EMPLOYMENT TRIBUNALS

Claimant: X

Respondent Y

HELD AT: Manchester **ON:** 12 – 15 December 2016; 21 March2017
12 June 2017 (hearings)
20 November 2017; 24 November 2017
21 February 2018 (In Chambers)

BEFORE: Employment Judge Holmes
Mrs C Linney
Ms J A Beards

REPRESENTATION:

Claimant: In Person 12 – 15 December 2016, thereafter written representations;

Respondent: Mr C Taft, Counsel 12 – 15 December 2016, 21 March 2017 thereafter written representations

RESERVED JUDGMENT

It is the unanimous judgment of the tribunal that:

1. The claimant was unfairly dismissed.

2. In breach of contract the respondent dismissed the claimant with insufficient notice, and she is entitled to the balance of six months notice pay.

3. The claimant's dismissal was an act of discrimination because of something arising in consequence of her disability, which the respondent has failed show was a proportionate means of achieving a legitimate aim.

4. The respondent failed to make reasonable adjustments for the claimant's disability.

5. The claimant is entitled to a remedy. The Tribunal has issued further case management orders under separate cover in respect of any future remedy hearing.

REASONS

1. By a claim form presented on 3 March 2016 the claimant complains of unfair dismissal , and disability discrimination arising out of the termination of her employment with the respondent on 8 October 2015. She also seeks damages for breach of contract , contending that, whilst her dismissal was with notice, she was given, or rather paid in lieu for , insufficient notice.

The procedural history.

2. The claimant is a paranoid schizophrenic, a condition conceded by the respondent to constitute a disability. The final hearing was commenced by the Tribunal on 12-15 December 2016 , when the claimant gave evidence. However, in the course of that evidence, and whilst she was in fact answering questions from the Tribunal, the claimant became upset and her behaviour in the Tribunal was such as gave concerns as to her wellbeing , and consequently that hearing was adjourned.

3. The Tribunal on that occasion made an order that the claimant do confirm in writing to the Tribunal that she was fit and willing without condition to resume giving her evidence to answer questions from the Tribunal and thereafter re-examining herself so that her claims could thereafter proceed to a conclusion. There ensued communication with the claimant between January and March 2017 from which her position as to further attendance to conclude her evidence, and resume the hearing, became clearer, with the result that at a preliminary hearing on 21 March 2017 , as a result of the respondent applying to strike out the claims, on the grounds that a fair hearing was no longer possible, the Tribunal further considered that application n Chambers on 12 June 2017, the claimant having been given a further opportunity either to state that she would now attend a resumed hearing, and to answer specific questions from the Tribunal.

4. The Tribunal received further communications from the claimant, who maintained her position that she would not attend a further hearing in person. The Tribunal accordingly in its deliberations on 12 June 2017 mooted the possibility of proceedings by way of written representations and evidence only. The Tribunal , in its judgment, declined to strike out the claimant's claims, and invited the respondent to respond to its proposal to continue the hearing without further attendance of either party, but by way of consideration of the written evidence and written submissions only.

5. By e-mail of 29 June 2017 the respondent's representative confirmed its consent to that proposal. Extension of time was sought and granted for the admission of any further written evidence, which ultimately was not required by the respondent.

6. The Tribunal subsequently directed that the respondent file its closing submissions by 18 September 2017, and that the claimant do file hers in reply by 16 October 2017. The Tribunal listed the resumed hearing in Chambers for 24 November 2017, when its considered the written material, and started its deliberations, which were then continued , and concluded on 28 November 2017. This reserved judgment is now promulgated, with apologies to the parties for the

delay since the Chambers deliberations, occasioned by the very limited availability of judicial time.

7. The claimant gave evidence on 12 to 15 December 2016. She was cross – examined, and the Tribunal had started its questions, but had not completed them. The claimant had not had an opportunity to re-examine herself. She called, and indeed did not intend to call, any supporting witnesses, nor did she put before the Tribunal any additional witness statements in support of her case.

8. The respondent put forward (but did not, of course, call as live witnesses) witness statements from SD (female), who made two statements , the claimant's line manager from February 2013 to the date of her dismissal, RR (female), a Manager, who was appointed Decision Maker in terms of the claimant's sickness absence , and LH (male) who heard the appeal. There was a hearing Bundle . The respondent's submissions were received, after an extension of time was granted, on 18 September 2017. The claimant was given until 16 October 2017 to submit any submissions, but did not submit any closing submissions.

9. Having considered the claimant's evidence to the Tribunal, the witness statements adduced on behalf of the respondent, the documents in the Bundle, and the parties' written submissions, the Tribunal finds the following relevant facts.

9.1 The claimant, who is, and has been for some years, a paranoid schizophrenic, was first employed by the respondent, which is part of the Civil Service, and is a large public sector employer in April 2006. She was an Administrative Officer, carrying out the role of Customer Service Agent, which involved her dealing with telephone enquiries from members of the public.

9.2 The claimant had significant periods of sickness absence from July 2011. Those are set out (up until the date of the document) in a document dated 17 July 2015 , pages 327 to 329 of the Bundle. In terms of the most recent absences prior to the claimant's dismissal, her absence history was as follows:

25 Feb 2013 to 26 May 2013	91 days	Anxiety & Depression
27 May 2013 to June 2013	14 days	[unclear]
29 Jul 2013	1 day	Migraine/headaches
16 Aug 2013 to 19 Aug 2013	4 days	Nervous system
23 Aug 2013	½ day	Digestive system
9 Oct 2013 to 16 Oct 2013	10 days	Eye – related
30 Oct 2013 to 1 Nov 2013	3 days	Migraine/headaches
30 Jul 2014	1 day	Migraine/headaches
22 Sep 2014	1 day	Musculo-skeletal

9 April 215	1 day	Digestive system
28 May 2015	ongoing	Genito-urinary system

9.3 The claimant was dealt with under the respondent's Attendance Management Procedure . Her last absence in October 2013 resulted in a final written warning on 29 October 2013 (pages 192 to 195 of the Bundle). The review period was 6 months, during which the claimant's attendance would be considered unsatisfactory if her absences were of more than 4 days in total during that period.

9.4 The claimant successfully completed the review period, during which her attendance was satisfactory, and thereafter she was subject to a Sustained Improvement Period under the Attendance Management Procedure , which ended on 28 April 2015 (see page 202 of the Bundle). Under that procedure her attendance would be deemed unsatisfactory if her absences reached 8 days or 4 spells in a rolling 12 month period from 29 October 2013 to 28 April 2015. The claimant successfully completed this period.

9.5 The claimant's next absence from 28 May 2015 was initially by reason of the need for her to undergo a gynaecological procedure, a hysteroscopy. She underwent this procedure, but continued to suffer post-operatively, remaining unfit to return to work until 1 July 2015. On 22 June 2015 the claimant participated in a telephone occupational health assessment, and the resultant report is at pages 237 to 238 of the Bundle. The claimant was still suffering symptoms related to the procedure, and also a persistent cough and shortage of breath. The report concluded that she was not currently fit for work, and that a further 4 weeks may be needed for her recovery.

9.6 A fit note of 29 June 2015 (page 245 of the Bundle) was provided, which stated that the claimant would remain unfit for work by reason of both the conditions for a further 6 weeks.

9.7 By 16 July 2015 the claimant was still off work, but around this time she drank a chemical in the belief that it would assist her condition, with the result that she was referred to the Mental Health Team.

9.8 The respondent at this time arranged a referral to occupational health, but the claimant missed appointments on 20 and 22 July 2015. A further appointment was booked for 23 July 2015, which the claimant did attend (presumably by telephone) , which resulted in a report dated 23 July 2015 (page 266 of the Bundle), in which the claimant was said to be vague and evasive, The claimant was asked for, and provided , permission to contact her GP.

9.9 On 24 July 2015 the claimant was admitted as an emergency admission to hospital by the Mental Health Team, probably (though there is no confirmation of this) on a compulsory basis under the Mental Health Act.

9.10 The claimant was due to have a 2 month review of her sickness absence on 27 July 2015. Due to her admission to hospital, she could not attend this, and advised the respondent of this in a telephone call on 27 July 2015.

9.11 Thereafter SD attempted to contact the claimant, but being unable to reach her, she contacted the claimant's brother. Further to this, SD's manager , FH, contacted(apparently on CSHR advice) the hospital to which the claimant had been transferred in order to obtain more information.

9.12 On 6 August 2015 FH was given information by the hospital to the effect that the claimant was in a period of assessment for a maximum of 28 days, following which there would be a treatment plan.

9.13 Between 10 August and 12 August 2015 the claimant and SD spoke by telephone, the claimant actually making the calls. The discussions were mainly about the progress of the fit note from the hospital.

