* why that could not amount to a reasonable adjustment. Nothing in **O'Hanlon** ruled that out as wrong in principle. The EAT could not say that the Tribunal was wrong in law to reach the conclusion that it did on the facts of this particular case.

Arguments, Discussion and Conclusions

32. We will start with the cross appeal.

Cross-Appeal

33. The two live grounds of the cross appeal assert that the Tribunal erred, in concluding at [62] of the liability decision, that, on account of her disability, the claimant was, at the relevant time, at the disadvantage of being unable to work as a teacher four days per week; alternatively this decision was not **Meek** compliant.

34. Mr Powell argued in his skeleton that the Tribunal had not properly taken account of relevant evidence. In May 2016 the claimant had indicated a wish to return to teaching four days per week. That suggested that she would have been capable of doing so then. When, in July 2017, she sought to return to teaching four days per week, she stated that she had remained in the role of cover supervisor in the expectation that she would succeed in her claim at the Tribunal,

A that pay at teachers' rates should have been maintained. The OH report of August 2017 that she relied upon in support of that application indicated that she had not suffered adverse effects from her mental health for the previous year. That, Mr Powell submitted, was evidence that she would have been able to return to teaching from at least August 2016.

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35. However, the OH report of 6 November 2016, which was shown to us, indicated that the claimant was not fit for a full time teacher role at that time, because of the inherent pressures of the role, and the need to perform tasks such as planning and marking. It stated that adjustments would involve restricting her to a part time cover-supervisor role on a long-term basis. She was unlikely to achieve a return to her contracted duties (as a teacher) for the foreseeable future. Her condition was a chronic one.

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36. Although Mr Powell noted that this report referred to teaching full time – that is five days per week, as opposed to four – it appears to us to have clearly stated that the claimant was not at that time able to cope with the particular stresses of the requirements of the teaching role. The Tribunal, at [62], described this issue as "difficult" and specifically noted that the claimant had been able to carry out the teaching role in 2015 and had asserted in July 2017 that she was able to do so. This was a matter for the appreciation of the Tribunal, and the OH report of November 2016 provided evidential support for the conclusion that it reached. We cannot say that it erred in finding that the claimant was at that time, on account of her disability, at a disadvantage in respect of the requirement to work four days per week as a teacher. Having regard to its overall findings of fact, this part of the Tribunal reasoning was also **Meek** compliant. Accordingly, the two live grounds of cross-appeal both fail.

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Liability Appeal – Ground 4

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37. Next we will take ground 4 of the liability appeal. Ms Kerr confirmed that the argument about whether the claimant was contractually entitled to the teachers' rate was advanced before the Tribunal solely as part of the reasonable-adjustment claim. She submitted that the Tribunal's reasoning in paragraph [70] was inadequate, and its conclusion was wrong. She referred to the DFE's Guide to Pay and Conditions for Teachers. Legislation, she submitted, required qualified teachers to be paid at teachers' rates. The Tribunal had failed to explain why the claimant was not entitled to this rate, given that she was a qualified teacher, and when she had also, when working as a cover supervisor, carried out some teacher's tasks.

38. Mr Powell submitted that, if the Tribunal appeared at [70] to be a little perplexed by Mr Suhail's argument on this point, that was understandable. If a given rate was *not* a matter of independent entitlement, it might form part of a reasonable adjustment claim. But if it *was* a matter of independent entitlement, it could be claimed as wages (though it was not in this case), which would be the natural way to frame a claim. It was hard to see how something that was said to be a matter of entitlement in any event would fit in to a reasonable adjustment claim.

39. As to the substantive underlying point, he referred us to the statutory framework. Section 122(1) **Education Act 2002** enables teachers' pay and conditions to be prescribed by order. Section 122(3) then provides:

> **"(3) A person is a school teacher for the purposes of this section if—**
>
> **(a) he is a qualified teacher,**
>
> **(b) he provides primary or secondary education under a contract of employment or for services,**
>
> **(c) the other party to the contract is a local authority or the governing body of a foundation, voluntary aided or foundation special school, and**
>
> **(d) the contract requires him to carry out work of a kind which is specified by regulations under section 133(1)."**

40. Separate regulations, which we were shown, define "specified work" for these purposes.

41. The Tribunal, submitted Mr Powell, was plainly cognisant of this framework. It carefully addressed and explained the different roles which teachers, and others doing classroom work in a school, could have, at [8] to [11] of its decision, including specific citation of the definition of "specified work". The central flaw in the claimant's argument, he submitted, was that merely being a qualified teacher, or even carrying out some teaching duties on occasion, would not entitle her to teachers' pay rates, unless her contract *required* her to perform teachers' specified work. A cover supervisor's contract would not require that of her.

