EMPLOYMENT TRIBUNALS

Claimant: Mrs D Hall
Respondent: The Governing Body of South Holderness Technology College

Heard at: Hull **On:** 7, 8, 9 September 2018, 10 September 2018 (in chambers)

Before: Employment Judge D N Jones
Mr G Harker
Mr K Smith

REPRESENTATION:

Claimant: Ms S King, counsel
Respondent: Mr B Frew, counsel

JUDGMENT

The complaints of unfair dismissal and disability discrimination are dismissed. The decision is unanimous.

REASONS

Introduction

1. On 13 March 2018, Mrs Hall presented claims that she had been unfairly dismissed and subjected to detriments, harassed and dismissed for discriminatory reasons concerned with her disabilities of leukaemia and fibromyalgia.
2. The various complaints and issues to which they gave rise are contained in a case management summary which followed a preliminary hearing with the parties' representatives on 3 May 2018.
3. In this hearing, the parties agreed that there were additional issues concerning time limits. The parties' representatives agreed with the refinement of the provisions, criteria or practices in respect of the breach of duty to make adjustment claim suggested by the Tribunal. They are set out in our conclusions

below. Ms King indicated that the claimant did not pursue the last alleged breach of the duty to make adjustments and it was pursued only as a harassment claim.

Evidence

4. The Tribunal heard evidence from the claimant, from Mr Gary Truran, deputy head teacher at South Holderness Technology College (the College), Mrs Elizabeth Croft, formerly head teacher at the College, and from Mrs Tina Mawer, senior human resources officer at the East Riding of Yorkshire Council. The Tribunal had regard to a bundle of documents which ran to 363 pages.

Background/findings of fact

5. The claimant is a qualified teacher of English. She taught in number of schools in Hull and the East Riding between 2001 and 2017. She commenced work at the College on 1 January 2014, employed under a temporary contract and then was appointed to a permanent post teaching English.
6. The claimant underwent a medical investigation following months of pain and exhaustion and was diagnosed with fibromyalgia, scleroderma and Raynaud's disease in September 2015. In May 2016, having undergone further tests, she was diagnosed with chronic lymphocytic leukaemia. It is accepted that the fibromyalgia and leukaemia are disabilities for the purpose of the Equality Act 2010 (EqA).
7. As a consequence of the fibromyalgia the claimant has widespread pain and stiffness in the fingers, neck, shoulders, back, hips, knees and feet. She becomes easily exhausted, has headaches, an urgent need to go to the toilet, insomnia, sweating, memory loss and bone pain. The leukaemia also causes, or contributes, to the exhaustion and has made the claimant more susceptible to infection.
8. The claimant informed Mr Truran of the first diagnosis on the 24 September 2015. She was referred to the occupational health advisor of the College, Ms Dixon. She reported on 2 October 2015. She made a number of suggestions to assist the claimant at work. These included reducing the amount of walking, providing assistance to move books or equipment such as by the use of a trolley, maintaining her teaching area at ground level, being allowed to sit whilst teaching but also alternating this with standing to alleviate symptoms, allowing the claimant to write everything down to assist with memory problems, having a classroom close to toilet facilities, reducing hours to part-time to assist her in managing ongoing symptoms and maintaining attendance at work and allowing the claimant more time to recover when she picked up minor ailments. She also suggested a risk assessment be undertaken. That was done on 12 November 2015.
9. At a meeting with the former executive head, Mrs Pickerill, on 20 October 2015, the claimant asked for a part-time time table, with one day off per week and for extra time for planning, preparation and assessment (PPA). For a full-time teacher 10% of time is allocated for PPA. From 2 December 2015, further to the outcome of the risk assessment, the claimant's PPA was increased from 5 lessons to 6 every fortnight, being a proportionate increase to 12% of PPA.
10. Her request for part-time hours was declined. Mr Truran wrote to the claimant on 5 January 2016 to inform her that no reduction in hours could be offered because of the pressure on the English department, but there may be a possibility for the forthcoming school year.

11. On 14 January 2016 the claimant had to take sick leave due to a kidney infection and an exacerbation of her symptoms attributable to the fibromyalgia. She remained off sick until June that year.
12. In February 2016 the claimant received a letter informing her that there would be forthcoming redundancies and staff were invited to consider whether they wished to apply for voluntary redundancy.
13. On 4 March 2016 Mr Truran telephoned the claimant to keep in contact with her, in accordance with the attendance at work procedure of the College. He was the designated manager for that purpose. Mr Truran informed the claimant that she would have until 16 March 2016 to apply for voluntary redundancy. She found his phone call stressful and she felt a little intimidated. She contacted her union representative, Mr Howard Nind, who wrote to Mr Truran and suggested that all communication be through his offices and he could act as mediator if necessary. Mr Truran agreed. He informed Mr Nind that during his conversation with the claimant she had said she had been grateful for the call and had not expressed any concern about the contact. He said the claimant had said she felt a burden to her colleagues and had been contemplating applying for voluntary redundancy.
14. On 8 March 2016 Ms Gotts, personnel officer, wrote to the claimant to invite her to a case review meeting under the attendance policy. The claimant declined because she had undergone oncology tests and felt nothing would be gained from a meeting. She requested referral to the occupational health advisor. On 10 March 2016 the claimant emailed Mr Nind to pass on this information. She informed him that she had had a bad day, could hardly get out of bed due to the pain, exhaustion and stiffness and had to pace herself to do day-to-day basics. She said even having a shower left her exhausted and in pain. Her medication caused difficulties with driving because of the side effects of drowsiness. She reported that she took exception to being quizzed in her own home when she may be confined to bed for the whole day.
15. On 29 March 2016 the claimant submitted a fit to work note ('sicknote'), which advised that the claimant may be fit to return to work on a phased return basis from 6 April 2016. The claimant attended an appointment with the occupational health advisor on 18 April 2016, it having been rescheduled, and a report dated 25 April 2016 recommended a phased return over 4 weeks, commencing with 2½ days a week. Ms Dixon also recommended that there be one-to-one meetings with management during the phased return to monitor progress, an evaluation of the claimant's workload to look at whether there was any possibility of reducing it on a temporary basis or in the medium term, that a workstation assessment be undertaken and that the claimant's medical appointments be facilitated. She also recommended that the earlier proposals in her report of 2 October 2015 be implemented.
16. The claimant met Mr Truran at a case review meeting on 21 April 2016 at which the phased return was discussed. During the discussion Mr Truran said that "*you have to be fit to be teaching, you need to be 100%*". In cross-examination Mr Truran agreed that he had said something along these lines, but not quite as alleged. He thought he had said that in discussing the demands of a teacher one needed to be 100% fit to do the job as well as one can. We are not satisfied the different recollection is of any significance. Mr Truran also made an observation that in his opinion the claimant did not look well enough to start the planned phased return.
17. Mr Truran confirmed the understanding as to how this was to operate in a letter dated 25 April 2016, but before the proposed commencement on 26 April, the