9.14 The respondent subsequently received a fit note, dated 30 July 2015 (page 285 of the Bundle) confirming that the claimant was expected to remain an in – patient for 6 (or it could be 4) weeks from the date of the note.

9.15 Around this time, the previous referral to occupational health was closed, and as the claimant was approaching the 3 month review of her sickness absence, a further referral was made to occupational health.

9.16 SD continued to have telephone contact with the claimant whilst she was in hospital. By 20 August 2015 the claimant informed her that she was to stay in hospital on a voluntary basis once the 28 assessment period had ended.

9.17 On 25 August 2015 SD had a case conference with Dr Bollman of occupational health. They discussed whether the claimant would be fit enough to participate in a three – monthly sickness absence review meeting. Dr Bollman advised that the claimant may be delusional still, and not well enough to participate She advised a report from a specialist psychiatrist be obtained. There was also discussion of ill health retirement, but this was discounted by Dr Bollmann, due to the claimant's age, and how it would be expected that she would make a recovery. The notes of this conference are at pages 290 to 291 of the Bundle.

9.18 On 27 August 2015 SD wrote to the claimant (pages 294 and 295 of the Bundle) inviting her to a three month sickness absence review meeting to be held on 4 September 2015.

9.19 There was further telephone contact between the claimant and SD on 27 August 2015, in which the claimant updated her on her situation, which was that she spending some time at home, but was also returning to the hospital. This was a fairly lengthy discussion (noted at pages297 to 299 of the Bundle) in which the possibility of a psychiatrist's report being obtained was discussed.

9.20 On 1 September 2015 the claimant informed the respondent that she could not attend the review meeting on 4 September 2015, and that she was staying in hospital for a further week.

9.21 SD accordingly re-arranged the review meeting for 9 September 2015 (see letter at pages 301 to 302 of the Bundle).

9.22 The claimant did attend this meeting, the notes of which are at pages 304 to 307 of the Bundle. The claimant did not have , and did not ask for, anyone to accompany her to this meeting. A note taker, NL, was present.

9.23 This meeting was treated as a four month review, as this would have been due on 17 September 2015. The claimant had been the subject of a medical case review by her medics on the previous day, and this was discussed. The claimant had been discharged from hospital, and was to see a community health worker. She was due to have her first visit that day. She had been prescribed medication, but had not started taking it. He said she was feeling much better. Whilst her last fit note was due to expire that day, the claimant said that she had been provided with a further one, for two weeks, whilst she was settling back in. There was discussion about the recommendation for a psychiatrist's report, and the claimant had consented to this. The claimant hoped that she would be able to return to work after two weeks, on a phased return. This was discussed, and the claimant expressed the wish to return to work as soon as she had settled back into the community. She did not see anything preventing her returning to work. Ill health retirement was discussed, but SD explained how it would be unlikely, and the claimant agreed that she did not feel that she could not return to work.

9.24 On 10 September 2015 the claimant rang SD (see pages 308 to 309 of the Bundle) to inform her of how the visit had gone. Whilst the claimant had felt that she could return to work quite soon, she had been advised to stay off work for a further 6 weeks. The mental health worker had expressed fears that the stresses of work may trigger off a further illness. Further, her GP had given her a further fit note for 8 weeks.

9.25 A fit note from the claimant's GP dated 10 September 2015 for 8 weeks (page 311 of the Bundle) was duly provided.

9.26 By letter of 11 September 2015 SD wrote to the claimant summarising the meeting 9 September 2015, and recording the telephone contact on the following day. She acknowledged receipt of the claimant's consent for a medical report.

9.27 SD, however, then explained how she had decided to refer the claimant's case to a "Decision Maker" , RR who would decide whether the claimant should be dismissed or demoted, or whether her sickness absence level could be supported. RR was an Operational Change Manager, managing at the time Learning and Development Planing and Resource deployment for the respondent.. Whilst she had previously been Group Business Manager for North West Contact centres, this was 12 months previously, and she had no current managerial responsibility for the claimant, or her department.

9.28 By letter of 14 September 2015 RR then wrote (pages 314 to 315 of the Bundle) to the claimant, inviting her to a meeting on 21 September 2015. She informed the claimant of the purpose of the meeting, and of her right to be accompanied to it. She told the claimant that after considering her comments and all the relevant information she would make her decision in writing qwithin 5 working days.

9.29 SD prepared a report upon the claimant's absences dated 15 September 2015 for RR (page 317 of the Bundle). It is unclear precisely what documentation was enclosed with the report (the report simply refers to attaching copies of "all letters and reports", but they are not identified or copied at this part of the Bundle to enable the Tribunal to ascertain what accompanied this report), and contained the recommendation that the claimant be dismissed.

9.30 A document entitled "Ill Health Retirement" , dated 15 September 2015 (page 316 of the Bundle) was prepared by MM, in which she stated that this had been considered but not considered appropriate , as there was no evidence that the claimant was suffering from a health condition that would permanently prevent her from doing her current job, or any other similar role.

9.31 The meeting was duly held on 21 September 2015. The claimant attended with a Home Treatment Worker ("HTW"), and NL was again present as a notetaker.

9.32 In this meeting (notes at pages 319 to 321 of the Bundle) RR explored the claimant's current medical position. The HTW assisted by explaining what support the claimant would be receiving. It was noted that she was subject to a fit note for 8 weeks, and RR asked how the claimant felt about returning to work. She said she felt fine about it. RR expressed concerns about the stressful nature of the claimant's role, but she said that she felt she would cope with it.

9.33 RR raised the issue of a previous mental health related absence in 2013, and asked if the current problems were related, and if they were likely to return. The claimant said they were not, and that although the future could not be predicted, she had a lot of support in place. The HTW referred to the hope , there would be long term mental health support. She also asked about the need for support for time off for appointments, and for a phased , graded, return. She said there was no reason why the claimant would not be able to cope. There was further discussion as to the details of a phased return.

9.34 RR explained that this would be matter for the claimant's team leader. The HTW asked about a "buddy" system, and whether the claimant could return sooner than 8 weeks. The HTW explained how it would take time for an assessment to be made for extra support in the form of a Community Psychiatric Nurse.

9.35 RR explained how she would try to make a decision in 5 working days, but that if she could not, she would let the claimant know.

9.36 The HTW asked about redeployment, and RR explained that as the claimant worked in a contact centre, there were very few other jobs. The HTW asked if a move to another department was possible. RR said that this would be considered as part of her decision.

9.37 On 22 September 2015 RR wrote to the claimant again, informing her that she would not be able to give her a decision , as she was awaiting advice from the occupational health and HR advisers.

9.38 On a date that is unclear , but is between 22 September and 5 October 2015 , a referral was made to occupational health. It appears that this was by telephone, as there is no referral document in the Bundle. Further, it appears that the occupational health advisers received a report from the claimant's psychiatrist.

9.39 On 5 October 2015 Dr Bollmann of the occupational health advisers conducted a telephone assessment with the clai/mant. The resultant report is at pages 325 to 326 of the Bundle. In it Dr Bollmann referred to the report from the claimant's specialist, which she referred to as "helpful", though this is not in the Bundle.

9.40 In her report Dr Bollmann said this:

".. She has required in – patient medical care, and has a diagnosis of paranoid schizophrenia for which she is on long term medication. The report from her specialist confirms that she has made good progress in her recovery as an in-patient, with discharge back into the community mental health team. She remains under their care and is working on re-integrating back into the community with their support. Her day to day function has improved."

9.41 Dr Bollmann went on to advise that she considered that the claimant would meet the definition of disability under the relevant legislation. She said that her current capacity for work was that she remained unfit to work in any capacity whilst she consolidated her day to day recovery and resilience.

9.42 Under "Outlook", Dr Bollmann said this:

"The expectation is that [the claimant] will be fit to rehabilitate back to work in the forthcoming 4-6 weeks and this is best led by her community mental health team/ home support (on the advice of her specialist).She will need a gradual return to work and I suggest:

- *Resumption of fulltime hours over 13 weeks*
- *Initial return to non telephone based work whilst refamiliarising with her role and work*
- *refresher training*
- *reduced performance targets by 20% for a total of 6 months*
- *Adjustment of attendance targets for as much as the business can support in relation to her mental health*

Overall her specialist appears optimistic that she will be able to successfully rehabilitate back to work , and remain well on medication. On this basis and having considered the above medical evidence I advise that this employee is unlikely to be permanently incapacitated for the normal dutries of their employment."

9.43 RR received this report, and considered it. No further meeting was held with the claimant to discuss the report. RR did not revert back to Dr Bollmann to discuss or query the report she had provided. She decided to dismiss the claimant, with 100% compensation under the Civil Service Compensation Scheme.