42. We remind ourselves that the complaint was that there was a failure to comply with the duty of reasonable adjustment by not continuing to pay the claimant at the teachers' rate *after 21 November 2016*.

43. The Tribunal found that the respondent was at pains to make it clear to the claimant at every stage from March 2016 onwards that, when working as a cover supervisor, the pay to which she was entitled was the cover supervisors' rate, which was lower than the teachers' rate. However, it explained that it was continuing to pay her at the teachers' rate for specific reasons and for a corresponding defined period: in the first instance, during the initial probationary period as a cover supervisor, and then, until the formal grievance, and then the grievance appeal, processes ran their course. The respondent did not make any greater or other commitment to pay the claimant teachers' rates when working as a cover supervisor than that.

44. The 1 November 2016 letter disposing of the grievance appeal (which we were shown) indicated that one of the options for the claimant after 21 November 2016 was to work as a cover supervisor on cover supervisors' rates going forward. That amounted to an offer of continued employment in that role, at the pay rate ordinarily attaching to it. As Mr Powell correctly

submitted, the statutory right to teachers' pay rates does not apply merely because the individual is a qualified teacher, nor is it triggered as such merely by them carrying out some teachers' duties. It applies only if all the conditions in section 122(3) are met, including that the contract *requires* the performance of specified teachers' tasks.

45. We conclude that, when offering continued employment as a cover supervisor in November 2016, the respondent was not obliged to offer that at teachers' rates. Neither the fact that it had, for particular reasons, hitherto been prepared to pay her teachers' rates in that role, nor the fact that she had in fact carried out some teachers' tasks when performing it, created any such obligation. The claimant was free to reject the offer, but in accepting it, she accepted it on the basis that it was made, being that she would henceforth be paid the rate for the job.

46. We can see *some* force in the argument that, when addressing this strand of the claimant's case in paragraph [70], the Tribunal should perhaps have specifically and expressly considered the implications of the statutory framework to which it had referred earlier in its decision. But, in view of the fact that the pay follows the contractual obligation, and the clarity of the factual position in terms of what the respondent was offering in November 2016, we cannot see any basis on which the Tribunal could properly have concluded that the claimant was entitled to insist on receiving teachers' pay, if she chose to accept the offer to continue in the cover role going forward. It would have been an error for the Tribunal to find that she was. Therefore this ground of appeal does not succeed.

Liability Appeal – Ground Three

47. It is convenient to take next ground three of the main appeal. As originally framed, this contended that the Tribunal erred because (a) it made a finding of fact at [12] of the original

decision, regarding the £2.5m deficit, which was unsupported by the evidence; and (b) that finding then provided part of the support for the conclusion reached at [71].

48. When HHJ Richardson stayed that appeal, as well as allowing the opportunity for a reconsideration application seeking to rely upon the accounts as new evidence, he effectively also envisaged that as the vehicle for what amounted to a *Burns/Barke* reference. This broke down into two elements. First, it would be an opportunity for the Tribunal to clarify what part, if any, the finding at [12] had played in the conclusion at [71]; and secondly it was invited to clarify what the evidential basis was for the relevant findings in paragraphs [12] and/or [71].

49. In the reconsideration decision the judge stated, in terms, that the finding at [12] related to the position of Crest Academy in January 2015, and that it did not feed into the conclusions at [71], which concerned the position of the respondent as a whole in November 2016. During the course of her initial submissions on this appeal, Ms Kerr indicated that the claimant wished to challenge that conclusion in the reconsideration decision, and would, if necessary, apply to amend her grounds of appeal in relation to it. However, after a break in which she took instructions, she indicated that this was not pursued.

