

EMPLOYMENT TRIBUNALS

Claimant: Mrs A Moss

Respondent: Next Retail Limited T/A Next Online

Heard at: Nottingham (by CVP) **On:** 25, 28, 29 and 30 September 2020
and 1 and 2 October 2020.

Before: Employment Judge Victoria Butler
Mr R Loynes
Mr C Bhogaita

Appearances

For the Claimant: Ms D Millington, lay representative

For the Respondent: Mr W Ho, Legal Director

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is:

1. The Claimant's claim of unfair dismissal succeeds.
2. The Claimant's claims of disability discrimination are not well-founded and are dismissed.
3. The Claimant's claim that she suffered less favourable treatment under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 succeeds.

A remedy hearing will be listed and notified to the parties.

REASONS

Background

1. The Claimant was employed by the Respondent, most recently as a Letter Writer, from 22 June 1989 until her dismissal with effect from 3 May 2019. She claims the following:

- Unfair dismissal;
 - Direct disability discrimination;
 - Discrimination arising from disability;
 - Failure to make reasonable adjustments; and
 - Breach of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTW Regs)
2. The Claimant notified ACAS on 23 January 2019 and the early conciliation certificate was issued on 23 February 2019. She issued her first claim in respect of less favourable treatment under the PTW Regs on 26 February 2019. She subsequently issued a second claim for the remaining complaints on 13 August 2019. The Respondent filed its ET3s on 11 June 2019 and 1 October 2019.

The issues

3. The issues were agreed at a closed preliminary hearing before Employment Judge Adkinson on 30 March 2020 as follows:

Unfair dismissal

- i. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”)?*
 - *The respondent asserts that it was ill health.*
- ii. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called “band of reasonable responses”?*
- iii. Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?*

Disability

- iv. Was the claimant a disabled person in accordance with the Equality Act 2010 (“EQA”) at all relevant times because of the following condition(s):?*
 - *Stress and anxiety.*

EQA, section 13: direct discrimination because of disability

- v. Did the respondent subject the claimant to the following treatment:*

- *At a meeting discussing her bonus in which she became distressed, she was not offered a separate meeting;*
- *She was given no special consideration to award her the bonus where she did not meet the criteria; and*

vi. There is no dispute that the respondent subjected the claimant to the following treatment:

- *Her dismissal.*

vii. Was that treatment “less favourable treatment”, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances?

viii. The claimant relies on the following comparators

- *Hayley Downing;*
- *Nicky Norman;*

ix. The claimant relies on hypothetical comparators also.

x. If so, was this because of the claimant’s disability?

EQA, section 15: discrimination arising from disability

xi. Did the following thing(s) arise in consequence of the claimant’s disability:

- *Sickness absence?*

xii. There is no dispute that the respondent treated the claimant unfavourably as follows:

- *Her dismissal.*

xiii. Did the respondent treat the claimant unfavourably as follows:

- *The respondent put the claimant under extra pressure because she had to meet the same target for a bonus and performance standards as a full-time employee?*

xiv. Did the respondent treat the claimant unfavourably in any of those ways because of her sickness absence?

xv. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

- *Ensuring customer satisfaction?*

xvi. *Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?*

Reasonable adjustments: EQA, sections 20 & 21

xvii. *Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?*

xviii. *A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):*

- *Requiring a part employee and the claimant in particular to deal with enough complaints to secure 9 responses from customers relating to the claimant's performance?*

xix. *Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:*

- *It caused greater levels of stress and anxiety than in an employee not already suffering from stress and anxiety?*

xx. *If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?*

xxi. *If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:*

- *The respondent's managers to stop constantly asking the claimant if she had made any calls to customers;*
- *Remove her from requirements to comply with the terms of bonus scheme (and she acknowledges she would have not therefore have been entitled to the bonus);*
- *The number of responses required from customers secured should be reduced pro-rata to reflect her part time work.*

xxii. *If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?*

Part time workers (Prevention of less favourable treatment) Regulations 2000 regulations 5 and 8

xxiii. It is not disputed that the respondent subjected the claimant to the following treatment:

- *Requiring the claimant to process enough complaints that 9 customers would give satisfactory feedback about the claimant, which is the same target for full time employees but,*

xxiv. If she met the target, her bonus was pro-rata'd to reflect her part time hours.

*xxv. Is it inappropriate to apply the “pro-rata principle” (as defined in **regulation 1**) in determining if the treatment is less favourable?*

xxvi. Is that treatment less favourable than the treatment the respondent would give to a comparable full-time worker?

xxvii. If so, is the respondent thereby subjecting the claimant to a detriment?

xxviii. If so, is the treatment;

- *On the grounds the claimant is a part time worker*

xxix. Not justified on objective grounds? The respondent relies on the objective grounds that the target is a low level and clearly achievable and allows better monitoring customer satisfaction.

The hearing

4. This case was heard on 28, 29 & 30 September 2020 and 1 & 2 October 2020. We read the relevant documents and witness statements on 25 September 2020

5. Prior to the hearing the parties helpfully presented:

- A chronology;
- An agreed bundle; and
- A cast list.

6. References to page numbers in these Reasons are references to the page numbers in the agreed bundle.

The evidence

7. We heard evidence from:

On behalf of the Respondent:

- Ms Jaspal Kaur, Head of Complaint Resolution Management
- Ms Barbara Bowyer, Operations Manager
- Ms Sara-Louise Cook, International Operations Manager
- Ms Kate Howard, Assistant Operations Manager
- Mr Rob Harris, former Head of Learning and Development

On behalf of the Claimant:

- The Claimant

8. We are satisfied that all the witnesses we heard from were honest and genuine and we thank them for this. This case is, in the main, one of differing perspectives on the Respondent's survey scheme and the consequences for the Claimant flowing from it.