9.44 RR's reasons for her decision to dismiss are set out in paras. 23 to 30 of her witness statement. In summary they are:

a) RR considered that the respondent "had supported the claimant's illness" since May 2015, a period of 4 months and 1 week, and the claimant had only been out of hospital for two weeks after being admitted under the Mental Health Act, and was waiting to see if she would get long term support after the end of November 2015;

b) Whilst the OH advice was that there was an expectation that the claimant could potentially return to work, there was no definitive date;

c) RR was concerned, given the seriousness of the claimant's condition and her previous extended period of absence for mantal health reasons, that she would be unable to sustain her attendance if she did return to work;

d) RR was concerned that the role was stressful, and the claimant could face a setback in her recovery, or another breakdown;

e) RR considered that the claimant was not sufficiently "openly accepting" of her mental health issues. She had been vague and evasive in previous discussions of her mental health in 2015, and in 2013 had questioned a previous diagnosis;

f) RR did not believe that the claimant was capable of achieving a satisfactory level of attendance within a reasonable time period, given her past history and current illness.

9.45 RR's decision to dismiss the claimant was communicated to her by letter of 7 October 2015 (pages 341 to 342 of the Bundle). Her reasons were set out in the second paragraph of that letter, which does not set out the reasons given in paras. 23 to 30 of her witness statement, but states as follows:

"I believe that the Department cannot continue to support this absence as if you did return to work you may not be able to show a sustained and improved level of attendance. This decision is based on the fact that you had a long term mental illness in 2013 , and also during your sustained improvement

period which ended on 28 April 2015 you had 3 further spells of absence and this has been followed by you (sic) *current long term sickness absence. I feel the Department cannot continue to support this absence further due to the on going* (sic) *cost of management administration for the absence, the impact on colleagues through increasing their pressures carrying the additional workload and also on customers in terms of reduced levels of service."*

9.46 There is no evidence before the Tribunal from either SD or RR of the matters set out in the final sentence of this paragraph. Whilst RR does not say so in her witness statement, it seems likely that a document (pages 343 to 345 of the Bundle) was attached to the dismissal letter, which is, in effect , a summary of the background and a rationale for the decision that RR took. It is in similar terms to her witness statement.

9.47 The dismissal letter went on to inform the claimant that she was entitled to 10 weeks' notice, which she was not required to work, and to 100% compensation under the Civil Service Compensation Scheme for being dismissed to unsatisfactory attendance.

9.48 The claimant was also advised of her right of appeal, and how to exercise it.

9.49 The claimant appealed , through her union the PCS, by letter of 3 December 2015 (page 346 of the Bundle). The claimant's representative gave as the initial grounds of appeal that the OH report provided as timescale for a return to work, and the claimant was covered by the Equality Act. It was unclear why the Decision Maker did not consider sustaining the absence as a reasonable adjustment. Further, whilst cost was cited, the cost of dismissing the claimant was higher than sustaining her in her employment. Finally, whilst there may have been added pressures on the claimant's colleagues, she had not been replaced.

9.50 An appeal meeting was held the next day, 4 December 2015. LH a Cluster Manager was appointed the appeal officer. The claimant attended that meeting, with her trade union representative. A notetaker , MW, was also present. The notes of the meeting are at pages 349 to 354 of the Bundle, though page 353 is a duplicate of page 352.

9.51 There was no further referral to occupational health, LH did not obtain any further medical evidence for the appeal.. In the meeting the claimant was saying at this meeting that she felt fine, and was ready to be back at work. She said she was taking her medication, and had appointments to see a psychiatrist. The union representative explained how her latest sickness absence was caused by her stopping her medication. The claimant confirmed again she was taking her medication .

9.52 A document headed "Appeal Meeting – 04/12/2015" was tabled by the claimant's union representative (pages 347 to 348 of the Bundle) during this meeting. In it he contended that the decision to dismiss was unfair because the decision maker failed to consider suitable reasonable adjustment to sustain the absence for a further 4 to 6 weeks. Reference was also made to the respondent's policies and procedures, and it was contended that these

had not been followed or applied correctly. It was argued that the dismissal was more costly than retaining the claimant would have been. In the alternative it was argued that if the claimant's salary was an issue, her dismissal may have been by reason of redundancy. It was pointed out that the Decision Maker had produced no figures or workings for her conclusion. Finally, the union representative disputed how operational pressures could justify the dismissal , when the claimant had not been replaced in the 9 weeks since her dismissal.

9.53 The union representative went on to say how, as predicted in the H report the claimant had made a suitable recovery within the 4 to 6 week period. The claimant repeated that she felt well enough to come back to work.

9.54 The claimant went on to say that she was under the local community help team, that she felt she could cope with being on the phones, and how she felt much better on her medication. She had not yet seen a psychiatrist, but was due to do so. She said she had not had any further problems since being discharged from hospital.

9.55 LH did not give a decision at the end of the meeting, but deliberated, and sent his decision by letter of 14 December 2015 (pages 355 to 356 of the Bundle).

9.56 His decision was that the original decision stood. He reiterated how his role as appeal manager was not to re-perform the decision making process nor to supplant the original Decision Maker's decision with his own.

9.57 He went on to say how he considered that the procedures had been followed, and all the evidence available to her had been considered . His role was then to consider whether the decision made on the balance of probabilities was reasonable.

9.58 He went on to say this:

"You have argued that the decision maker acted in haste and that you now feel able to return to work. You feel that your on – going treatment and medication will allow you to attend work and undertake telephony duties; however you did acknowledge that you will only know that once you are back. You also argued that the decision to cite cost of managing the absence is negated, because you can now attend work, and the impact on colleagues is not relevant as your place in the team has not been filled."

9.59 LH then wrote that after due consideration of all the issues raised in the appeal he had concluded that the decision made at the time could be classed as reasonable. He referred to the decision maker's determination that the department had already supported the absence for 4 months, and despite the expectation of a recovery within 4 to 6 weeks, a return to work date had not been provided. He referred also to her feeling that there was no evidence that the claimant would be able to show a sustained and improved level of attendance. He determined that was a reasonable conclusion for her to have drawn on the balance of probabilities. He went on to say that as "further

absences were likely" the impact of the ongoing costs of absence management was a relevant factor.

9.60 Finally, in relation to the contention that the claimant had not been replaced , he said this:

".. you have argued that you have not been replaced on the team so have not impacted on colleagues however we operate telephony as a virtual network. As such any absence has to be covered elsewhere across the network and consequently colleagues are impacted across the telephony network."

9.61 That concluded the claimant's right of appeal. The claimant was dismissed with notice, being paid 9 weeks notice. This was based upon her length of service of 9 years from 24 April 2006 to 8 October 2015.

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9.62 The claimant was initially employed by means of an offer letter dated 8 August 2006 (page 49 of the Bundle) , which enclosed two copies of a contract of employment, which the claimant was invited to sign, if she accepted the terms, and to return one copy to the respondent. The contract is at pages 50 to 58 of the Bundle. The claimant signed and dated one copy on 23 August 2006, thereby accepting those terms as the terms of her contract of employment.

9.63 The following express provisions are set out in the contract (page 53 of the d

"Notice

Unless you are dismissed for gross misconduct the following minimum periods of notice apply:

- *Fewer than 4 years continuous service – 5 weeks notice.*
- *4 years continuous service or more- One week for each year of service plus one week up to a maximum of 13 weeks."*

9.64 Further, after a section headed "Redundancy" there appears the following (page 54 of the Bundle) :

" If your employment is terminated compulsorily on any other grounds , unless such grounds justify summary dismissal at common law or summary dismissal is the result of disciplinary proceedings – 6 months.

In cases of dismissal for gross misconduct (except where there has been repeated serious misconduct) there is no period of notice.

Further information on periods of notice can be found on 'The Department and You' intranet site."

9.65 Two documents were produced by the respondent and attached to the closing submissions of counsel . Both are undated. One is said to date from 2004, and the other from 2006, and both are contended to have been available on the respondent's intranet. In the first , headed "Notice Periods Policy" , at para 1 , the following is provided:

"1. When contracts are terminated , different periods of notice will apply. Notice .periods are to ensure that you can adequately plan ahead of leaving the Department and minimum disruption is caused to the business by your departure."

Under "Levels of Notice", the following provisions appear:

"3. For permanent employees the Department will normally offer you the following periods of notice unless you have committed gross misconduct."
There then follows a table in which the notice periods of five weeks for up to four years service, and one week for each year of service over four years, plus one week, up to maximum of 13 weeks, are set out.