50. The clarification in the reconsideration decision means that ground 3 of the original appeal must therefore fail, regardless of whether the finding of fact at [12] was itself a proper one, as it has been clarified that the Tribunal did *not* rely upon it, in rejecting, at [71], the complaint of failure to comply with the duty of reasonable adjustment to which this appeal relates. However, we record that it appears to us that the finding at [12] of the original decision *was* in any event a proper finding. As the reconsideration decision confirmed at [13], it reflected oral evidence that the Tribunal heard from Mr Ojja, who began as head of Crest Academy in January 2015, that at that time Crest was in special measures and running a deficit.

Liability Appeal – Grounds 1 and 2; Reconsideration Appeal – Grounds 1, 5, 6 and 7

51. We turn to grounds 1 and 2 of the liability appeal. These assert that the Tribunal erred in concluding that it would not be reasonable to expect the respondent to continue to pay the claimant indefinitely at teachers' rates from 21 November 2016; alternatively that this conclusion was not **Meek**-compliant.

52. We make the following preliminary observations. As the judge clarified in the reconsideration decision, that the Tribunal did not rely upon its finding at [12] of the original decision, when, at [71], rejecting this reasonable-adjustment claim, whether the Tribunal erred in that regard must be considered without reference to that earlier finding. However, as we will set out, certain of the grounds of the reconsideration decision then effectively challenge the original decision, *as clarified in the reconsideration decision*. It therefore makes sense also to consider those grounds of the reconsideration decision at this stage.

53. Once we put to one side as irrelevant, the finding that Crest Academy had a deficit in January 2015, the heart of the challenge to the Tribunal's conclusion at [71], posed by grounds 1 and 2 of the first appeal is, we think, that there was no, or no sufficient, evidential basis for the Tribunal's finding, in the course of [71], that the respondent was "already facing financial difficulties"; and/or it is said that the Tribunal should not have attached any weight to it.

54. In the reconsideration decision, the judge referred at [9] to the evidence of Mr Hatchett, who had dealt with the internal grievance at first instance, under cross-examination, in which he had referred to "significant financial pressures". As we have set out, the reconsideration decision, at [18], the last sentence of [38], [40] and [41], clarified the basis for the finding at [71] of the liability decision, regarding "financial difficulties" and its significance.

55. The relevant grounds of appeal against the reconsideration decision, in summary, contend that these passages did not satisfactorily justify, or explain, the "financial difficulties" finding, or the Tribunal's reliance upon it. Ground 1 asserts that, at the reconsideration hearing, the respondent's case was not that it could not afford to pay the extra sums involved in maintaining the claimant's pay and pension at teachers' rates, but that it was unreasonable to expect it to incur that level of cost by way of an adjustment. Accordingly, the finding of "financial difficulty" was improper, because it was irrelevant. Ground 5 asserts that it should have been found that Mr Hatchett's reference to "financial pressures" was, in context, a reference only to the position of Crest Academy. Ground 6 asserts that the judge failed to address the fact that Mr Hatchett referred to such pressures in the same answer as he indicated that he was not aware of the respondent having any deficit at that time. The Tribunal did not examine this contradiction in his evidence. Ground 7 asserts that this evidence could not be relied upon, as it was just an unsubstantiated statement of Mr Hatchett's subjective perception.

56. In her oral submissions, Ms Kerr developed in particular the following arguments. First, she argued that a finding of "financial difficulties" needed to be underpinned by some hard factual findings about the state of the respondent's finances or resources, based on primary documentary evidence; but none was put before the Tribunal. She drew on paragraph 6.28 of the EHRC's Code of Practice, which lists among potentially-relevant factors when considering whether an adjustment might be reasonable, "the extent of the employer's financial or other resources." It was unfair to the claimant to rely merely on Mr Hatchett's unsupported assertion about that. She referred to **Post Office Counters Limited v Mahida** [2003] EWCA Civ 1583 in this regard. Either the Tribunal should have proactively sought further specific details from Mr Hatchett, or it should have discounted this evidence altogether.

57. Secondly, she said that the Tribunal was wrong to posit that the issue was whether it was reasonable to expect the respondent to keep the claimant on teachers' pay "indefinitely", possibly until retirement, as, had the respondent maintained the adjustment from 21 November 2016, there would thereafter have been the opportunity for periodic reviews, and in any event no certainty as to how long the arrangement would in fact last.