Findings of fact

9. We have made our findings of fact based on the material before us, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We resolved any conflicts of evidence that arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.
10. The findings of fact relevant to the issues which we determine are as follows:

Background

11. The Claimant commenced employment with the Respondent on 22 June 1989. She was appointed to her most recent role as Letter Writer with effect from 10 June 2008 in the Directory side of the Respondent's business (p.144). The Claimant initially commenced this role on a full-time basis working 36 hours per week. After approximately eighteen months, she reduced her hours to part-time. She was working 21 hours per week on Mondays, Tuesday and Wednesdays from 8am to 3pm at the time of her dismissal.
12. The Claimant's role entailed dealing with escalated complaints from customers which arrived by e-mail or letter, or complex cases from the call centre. She dealt predominantly with complex safety cases. Each Letter Writer has an electronic diary which is filled with seven pieces of work daily. This could be new work or outstanding actions from a previous complaint.
13. On receipt of new work, the Claimant would review the complaint and attempt to contact the customer by telephone to discuss it, albeit her team had been instructed not to call customers before 8.30am. Thereafter, she would assess the best way to deal with the complaint. She was required to compile a safety report and send it to the managers in her department, the Head Technologist and the technologist who would be dealing with the complaint, as well as the

directors. At every stage of the process it was the Claimant's responsibility to keep the customer updated by phone or e-mail. At the end of the investigation, regardless of whether she had spoken to the customer on the phone, she would send out a final letter explaining the outcome of the investigation with an apology, if appropriate.

14. The Claimant took great pride in her work and had an unblemished disciplinary record. She had worked for the Respondent for nearly 30 years at the time of her dismissal.
15. The Respondent has a Sickness Policy which provides: *"if an employee is absent from work for a period of three weeks their absence is classed as 'long term'the Company will normally hold an employee's contract of employment open for at least a 3 month periodIn circumstances where an employee's health difficulties/non-attendance continues, this may affect their ability to do their job. In these circumstances, Next will take steps to determine an accurate medical diagnosis, consultation will take place with the employee and, where possible, alternative duties/phased return will be investigated. In the unfortunate event that an employee is unable to return to their full role/contracted hours or an alternative role (where applicable) following the absence period of at least 3 months and there is no reasonable prospect of the employee doing so in the foreseeable future, a meeting will be held to review the situation regarding the employee's continued employment. This may result in employment being terminated on the grounds of incapability, as the employee is no longer able to perform the job they were employed to do..... Termination of employment on the grounds of capability is always a last resort.*
16. Under the section 'responsibilities', managers are expected to *'implement appropriate rehabilitation plans and make any reasonable adjustments following discussions and guidance from Occupational Health and HR'*.

The Claimant's health

17. The Claimant has suffered with anxiety since she was twenty years old when she was prescribed a short course of Valium. Thereafter, she coped with her anxiety without seeking help from her GP until 2012, circa 35 years later.
18. In 2012, she was admitted to hospital suffering from severe migraines and had a period of six weeks off work to recover. This episode triggered her anxiety and she was prescribed various anti-depressants but generally preferred to manage it without medication. On her return to work, the Claimant told her line managers that she suffered from anxiety and requested a reduction to her working hours which was initially refused, but subsequently agreed in March 2013. Her working days were Monday, Tuesday and Friday.
19. In October 2015, the Claimant requested a change to her working pattern because she was experiencing heightened anxiety on Sunday and Thursday evenings consequent of attending work the following day. This was offered on

a trial basis and eventually agreed as a permanent change in September 2016 (p.215).

20. The Claimant had a further period of absence due to anxiety in 2016 consequent of issues she was experiencing with her then Line Manager (paragraph 106 of her witness statement). She felt that her Line Manager was treating her unfairly because she was not part of her 'clique'. This was a short period of absence between December 2019 and January 2017 to allow the Claimant to remove herself from the situation. She subsequently raised a grievance, which was upheld, and was placed in a different team with a new line manager. She had no further periods of absence until 23 August 2018.
21. The Claimant developed ways to cope with her anxiety. One such coping mechanism was setting herself targets, whether it be hours, days or even a retirement date. For example, she and a colleague had both agreed various retirement dates, the most recent being April 2018. This particular target was not set in stone and had changed over the months/years. At no time did the Claimant formally notify the Respondent that she intended to retire on a specific date.
22. The Claimant acknowledges that her anxiety '*was predominantly caused by [her] employer*' (p.63). However, it did not affect her ability to do her job and she asserted that "*my health had nothing to do with not being able to elicit responses from customers; or the fact that I was denied the bonus on my last quarter*" (paragraph 78 of her witness statement).
23. Even whilst she was off sick (more below) the Claimant could carry on with normal activities and her daily routine was to '*rise early, read the papers, do some exercise and visit [her] elderly parents*' (p.63). She was also able to socialise with friends and care for her elderly parents. At times she could be irritable and would sometimes experience palpitations, chest pain and shortness of breath, although these would be alleviated by deep breathing and the effects were only trivial. The Claimant's anxiety did not prevent her from doing anything, she just had to 'push herself' to do certain things.

The bonus scheme

24. The Respondent operates a bonus scheme which is discretionary and non-contractual and '*may be withdrawn at any time*'. (p.125). When the Claimant first joined the Respondent, there was no bonus scheme in place. When it was first introduced it was based on company profits and paid as a percentage on hours worked. It evolved over time and moved to a scheme based on personal performance. After this shift, the Claimant's bonus was initially assessed on the quality of her letters. However, the scoring was liable to subjectivity on the line manager's part.
25. In 2014, the Respondent introduced a bonus scheme for the telephone teams based on responses to text surveys called "Rant & Raves". Each time an advisor spoke to a customer, a text survey was sent to the customer asking

them to rate the quality of the assistance received. The number of surveys returned was entirely dependent on customers completing and returning them. Bonus payments were made quarterly and were subject to a minimum number being returned and the rating received. At this time, the Claimant's team was still subject to an assessment of their letters.