9.66 Under the heading "Other Cases", the following is provided:

"9. Civil Service rules apply and employees are entitled to 6 months paid notice if, exceptionally , employment is terminated for reasons other than:

- *Retirement*
- *Inefficiency*
- *Disciplinary action*
- *Medical Grounds*
- *Gross Misconduct*
- *Redundancy "*

9.67 The 2006 document is in similar terms, but contains the preamble that the 2004 Policy has been revised to ensure that all monthly paid staff receive a minimum of 5 weeks notice when their employment is being terminated. Section 2, entitled "The Departmental Enhanced Policy Provision" , contains at section 2.1 in tabular form the same notice periods as in the previous policy, expressed as "Minimum Notice by Department".

10. Those are the relevant facts. It will be appreciated that, as there has not been a complete oral hearing, where all the evidence can be tested by cross –examination and clarified by the Tribunal's questions any disputed questions of fact cannot be resolved by the Tribunal unless the written witness evidence relied upon is so manifestly wrong (perhaps in the light of clear documentary evidence) that it cannot safely be relied upon. Fortunately, nothing in this judgment turns upon what could be considered disputed facts, and the evidence, particularly of the respondent's three witnesses has been accepted in its entirety, as far as factual issues are concerned. What has been far more at issue is the assessment of the respondent's actions, and reasoning, in determining whether the claimant's dismissal was fair, and , further , whether her disability claims succeed. Finally, the issue of the notice period is not a matter of evidence from any witness, it is a matter of construction.

11. Mr Taft for the respondent made written submissions, which are available on the file, and it is not intended to rehearse them in this judgment. In summary, he, as SD and RR did in their evidence, made extensive reference to the claimant's absences in 2013, and her final written warning issued on 29 October 2013. He, as

did RR , relies upon that history , in part, to then argue that RR's decision to dismiss was one that was open to her. He refers to the report of Dr Bollmann, and what he terms the "hope" that she expressed that the claimant would be able to commence rehabilitation over the next 4 to 6 weeks. He also refers to the similar "hope" expressed by Pat, who accompanied the claimant to the dismissal meeting. He contended that RR was not bound to accept what were optimistic views. He contended that it was entirely reasonable for RR to arrive at her conclusion based on the medical evidence and her experience of the claimant and her employment history. As to the appeal , he submitted that there was no reason why LH should have formed a different view.

12. He therefore contended that the dismissal was fair, and not discriminatory, being a proportionate means of achieving the respondent's legitimate aims. There was no failure to make reasonable adjustments. The notice period was correct, the term relied upon by the claimant was clearly an error. He referred to policy documents on the respondent's intranet which he contended showed that the notice period in the claimant's contract was erroneous.:

13. The relevant statutory provisions are set out at Annexe A to this judgment. The issues were identified at a preliminary hearing on 3 May 2016 as:

i. What was the reason for the claimant's dismissal?

ii. Was the claimant unfairly dismissed?

iii. Was the claimant dismissed because of something arising in consequence of her disability? Can the respondent show this was a proportionate means of achieving a legitimate aim?

iv. Did the respondent fail to comply with the duty to make reasonable adjustments?

v. Did the respondent's Attendance Management Policy, and in particular, its requirement for satisfactory attendance, constitute a provision, criterion or practice (PCP) which placed the claimant at a substantial disadvantage when compared with an employee of the respondent who was not disabled but who was subjected to the respondent's attendance management policy with the same levels of absence as the claimant.? Can the respondent show the PCP was a proportionate means of achieving a legitimate aim?

vi. Was the claimant paid all of her contractual entitlement to notice pay in respect of her dismissal?

Discussion and Findings
i)The unfair dismissal claim.

14. The first issue, as ever, in an unfair dismissal claim is the reason for the dismissal. The burden is upon the respondent to satisfy the Tribunal that the dismissal was for a potentially fair reason falling within s.98 . In this instance that reason is capability. The claimant has not challenged that this was the reason for her dismissal, in that she was dismissed because of her sickness absences, and we are

quite satisfied that the respondent has discharged this burden, and has established the potentially fair reason for dismissal of capability.

15. The next issue, and the nub of this aspect of the case is whether the dismissal was fair in all the circumstances. The burden of establishing fairness is neutral. The test of fairness to be applied in capability cases is set out the leading case on the degree to which an employer should investigate the medical position, ***East Lindsey District Council v Daubney [1977] ICR 566*** , in which Phillips J. said:

''Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done'.'

16.The starting point for analysing the duty of the tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT decision in ***Spencer v Paragon Wallpapers Ltd [1976] IRLR 373,***. In that case Phillips J emphasised the importance of scrutinising all the relevant factors.

''Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?''

He added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'. ***In Lynock v Cereal Packaging Ltd [1988] IRLR 510*** , the EAT (Wood J presiding) described the appropriate response of an employer faced with a series of intermittent absences as follows:

''The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own facts, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following—the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of

good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding'.'

17. So there is a conflict between the needs of the business and those of the employee, and the tribunal must be satisfied that the employer has sought to resolve that conflict in a manner which a reasonable employer might have adopted. In the course of doing this, he will have to show that he carried out an investigation which meant that he was sufficiently informed of the medical position.

18. Applying those principles, there are a number of factors which the Tribunal considers render RR's decision on 7 October 2015 to dismiss unfair. They are:

a) RR decided to dismiss in the face of a medical report from Dr Bollmann, based upon a specialist's report, which did provide a timescale for a return to work within 4 to 6 weeks on a phased basis, with full time working within 13 weeks. The report did not suggest that the claimant would not be able to sustain or maintain regular attendance, quite the opposite, it reflected the claimant's specialist's optimistic view that the claimant would, with support, be able to be rehabilitated back into full time work.

b) RR did not question the report with Dr Bollmann , or revert back to her to explore any aspects of it. Instead, as is clear from paras. 25 to 30 of her witness statement, she formed her own views upon the ability of the claimant to return to work, and sustain her attendance. These views were not based upon any medical knowledge, and were not tested with occupational health. RR talks of her "concerns", which were based upon the claimant's overall attendance record from 2013, her view that the claimant was not "openly accepting of her mental health issues", and her previous mental health issues in 2013. None of these matters were raised with occupational health, or the claimant.

c) Para. 23 of RR's witness statement also shows that she failed to distinguish between the causes of the claimant's most recent absence. She refers to the Department "supporting the claimant's illness since 28 May 2015". The claimant's initial absence was for a gynaecological issue, which necessitated surgery. The implication of the medical evidence is that there were no ongoing physical issues after that surgery, but rather, some two months later , the claimant's mental health issues became the reason for her continued absence. RR has treated this period of absence as having the one, mental health related, cause, whereas there were two quite separate and distinct medical reasons for the absence. Thus only two months' of absence were attributable to the mental health issues, not four.

d) The claimant's overall absence record , whilst superficially relevant, was not the issue, it was her most recent, 4 month absence , that was. The medical advice was that the claimant would be able to return to work within 4 to 6 weeks. Dr Bollmann had access to the claimant's medical history, and previous OH reports. She saw no reason to question the prognosis for a return to work in the light of the claimant's previous history. Further, RR seems to have taken the view that the claimant's previous absence in 2013 for mental health issues was of some relevance to this absence. She asked the claimant if it was, which she denied, but she did not make that enquiry of occupational health. Instead, her unqualified view was that there a connection from which she could infer that the claimant would not be able to sustain her recovery when she returned to work on this occasion.

e) In para. 27 of her statement RR refers to what the claimant had told SD on 9 September 2015 about having not taken her medication for the first two weeks. She had, however, resumed doing so, and Dr Bollmann and the claimant's specialist make no mention of any concerns in this regard.

f) To the extent that RR was concerned that the claimant may not, as at the end of November 2015 , still receive support from a Community Psychiatric Nurse, she gives no explanation as to why the respondent could not wait until then to see what the position in fact would be. By then the prognosis was for the start of a phased return to work (within 4 to 6 weeks of the report of 5 October 2015) , so the respondent would by the end of November have been in a much better position to see, firstly, if that return to work had been possible, and then whether the support that the claimant needed was likely to be provided.

g) No further meeting was held with the claimant after receipt of the report to discuss the report , and RR's concerns , to explore them with the claimant, or to warn her that, despite an encouraging occupational health report , which was supportive of a return to work , and from which the claimant could reasonably have expected that her employment would not be terminated, RR was in fact contemplating dismissal.