58. Thirdly, Ms Kerr argued that, in the internal grievance process, the respondent's managers had never suggested that one reason why the claimant's protected pay should not be maintained was because the respondent could not afford to do so. She submitted that, to the contrary, in his investigation report, Mr Turner had positively recommended that it be maintained. Mr Kerr also argued that, despite that, the respondent had run an argument based on affordability before the Tribunal, even though the evidence did not support it.

59. In response Mr Powell's main points were as follows.

60. First, the way that the claim, and the grounds of appeal, had been advanced, was on the basis that the Tribunal was wrong to conclude that keeping the claimant on teachers' rates indefinitely from November 2016 was not a reasonable adjustment. The Tribunal had ample evidence, and heard argument, as to the likely cost of keeping the claimant on teachers' terms as to pay and pension, potentially until her retirement, as well as the cost of paying another teacher to perform the claimant's former teaching duties in parallel with her. It had never been the respondent's case that it could not *afford* to pay those sums. Its case was that it was not reasonable to expect it, by way of adjustment, to pay the significant amounts that would potentially be involved. There was more than enough evidence to support the conclusion that the proposed

adjustment was not a reasonable one, having regard to what it would potentially cost the respondent to implement it, from year to year.

61. Secondly, the Tribunal's reference to "financial difficulties" in [71] was properly based upon Mr Hatchett's oral evidence about "financial pressure" on the business. The Tribunal was entitled to take account of that evidence, and to weigh it in the balance. There was no basis for asserting that Mr Hatchett's reference to "financial pressure" related specifically and only to Crest Academy. To the contrary, it clearly related to the respondent as a whole. The difference between "financial pressure" and "financial difficulty" was also not material, particularly given that the liability decision was, in the first instance, given orally, and that the use of this wording was specifically and properly addressed in the reconsideration decision. Nor could it logically be said that one concept was subjective, but the other objective.

62. It was also not logically wrong to assert, or find, that there was financial pressure on the business, even though it was not in deficit. It was the claimant's representative's choice, not to press Mr Hatchett further in cross-examination as to what he meant. The Tribunal was entitled to draw on the evidence it had. It was not obliged to take an on inquisitorial role, pro-actively seeking to elicit more detail from him about this; indeed, it could have been properly criticised had it done so. Nor did the Tribunal's own reference to financial pressure carry the implication that the Tribunal believed the respondent *could not* pay, as opposed to this being a factor when considering whether it was reasonable in all the circumstances to expect it to do so.

63. Thirdly, the Tribunal properly took account of its finding that the respondent had already made a reasonable adjustment by allowing the claimant to remain on the teachers' pay rate, whilst working in the cover-supervisor role, and pending resolution of the grievance process, which had helped her to return to the workplace and work towards possibly returning to teaching. The

Tribunal implicitly found at [69] that paying the higher rate had, as of November, fulfilled its purpose as an adjustment in this respect. Its finding that offering her the role of cover supervisor, as such, was itself a reasonable adjustment, was not challenged on appeal. All of this provided proper context for its consideration of whether it was reasonable to expect the respondent to continue to pay the teachers' rate in that role from 21 November 2016.

64. We turn to our conclusions on these grounds. Our starting point is that we need to place what the Tribunal said about "financial difficulties" in [71] in the context of this paragraph as a whole, and of the overall decision of which this paragraph formed a part.

65. As to that, first, we note that, it was not disputed that the Tribunal, at [46] and [49], gave itself a correct self-direction as to the law, citing the relevant statutory provisions, referring to the staged approach set out in **Rowan**, and observing that: "[i]n considering what steps would have been reasonable, the tribunal looks at all the relevant circumstances and determining that question objectively, may well consider practicability, cost, service delivery and/or business efficiency." As we have noted, further on, the Tribunal made specific references to the decisions in **O'Hanlon** and **Powell** and the EHCR Code, all of which had been cited to it.

66. The specific adjustment contended for was that, upon the claimant deciding to continue in the cover-supervisor role from 21 November 2016, the respondent should have continued to pay her at the teachers' rate going forward. The Tribunal's substantive reasoning leading to the rejection of that claimed adjustment is in fact spread across a number of paragraphs.