claimant became unwell and submitted a further sicknote. The further diagnosis of leukaemia was provided the following month. The claimant returned to work at the end of the summer term, on a phased basis, from 13 June 2016. Although the claimant had applied for voluntary redundancy and had been provisionally accepted, this was subsequently withdrawn as a consequence of changes within the English department and the need for English teachers.

18. A further medical report had been commissioned. On 2 June 2016, Ms Dixon informed the College of the new diagnosis. She suggested her earlier advice was still applicable. She stated that the claimant had told her the school had been very accommodating in making adjustments to support her for which she was grateful. She also reported that the claimant was pleased not to have to take voluntary redundancy as work would take her mind off the recent diagnosis and enable her to return to normality. She could not say whether the claimant would be able to manage full-time work but the requested reduction in working hours should be considered.

19. On 15 June 2016 the claimant wrote, recording that she was enjoying her return and would like a meeting with the headteacher for an informal discussion about flexible working. That took place on 22 June 2016, when Mrs Croft indicated that would not be possible, but at a review with Mr Truran two days later, he provided the claimant with flexible working application forms. Her hours were reduced to 0.8 from the following academic year. It was agreed she would not work on Wednesdays. Mr Truran's note of the review on 24 June 2016 recorded that things were going well and positively. It included a reference to him having told the claimant that if she could think of any additional support she should get back to him. We accept the note accurately reflects what was discussed.

20. On 7 July 2016 Mrs Croft had a discussion with the claimant. There is no record of this meeting. The claimant expressed disappointment that she was not teaching KS 4 classes. Mrs Croft said that teachers did not always get the classes they wanted.

21. On 19 July 2016 Mrs Croft wrote to the claimant to inform her that she had decided to extend the phased return into the first two weeks of the autumn term. That was because the claimant had not taught a full teaching timetable at the end of the summer term, after returning from sick leave. Most of those students who finished exams did not return for the remainder of the school year. Mrs Croft informed the claimant that she would have to complete these additional two weeks satisfactorily and the policy required that otherwise the period was to be deemed continuous absence. The approval of part-time hours was confirmed in the same letter.

22. A further meeting took place between the claimant and Mr Truran on 22 July 2016. The claimant was accompanied by a work colleague, Ms Clappison, who made a note of the meeting. This note recorded that the claimant had felt a lack of energy but was pleased to be back in the swing of things and she had taught two or three times a day. There is a reference to some of the staff having a few free lessons and that once the college term commenced it would be possible to consider whether time could be freed up for the claimant. We interpreted this as a discussion about request by the claimant for additional PPA's. The note recorded the claimant as having said she was okay with the tutor group of year 11. There is no reference in the note to any discussion about timetable and the allocation to her of classes of lower ability students in KS 3.

23. The new term commenced on 5 September 2016. A review meeting was held on 16 September 2016. It inaccurately recorded Ms Clappison as having been

present, but it is accepted that only Mr Truran and the claimant attended. The record of the meeting stated that the claimant was really pleased with the start of the term, was tired but had coped with a full timetable, the reduction to 4 days was proving to be really helpful in coping with the fatigue and that there was nothing the claimant could not do but she had to operate at a slower pace. The note recorded Mr Truran querying whether any other reasonable adjustment could be made and the claimant saying she could not think of anything. Mr Truran reminded the claimant she could talk to him if there was anything of concern. The claimant said in her evidence that she had been too intimidated to make any suggestions, her request for PPA time having been turned down in the past. We were satisfied that this record accurately reflected a summary of the discussion and we did not accept the submission of Ms King that it had been concocted after the event, following concerns raised by the claimant's union representative on 26 September 2016. In cross-examination the claimant accepted most of the points recorded in the note or could not remember if they had been discussed.

24. On 22 September 2016 the claimant asked for permission to attend a medical appointment for evaluation for state benefits in connection with a disability. Mrs Croft declined the request for this to take place in working time, having taken advice from the human resources advisors.

25. On 22 September 2016 one of the claimant's lessons was observed by Michelle Duland the vice principal of the Humber Teaching School and Mrs Lowery, the head of the English Department. This was part of an audit commissioned by Mrs Croft which was intended to provide feedback to her with a view to improving performance and the exam results in GCSE English. All teachers in the Department were observed, whether or not they taught GCSE classes. The claimant was graded as inadequate and, although she had requested not to receive her grade, it was provided to her by Mrs Lowery in an email. In her capacity as union representative, the claimant had made representations prior to the observation sessions to express concern that they may be used for performance management purposes but this was outside the College's policy. She was reassured that this would not be the case, but representations were made that some of the staff wished to rely upon the observation sessions. An agreement was reached that the staff could choose to rely upon the feedback if it assisted them but it would not otherwise be used and that if any member of staff did not wish to know their particular grading it would not be provided.

26. On 26 September 2016 Mr Lloyd, the claimant's new union representative, wrote to Mrs Croft to ask for an explanation as to why permission had not been given for the claimant to take time off to attend a medical appointment. He also expressed concern about the claimant's timetable. The claimant believed that her KS 4 and KS 5 responsibilities had been removed and media was being taught by non-specialists. Mr Lloyd expressed his concern that, as a consequence, the claimant would have a larger volume of students to support and that would impact on workload. He requested information in respect of the timetables and a breakdown of the number of students taught by the claimant. This was not provided.