19. In short, RR failed adequately to understand the claimant's most recent absence , and the medical causes of it, substituted her own view of the claimant's prospects of returning to work within a reasonable period of time, and thereafter maintaining satisfactory attendance , for that of the occupational health expert whose advice she had sought, and to whom she did not revert to discuss her "concerns" before proceeding to dismiss. As she says in her dismissal letter, she had concerns that the claimant "<u>may</u>" (our emphasis) not be able to sustain an improved level of attendance. This is echoed in her rationale document at page 344. Similarly, whilst she acknowledges that the OH report does provide an expected date for return to work, this was not "definitive". That may have been so, and the Tribunal can accept that there was a degree of risk involved, but that is usually the case. Medical evidence is rarely definitive, a prognosis is given on the balance of probabilities. With all due respect to Mr Taft, it must be pointed out that Dr Bollmann's report did more than express the "hope" , as he put it in his submissions, of the return to work within 4 to 6 weeks , she expressed the "expectation". That is rather stronger, and in a medical report is the equivalent of a prognosis. That was not, however, sufficient for

RR, and it was outwith the band of reasonable responses for her to take that view , particularly without reverting back to OH.

20. In general terms, the Tribunal was struck by how much of the respondent's evidence (and hence Mr Taft's submissions) was rooted in the claimant's absence history in 2013 in particular. That was, the Tribunal acknowledges, a troubling history, and her attendance was not good during that period. Standing back, however, it is notable that from November 2013 to May 2015 the claimant's actual number of days' absence was , in total, 6 days. The claimant had successfully completed two review periods, between 29 October 2013 and 28 April 2015, a period of some 18 months. RR , however, was clearly very exercised by the fact that the claimant had previously had absence for mental health issues, and extrapolated from that absence, and return to work after it, a perception of a higher degree of risk that the claimant would not be able to sustain a return to work after this most recent absence. That might have been a legitimate view, were it to have been backed by any medical evidence. It was not, however, even raised with OH, RR proceeded to make assumptions of her own with no medical foundation. As it was, it was to be presumed that Dr Bollmann, and the specialist whose report she based her report , were aware of the claimant's previous history, and would have mentioned any relevant factors which may affect the claimant's prospects for a return to work on this occasion. Even if that presumption is not warranted, it was not reasonable of RR to make the assumptions she did about the prospects for the claimant's recovery, contrary to the views expressed in the medical report , based on the claimant's previous history without at least raising these "concerns" with OH.

21. Further, there is no evidence whatsoever of the effect of the claimant's continued absence on the department . If it was so pressing, dismissal because of the mere risk of unsatisfactory attendance may have been reasonable, but there is no such evidence. Further, it is not clear what the position was in relation to the claimant's sick pay entitlement at this time. Whatever it was, it was clearly not a consideration for RR, so her justification in her dismissal letter (but not in her witness statement) of cost is not evidenced in any way. In any event this seems to refer to the cost of "administering the absence", whatever that means, which is not quantified at all.

22. The decision of RR to dismiss was, the tribunal appreciates , checked with the Civil Service HR Casework service (page 335 of the bundle), and a Decision Maker's checklist was completed (pages 337 to 340 of the Bundle). To some extent that is irrelevant evidence, RR's decision stands or falls on its own merits, and the fact that it was endorsed by the CSHR Casework service is neither here nor there. That said, there is in any event a fundamental omission in the information provided in the Checklist document, and that is the OH report of 5 October 2015. RR does not refer to this in the Checklist document. The Tribunal does not know whether a copy was provided to the Casework service. The implication of the e-mail of 6 October 2015 (page 335 of the Bundle) is that there was a discussion (presumably by telephone) between RR and this service, in which the October report was mentioned, but only parts of it have been referred to. The Tribunal can only conclude that the CSHR adviser did not have sight of the report, as that is the only explanation for this document containing the following summary of the discussion:

"Based on the information you provided we discussed that as there is no indication of when a return to work is likely or if the Officer would be able to sustain/maintain regular attendance, there are no reasonable adjustments that can be implemented to help facilitate a return to work, IHR is not applicable and the Business can no longer support the absence your decision to dismiss and award 100% compensation is consistent with policy."

23. Consistency with policy, of course, not a consideration for the Tribunal, fairness of the dismissal, and whether it was discriminatory , are the issues. A moment's perusal of the report of 5 October 2015 shows quite the opposite of the summary by CSHR. Dr Bollmann did provide a likely return to work date of between 4 and 6 weeks, and 13 weeks for a return to full time work. She did not suggest that the claimant would not be able to sustain or maintain regular attendance, and she did identify reasonable adjustments that could be implemented to facilitate a return to work. If the CSHR adviser was provided with a copy of the report, the Tribunal can only assume that he or she did not read or understand it correctly. Be that as it may, the endorsement of RR's decision is of no value, given the flawed basis upon which it appears to have been provided.

24. Whilst all that , of itself , would be sufficient to render the dismissal unfair, there are other factors which add to the unfairness of the decision. The first is the issue of redeployment. The claimant's HTW had specifically raised this, including redeployment outside the department, in the meeting on 21 September 2015. There is no evidence that either SD or RR looked for any other roles outside the department into which the claimant could have been moved to assist her in a return to work. RR makes no mention of this issue in her dismissal letter of 7 October 2015. In her witness statement, at para. 30 , RR mentions how "demotion" was not an option, but demotion is not redeployment. In any event she goes on then, somewhat contradictorily , to say that she did not consider that the claimant would be able to achieve the required level of attendance in a lower grade. This rather suggests, as does the rest of the evidence, that no consideration of redeploying the claimant into any role in any other department ever occurred.

25. Finally, whilst in the dismissal letter of 7 October 2015 RR makes reference to the Department not being able to continue to support the claimant's absence further "due to the on going cost of management administration for the absence, the impact on colleagues through increasing their pressures carrying the additional workload and also on customers in terms of reduced levels of service" , there is no evidence of any of these factors in the witness statements of SD or RR. It is to be remembered that RR was not the claimant's line manager, she was brought in as the Decision Maker, with no first hand knowledge of the effect of the claimant's absence upon the department she worked in. In her witness statement , at para. 83, SD simply says that the department could no longer support the claimant's absence because there was no prospect of a return to work within a reasonable period of time. No more is said, and certainly no evidence is given there as to how the claimant's absence was being managed, its effect upon the workload of others, or any of the factors mentioned in RR's dismissal letter. RR's witness statement at para. 34 recites the fact that RR stated that in her letter, but she does not give any evidence herself of these matters. Whilst the Tribunal appreciates that as a former Group Manager of Contact Centres she may have had an awareness of the effects of absences in

general terms, there is no evidence before the Tribunal of the specific position at the time of the claimant's dismissal in October 2015.

26. That, then was the position as at the date of the original decision to dismiss. There was, of course, an appeal, to LH. It is of course trite law that a fair appeal can cure an unfair dismissal, and whether or not it does so is a matter for the Tribunal to consider in all the circumstances, and there should not be over much focus on whether the appeal is a re-hearing or a review (see ***Taylor v OCS Group Ltd [2006] ICR 1602***) . That said, as LH says in para. 15 of his witness statement, his role was not to re-perform the original decision , and replace the decision of the Decision Maker with his own, but to consider whether the original decision could be classed as reasonable. As such, therefore, this was a review, not a re-hearing type of appeal.

27. For the appeal LH did not obtain any further medical evidence. There was no further referral to occupational health. Given that the RR had concerns as to whether the claimant would receive the support that she needed , a decision that was to be taken at the end of November, it is surprising that LH did not feel the need to obtain further medical evidence. As it was , the claimant was saying at this meeting that she felt fine, and was ready to be back at work. She said she was taking her medication, and had appointments to see a psychiatrist.

28. If anything, the claimant's position by the time of the appeal was better than it had been at the time of RR's meeting with her on 21 September 2015. At that time, and after the OH report of 5 October 2015 there was some question as to whether the claimant would be able to sustain the recovery that Dr Bollmann's report anticipated. Whilst RR doubted that prognosis, by the time of the appeal , that period had elapsed, the claimant continued to be under the care of a community team, was taking her medication and was due to see a psychiatrist again. Given that one might have expected the fact of her dismissal to have had a negative effect upon her mental health, the fact that she was feeling she could return to work, and was ready to do so was , or should have been , a further positive indicator. LH, however, in para. 19 of his witness statement recognises this, but says that he did not feel there was "enough evidence" of this. He did not, however, make a further referral to occupational health, and ignored the rather obvious fact that there was indeed evidence in the form of the elapse of time , now two months, from the date of Dr Bollmann's report , during which there had been no further problems , and the claimant's recovery was indeed progressing as Dr Bollmann's report anticipated it would. Whilst he "felt" (his word) there was not enough evidence to show that the claimant could cope with the demands of a return to work, like RR before him, he too was content to substitute his unqualified view of these medical issues, rather than make any further enquiry.