67. First, as we think the liability decision itself on a natural reading conveys, but the reconsideration decision also confirms, the factual aspects mentioned at [65] fed in to the later conclusion on that question. These included the fact that the respondent was providing state

education, that there were problems with standards of teaching in a subject for which it was difficult to recruit, and that the respondent had already made the adjustment of preserving the teachers' rate during the period in which the claimant had tried out the cover-supervisor role.

68. At [66] the Tribunal effectively previewed the conclusion to which it was going to come at the end of [71]. This paragraph did not purport to contain reasoning supporting that conclusion, and cannot be fairly criticised for not doing so. After addressing a different proposed adjustment at [67] the Tribunal identified that it was turning specifically to this adjustment at [68]. At [69] its point was, surely, that, while it was reasonable to maintain the teachers' rate as a way to support the claimant to get back to work, and possibly the substantive post of science teaching, in the period March to November 2016, those arguments in favour of that adjustment no longer held good after November. She was no longer in a probationary period in the cover-supervisor role, and there was no longer a live and unresolved grievance.

69. Ms Kerr suggested that this aspect of the Tribunal's reasoning was undermined by the fact that Mr Turner's report included a recommendation that the teachers' pay rate be maintained. However, that was in the context of a report in July 2016 which also recommended that the claimant continue in her current role for one more term and that there then be a further review. Further, as Mr Powell submitted, what the Tribunal had to decide – objectively for itself – was whether it was reasonable to expect the respondent to maintain the claimant on the teachers' rate in the circumstances which in fact obtained going forward from November 2016.

70. Reverting to the Tribunal's substantive reasons, [71] must be read as following from, and building upon, the paragraphs leading up to it. The Tribunal started by referring to **O'Hanlon** and to **Powell** and in terms referred to its consideration of the likely cost of keeping the claimant on teachers' pay going forward in the cover-supervisor role. It is clear that the Tribunal was not

here finding that the respondent simply could not have found the cash to pay teachers' rates at all. It was weighing up the factor of how great the cost would be. The Tribunal's rough assessment that, if the arrangement continued to retirement it would cost "many thousands of pounds" seems, if anything, to have been something of an understatement, given the figures that we were shown were canvassed before it. It seems clear that the figures canvassed in the Tribunal, without dispute, showed that these additional costs would, unless the claimant's employment in the new role proved to be unexpectedly short-lived, run comfortably into six figures. This was a factor that the Tribunal properly took into account.

71. The Tribunal then referred to the respondent being a publicly-funded educational establishment. We do not think it was wrong to do so. Ms Kerr made the point that a privately-funded body may be just as concerned about how it spends its money. But the Tribunal was surely doing no more than recognising that this was a body that was, in fact, dependent on public money, and accountable to the public provider for how it was spent. The reference to it being an educational establishment was, again, not wrong, given the Tribunal's proper recognition of the need to take account of the "business" context in which the decision was taken, and the considerations that had been discussed in particular at [64].

72. It is within that wider context of the paragraphs leading up to [71] and the opening lines of [71] itself, that we must then consider the reference to the respondent "already facing financial difficulties." The reconsideration decision clarifies that the Tribunal were referring here to the evidence of Mr Hatchett about "financial pressures". Further, we do not accept that is significant that the Tribunal used the particular phrase "financial difficulties" as opposed to "financial pressures". In particular, we do not agree that "financial pressures" is merely a subjective observation, whereas "financial difficulties" signifies a different kind of objective assessment.

Mr Hatchett made a general observation about the respondent's situation, without going into specifics. The Tribunal simply referred to, and relied upon, what he had said.

73. Nor do we accept that the Tribunal's conclusion that Mr Hatchett's observation related to the situation of the respondent in November 2016, and not to the deficit at Crest Academy that Mr Ojja inherited upon taking it over in January 2015, was wrong or perverse. It is clear from the materials we were shown – in particular the closing submissions made to the Tribunal – that Mr Hatchett gave this evidence when it was put to him in cross-examination that the respondent as a whole was not in deficit, to which he, in response, agreed, but said that it was facing financial difficulties. It was said that it was, nevertheless, significant, that Mr Hatchett was not recorded as mentioning a date. But the evaluation of the sense of his evidence was a matter for the Tribunal which heard it; and the judge properly (as requested by the EAT) clarified in the reconsideration decision at [40], what it understood by the evidence, and was referring to in [71] of its decision. Nor do we accept that the Tribunal should have regarded it as contradictory to say both that the respondent did not have a deficit and that it was facing financial pressure. We therefore do not accept that the Tribunal erred in that respect.