26. In March 2017, the Respondent trialled the use of 'Rant & Rave' surveys in the Letter Writing team. Letter Writers had a target of six return surveys but their bonus was not affected during the trial. The team was advised "*So please, wherever possible, always leave messages encouraging customers to call you back to discuss their complaint or send them a text, and allow them time to call back before writing a response instead...*" (p.236).
27. On 13 April 2017, the Claimant was informed that Letter Writers would continue to have their letters assessed, rather than being subject to Rant and Rave surveys (p.240).
28. In August 2017, the Claimant was informed that Letter Writers would now be subject to their bonus being calculated on eight returned Rant & Rave surveys '*and if that figure isn't achieved, you will receive the CRMT department average*' '(p.254).
29. Each time a call was made, the Claimant and her team were expected to pass on the details of the call to their manager who would in turn send the survey to the customer. There was an official log sheet, but, in reality, the information was given to the manager verbally, on a piece of paper or by e-mail. The onus was the on the manager to send out the surveys and was not within the gift of the individual adviser.
30. On 19 September 2017, the Letter Writers received an e-mail explaining that their response rate for Rant & Rave surveys was low and suggesting how to increase it (p.256).
31. On 5 December 2017, Ms Kaur sent an e-mail to the relevant teams as follows:

"Last quarter not everyone participated fully, so we really need you to engage with us on this to make sure we are sending a survey text on every incoming or outgoing customer call, where there is a mobile contact no. Please make sure you let your manager know every time you complete a customer call (as well as noting 'incoming' or 'outgoing call' on your case notes)..... If you are not being given the opportunity to make regular customer contact, as you have been asked to take on other tasks, it is your responsibility to raise this with your manager and agree a resolution..... We have seen from the results last quarter that the minimum of 8 surveys for letter writers and 12 for phone advisors are both realistic and achievable, (with effort on all sides) (p.258).
32. On 12 March 2018, the Claimant was advised that for the Quarter One bonus, Letter Writers were expected to achieve nine text surveys and they would also be assessed on three letters. The ratio would be reflected in the calculation of

any bonus payment, namely 75% based on text surveys and 25% on letters (p.267).

33. If the Claimant failed to receive nine text responses, her bonus would be based on the departmental average if she could demonstrate that she had put in sufficient effort to obtain the responses. Otherwise, no bonus was payable at all (p.259).
34. The target of nine text surveys was applied across the board, regardless of the number of hours worked. The bonus score was calculated on *all* surveys received, the minimum amount to qualify being nine.
35. On 29 March 2018, the Claimant received a further communication brief explaining the bonus scheme and reminding Letter Writers that they must attempt to call every customer before writing a response, it was their responsibility to notify their manager when they came off a call and, if their survey numbers were low, they should speak to their manager so they could be given extra time on the phone to boost their totals (p.268-269).
36. The Claimant would pass on the details of her calls without fail so that a text survey could be sent to the customer, save where those calls were simply to provide an update. The Claimant did not cherry-pick which customers should receive a survey with a view to only obtaining positive feedback.
37. The Claimant struggled with the pressure of meeting the requisite survey target and would experience immense relief on achieving it each quarter.
38. In Quarter One 2018, the Claimant received a total of nine survey responses and received her full bonus. In Quarter Two 2018, for the first time she did not meet the threshold of nine and received only seven responses. She was on holiday for eleven out of thirty-nine working days. In the same quarter, four part-timers failed to meet the threshold, as did four full-timers.
39. On 7 August 2018, Ms Kaur called the Claimant and three other part-time workers to a meeting in which she advised them that they had not received the requisite nine survey responses and, accordingly, they would not receive a bonus payment. Ms Kaur had their individual Quarter Two figures with her and explained that they had not made enough outbound calls to generate sufficient responses. The Claimant's colleague, Ms Downing asked if consideration could be given to them receiving the call centre average of 6% (which was lower than the departmental average) and Ms Kaur agreed to make enquiries in this regard. Ms Downing was particularly upset because she had been undertaking work that limited her ability to make calls and Ms Kaur agreed to have a separate discussion with her.
40. On 8 August 2018, the Claimant e-mailed Ms Kaur expressing her frustration about the meeting the previous day, explaining the following:

“I still believe that the whole Bonus Scheme for the OCRMT team to be flawed and to be discriminatory to your part time workers and the inequality between part time workers and their full time peers exists.

Therefore this now gives me no alternative but to script a formal grievance concerning the bonus scheme and its discriminatory aspects

I would also like to add, again as mentioned in the meeting, the constant pressure of rant and rave is making me ill” (p.275).

41. Ms Kaur replied the following day addressing the Claimant’s issues about the non-payment of a bonus and confirming that she had secured agreement for payment of 6%. In respect of the Claimant’s claim that the bonus scheme was discriminatory she responded:

“The good news is everyone have (sic) achieved a bonus for the last two quarters, this includes fulltime and part timers again this time..... If you wish to discuss this with me tomorrow happy to discuss, however if you remain unhappy, I have attached the grievance procedure from the Intranet, thanks.” (p.276).

42. On 22 August 2018, the Claimant attended her appraisal with her line manager, Mr Shentall. The appraisal system is based on a four-point rating with ‘four’ being ‘outstanding’. The Claimant was awarded a ‘three’ which was ‘good’, despite usually receiving a ‘four’. She believed that she had been marked down for failing to hit the target survey responses and was very distressed. Thereafter, she was absent from work with anxiety until her dismissal.

43. On 3 October 2018, the Claimant had a welfare meeting with Mr Shentall and Mitesh Patel (manager) in accordance with the Respondent’s Sickness Policy. The Claimant explained that her anxiety was caused mainly by work-related concerns and that she would like the option to be removed from the bonus scheme. She said she felt that she was working in ‘fear and pressure’ at work and was not ready to return (p.287 – 298).

44. On 22 October 2018, the Claimant raised a comprehensive grievance about the bonus scheme and her appraisal. She complained about the overall fairness of the scheme for the Letter Writers, but also the impact it had on part-time workers. She said:

“As a part-timer, working a percentage of a full time equivalent, further reduces my opportunities to receive and make calls. I do not believe that having the same prescriptive figure for all letter writers is fair. I feel it should be a percentage of a full timer’s target although I still state the scheme to be flawed.....