29. Finally, in relation to the effect of the claimant's absence upon the department, he briefly addressed this in the concluding paragraph of his appeal letter, and amplifies this in para. 20 of his witness statement. With respect to him, both are no more than generalisations , where he says what the respondent "would do" in such circumstances. Like RR before him, he obtained no information whatsoever as to the actual position, nor as to how the claimant's absence had in fact been managed during the 4 months she was off work, nor did he address the specific issue raised by the union representative as to the fact she had not been replaced since her dismissal. LH appears to have accepted that contention , but to

have ignored these further factors, and concentrated instead on the decision of the Decision Maker at the time that she took it. He concluded that it was a reasonable one. For the reasons set out above, we find that it was not. The appeal , therefore, did not begin to remedy the unfairness of the original decision, and rather compounded it, missing a golden opportunity to explore further whether the claimant could then actually return to work.

30. For all these reasons, the Tribunal finds that the dismissal of the claimant, whilst clearly for the potentially fair reason of capability, was unfair.

The disability discrimination claims.

31. The claimant not being a lawyer and not being able to make closing submissions, did not expressly address what type of disability claims she was making. In essence, the Tribunal considers that they are basically that the respondent failed to make reasonable adjustments for her, i.e those suggested in Dr Bollmann's report of 5 October 2015 to facilitate her return to work, and supporting a longer period of sickness absence, and that her dismissal was an act of dismissal by reason of something arising as a consequence of her disability (a s.15 claim), which the respondent could not justify. To some extent the issues have changed a little from those identified in the preliminary hearing on 3 May 2016, and , in essence, the s.15 claim is the main claim, which if successful, rather obviates the need for any further consideration of any reasonable adjustment claims. The PCP of trigger points under the absence procedure is not really the issue. Mr Taft's submissions anticipate that these are the two claims that the claimant makes. Further, he concedes that the claimant's dismissal was something which arose in consequence of the claimant's disability, and hence the only issue is whether the respondent can justify it. In his submissions Mr Taft identified as the legitimate aims "the institution and enforcement of reasonable attendance management policies and procedures" and "the efficient running of the respondent's business". He argues that the decision was proportionate because there was no realistic or reasonable alternative on the evidence as it appeared to the dismissing officers.

32. The need to consider more favourable treatment for disabled people, as required when there is a duty to make reasonable adjustments, means that employers must assess on an individual basis whether allowances or adjustments should be made for them: ***Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216***. In ***Buchanan*** this finding from ***Griffiths*** was emphasised in the context of holding that it was 'impossible to assess' whether a particular step was a proportionate means of achieving a legitimate aim simply by looking at the policy itself; rather, there was a requirement to ask whether the treatment was justified by considering how the policy was applied to the individual in question. In the case law, the ingrained consideration of the duty to make reasonable adjustments seems to be evidenced by the discussion (at para [56]) that the aims of the police force would 'no doubt include' supporting a disabled employee and considering termination fairly where 'an absence can no longer reasonably be supported'; this could properly be interpreted to mean when all reasonable adjustments have been made. There is thus an interrelationship between reasonable adjustments and proportionality.

33. In terms of this justification defence , as the caselaw (***Hardy v Hansons plc v Lax [2005] ICR 1565*** , ***Hensman v Ministry of Defence [20114] EqLR 670*** ,

Buchanan v Commissioner of Police for the Metropolis [2016] IRLR 918) makes clear, it is for the tribunal to make its own , objective , judgment on the issue. The tribunal does not apply the "range of reasonable responses" test that it does in unfair dismissal to the issue of justification. The question is not whether the respondent reasonably believed that the treatment was justified as a proportionate means of achieving its legitimate aim, but whether, in the tribunal's own objective view, it was. To that extent, therefore, with respect to Mr Taft, the Tribunal is not confined to an examination of what the evidence available to the dismissing officers was. Conversely, the tribunal is not limited to consideration of matters which were in the mind of the employer at the time. Ex post facto justification can therefore be relied upon even if not in the mind of the respondent at the time.

34. In terms of the legitimate aims, whilst the second identified by Mr Taft, the efficient running of the respondent's business is one the Tribunal can recognise and accepts as a legitimate aim, the first "the institution and enforcement of reasonable attendance management policies and procedures" as a legitimate aim requires qualification. In any event, as the caselaw makes clear the Tribunal must look at the application of the policy to the individual. Thus whilst the institution and enforcement of a policy may be a legitimate aim, the Tribunal has to consider whether, on the facts of this case, the application of that policy to the claimant was a proportionate means of achieving that aim.

35. Taking all the factors into account in this case, the tribunal does not find that the respondent's treatment of the claimant was a proportionate means of achieving the legitimate aims. As observed in ***O'Brien v Bolton St Catherine's Academy [2017] IRLR 547*** the assessment of reasonableness for the purposes of determining the fairness of a capability dismissal is unlikely to differ markedly from the test of proportionality for the purposes of a justification defence under s.15. We do indeed consider that the same factors which led us to hold that the dismissal was unfair under s.98 lead us also to conclude that the defence of justification is not made out, as the dismissal was not a proportionate means of achieving the legitimate aim. Indeed, some factors are rather more prominent in the consideration of proportionality than they are in the test of reasonableness, where, of course, the tribunal is constrained by the prohibition of substitution of its own views, whereas it is not in the assessment of proportionality for the purposes of the s.15 claim. To that extent, we consider that the requirement upon an employer, in the case of a disabled employee to "go the extra mile" , in terms of seeking further medical evidence, and exploring all other reasonable avenues for a return to work, including redeployment outside the department , are highly relevant factors in deciding whether the treatment was proportionate. We consider here that the respondent did very little to find alternatives that may have kept the claimant in work, or to make the adjustments suggested by Dr Bollmann in her report of 5 October 2015. For much the same reasons as the Tribunal has found the dismissal unfair, it finds that the respondent has failed to justify the dismissal for the purposes of s.15.

36. Thus we find that the respondent failed to make reasonable adjustments, in that they dismissed her, rather than allowing the claimant to return to work on a phased basis, and discriminated against the claimant because of something arising in consequence of her disability, and the respondent has failed to justify such treatment.

The Notice Pay claim.

37. This is a separate and discreet claim, unrelated to the unfair dismissal and discrimination claims. There is only one issue, namely to what period of notice was the claimant contractually entitled ? This calls for construction of the written contract of employment.

38. According to Chitty on Contract 32nd Edition , Chapter 13 , Section 3, the word "construction" refers to the process by which a court determines the meaning and legal effect of a contract. As such, it will embrace oral contracts as well as those in writing and implied terms as well as those that are expressed. In this chapter, however, the principles of construction discussed in the following paragraphs have mainly been developed in relation to written documents, and in this context "construction" denotes the process (sometimes referred to as *interpretation*) by which a court arrives at the meaning to be given to the language used by the parties in the express terms of a written agreement..The object of all construction of the terms of a written agreement is to discover therefrom and from the available factual background the meaning of the agreement.

39. The task of construing a written agreement has been said to be that of ascertaining the "common intention of the parties" to the agreement. But this may be misleading since it is clear that the agreement must be interpreted objectively. The question is not what one or other of the parties meant or understood by the words used but rather what a reasonable person in the position of the parties would have understood the words to mean. In ***Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896*** Lord Hoffmann said:

"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

40. The words of the agreement must be construed as they stand. That is to say the meaning of the document or of a particular part of it is to be sought *in the document itself*: "[o]ne must consider the meaning of the words used, not what one may guess to be the intention of the parties" (see ***IRC v Raphael [1935] A.C. 96***). However, this is not to say that the meaning of the words in a written document must be ascertained by reference to the words of the document alone. The courts will, in principle, look at all the circumstances surrounding the making of the contract and available to the parties (usually referred to as the "factual matrix" or "available background") which would assist in determining how the language of the document would have been understood by a reasonable person in their position. The range of materials on which the modern courts now draw is considerably wider as the ambit of the "factual matrix" has increased, permitting the court to draw upon a greater range of materials when seeking to put the words of the contract in their context and interpret them accordingly

41. Mr Taft's submissions on this issue (para. 20) are that the respondent's position is that the paragraph in question in the claimant's contract of employment , i.e. that set out at page 54 of the Bundle, "is misplaced and must result from a formatting error, appearing as it does beneath the heading "Redundancy"." He goes

on to argue that any ambiguity is resolved by reference to further information on notice which can be found on the Department's intranet site, and he has produced two documents from that site.

42. That submission raises a number of issues. Firstly, should the Tribunal consider any extraneous material at all, or should its enquiry be confined to the terms of the written document? It is often said to be a rule of law that: "If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given … so as to add to or subtract from, or in any manner to vary or qualify the written contract." Indeed, in 1897, Lord Morris accepted that: "… parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract." This rule is usually known as the "parol evidence" rule. Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing, such as drafts, preliminary agreements, and letters of negotiation. That would presumably also extend to policy and procedures on an intranet site, in this more modern context. The rule has been justified on the ground that it upholds the value of written proof, effectuates the finality intended by the parties in recording their contract in written form, and eliminates "great inconvenience and troublesome litigation in many instances".