74. Next it is contended that the Tribunal erred by attaching excessive weight to this evidence, as it was unsupported by any hard financial data or primary accounting records. Ms Kerr referred us to **Mahida**. That case concerned a financial claim by the Post Office against a sub-postmaster in respect of an alleged deficit of a specified amount. Primary records had been lost or destroyed. The Post Office had had control over, or access to, those records, not the defendant. The claim was, however, found to have been made good on the basis of secondary evidence. The Court of Appeal, allowing the appeal, did not hold that it was wrong to admit the secondary evidence; but it held that there was "substantial unfairness" in the process and "lamentable failures" on the part

of the Post Office, and that the secondary evidence relied upon was not sufficient to prove the full amount of the debt claimed. The present case is not remotely comparable. It is not a claim for debt; and the Tribunal did not purportedly extrapolate from Mr Hatchett's general evidence, to purportedly make any more precise findings about the respondent's financial circumstances that went beyond what he had said.

75. Ms Kerr sought to suggest that [71] was a culmination of reasoning focussing on the respondent's financial position, as a key consideration, starting at [12], moving through its observations at [62] and then [66] to [71]. However, in our judgment it is this reading which seeks to attach more weight to the Tribunal's own brief reference to this aspect, than, on a fair reading, the Tribunal itself attached to it. The reconsideration decision confirms that the Tribunal was not, at [71], referring back to the finding about the Crest Academy January 2015 deficit made at [12]. The discussion at [62] is to the effect that there was disadvantage to the claimant because she was not well enough, in November 2016, to return to the teaching role (and, hence, the pay that went with it). [66] merely previews the conclusion that is to come.

76. Judge Manley acknowledged how paragraph [71] "could appear", and that the reference to financial pressures could have been "better put". However, we have accepted that her clarification of what the Tribunal had meant was fair and accurate. The observation also came within the context of the general discussion of the cost that would be involved in the adjustment sought, about which the Tribunal *did* have figures put before it to suggest that the year on year cost of keeping the claimant on the teachers' rate would have been substantial. To repeat, the paragraph, read as a whole, did not purport to find that the respondent did not have the available cash at all to fund such payments. It simply concluded that it would have been a substantial cost

bearing in mind the likely amounts involved, that it was publicly funded, that it had educational goals to deliver on, and, in addition, that it was facing financial difficulties.

77. It is contended that the Tribunal erred by characterising the proposed adjustment as entailing the respondent paying the claimant at teachers' rates "indefinitely". However, the starting point was that the appropriate rate of pay for the cover supervisor's job was the cover supervisors' rate. The respondent had previously paid the claimant at the teachers' rate for particular reasons for a limited period. In holding that the temporary continuation of the old rate for those reasons constituted a reasonable adjustment, and referring to the potential for it to assist the claimant back into work, and, possibly, back into the teaching role, the Tribunal plainly had the **O'Hanlon** guidance in mind.

78. But in November 2016 the situation was materially different. The claimant had had a probation or try-out period in the cover-supervisor role. Her grievance, and grievance appeal had run their course. The November OH advice was that she was unfit to return to teaching responsibilities, and that her mental ill health was chronic and long-term. The decision now being taken was as to a permanent, and, in that sense, indefinite, change to the position in which the claimant was employed, not a temporary arrangement for a limited purpose.

79. What the Tribunal had to decide was whether, in those new circumstances, it was incumbent on the respondent, as a reasonable adjustment, to maintain the claimant on teachers' rates, if she now elected to accept the offer of work in the cover supervisor's role on a permanent and indefinite basis going forward. The fact that it had been a reasonable adjustment, hitherto, in particular circumstances, to maintain that rate, did not show that it would be reasonable to do so, going forward, in those different circumstances.