Reasonable Adjustment

During a meeting with SS on 6 August, I advised him that I wanted to officially request to be taken out of the bonus scheme as the pressure of getting surveys is having an adverse effect on my health. ...

In summary

..... I want a bonus scheme that is fair and equitable as applied to the letter writers and that meets the statutory obligations in regard to the treatment of part time workers. In addition, I would like to opt out of the bonus scheme.....” (p. 306 – 314).

45. On 23 October 2018, the Claimant attended an appointment with the Respondent’s Occupational Health provider. The subsequent report confirmed that she was not fit to return to work and *‘in Anne’s opinion there are several processes within the management system that she perceives as inconsistent and unfair’*. One of the recommendations made was to *‘look at potentially reducing her bonus target initially’*. The advisor’s opinion was that it was *‘unlikely’* that she was a disabled person for the purposes of the EQA.
46. On 8 November 2018, the Claimant attended a grievance meeting with Barbara Bower, Operations Manager. During the hearing, the Claimant acknowledged that when the scheme was first introduced she thought that getting eight survey results would be *‘a doddle’* and had not realised how difficult it would be. She told Ms Bowyer that the target was making her ill (p.334 – 382).
47. Ms Bower undertook an investigation and confirmed her conclusions by way of letter dated 3 December 2018. In respect of the part-time worker complaint she concluded:

“I do not believe that the scheme discriminates against part timers. I believe the ability to achieve 9 surveys over the quarter is achievable. Evidence shows that other part time Letter Writers in the Complaints Resolutions teams on similar hours have achieved the minimum or more. You achieved the required amount yourself in Quarter 1. During Quarter 3, two other part time Letter Writers in your area on fewer hours than you have achieved the minimum of 9 and more..... You stated you didn’t wish to participate in the bonus scheme going forward as you felt it was unfair and the stress and pressure of achieving the required number of surveys makes you ill. I’m sorry you feel this way, however I am confident with the changes made and the recommendations I will be putting forward the situation will improve. There is no option to be removed from the bonus scheme.....”
48. Ms Bowyer acknowledged that the process for sending out surveys to customers was inconsistent and agreed that the Claimant should be paid the departmental average bonus, rather than the call centre average (p.519 – 523). However, she did not recommend any change to the minimum target.
49. On 11 December 2018, the Claimant appealed Ms Bowyer’s decision. Her appeal in respect of the part-time worker issue was as follows:

“The question of discrimination against part timers has nothing to do with the achievability of the targets set, or that other part time team members have on occasion met those targets. It relates to the difference in percentage of time and therefore opportunity to make contact with customers between full timers and part timers. How can it be fair that someone such as myself, who only works 21 hours, is expected to achieve exactly the same targets as someone in full time employment (36 hours), when I only work for 60% of their contracted time. Surely to avoid discrimination against part time workers in accordance with the Part-Time Workers’ Rights, the target for part time workers must be a percentage of their full time equivalent. In this instance for me it would be 5 surveys..... However, I shall be addressing the fact that I feel part time workers have been treated less favourably under the Bonus Scheme by separate submission (to follow).....” (p.525 – 528).

50. On 20 December 2018, HR e-mailed the Claimant to confirm that Sara-Lou Cook, International Operations Manager, would be dealing with her appeal and that *‘she can investigate your grounds of appeal based on the information you have provided. Therefore she does not need to see you and will send your outcome to you in writing by no later than Monday 31 December’* (p.529). The Claimant thanked HR for the update (p.529). The decision not to meet the Claimant was made unilaterally by the Respondent and without discussion with her.

51. Ms Cook confirmed her conclusions in a letter dated 31 December 2018 and did not uphold the Claimant’s appeal. In response to the part-time worker issue, she said:

“I do not believe that the current survey process discriminates against part time workers. My reason for this is you are not being treated less favourably because you work 21 hours a week. The number of surveys you are required to achieve averages less than one survey per week, which again I do not feel is unreasonable to achieve.

You stated you would submit further information to support your claim on this point, however as this has not been received I have been unable to take it into consideration.” (p.531 – 534).

52. On 16 January 2019, the Claimant submitted a complaint to the Respondent about less favourable treatment under the PTW Regs (p.536 – 539). In her complaint, she highlighted that whilst the target for both full and part-time workers was the same, the full-timers receive their bonus based on their full-time salary whilst part timers receive it on their part-time salary. The Respondent acknowledged the complaint but refused to deal with it because it had already been the subject of her grievance which was exhausted (p.540).

53. On 23 January 2019, the Claimant attended a further welfare meeting with Mr Shentall and Ms Patel in which she confirmed that she was still unable to return to work (p.544 – 552).

54. On 26 February 2019, the Claimant submitted her first claim to the Employment Tribunal complaining of a breach of the PTW Regs 2000. Under the section headed '*What do you want if your claim is successful?*' she said she wanted, in addition to compensation, "*A fair and equitable bonus scheme; number of surveys to be achieved based on hours worked; pro rata to full time expectations; value of bonus not to be based on pro rata salary OR removal from the bonus scheme and free from the constant bombardment from managers asking if she has surveys that they can send to customers*" (p.9).
55. The Claimant attended a further appointment with Occupational Health on 18 March 2019. The report confirmed that she was suffering from work-related stress and felt unable to return to work until '*the Grievance/Tribunal have come to an end and there is an outcome*'. It was recommended again to '*look at potentially reducing her bonus target initially*'. It also confirmed that it was '*unlikely*' that she was a disabled person for the purposes of the EQA (p.570 – 575).
56. On 2 April 2019, the Claimant contacted the Respondent to confirm that her GP had said that she was now suffering from depression and had prescribed her medication (p.576).
57. The Claimant was invited to a final welfare meeting on 3 May 2019 '*to discuss [her] continuing non attendance from work due to [her] medical condition*' and was advised that one outcome could be her dismissal on the grounds of incapability due to ill health (p.581(a)-(b)). The Claimant was aware that this was a potential outcome of the meeting.
58. The meeting was chaired by Kate Howard, Assistant Operations Manager, and the Claimant was accompanied by her colleague Bridgette Hill (who was also formerly a union representative). During the meeting they discussed the Claimant's health. The Claimant confirmed that she was still suffering from anxiety and depression but was still able to go out every day, socialise and exercise. She explained that she had lost trust in management and that Ms Bowyer had failed to investigate her grievance properly. She also confirmed that she could not return to work until there had been resolution of her Tribunal complaint explaining that she '*can't come back whilst this is going on*' and '*until a judge decides*'. The Claimant declined a phased return to work, an alternative role and early ill health retirement.
59. The Claimant told Ms Howard that it was the bonus scheme that was making her ill. However, Ms Howard did not adjourn to investigate whether any adjustments could be made to the scheme, despite this being a recommendation in both Occupational Health reports. She was of the view that it was a separate matter being dealt with under the grievance procedure.
60. In light of the Claimant's affirmation that she could not return to work until her Tribunal complaint had been resolved, Ms Howard took the decision to dismiss her on '*the grounds of incapability through ill health*' and her effective date of