27. After receiving the letter from Mr Lloyd, Mrs Croft spoke to the claimant in her classroom. There is no note of this meeting and it is dependent on the recollections of Mrs Croft and the claimant. The claimant believes Mrs Croft reacted angrily to the complaints in the letter from Mr Lloyd, but Mrs Croft disputes that she was confrontational, saying she had walked to the claimant's class to avoid her having to

attend her office. On balance, we accept Mrs Croft probably displayed irritation about the complaint.

28. On the 29 September 2016 Mrs Croft wrote to the claimant confirming that she had completed the reintegration plan successfully and asked if there were any further adjustments she required. On the same day she wrote to Mr Lloyd explaining the reason for rejecting the application to attend the medical appointment in work time. As to the concern about the timetable, she said that the decisions had had to be taken about the forthcoming year whilst the claimant was absent on sick leave and before she had returned on a phased basis. She said that the timetable was constructed to provide least disruption to learning. She added that it was a reasonable adjustment to allocate KS3 lessons, which would provide the opportunity for the claimant to complete training and receive support during the academic year with the new English GCSE specifications. She expressed the opinion that this would reduce the stress of delivering examination classes. Mrs Croft had consulted Mrs Mawer about the issues raised in Mr Lloyd's letter. Mrs Mawer suggested further referral to occupational health advisers to discuss any other reasonable adjustments. Mrs Croft duly made another referral.

29. On 4 October 2016 the claimant submitted a sicknote. The symptoms relating to her fibromyalgia and leukaemia had worsened. She received a request to attend an appointment with the occupational health advisor the day after her sickness absence commenced and she believed this this had been so rapidly arranged it signified a desire on the part of her employer to remove her from her employment on grounds of incapacity. In fact, we are satisfied, the decision for the referral had been made with a view to considering any further adjustments in the light Mr Lloyd's letter, but the claimant's assumption was understandable in the light of her vulnerability and the timing of her notification of the appointment.

30. The state of the claimant's health was such that she did not feel able to attend in person, so she requested that any appointment be held by telephone call. This was resisted by the occupational health advisers and an understanding that there would be communication through the claimant's union representative was not adhered to, causing further anxiety to the claimant. Eventually it was agreed that a telephone appointment would be facilitated. The claimant was prescribed antidepressant medication by her GP at this time.

31. On 19 October 2018 claimant submitted a grievance. There were eight complaints. They concerned Mrs Cross' decision not to allow her time off to attend the medical appointment, the change of her timetable to give her KS 3 classes, increasing workload from 100 pupils to 240, failure to allocate additional PPA time, a change of classroom moving her further from the toilet facilities, refusing to provide part-time hours in January and May 2016, failure to remove detention duty, and failure to provide reasonable adjustments in respect of lesson observation, whereby she had been graded as inadequate on 22 September 2016.

32. The chair of governors, Mr King, wrote to the claimant on 21 October 2016 acknowledging the grievance on 31 October 2016. In a further letter he invited the claimant to a meeting to discuss it, on 7 November 2016. The meeting had to be postponed because the union representative was unavailable and then subsequently unwell. Mr King wrote on 18 November 2016 to inform the claimant that he would commence the investigation based on her written complaints, due to the difficulties in arranging a meeting with her and her union representative and her state of health. He offered the option of rearranging the meeting with her but, in the absence of any objection, would continue his investigation as proposed.

33. Ms Croft was interviewed by Mr King in the presence of Mrs Mawer on 24 November 2016. Mr Truran was interviewed on 8 December 2016, Mrs Lowery on 8 December 2016 and a meeting with the claimant took place on 25 January 2017. Mr King wrote to the claimant on 10 March 2017. He did not uphold any of the specific complaints, but in respect of the outcomes the claimant had invited, he suggested that there should be a meeting with Mrs Croft and himself to discuss the claimant's return to work. He proposed that the College would review with her the duty rota and PPA allocation on her return, that there would be work to improve communications between the College and herself and there would be a review of the position of her classroom. Mr King offered the claimant the right to appeal his decision. Having taken advice from a union representative the claimant chose not to appeal.

34. The occupational health advisor conducted a telephone assessment with the claimant on 24 November 2016. In a letter dated 6 December 2016 Ms Dixon reported that the claimant had said she was getting very fatigued, had been struggling carrying books albeit she had not asked for help, and that she had some concerns in terms of her classes and workload. She stated the claimant had a number of stresses, including a personal stressor. She perceived she had not been supported on the return to work. She suggested that there should be a meeting with the claimant prior to the Christmas holidays to explore what the difficulties within the workplace were and whether other adjustments were needed. She also said that the earlier recommendations from her reports remained applicable.

35. A further occupational health meeting took place on 10 January 2017. Ms Dixon reported in letter of 19 January 2017. She informed Mr Truran that the claimant continued to experience pain in a number of areas of her body, had significant fatigue and "brain fog". She had informed Ms Dixon she did not believe she would be able to return to teaching in the foreseeable future, but had not ruled it out in the longer term. She had contacted telephone counselling services, further to this advice, but this was not having any particular benefit. She was to be reviewed by a neurologist for some dizzy spells and visual disturbance. Ms Dixon had discussed the possibility of exploring early retirement; the claimant was to be 55 years of age in March 2017. There was also discussion about applying for ill-health retirement. The claimant informed Ms Dixon that as she did not feel well enough to work, no adjustment could be made to facilitate a return.

36. On 20 January 2017 Mrs Croft wrote to the claimant to inform her that the College was to consider the potential for redundancies because of falling pupil numbers. She also wrote to ask if the claimant wanted to explore the possibility of early retirement from March 2017, as discussed with Ms Dixon. Mr Truran wrote to her on 15 February 2017 to arrange a case review meeting to discuss the occupational health report and also to explore the possibility of early retirement. Mr Truran wrote again on 16 March 2017 asking the claimant to contact him to arrange an appointment to hold a case review meeting to explore the possibilities of early retirement or retirement through ill-health. He pointed out he had had no contact from her.