80. Ms Kerr argued that the grounds of resistance suggested that the respondent was relying on an argument of inability to pay. But Mr Powell does not appear to have advanced the case in that way in his closing submissions to the Tribunal. In any event, what we have to consider is the basis of the decision in fact reached by the Tribunal itself. It is not the law that, in a situation like this, a respondent can only resist a claim that the old pay rate should be maintained as a reasonable adjustment, if it can show impecuniosity or at least some kind of serious financial difficulty. The Tribunal is entitled to have regard to the actual or likely cost. The exercise of weighing cost alongside other factors is an inherently imprecise one, and its industrial judgment must be accorded a wide margin of appreciation. See the discussion, and citation of earlier authority on this point, in **Powell** at [53].

81. In this case, it seems to us that, even had Mr Hatchett made no reference to financial difficulties, and even had the Tribunal not referred to that evidence at [71], its conclusion that it was not a reasonable adjustment to pay the claimant at teachers' rates from November 2016 going forward was in any event wholly proper. The fact that in **Powell**, the Tribunal, on the facts of *that* case, did *not* err by holding that it was a reasonable adjustment to maintain full pay, does not point to the conclusion that this Tribunal, on the facts of this case, was wrong *not* to hold that it was a reasonable adjustment to do so. Indeed, a striking factual difference is that Mr Powell was led to believe that preservation of his pay in the new role was indefinite; whereas, in the present case, the Tribunal found that the respondent was at pains to make sure (an effort in which it succeeded) that the claimant did not misunderstand the position.

82. Further, we cannot see anything in the facts found in this case that should have led the Tribunal to the conclusion that, in terms of the general guidance given in **O'Hanlon** (and **Powell**), there was something particularly exceptional or unusual about this case, such that it was a

necessary reasonable adjustment for the claimant's pay rate from the old rate to be maintained going forward in the new role.

83. Bearing in mind that [71] is only one part of the Tribunal's reasoning on this point, and that it builds and draws on what comes before, we also do not consider that the Tribunal's decision was not **Meek**-compliant. On the particular point of the level of additional cost that the respondent would incur year on year, had it maintained the claimant's pay and pension at teachers' rates, it is clear that the Tribunal was given information and estimates, that were not in dispute as such; and both parties would have been in a position to appreciate that the Tribunal was drawing on these ballpark figures, when reading its conclusions on that aspect.

84. For all of the foregoing reasons, this group of grounds of challenge to both the original liability decision and the reconsideration decision all fail.

Reconsideration Decision – New Evidence – Grounds 2, 3 and 4

85. The remaining grounds of the reconsideration appeal all challenge the Tribunal's reconsideration decision in relation to the application to introduce the annual accounts.

86. There is no dispute that the accounts were publicly available at the time of the original hearing. However, ground 2 argues that the Tribunal should have concluded that the claimant was, in effect, ambushed by the way that the respondent puts its case, and could not have reasonably anticipated that she might need to have recourse to them to combat its contentions. Ground 3 contends that the Tribunal should therefore have concluded that, in the interests of justice, a reconsideration should have been allowed. Ground 4 contends that the judge was wrong to hold that the accounts did not contradict the case which the respondent had advanced.

87. As to grounds 2 and 3, the authorities do establish that, even if the evidence in question could have been obtained at the time of the trial, an application to admit it on reconsideration may still succeed in a sufficiently strong case, if the party applying could not reasonably have anticipated that it might be needed. However, in this case, as various materials to which we were taken showed, the claimant was plainly on notice that the respondent considered cost to be a factor when considering whether it ought reasonably to have made the adjustment sought; and it is clear that Mr Suhail himself indeed cross-examined, and made closing submissions, on this aspect. The Tribunal on reconsideration was entitled to conclude that there was nothing amounting to an ambush on this point, sufficient to support the grant of a reconsideration.

88. As to ground 4, in our judgment the evidence of the accounts, showing a positive cash and net assets position on each balance sheet, did not show that the Tribunal's limited reference to financial difficulties in November 2016, based in turn on Mr Hatchett's limited and general observation, was plainly wrong or perverse. That could not be spelled out merely from this feature of the end-of-year overall accounts. The judge was certainly entitled to conclude, in **Ladd v Marshall** terms, that it was not the case that this evidence would probably, if admitted, have had an important influence on the result of the case.

Outcome

89. Accordingly, the appeal against the liability decision, appeal against the reconsideration decision, and cross-appeal all fail. The Tribunal's decision stands.