termination was 3 May 2019 (p.583 – 597). The Claimant was advised that she had the right of appeal.

61. The Claimant appealed the decision to dismiss her after thirty years ‘*of loyal and dedicated service on the grounds of ill health*’. In her appeal letter she stated that “*due to Next’s inactivity on addressing the issues that have caused my anxiety and depression, I have had no alternative but to seek to resolve this through Tribunal. A hearing date has yet to be determined*”. Amongst other things, the Claimant said that her sickness absence had been caused by the pressure the Respondent had put her under; she had received insufficient warnings before her dismissal; Occupational Health recommendations had been ignored; and no reasonable adjustments had been offered to aid her return to work. She also considered that she was a disabled person for the purposes of the EQA (p.600 – 601).
62. The appeal was chaired by Rob Harris (Head of Learning and Development) and took place on 30 May 2019. The Claimant was accompanied by Ms Hill. During the appeal hearing the Claimant repeated her request to be removed from the bonus scheme and said that there had been no recognition of adjustments for someone with mental health issues. She confirmed that a Tribunal date was fixed but ‘*Next could have picked up the phone and say ‘let’s sort this out*’. Mr Harris allowed the Claimant to explain her grounds of appeal fully and her feelings about the bonus scheme. He also acknowledged that her desired outcome was to be re-instated with reasonable adjustments i.e. the removal of the minimum survey responses required.
63. Mr Harris advised the Claimant that he would confirm his findings in writing, albeit did not tell her that he was going to explore whether reasonable adjustments to the bonus scheme could be made to allow her to return to work.
64. Mr Harris undertook a thorough investigation and sent his outcome by way of letter dated 14 June 2019. He addressed the Claimant’s grounds of appeal (most of which were not upheld) and, in addition to offering her alternative roles, offered the following:

“Removal of surveys – should you wish to return to your role as a Letter Writer, the preference would be that you remain on the current survey process and bonus scheme and support is provided to help you achieve the targets. It is important that the Company continues to drive customer service obtaining feedback from our customers using surveys as a crucial part of this. Therefore, if you do not feel this is possible, whilst we would still need you to follow the survey process, as a reasonable adjustment we can consider the removal of the minimum number of surveys required. As a result you would be paid the call centre average bonus. If any of the above would aid your return to work and you are able to provide a reasonable date of return, which I believe would be by Monday 1 July 2019, I am happy to overturn the original decision to terminate your contract and re-instate your employment with effect from 3 May 2019. Should you wish to return to any of the roles offered, please confirm by email to [HR] no later than Monday 24 June 2019” (p.641 – 644).

65. Mr Harris made the offer of re-instatement with the removal of the minimum survey target without discussing it with the Claimant in advance, or offering her the opportunity to discuss it with him - it was suggested to her for the first time towards the end of a comprehensive letter. The Claimant was advised to e-mail HR if she wished to accept any of the offers made to her.
66. On 24 June 2019, the Claimant submitted a further sick note confirming that she was unfit for work. This was acknowledged by HR who replied: "As you have not accepted any of the alternative proposals offered to you to facilitate a return to work, as outlined in Rob's letter, the decision to terminate your contract on the grounds of ill health is upheld" (p.647). The Claimant was not offered any further time to consider the options given to her by Mr Harris.

The law

Unfair dismissal

67. Section s.98 ("ERA") provides.
- "(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,*
-*
- (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."*
68. Section 123(6) provides:

“(1) Subject to the provisions of this section and sections 124, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

.....

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding”.

69. We have also had regard to the following cases:

East Lindsey District Council v Daubney [1977] ICR 566; Spencer v Paragon [1976] IRLR 373; BS v Dundee City Council [2014] IRLR 131; Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 158; S v Dundee City Council [2014] IRLR; Iceland Frozen Foods Ltd v Jones [1982] IRLR 439; and Post Office v Foley [2000] IRLR 827.

Disability discrimination

Disability

70. Section 6 of the EQA provides:

“(1) A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities”.

71. Section 212 provides that substantial means ‘more than minor or trivial’.

72. Schedule 1, paragraph 2 of the Equality Act 2010 provides:-

“(1) The effect of an impairment is long term if –

- (a) it has lasted for at least 12 months,
- (b) it is likely to last for at least 12 months, or
- (c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur”.

73. The Tribunal must take into account the ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)’ (“the Guidance”).

Direct discrimination

74. Section 13 of the EQA states:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2).....

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B”.

.....

Discrimination arising from disability

75. Section 15 of the EQA states:

“(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arises in consequences of B’s disability, and

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

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

Failure to make reasonable adjustments

76. Section 20 of the EQA provides:

“(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.”

.....

77. We have had regard to the following cases:

J v DLA Piper UK LLP UKEAT/0263/09; Leonard v South Derbyshire Chamber of Commerce [2001] IRLR 19; Kapadia v London Borough of Lambeth [2000] IRLR 699 (CA) and Goodwin v The Patent Office [1999] IRLR 4 EAT

Less favourable treatment under the PTW Regs

78. Regulation 1 of the PTW Regs provides:

“pro rata principle” means that where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker;

79. Regulation 5 provides:

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

(4) A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime.