43. However, the parol evidence rule is and has long been subject to a number of exceptions. In particular, the courts have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express the entire agreement between the parties. In ***Gillespie Bros & Co v Cheney, Eggar & Co [1896] 2 Q.B.59***, Lord Russell C.J. stated: *"… although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."*

It cannot therefore be asserted that the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference in the document: "The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties."

44. It follows that the scope of the parol evidence rule is much narrower than at first sight appears. It has no application until it is first determined that the terms of the parties' agreement are wholly contained in the written document. The rule: "… only applies where the parties to an agreement reduce it to writing, and agree or intend that the writing shall be their agreement." Whether the parties did so agree or intend is a matter to be decided by the court upon consideration of all the evidence relevant to this issue. It is therefore always open to a party to adduce extrinsic evidence to prove that the document is not a complete record of the contract. If, on that evidence, the court finds that terms additional to those in the document were agreed and intended by the parties to form part of the contract, then the court will have found that the contract consists partly of the terms contained in the document and partly of the terms agreed outside of it. The parol evidence rule will not apply. If, on

the other hand, the court finds that the document is a complete record of the contract, then it will reject the evidence of additional terms. But it will do so, not because it is required to ignore the additional terms or the evidence said to prove them, but because such evidence is inconsistent with its finding that the document does contain the entire terms of the parties' agreement. No doubt, in practice, where a document is produced which appears to be a complete contract, a party will experience considerable difficulty in proving, on the balance of probabilities, that further contractual terms were agreed outside the written terms of the document. But extrinsic evidence of such terms is not ipso facto excluded.

45. What then is the position here ? The Tribunal has the offer letter sent to the claimant on 8 August 2006 (page 53 of the Bundle), and the enclosed document at pages 54 to 58 of the Bundle. The letter is an offer letter, in which the author (who has not been called, nor has any other factual evidence been led by the respondent on this issue) offers the claimant employment "subject to the terms and conditions of employment of [the respondent] … pending the further development of new terms and conditions of employment….". The letter continues :

"This offer of employment is open for four weeks from the date shown on the front of this contract. If you are willing to accept it please sign both contracts and return one to me as quickly as possible and in any case within four weeks."

46. The first page of the attached document (page 50 of the Bundle), however, bears no date, although it does provide that the claimant's employment began on 24 April 2006, presumably because this was a permanent contract, and the claimant had presumably previously been employed on a temporary basis. This document also sates in the Introduction that it is a statement which gives the claimant "particulars of the terms and conditions of employment applicable to her appointment" with the respondent. It is not stated to be a statement for the purposes of s.1 of the Employment Rights Act 1996, but doubtless could be relied upon by the respondent as such a statement if necessary. On page 57, at the conclusion of 8 pages of terms relating to (after formalities as to identity , job title and continuity of employment) :

Place of Work
Probation
Hours of Attendance
Pay
Overtime
Paid Leave
Sick Absences
Training
Notice
Redundancy
Age of Retirement
Pension Arrangements
Rules on the acceptance of outside appointments
Conduct
Discipline
Date Protection
Use of Departmental Computers

Use of official information
Grievances
Representation
Collective Agreements

there then appears the following:

*"**Acceptance***

I accept employment on the basis of the terms and conditions of service contained or referred to in this statement."

The claimant duly signed and returned a copy of the document to the respondent.

47. In the Tribunal's view that document constitutes the entire contract of employment between the parties. There was offer and acceptance, and the terms of the offer were those set out in the document, which the claimant accepted. The terms are very full, and were clearly intended by the parties to constitute the agreement between them. Whilst there is reference to other documents, and information on the intranet, there is no suggestion (save where the terms of collective agreements are incorporated) that any other document or information will have contractual effect. This would, for instance, be the case, one would expect the respondent to argue, were an employee to seek to argue that the disciplinary procedures referred to on page 55 of the4 Bundle by reference to the respondent's intranet site had contractual force. Polices and procedures are not the same as contractual terms, and the Tribunal's conclusion is therefore that the document proposed as the contract of employment and accepted by the claimant does indeed constitute the entire agreement between the parties as to the terms of the contract.

48. There is thus no basis for the admission of extrinsic evidence under the parol evidence rule, the contract must be construed on the basis of its terms alone.

49. Mr Taft's submission is that the clause relied upon by the claimant is "misplaced" and "must" result from a formatting error. The basis upon which he asserts this (there is no evidence to this effect from anyone) is that the clause in question appears under the heading "Redundancy" , which is not applicable, and hence this must be an error. With all due respect, that does not necessarily follow. The layout of the document has provisions as to notice (the ones the respondent seeks to rely upon) preceding the section headed "Redundancy". After the redundancy provisions, however, appear these terms:

If your employment is terminated compulsorily on any other grounds , unless such grounds justify summary dismissal at common law or summary dismissal is the result of disciplinary proceedings – 6 months.

In cases of dismissal for gross misconduct (except where there has been repeated serious misconduct) there is no period of notice.

Further information on periods of notice can be found on 'The Department and You' intranet site."

The problem for Mr Taft's argument is that the next clause after the one in issue relates to cases of gross misconduct. Clearly such provisions are also nothing to do with redundancy, but appear under that heading. Further, the ensuing clauses in this part of the document , up until the Age of Retirement provisions, all relate to notice in general, including the notice required from the employee to the employer, again, nothing to do with redundancy. Thus, it is equally possible that the specific redundancy notice provisions are no more than specific instances of notice provisions, and these terms are all really still under the previous heading of "Notice".

50. Whatever the position, the words are clear, and the mere fact of the position they occupy in the document does not, in the Tribunal's view, in any way alter or detract from their plain meaning, that if the claimant's employment was terminated compulsorily on any other grounds , i.e other than redundancy or gross misconduct, she was entitled to 6 months notice.

51. In essence the respondent's argument is that it did not intend to give the claimant this 6 month notice clause. That may be so, but a contract is to be construed objectively, not on the basis of one party's intentions. The words are clear, and those were the terms that the claimant accepted.

52. For completeness, however, and considering , though we need not ,the further documents that have been produced, a perusal of them does not, in any event, assist the respondent. Firstly, both documents are expressly only policies. They do not purport to be contractual, and the contractual terms on page 54 refer to "further information" being available in this way. A unilateral policy document cannot have contractual force unless there is clear agreement that should do so.

53. Secondly, it is unclear which document applied at the material time. If it was the 2004 policy, it is to be noted that the section on "levels of notice" states what periods of notice the respondent "will normally offer" the employee. This is not , on any view, a statement of any contractual right, as the words "normally" and "offer. "demonstrate, and to the extent that it is contended that this policy document should override the clear terms of the contract, it manifestly fails to do so. Further, at section 9 , it is provided that employees are entitled to 6 months notice in "other cases", which follows the section on notice periods in redundancy situations. This 6 month entitlement is excluded in cases where employment is terminated for :

.

- *Retirement*
- *Inefficiency*
- *Disciplinary action*
- *Medical Grounds*
- *Gross Misconduct*
- *Redundancy*

It is to be noted that SD dismissed the claimant for being unfit for work in any capacity whilst she consolidated her day to day recovery and resilience, taking this from the first paragraph of her dismissal letter (page 341 of the Bundle). In her decision document she amplifies this by saying that she did not believe the claimant was capable of achieving .a satisfactory level of attendance within a reasonable period of time, and "on this basis" she decided she should be dismissed. These

reasons are not in the list of excluded other cases, so even on this basis the 6 months notice period would apply.

54. If the 2006 document applies, however, it is again a policy document, and refers to enhanced provision. This is a briefer document, and sets out minimum notice periods for monthly paid staff. Section 1 of this document states that the actual period of notice will depend on length of service, and the reason for termination (emphasis added). Again the Tribunal cannot view this as in any way altering the express provisions .in the written contract.

55. Finally, as Mr Taft refers in his submissions to "any ambiguity" being resolved by reference to these documents, it will be clear that the Tribunal does not consider that these documents do resolve any ambiguity. If, however, ambiguity remains, a further guide (or rule, though the modern approach is to treat such maters as guidance rather than rules) to construction comes into play, and that is the "*contra proferentem"* principle. This is the principle of construction that a deed or other instrument shall be construed more strongly against the grantor or maker thereof.