37. The case review meeting took place on 5 April 2017. The claimant said that there had been no improvement in her health since 10 January 2017 and she was to undergo a brain scan. She reported that her mobility had worsened. She was to receive a personal disability payment, relating to her lack of mobility. She informed Mr Truran that she had resigned herself to admitting she did not feel she would ever be able to return to teaching and therefore would explore the possibility of early ill-health retirement and if that was not accepted that she would take early retirement.

She said that either way she would not be returning to work in September. It was agreed that Mr Truran would contact Ms Dixon to start the process to apply for ill-health retirement. By this stage the claimant was in receipt of half pay, pursuant to sick pay scheme, but this was to expire on 11 October 2017.

38. On the 20 September 2017 a further case review meeting was held. The ill-health retirement application had been submitted. It was thought a decision would be made within four weeks. The claimant said that she would still be unable to return to work in her role as teacher and nothing had changed. Mr Truran asked if redeployment was something she had considered. The claimant said she had not thought about it. She requested the human resources department contact her about the systems and processes involved. Mr Truran said that from the perspective of the College it was necessary to draw the matter to a close and that he would therefore propose a dismissal hearing before the end of October. It was agreed this would be held once the application for ill-health retirement had been determined.

39. On 5 October 2017 the application for ill-health retirement was rejected. It was not accepted that the claimant's state of health was such that she was permanently prevented from continuing in her profession as a teacher until normal pension age.

40. On 13 October 2017 Mr Truran wrote to the claimant to invite her to a meeting to consider terminating her employment on the grounds of capability because of her unresolved ill-health. He said he had requested the human resources department to provide details concerning redeployment.

41. The hearing took place as proposed on 23 October 2017. Neither the claimant nor her union representative attended. In evidence the claimant said that she believed her union representative was to attend.

42. On 26 October 2017 the human resources department of the Council wrote to the claimant and provided her information about the redeployment register and how to contact them if there was any suitable vacancies. The claimant considered the job opportunities but they were sufficiently far away from where she lived to be practicable alternatives.

43. On 30 October 2017 the Director of Children Families and Schools of the Council wrote to the claimant terminating her employment by reason of capability due to unresolving ill-health. He gave the claimant the right to appeal but this was not exercised.

The Law

44. The relevant statutory provisions in respect of the discrimination claims are contained in sections 13, 15, 20, 21, 23, 26, 39, 40, 123 and 136, paragraph 22 of schedule 8 of the EqA and, in respect of the claim for unfair dismissal, in sections 94 and 98 of the Employment Rights Act 1996.

45. We have had regard to the Equality and Human Rights Commission's statutory Code of Practice on Employment, as required by section 15(4)(b) of the EqA and the ACAS Code of Practice on Discipline and Grievance Procedures, as required by section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992.

Discussion and conclusions

Disability discrimination

Harassment

Paragraph 10 of the case management summary

46. Observation of the claimant's lesson, in September 2016, and the evaluation of it as being inadequate qualifies as 'conduct' which was 'unwanted', for the purpose of section 26(1)(a) of the EqA. Given her state of health at the time the observation of the lesson would place the claimant under additional stress and the particular grading of inadequacy would be unwelcome and particularly unpalatable.

47. We are not satisfied that either the observation of the lesson or the grading of it as inadequate were 'related' to the claimant's protected characteristic of disability. That is an essential requirement for the definition of harassment to be made out within section 26(1)(a). Observations were undertaken not only of the claimant but of all staff in the English department. The observations related to membership of a group of staff which taught English, not the claimant's disability.

48. Seven of the eleven teachers were graded inadequate, three had been graded as requiring room for improvement and one as good. In this respect the claimant was treated the same as the vast majority of the other teachers, regardless of disability. This leaves little room to infer that the grading had been unfairly skewed in the claimant's particular case.

49. Ms King submitted that, during her interview for the grievance investigation, Mrs Lowery demonstrated an antipathy to the claimant, which touched upon her disability including Mrs Lowery's unfavourable opinion about the claimant promoting the blue badge scheme for disabled persons to another colleague. In addition Mrs Lowery had commented upon the fact that she did not believe the claimant fitted into the ethos of the English Department. This material provided, she contended, a factual basis from which the tribunal could infer that Mrs Lowery had unfavourably graded the claimant's lesson.

50. We did not hear from Mrs Lowery. The comments made during these interviews provided a limited impression of her views and relationship with the claimant, as they were extracts from an interview which was focused on specific issues of concern raised in the grievance. Even were we to accept the submission of Ms King that there was a hostility felt by Mrs Lowery to the claimant in connection with disability, we are not satisfied either aspect of unwanted conduct related to the protected characteristic. That is because the observation of the lessons affected all members of the teaching staff in the English department whether or not they were disabled and, whether or not they delivered teaching to KS 4 classes. As to the grading, although Mrs Lowery had been involved, the other observer was wholly independent. The claimant herself recognised that teaching KS 3 classes would not have been her choice. Having to teach such classes was a complaint in a number of her other discrimination claims. There is no evidential basis for inferring that the claimant would have been given another, better grading if Mrs Lowery had not been jointly involved in the assessment and that it related to disability.

51. There remains the unsatisfactory aspect of the claimant having been informed of the grading when she had specifically asked not to be. However, the harassment claim did not include such a complaint of unwanted conduct and so it would be inappropriate to make any finding in that respect.

Direct discrimination

Paragraph 11.1.1 of the case management summary: Removal of the claimant's former classes.

52. The removal of KS 4, KS 5 and media classes can properly be categorised as detrimental, for the purposes of section 39(2)(d) of the EqA. The claimant had been delivering this teaching for the majority of her career. It formed a major part of her work whilst with the respondent. She had prepared for those classes in the past. Notwithstanding there had been a change to the syllabus to exam based rather than assessment based, the claimant's chosen field of work was removed.

53. Was that less favourable treatment because of the claimant's protected characteristic of disability? We are required to have regard to a person's abilities in any comparison drawn for the purpose of determining that question[1].