80. We have also had regard to the following cases:

Hendrickson Europe Ltd v Pipe EAT/0271/02 and Sharma and others v Manchester City Council [2008] IRLR 336.

Submissions

81. We had the benefit of written submissions from both Mr Ho and Ms Millington, together with further oral submissions. Whilst they are not set out in full, we have considered all the points made and all the authorities relied on where appropriate, even when no specific reference is made to them.
82. In summary, Ms Millington submitted that the Claimant was disabled for the purposes of the EQA at the material time and criticised the Respondent for not exploring the question of disability further outside of the Occupational health reports which said it was '*unlikely*' that she was disabled.
83. In respect of the claim of unfair dismissal she submitted '*the dismissal was carried out without any reference or attempt to determine the full reason for the Claimant's continued absence and offer any appropriate recommendations for adjustments which might be made to aid her return to work the subsequent overturning of the dismissal, welcome though it might appear, was subject to conditions that the Claimant could not possibly have met and therefore resulted in her termination with the Respondent after thirty years of service*'.
84. In terms of the PTW Regs complaint, she clarified that the Claimant was comparing herself to full-time workers in the same team. Further, the mandatory requirement of nine survey responses for both part-timers and full-timers is unfair as full-timers have a greater opportunity to secure a return of nine surveys. In addition, considering that part and full-timers had to reach the same target, the 'reward' for part-timers was less because they only received a bonus based on their pro rata salary.
85. Mr Ho for the Respondent denied that the Claimant was disabled for the purposes of the EQA, remarking that her impact statement was 'light' on how her day-to-day activities were substantially affected. It follows that all heads of disability discrimination were denied.
86. He submitted that the Claimant's dismissal by reason of capability was fair. She had had thirty-four weeks absence and confirmed that there was no prospect of returning to work until her Employment Tribunal case was resolved. Further, he submitted that Mr Harris '*offered her everything she wanted and to be reinstated but she did not accept the offer (or even directly respond to it)*'.
87. In respect of the PTW Regs complaint, he submitted that the minimum target of nine surveys was achievable, and therefore not less favourable treatment. Alternatively, the Respondent was justified in ensuring that a minimum number of surveys were obtained from customers to ensure it could monitor customer satisfaction as to how its services were being delivered.

Conclusions

Disability

88. The definition of disability is set out in s.6 EQA which provides:
- “A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities”.*
89. This definition requires us to consider four essential elements: did the Claimant have an impairment, did that impairment have an adverse effect on her ability to carry out normal day to day activities, was that effect substantial and was that effect long term. In this context “substantial” means more than minor or trivial and long-term means lasting or likely to last for twelve months or more.
90. The burden of proof is on the Claimant to prove she is disabled, and the standard of proof is the balance of probabilities.
91. We are satisfied that the Claimant had a long-term mental impairment, that impairment being anxiety. This is not disputed by the Respondent and is clearly documented in her medical records. We found the Claimant’s evidence about her anxiety entirely credible.
92. Did the impairment have an adverse effect on her ability to carry out normal day-to-day activities? The EQA Guidance states:
- “In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities”* (paragraph D3)
93. We are persuaded by Mr Ho’s submission that the Claimant’s impact statement is ‘light’ of detail as to how her day-to-day activities are impacted. When questioned on this further during the hearing, the Claimant said that her anxiety did not prevent her from carrying out any activities at all, she just had to ‘push herself’ to do them. Whilst she took medication from time to time, she preferred to manage without it and had other coping mechanisms in place, such as setting herself targets. Even during periods of absence from work, the Claimant could continue with a daily routine which included rising early, exercising, caring for her parents and socialising.
94. The Claimant would sometimes suffer from palpitations, chest pain and shortness of breath from time to time, but these symptoms were alleviated with deep breathing and were not substantial.
95. The Claimant’s impairment did not affect her ability to carry out her work, on the contrary in fact. Her role entailed reading and writing and having conversations

in both person and on the phone and, until her last appraisal/bonus, she was consistently rated as 'outstanding' and met her target of return surveys.

96. We are not satisfied that the Claimant's impairment had an adverse impact on her ability to carry out day-to-day activities and, if it did, that impact was certainly not more than minor or trivial.
97. Accordingly, we are satisfied that the Claimant did not meet the definition of a disabled person for the purposes of the EQA at the material time.
98. Considering this conclusion, it follows that her claims of disability discrimination must fail.

PTW Regs

99. The Claimant's case is that the imposition of the target of nine return surveys for both part-time and full-time workers amounts to unfavourable treatment under the PTW Regs. Further, her bonus payment should be calculated on a full-time equivalent salary.
100. Her first ET1 sets out the basis to her claim as follows:

".....

Both full time and part time staff have to achieve a minimum of 9 responses to surveys in a quarter. Full-timers make and take a greater number of calls, therefore have a greater opportunity to achieve the target than a part-timer.

Also, as an example; If 9 surveys are achieved (that fully meet the criteria) an employee receives 20% of their quarterly salary as a bonus. For a full-timer this is £1104, but a part-timer, working 21 hours per week, for achieving the same would only receive £644 as their annual salary is pro-rate.

As a part-time worker everything is pro-rata to my full time equivalent, other than the 9 surveys I am expected to achieve. This is unfavourable to me as I have reduced opportunity take (sic) or make calls and there is a reduction to the bonus that I receive by the very virtue that my salary is pro-rata" (p.8).

101. One of the first questions we asked ourselves was whether it was appropriate to apply the 'pro-rata principle' found in Regulation 1 PTW Regs. The principle requires that, where a comparable full-time worker receives a particular level of pay or benefit, a part-time worker is entitled to receive no less than the proportion of that pay or other benefit which reflects the number of hours that he or she works.
102. The principle applies to amounts payable or benefits received and the Claimant received 20% of her base salary, when a full bonus was payable, as did full-timers, in accordance with that principle. It does not operate to increase a part-

timer's salary to that of a full-timer. Accordingly, we are satisfied that the pro-rata principle is applied appropriately in this regard.