56. This rule is often misinterpreted. It is only to be applied to remove (and not to create) a doubt or ambiguity, and as a last resort where the issue cannot otherwise be resolved by the application of ordinary principles of construction.. The principle has been constantly cited as a rule of construction for many years. For instance, Coke , then Chief Justice, said , "[i]t is a maxim in law that every man's grant shall be taken by construction of law most forcibly against himself"; and in 1949, Evershed M.R. said:

"We are presented with two alternative readings of this document and the reading which one should adopt is to be determined, among other things, by a consideration of the fact that the defendants put forward the document. They have put forward a clause which is by no means free from obscurity and have contended … that it has a remarkably, if not an extravagantly, wide scope, and I think that the rule contra proferentem should be applied."

The justification for the rule has been said to be that:

"… a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not."

57. If, therefore, there is any ambiguity, and the extraneous material does not resolve it, we would in the alternative find that, as the terms were clearly drafted by and produced by the respondent, and were not part of any negotiation, the respondent is bound by the express term as contended for by the claimant, and she was entitled to 6 months notice upon her dismissal.

Remedy.

58. We turn now to remedy. At this stage the Tribunal cannot make any final awards (there is no Schedule of Loss in the Bundle, though one has previously been ordered) , and a remedy hearing, which could also be conducted on paper, may be

necessary. At this stage, however, the Tribunal will attempt to assist the parties to either reach an agreement on remedy (for which purpose ACAS can be approached), or to prepare for a remedy hearing. As there are three jurisdictions in respect of which the claimant has succeeded, the Tribunal will deal with each in turn.

1.The Breach of Contract claim.

59. This is the simplest claim, and the basic remedy will be the additional notice pay which the claimant should have received. The Tribunal has determined that she was entitled to 6 months notice, but she received 10 weeks, so she is entitled to a further 16 weeks. The Tribunal has no figures, so cannot calculate this award. The claimant should be aware however, that from this sum deductions will be made for any benefits she received, or income that she received in this period of 16 weeks from the date of the expiry of the initial 10 weeks notice for which she was paid.

The Unfair Dismissal claim.

60. There will be two elements to this award. The first will be a basic award calculated at one week's pay for each year of service (the claimant starting her employment at the age of 25 for 9 complete years), subject to a cap on a week's pay of £475.. This award is a basic entitlement, and is unlikely to be subject to any deductions.

61. The next element is the compensatory award, which as its name implies, is designed to compensate the claimant for the losses that she has suffered as a result of her dismissal. That will require the Tribunal to know whether, and if so when, the claimant obtained other employment, and if she did not, why. It will be based upon the claimant's net earnings.

62. Further, there is a cap on the compensatory award of £78,335 , or one year's earnings, whichever is lower. That is not a cap on the period of time for which the Tribunal can award loss of earnings, it is a financial cap.

63. Additionally, as the claimant will be receiving an award for notice pay, and received 10 weeks notice pay, she will have to give credit for these amounts against the first six months of any loss of earnings claim, as otherwise she would be recovering twice for the same loss. Further, to the extent that she also received a Civil Service Compensation Scheme payment, this too will fall, subject to argument to the contrary, to be offset.

64. Accordingly, if the claimant wishes to claim a compensatory award for loss of earnings extending beyond the initial 6 month period, she should set out what she is claiming, how much she would have earned but for being dismissed, and what, if anything, she has earned during the period for which she seeks loss of earnings..

The Disability Discrimination claims.

65. Under this head, the claimant can seek compensation. One aspect is injury to feelings, for which there are guidelines. If the claimant contends that her dismissal caused her injury to feelings, she should set this out in a further statement. Whilst she is free to suggest a figure for injury to feelings, she is not obliged to do so, she

would not be held to any figure she put forward, and the Tribunal will make its own assessment. Guidance is available in relation to the bands for such awards (based on a case called ***Vento***) which the claimant may wish to consult in this regard.

66. If the claimant seeks to contend that her dismissal caused more than injury to feelings, and caused her actual injury to her health, she would need medical evidence to support this.

67. In relation to other aspects of compensation under this head of claim, the claimant can seek loss of earnings under this head as well, just as she can under unfair dismissal. The difference is that the award for disability discrimination is not subject to any cap. Thus, if she were to seek to recover loss of earnings for a period hat took her beyond the unfair dismissal cap, she could do so under this head.

68. The claimant was dismissed on 8 October 2015. If she has not obtained alternative employment during this time , she will have lost earnings for some just about two and a half years. If she seeks to recover loss of earnings for the whole of this period, and possibly beyond, for she can claim future loss as well, she will need to be able to establish that, but for her dismissal, she would have been likely to have remained employed by the respondent to date, and possibly for even longer.

69. That again is likely to require medical evidence, the burden being upon the claimant to show that , but for her dismissal she would have remained in employment of the respondent either to date, or to some particular date between the date of her dismissal and the remedy hearing.

70. Further, to the extent that the claimant has been unable to obtain alternative employment since her dismissal (and of course this is not known) so as to “mitigate her loss” as lawyers put it, the Tribunal will need to know why she has not done so. Again if there is a medical reason, the Tribunal would need medical evidence on this point.

The next steps.

71. The Tribunal accordingly is making orders , in a separate document, for the remedy stage of the case. The first will be for the preparation of a Schedule of Loss (or an updated one) from which the respondent and the Tribunal will be able to see the basic information needed to determine remedy, and what the claimant is seeking. The claimant has previously been referred to the Presidential Guidance – Case Management for guidance on how to complete a schedule of loss, and she reminded to consult it for assistance.

72. The document needs therefore to contain details of:

The claimant’s pre – dismissal gross and net earnings. These may have been affected by her sickness absence (the Tribunal has no details of what , if any ,sick pay the claimant was receiving as at the date of her dismissal), and therefore it would be helpful also to have details of the claimant’s normal, full time, earnings.

Details of the notice pay received.

Details of the Civil Service Compensation Scheme payment received.

A calculation of the further 16 weeks notice pay due.

Any earnings received by the claimant since her dismissal to date.

Details of all state benefits received by the claimant since her dismissal (including a description of the type of benefit, as well as the rate at which it was paid) to date
If the claimant is seeking loss of earnings for a period beyond the six month notice period, details of the period over which she is so claiming, and , if she is claiming future loss, the period over which she is so claiming.

If the claimant is seeking pension loss in respect of any period, details, if the claimant is aware of them, of the employee's and employer's contributions to any relevant scheme

To the extent she feels able to do so, the claimant's suggested figure for injury to feelings.

73. Once the claimant has done this, the respondent will be ordered to provide a counter – schedule of loss, in which it should set out what elements of the claimant's schedule of loss are agreed , and where they are not agreed setting out the respondent's figures, calculation or contentions.

74. The claimant will also be ordered to make a further witness statement dealing solely with remedy, in which she should include her evidence as to any injury to feelings or personal injury claimed, her post – dismissal employment history, her attempts to obtain alternative employment, and if unsuccessful, or not made, the reasons for this. She should also include her medical history post – dismissal, dealing specifically with whether, when and for how long she considers that she would have been able to return to her pre – dismissal job.

75. The Tribunal will also order disclosure of any further documents relating solely to remedy, and service of any medical evidence that the claimant, or indeed, the respondent, may want to rely upon.

76. The parties and the Tribunal should then be able to define the issues for any remedy hearing. Parts of remedy may be capable of agreement (the notice pay, the basic award, for example), leaving the Tribunal only to determine those matters which remain in issue. A remedy hearing can then be held, and conducted as best suits the claimant's current state of health.

77. By way of further assistance, to identify the likely issues, and inform any medical evidence that the claimant , or respondent , may seek the Tribunal has set out at Annex A to the Case Management Orders a draft List of Issues/Questions for medical opinion which may help the preparation or the remedy hearing. These are, of course, only suggestions, and either party is free to add to, or depart from this List as they see fit.

78. Finally, the Tribunal has not heard directly from the claimant for some time, and it is hoped that her health has improved since the last hearing she could attend

in December 2016. It is appreciated that it has been difficult for her to bring and conduct this claim, which she has managed without any real support. Now she has a judgment in her favour, it may be that she can seek and obtain some legal advice , or even representation, as to the next stage of the process. If not legal advice, any further assistance or support she can get for the next stage of the proceedings would clearly be beneficial.

Employment Judge Holmes

Dated : 22 February 2018

RESERVED JUDGMENT, AND REASONS

ANNEX A

THE RELEVANT STATUTORY PROVISIONS

1.Unfair Dismissal.

Employment Rights Act 1996

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(3) In subsection (2)(a)—

(a) 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Equality Act 2010

15 Discrimination arising from disability

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

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

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

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

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

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

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

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

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

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

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

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

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

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

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

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

(d) any other physical element or quality.

(11) – (13) N/a

21 Failure to comply with duty

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

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

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