54. The timeframe within which the forthcoming academic year was planned was significant. It had commenced, at least, by February 2016 and led to a decision, by Mrs Lowery and Mrs Croft, to select other teachers than the claimant to teach KS 4 and KS 5 whilst the claimant remained off sick. Whilst there was some refinement of the allocation of classes when the claimant returned to work at the end of June 2017 and July 2017, including adjustments for the claimant's part-time hours, we are satisfied that the decision to remove the exam classes had been made before the claimant's return from sick leave. At the time the decision was made, the claimant's future, as regards to her return to work, was unclear. We accept the evidence of Mrs Croft that the uncertainty which arose from the claimant's absence influenced the choice of teachers for these critical exam classes, on which the school was assessed, for the forthcoming academic year. To maximise the continuity of educational provision, a selection of teachers who were most likely to be present consistently and without interruption was judged to be advantageous to a better ultimate outcome for the pupils and their exam results.

55. A comparison is an important means to determine whether or not the reason for the less favourable treatment was discriminatory, and is implicit from the language of section 13(1) of the EqA which requires a resolution of the question as to whether the treatment was less favourable (or would be less favourable) to that of others who do not share the protected characteristic. We are satisfied that a teacher who was not disabled but who had been absent from work for a comparable period of time and whose future attendance raised a similar question mark in respect of the forthcoming academic year would not have been selected to teach KS 4 and KS5 classes. There would be the same risk to the continuity of delivery of the curriculum. The decision was taken to maximise educational outcome regardless of the issue of disability. We are satisfied that this reason discounts any directly discriminatory causal contribution to the decision, such that it is not necessary to analyse this complaint by reference to section 136 of the EqA.[2]

[1] Section 23 (2) of the EqA.

[2] *Hewage v Grampian Health Board [2012] ICR 1054*

Paragraph 11.1.2 of the case management summary: Rejecting the claimant's grievance in March 2017

56. Mr King, the chair of governors, arranged for the relevant teachers about whom the claimant complained to be interviewed, as well as the claimant. The outcome, whilst not upholding the individual complaints, made recommendations to open a dialogue with the claimant to consider what further adjustments could be made to assist her to return. Whilst her disabilities formed the context against which a number of the concerns were raised, for example inadequate consideration to assisting her in the workplace, it does not provide a proper basis to infer that Mr King did not uphold the complaints because of the claimant's protected characteristic. For comparative purposes, would Mr King have dismissed a grievance if the complaint had been brought by a person who was not disabled?

57. Ms King criticised the process. She drew attention to a deficient, or limited, summary of disability discrimination rights in the decision letter, which had been based upon advice from Mrs Mawer and the fact that there had been the potential for a conflict of interest because Mrs Mawer had advised Mrs Croft in September 2016 as to potential adjustments and she was the advisor to Mr King during the grievance process. These submissions provided no support for the proposition that Mr King had rejected the complaints because he had been influenced consciously, or subconsciously, by the claimant's protected characteristic. Indeed, the outcome he proposed was to work constructively with the claimant to address her concerns going forward.

58. There is no distinction drawn by the claimant between different aspects to the several complaints which were not upheld in the grievance decision. Rather, her case is that in rejecting it all, Mr King did so, consciously or subconsciously, because of her protected characteristic of disability. In respect of some of these complaints we have reached a similar conclusion to Mr King, for example with regard to the allocation of classes for the academic year 2017/2018. No material in the facts we have found permits any fair or reasonable inference that Mr King's approach and conclusion was tainted by reason of the claimant's protected characteristic. The claimant has not established facts which we could decide, in the absence of any adequate explanation, that Mr King rejected the grievance because of the claimant's disability.

Paragraph 11.1.3 of the case management summary; the dismissal

59. Ms King drew attention to comments made by Mr Truran that one had to be one hundred percent fit to be a teacher and Mrs Croft's testy behaviour in visiting the claimant on 26 September 2016 in her classroom. She submitted that these were matters, together with the comments of Mrs Lowery during the grievance, which provided ample scope for drawing inferences that actions of the respondent were, in reality, attributable to the claimant's disabilities.

60. We do not agree, because the events leading up to the termination of the claimant's employment left no realistic alternative. The claimant had been absent from work for 12 months at the time of her dismissal. The occupational health advisor expressed the opinion that she would not be fit to return to teaching then or in the foreseeable future. That was also what the claimant had said at case review meetings.

61. The decision to dismiss the claimant was, unquestionably, because she was unfit to return to duties because of her ill-health. That was attributable to the disability, but that does not make good a complaint of direct discrimination. We must

have regard to a comparator who has the same abilities as the claimant, in order to determine whether or not the direct discrimination claim is made out. We are satisfied that a teacher who was not disabled but who had a similar record of absence and inability to work as a teacher in the future would have been dismissed.

62. The reason for the termination of the claimant's employment was not her disability, but rather her inability to work as a consequence of it. That places the case squarely within section 15 of the EqA and not section 13. We address this, within the context of section 15, below.

Discrimination arising from disability

Paragraph 12.1.1 of the case management summary: removal of media/KS 4 and KS 5 classes/leaving claimant with low ability students/creating an additional burden.

63. The changes to the timetable were down to the fact that the claimant had been absent from work for nearly 6 months on sick leave from mid-January to mid June 2016 and the uncertainty that gave rise to. We have set out our findings about this at paragraph 54 above. In the circumstances, the removal of the claimant's former classes and the substitution of them with KS3 was because of something, the claimant's absence, and that arose from her disability.

64. The respondent does not accept that the removal of these classes was unfavourable treatment. Mrs Croft and Mr Truran were of the view that there were additional strains and responsibilities arising from teaching the GCSE classes, which were not present in teaching the younger year group. Moreover the changes to the curriculum from an assessment base to exam base necessitated additional training which the claim would have to catch up on, which in itself would impose additional pressures.

65. There was a dispute as to whether the increase in the numbers of pupils rose from 100 to 240, or 100 to160. Mr King recorded the latter and said that had been agreed, but this was not accepted by the claimant in this hearing. Whatever the increase, we accepted the evidence of Mrs Croft and Mr Truran that that alone is not a barometer of an additional burden. It must be balanced against the extra responsibilities and requirements of teaching exam year classes.