103. We questioned the appropriateness of applying the pro-rata principle to the minimum number of surveys required to be obtained by part-timers. However, we are satisfied that the pro-rata principle only applies to '*pay or any other benefit*', and not, as in this case, the application of targets in the bonus scheme. It would be different if full-timers received a higher percentage of their base salary in respect of a bonus payment, but that is not the case here.
104. Accordingly, it is inappropriate to apply the pro-rata principle to the requirement to obtain nine surveys.
105. What the Claimant's case is really concerned with is less favourable treatment. We have been referred to the case of **Hendrickson Europe Ltd v PIPE** which refers to the four questions that need to be asked, namely:
 - i. What is the treatment complained of?
 - ii. Is that treatment less favourable than that of a comparable full-time worker?
 - iii. Is the less favourable treatment on the ground that the worker was a part time worker?
 - iv. If so, is it justified on objective grounds?
106. Taking each question in turn, the treatment complained of is the requirement for the Claimant to obtain a minimum of nine surveys in order to qualify for a bonus, the same requirement as full-timers.
107. Is that treatment less favourable than that of a comparable full-time worker? There were seven comparable full-time workers in the Letter Writing team in Quarter One and eight in Quarter Two so there are appropriate full-time comparators. The Respondent raises no issue in this regard either.
108. The requirement for part-timers to achieve the same minimum number of surveys as full-timers is clearly less favourable treatment. Part-timers have fewer working hours to achieve the same target, more so in any quarter when they take annual leave or have any other leave of absence.
109. The Respondent says that the minimum of nine was such an easy target to reach and equated to one survey per week. The bar was set so low that there was no disadvantage to part-timers. The Respondent also points to the fact that the Claimant has always achieved the target, save in Quarter Two 2018.
110. In Quarter Two 2018, three part-time employees in addition to the Claimant failed to achieve the target. In response, the Respondent pointed to four full-timers who also failed to meet the target to demonstrate that there was no

disadvantage to part-timers. However, this undermines its position that nine was such a low bar that it was easily achievable. The evidence demonstrates that this was clearly not always the case. Advisers are at the mercy of customers as to whether they choose to return a survey. The key difference for those working fewer than full-time hours is there is *less opportunity* to send and receive the surveys and a *higher risk* of not achieving full bonus potential.

111. We heard evidence that if an adviser is struggling to meet the minimum target they were afforded the chance to spend more time on the phones to maximise opportunities. Again, this counters the Respondent's argument that the target was easy to reach. If the target was genuinely so easy to reach, there would be no need to put measures in place to boost opportunities to obtain surveys. The fact that full-timers failed to meet the target in Quarter Two supports the proposition that it was harder for part-timers to meet that target consequent of having less time in which to do so.
112. The Claimant gave credible evidence of the immense pressure she felt achieving that target and the relief she felt when she met it. We accept that this pressure was genuine.
113. We considered the Respondent's submission that Letter Writers have the opportunity to cherry-pick which customers they send the surveys out to. However, this does not address the reality that full-timers have more opportunity to cherry-pick too if they so choose – clearly, they deal with a higher proportion of customers by virtue of their working hours, so we see no merit in that argument.
114. We note the Respondent's assertion in its second ET3 that "*the Respondent's view was that, if anything, it would consider increasing the number of text surveys for her full-time colleagues, rather than reducing the Claimant's*". On either proposition, reducing the target for part-timers or increasing it for full-timers, it would produce a fair and equitable distinction between part and full-timers. If the targets are proportionate, it matters not for the purposes of the PTW Regs whether the scheme is difficult or easy to comply with – it eliminates the less favourable treatment.
115. The Respondent also sought to argue that reducing the target for part-timers would produce an inequitable result. The example given was if the target was five, and one survey was negative, it would be harder to elevate the overall score with the remaining four surveys. However, the target of nine allowed the opportunity of eight further surveys to boost the score.
116. This may well be the case. However, the bonus was assessed on all surveys received, not just the minimum so that argument holds little weight. Additionally, on that analysis, it is arguable that even with one poor survey, the bonus payable might still be higher than not receiving one at all (which is a possibility if the Respondent determines that insufficient effort was made) or the department or call centre average.

117. Obtaining the minimum target itself put the Claimant under immense pressure. We do not accept that a full-timer would have felt the same degree of pressure when they had more working hours to meet it.
118. Considering the above, we are satisfied that the Claimant suffered less favourable treatment in the application of the minimum target of nine than a comparable full-time worker.
119. We are also satisfied that the less favourable treatment was on the ground that the Claimant was a part-time worker. She was afforded less opportunity to achieve the minimum target by virtue of the number of hours she worked.
120. The Respondent asserts that if the Claimant suffered less favourable treatment, the requirement to obtain a minimum of nine surveys, regardless of the number of working hours, is justified on objective grounds. It relies on the objective grounds that the target is set at such a low level, was clearly achievable and allows better monitoring of customer satisfaction.
121. We agree that the requirement of sending out surveys is an important measure for the Respondent to monitor customer satisfaction and feedback on the Claimant's performance. However, we do not accept that the target is set at such a low level and clearly achievable. The evidence presented to us showed that in Quarter Two, four part-timers and four full-timers failed to meet the minimum. Measures are in place to support advisers who may fall short of the target, thereby acknowledging that it is not as easy to meet the target as the Respondent asserts. Further, once the surveys have been sent to customers, advisers have no control over their return. If they do not receive the minimum, they risk a lower bonus payment, or no payment at all.
122. It follows that we are satisfied that the required minimum of nine surveys was not easy, regardless of the number of hours worked. We note that in both Quarters One and Two 2018, the maximum number of surveys received was fourteen across all Letter Writers – had the target been so easy we would have expected to see numbers much higher than that.
123. The Respondent has not asserted that it considered increasing the ratio of full-timers or decreasing the ratio for of part-timers, save in its defence to the second claim. In fact, it provided no substantive evidence to demonstrate that it had considered this in any detail at all. Further, it did not advance any substantive rationale as to why adjusting the minimum for either part-timers or full-timers would not achieve the same result in monitoring customer satisfaction. We cannot see how increasing the minimum target for full-timers or reducing it for part-timers would have any impact on its monitoring of customer service or obtaining feedback in respect of advisers' delivery.
124. In the absence of any evidence to demonstrate that a target other than nine across the board would not achieve the desired objective, we are satisfied that the equal application of nine surveys was not justified on objective grounds.