66. Notwithstanding our observation concerning pupil numbers, we are satisfied there was unfavourable treatment, largely for the reasons we have set out at paragraph 52 above, in which we accepted that removal of the claimant's preferred choice of work would amount to a detriment. We recognise that from the perspective of many teachers the requirement to undergo additional training in a foreshortened period to teach the new curriculum, in addition to the pressure internally and externally to achieve good examination results at GCSE level, would be considered less desirable than teaching the students at KS 3 level, even if that meant teaching more pupils or pupils of lower ability. From the claimant's point of view, however, this was a change to a pattern of working to which she had become accustomed. We are satisfied it was unfavourable treatment, factoring in that element of subjectivity.

67. In summary, we accept, for the purpose of section 15(1)(a) of the EqA, that the changes to the classes and curriculum were unfavourable treatment because of something which arose in consequence of the claimant's disability. That throws upon the respondent a burden to establish that such unfavourable treatment can be justified, by reference to section 15(1)(b) of the EqA. Was there a legitimate aim and was the unfavourable treatment a proportionate means of achieving it?

68. The legitimate aim relied upon by the respondent was to provide the best education to the students and to safeguard the interests of the staff. That corresponds with an appropriate business need and qualifies as a legitimate aim.
69. The changes to the timetable were relevant, or appropriate, to that aim. They were designed to provide continuity of teaching, to minimise the risk of interruption to the delivery of the curriculum during the exam year through sickness absence and to ensure the teachers who were selected had attended the recent training sessions for the new examination assessments. Mrs Croft and Mr Truran had reasonable grounds for believing the changes would alleviate stresses notwithstanding that view was not shared by the claimant. Whilst the claimant wished to retain teaching at this level, it does not follow that the additional stresses identified by Mrs Croft and Mr Truran would not have created alternative difficulties.
70. Were these changes a proportionate means of achieving those aims? Were they appropriate and were they necessary? That requires a balance between the discriminatory impact and effect of the unfavourable treatment and the importance of the aim to be pursued. Could any reasonable alternative approach have been adopted to meet the legitimate aim without causing any form of discrimination?
71. There were limited options available to Mrs Croft. There was a finite number of teachers to allocate to teach English and media studies. The flexibility to deploy the claimant's teaching skills was further limited by reason of her reduction in working hours. It was not possible, realistically, to have provided adequate training to the claimant on the new curriculum in the short time available at the end of the summer term, particularly bearing in mind that this also involved a reintroduction to teaching which was, itself, tiring. No alternative was identified which would have overcome the risk to continuity of teaching through the unpredictable episodes of absence through ill health. In respect of media studies, the A-level class provided by the claimant at KS 5, the course had undergone a number of changes because of the low number of pupils undertaking the subject. It had been combined with another subject and was studied as a BTEC. The claimant would not have been able to deliver this new course.
72. In the circumstances we are satisfied that there were no alternatives to meet the legitimate aim than the implementation of the changes made by Mrs Croft. The aim was important. GCSE English was a measure by which the school was evaluated by Ofsted. The unfavourable treatment did not exclude the claimant from work and was compatible with her part time hours. Balancing the importance of the aim against the disadvantage arising, we are satisfied the respondent has justified the decision to change the timetable.

<u>Paragraph 12.1.2 of the case management summary: The rejection of the claimant's grievance</u>
73. We were unable to identify what the claimant contended arose in consequence of her disability which led to the decision to reject her grievance. Under section 15(1) of the EqA, the unfavourable treatment must be because of 'something' arising in consequence of the disability. It is not referred to in the skeleton argument of closing submissions of Ms King. This complaint is not well-founded.

<u>Paragrah 12.1.3 of the case management summary: Dismissal</u>
74. A dismissal is unfavourable treatment. It was because of the claimant's long-term absence through ill-health. That arose from the claimant's disability. The

requirements of section 15(1)(a) having been made out, has the respondent discharged the burden to establish that such unfavourable treatment can be justified, by reference to section 15(1)(b) of the EqA? Was there a legitimate aim and was the unfavourable treatment a proportionate means of achieving it?

75. The legitimate aim was to provide a good educational service. That required the respondent to have teachers who were available and able to discharge their duties. The dismissal of the claimant was relevant to the aim so that the respondent could replace her with another member of staff to teach English.

76. We are satisfied dismissal was a proportionate means of achieving the legitimate aim. It was reasonably necessary. The claimant had indicated that she had no expectation of returning to teaching in the near future, in January 2017. She repeated this at every case review meeting subsequently. She had expressed an intention to retire, either under the ill-health retirement scheme or by way of early retirement. There was no present or future expectation she would teach. There was no alternative means of achieving the aim.

Breach of the duty to make reasonable adjustments

Paragraph 13.3.1: failure to offer part time hours in January and May 2016

77. It was agreed there was a provision criterion or practice for the claimant to work full-time hours until the beginning of the 2016 academic year.

78. The claimant had raised the request to work part-time in October 2015, with Mrs Pickerill, the former executive head. It was rejected on 5 January 2016. It was said there was too much pressure on the English department to accommodate the request. From 14 January 2016 the claimant was absent through ill-health until her phased return on 13 June 2016.

79. Ms King suggested that had the request for part-time work been implemented at the end of 2015, the claimant would have been in a better state of health, so that she would have been able to continue to work during the following months. The claimant was finding work difficult at the end of 2015 and the beginning of 2016. The respondent was on notice that part-time work would have assisted, from Ms Dixon's report.

80. The claimant was at work for one and a half weeks before succumbing to a kidney infection on 14 January 2016. Her symptoms generally worsened particular with insomnia and anxiety. She was prescribed antidepressants on 21 January 2016 and referred for tests to investigate abnormally high blood. She was referred to a gastroenterologist to investigate bowel problems. On 18 February 2016 the claimant's GP prescribed a strong painkiller. The condition began to improve at the beginning of April such that plans for a phased return were put in place. Regrettably the symptoms of insomnia returned and the claimant was provided with a sicknote for a further four weeks on 26 April 2016. It was a particularly difficult time as the claimant was awaiting the oncology results. The phased return therefore was not possible until the claimant recovered by mid June.

81. Having regard to the illnesses which led the claimant to being off work from 14 January 2016, we are not satisfied that the absences were attributable to the failure of the respondent to offer part time hours. For the majority of the working time available in January 2016 and in May 2016 the claimant was not able to work because of her ill-health. She was not placed at a substantial disadvantage by the PCP during this period, because she was not available to work at all. Moreover, an adjustment will not be reasonable if there is not is a chance of it removing or

alleviating the substantial disadvantage[3]. Even had the respondent offered the part-time work, the claimant could not have taken advantage of it. The phased return, which introduced the claimant back into the workplace on reduced hours at a time when there were fewer pupils at school was successful and the request for part-time hours after the summer break had been agreed. We are satisfied those measures were reasonable.

82. There was a short period from 4 January 2016 to 14 January 2016, a period of eight working days, when the claimant would have been at a substantial disadvantage by not being able to work for one less day for the working week, to alleviate the stress and accommodate the rest of her duties. There was very little evidence about the potential to change the timetable during that period to accommodate the claimant's request. In her witness statement the claimant does not comment upon the statement of Mr Truran that the pressures were such that part-time hours could not be accommodated. It is addressed very briefly at paragraph 7 of Mr Truran's statement. It was not explored in cross-examination. Mrs Pickerill, who made the decision, has left the employment of the respondent and did not give evidence.

83. That left very little material upon which to evaluate the reasonableness of the refusal for that 10 day period. An employer is entitled reasonably to consider its business needs and must balance those as against the removal of a substantial disadvantage created by a PCP to a disabled person. However, for the reasons set out below, we are satisfied that we do not have jurisdiction to consider this complaint as it is out of time.

Paragraph 3.3.2: Increased preparation time

84. It is agreed there was a provision criterion or practice to allocate 10% of work time to PPA. This had been adjusted to assist the claimant in early 2016, but this was not continued upon her return in June 2016 or September 2016.

85. The claimant had raised her concern about this during the phased return both to Mrs Croft and to Mr Truran. On the last day of term Mr Truran had suggested he might be able to free up some teacher time, because one of the drama teachers might not have needed his free period.

86. We are satisfied that the use of additional PPA time did assist the claimant. Providing only 10% of time for this purpose placed the claimant at a substantial disadvantage given her symptoms of exhaustion and her memory difficulties. It was a reasonable adjustment to increase it to 12%, which is why that had been agreed at the beginning of the year.

87. We are satisfied that it would have been reasonable to continue this arrangement, pro rata, when the claimant commenced part time hours. That would involve providing the equivalent of 4.8 lessons of PPA, and sensibly that would be rounded up to 5 on the claimant's reduced hours. No adequate explanation was provided for why that not was not accommodated in September 2016. Mr Truran suggested that the matter was to be kept under review. Although the claimant did not raise this again at the meeting on 16 September 2016, as we would have expected her to have done, we accept that this is because she was diffident in complaining again about an issue she had raised without success in July. We are satisfied it was likely the respondent could have accommodated this additional time. We find the

[3] *South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley EAT 0341/15*

matter had not been given any degree of priority by Mr Truran, who doubtless had many demands on his time at that busy time of year. We are satisfied it was a breach of the duty not to provide the extra PPA. It caused the claimant some additional stress for the four weeks of the new term, before she became ill and was unable to work again.

88. There is no support in the medical evidence to establish a causal link to the onset of the illness which led to the claimant being absent, never to return. The medical evidence plainly portrays a continuing and worsening condition which developed regardless of the failure to provide an additional PPA period per fortnight.

89. For the reasons set out below, we do not have jurisdiction to find this claim established as it is out of time.

Paragraph 3.3.3: Locating the claimant in a classroom nearer to a toilet.

90. There was an arrangement which amounted to a provision whereby the claimant was allocated a classroom which was further from the toilet facilities than had previously been the case. We are not satisfied this place the claimant at a substantial disadvantage. The reason for the reallocation of classroom was to provide greater space than the cramped facility previously occupied by the claimant. The other classroom was 17.5 m from the toilet an extra 9.5 m than previously. Whilst Ms Dixon had recommended that a classroom close to a toilet was desirable, there was no evidence to suggest that the additional, relatively small distance would create any particular problem. Nor had the claimant raised any complaint about the position of her classroom in 16 September 2016, when specifically asked by Mr Truran if there were any reasonable adjustments which could be put in place, through her union representative, or in her discussions with Ms Dixon on 24 November 2016. Whilst it was an item raised in the grievance, she never returned to work afterwards.

91. Even if we were satisfied that the additional distance of 10 metres was a substantial disadvantage, we are not satisfied that, at the material time she was at work, the respondent knew, or ought reasonably to have known of that, in the absence of the problem being specifically identified by the claimant. She had raised the issue with her manager the year before and Ms Dixon observed in her first report that the claimant required a classroom near to toilet facilities, but that was being provided. Without it being mentioned upon her return, we are not satisfied the requisite knowledge of the disadvantage, under paragraph 22 of schedule 8 of the EqA, was established. After she drew attention to it, in the grievance, Mr King agree to review the position of the classroom upon her return. We are satisfied that was a reasonable offer and response which would have been acted upon had the claimant returned.

Paragraph 3.3.4 of the case management summary: Removing the claimant's duties to supervise detentions.

92. There was a provision criterion or practice whereby staff had to undertake detention duties for three hours each academic year and break duties twice a week. This placed the claimant at a substantial disadvantage because of her symptoms. At paragraph 31 of her witness statement (the only evidence which refers to this matter) she said that she emailed Mr Harris who coordinated break duties and informed him that she was struggling and asked to be excused. He agreed. In the grievance Mr King concluded that this part of the complaint was not well-founded because Mr Harris had responded appropriately. We agree. Whilst it is for an employer to be

proactive and make adjustments, that will depend upon what the employer knew as to the extent of any disadvantage which arose from any provision criterion or practice or ought to have known[4]. In the circumstances, it was not reasonable for Mrs Croft or Mr Truran to have assumed what the claimant could or could not have done. We agree with the conclusion of Mr King in the outcome to the grievance.

Paragraph 13.3.5 of the case management summary: Not giving the claimant an inadequate assessment of the lesson observation in early September 2016.

93. Ms King did not pursue this complaint as breach of the duty to make adjustments.

Time limits

Breach of the duty to make adjustments in failing to maintain a proportionate level of PPA upon the claimant's return to work in September 2016

94. By section 123 and section 140B of the EqA a complaint may not be brought before the end of the period of three months and any relevant early conciliation period starting with the date of the act complained of. Conduct extending over a period is to be treated as done at the end period, see section 123(3)(a) of the EqA. The Tribunal may consider a complaint otherwise if it is just and equitable to do so, see section 123(2)(b) of the EqA and the factors which are relevant to that determination will include those considered by a court in exercising its discretion under section 33(3) of the Limitation Act 1980.

95. Ms King contends that the failure to maintain a proportionate level of PPA was a continuing act as, so long as the respondent continued to employ the claimant and did not inform her that it had reintroduced the same level of PPA, the duty was a continuing one.

96. We do not agree. Section 123(3)(b) of the EqA provides that a failure to do something is to be treated as occurring when the person in questioned decided upon it. Section 123(4) of the EqA provides that in the absence of evidence to the contrary, a person is to be taken to decide on the failure to do something when either he does an act inconsistently with doing it or, if he does no such inconsistent act, on the expiry of the period in which he might reasonably have been expected to do it. By doing nothing, Mr Truran did not do an act inconsistently with providing additional PPA. Upon application of these provisions time commenced to run from September 2016 when Mr Truran could have been expected to have made a decision on providing the claimant with additional PPA. This was not continuing conduct.

97. The claim was presented on 13 March 2018. That complaint is therefore out of time by more than 14 months. Ms King suggested that part of the reason for the delay was the extended period it took for the respondent to determine the claimant's grievance. That would not be a justification for not presenting a claim in time but could be a factor for the tribunal to take into account in determining whether it is just and equitable to allow the claim to proceed. Even taking that into account, the claimant could have presented the claim any time after Mr King had determined the grievance on 10 March 2017. She chose not to challenge his decision on appeal and did not present the claim until one year later.

[4] *Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT*

98. We accept the submission of Mr Frew, that the cogency of the evidence has been adversely affected by the delay. The recollections in respect of the handling of the request for PPA had faded with time. The documentation about the matter is scanty and equivocal.
99. The delay is a substantial one. The claimant had access to advice from her union and could be expected to become informed about how to pursue complaints to an employment tribunal. She is an intelligent and educated person. We recognise that her disabilities may have had an impact on her, because of the tiredness and memory problems, but not to the extent that she could not have presented her claim far sooner than she did.
100. We have to have regard to the respective prejudice to the claimant in not being allowing to proceed with the claim and to the respondent if is allowed to proceed. The complaint did not give rise to any loss of earnings, but would be compensated by way of a sum for injury to the claimant's feelings. Being denied the opportunity of having this aspect of discrimination recorded in a judgment is an additional hardship. For the respondent to have to meet a stale claim, without the opportunity to meet it with the most cogent evidence, is a hardship.
101. Balancing all the above we have concluded it is not just and equitable to extend time.

Breach of the duty to make adjustment: failing to provide part-time hours in January 2016

102. Mrs Croft agreed to the request for part-time hours, which commenced in September 2016. For the purpose of section 123 of the EqA the time limit would commence at the very least at the beginning of September 2016.
103. This complaint is out of time by at least 14 months. For the reasons we have set out, we are not satisfied that the claimant's subsequent absence from work through ill-health was caused by a failure to provide part-time hours at the commencement of 2016. Compensation for this claim would relate to any injury to feelings for the eight day period during which the claimant was not offered a reduced working week of one day out of five.
104. In determining whether it would be just and equitable to consider this part of the claim, we have taken into account those factors set out in paragraphs 95 to 97 above. The respondent has been prejudiced by the delay. Mrs Pickerill has left her employment and it was she who made the decision. There was very little documentation available to assist the tribunal in determining the competing demands for teaching of English and available staff to facilitate the claimant's request. The memories of the claimant and Mr Truran would inevitably had been adversely affected by the fact that these matters concerned events of nearly 3 years ago, albeit they were not asked specifically about them.
105. We are satisfied that it would not be just and equitable to allow that complaint out of time having balanced the relevant factors set out above.

Unfair dismissal

106. The principal reason for the dismissal related to capability, the claimant's inability to perform her duties due to ill-health, see section 98(3)(a) of the ERA. We have set out our conclusions about the reason for the dismissal in our considerations about whether the dismissal constitutes an act of direct discrimination or discrimination arising from disability at paragraphs 60, 61 and 74 above.

107. Ms King submits that dismissal for that reason was unreasonable because of a departure from the respondent's written procedure. The policy provides for a case conference to be convened after six months of absence. That conference is for the purpose of consideration of the various options by the occupational health advisers, the human resources expert and the managers. It is not a meeting to which the employee is invited. No such case conference was held in March 2017, six months after the claimant became ill or at all.
108. The information available to Mr Truran from the occupational health advisers and the claimant herself was that she could not return to work as a teacher because of her health. That was with or without any adjustments. She was exploring retirement opportunities. A case conference in such circumstances would have been of no use or value. All appropriate avenues were explored with the claimant at case review meetings on 5 April 2017 on 20 September 2017.
109. We must determine whether the respondent acted reasonably or unreasonably in treating capability as a sufficient reason for dismissing the claimant, having regard to the size and administrative resources of the respondent and all the circumstances. Because of the fact that the claimant could not discharge the duties because of her ill-health, such a decision was reasonable, if not inevitable.
110. We must also consider the question of whether the dismissal was fair or unfair by reference to equity and the substantial merits of the case. This includes an assessment of whether the procedures undertaken were fair and fell within a reasonable range of responses. Mr Truran consulted the claimant in the two case review meetings, having obtained appropriate occupational health advice. He arranged for her to consider redeployment opportunities which were, in the event, not suitable. The claimant did not attend the dismissal hearing to advance a case that her employment should not be terminated. Although she believed her union representative was to have attended the dismissal hearing, the fact he did not could not be counted as a failing of the employer. Any concern the claimant had about that could have been addressed by way of an appeal, but that avenue was not one she took up.
111. Looking at the process overall and bearing in mind the inevitability of the claimant's employment coming to an end, the dismissal was reasonable in all the circumstances of case.

Employment Judge D N Jones

Date:17 October 2018