125. Accordingly, the Claimant's claim that she suffered less favourable treatment on the ground that she was a part-time worker succeeds.

Unfair dismissal

126. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position they held.
127. The Respondent contends that the Claimant was dismissed for a reason relating to her capability, namely ill health, which is a potentially fair reason falling within section 98(2) ERA. In considering the reason for the Claimant's dismissal, we had regard to the background leading up to it.
128. The Claimant's absence was triggered by her appraisal on 22 August 2018 at which she considered had been marked down for failing to meet the minimum target for survey responses. She told Ms Kaur earlier in the month that she believed the bonus scheme was discriminatory to part-time workers and the constant pressure to reach the required target was making her ill.
129. On 22 October 2019, the Claimant raised a comprehensive grievance claiming that the Respondent's application of the bonus scheme failed to '*meet the statutory obligations in regard of the treatment of part time workers*'. She also confirmed that she wanted to opt out of the scheme. Ms Bowyer investigated the Claimant's grievance and set out her belief that the scheme did not discriminate against part-time workers. She also told the Claimant that '*there is no option to be removed from the bonus scheme*'.
130. The Claimant appealed Ms Bowyer's decision, again complaining that the application of the bonus scheme was discriminatory and did not meet the requirements of the PTW Regs. The appeal was dealt with by Ms Cook who also concluded that the bonus scheme was not discriminatory.
131. On 16 January 2019, the Claimant submitted a complaint about less favourable treatment under the PTW Regs. The Respondent acknowledged the complaint but refused to deal with it because the substance had been considered under the internal grievance procedure which was concluded.
132. On 26 February 2019, the Claimant submitted her first claim to the Employment Tribunal complaining of a breach of the PTW Regs 2000. Under the section headed '*What do you want if you claim is successful?*' she said she wanted, in addition to compensation, "*A fair and equitable bonus scheme; number of surveys to be achieved based on hours worked; pro rata to full time expectations; value of bonus not to be based on pro rata salary OR removal from the bonus scheme and free from the constant bombardment from managers asking if she has surveys that they can send to customers*"

133. The Claimant attended two welfare meetings before being called to a final meeting on 3 May 2019 chaired by Ms Howard *'to discuss [her] continuing non attendance from work due to [her] medical condition'*. The Claimant told Ms Howard that it was the bonus scheme that was making her ill and she could not return to work until her Tribunal complaint had been resolved. Her concerns about the bonus scheme, grievance, complaint under the PTW Regs and the Employment Tribunal claim are, in effect, one and the same. She simply refers to the Tribunal in her welfare meeting because this was the only remaining avenue available to her to resolve the matter – all other avenues had been exhausted.
134. In consequence of the Claimant's declaration that she could not return to work until her Tribunal claim was resolved, Ms Howard took the decision to dismiss her.
135. The Respondent submits that Mr Harris *'offered [the Claimant] everything she wanted and to be reinstated but she did not accept the offer (or even directly respond to it)'*. Whilst Mr Harris offered to remove the less favourable treatment, this was only after the Claimant's dismissal and subsequent to the appeal hearing.
136. In evidence, the Claimant said on many occasions that all she wanted was for the Respondent to sit down with her and resolve her concerns about the bonus scheme. When asked whether the removal of the minimum target would have allowed her to return to work, she said, without hesitation, that it would. We accept her evidence in this regard.
137. The Respondent asserts that the Claimant was dismissed for ill health. However, the Claimant was perfectly capable of carrying out her duties - she simply could not return whilst she was subject to less favourable treatment on the grounds of her part-time status. If the Respondent had eliminated the less favourable treatment, as the Claimant asked it to do on so many occasions, she would have been able to return to work and would not have been dismissed after thirty years' service. Even Mr Harris agreed in cross-examination that the fundamental cause of the Claimant's dismissal was her anxiety caused by the bonus scheme.
138. In deliberating the reason for the Claimant's dismissal, we considered what was preventing her return to work and we conclude that it was the Respondent's refusal to make adjustments to the bonus scheme for her and, therefore, remove the less favourable treatment. The Claimant complained about less favourable treatment by reason of her part-time status to Ms Kaur, under the grievance procedure, by way of complaint under the PTW Regs and, ultimately, in these proceedings. She made it clear that an adjustment to the scheme would allow her to return to work in her current role and on confirming that she could not return until the matter was resolved, Ms Howard took the decision to dismiss her.

139. The reason for the Claimant's absence and subsequent dismissal was, therefore, her unwillingness to accept the less favourable treatment and the Respondent's unwillingness to remove it. Consequently, we are not satisfied that the Respondent has established that the Claimant's dismissal was potentially fair for a reason relating to capability. Accordingly, the Respondent has not satisfied the burden of proof set out in s.98(1) ERA and the Claimant's claim succeeds.
140. For completeness, we considered whether the Claimant's dismissal would have been fair had the Respondent established that it was for a reason relating to capability.
141. During the welfare process, the Claimant told the Respondent that she could not return to work until her Tribunal case had been resolved. At the final welfare meeting on 3 May 2019, Ms Howard offered the Claimant several solutions to assist in her return to work but the one thing she did not consider was an adjustment to the bonus scheme. Given the link between the Claimant's absence and the scheme, she was obliged to do so, particularly given that this was a recommendation made by Occupational Health. The sickness policy provides that managers are expected to make any reasonable adjustments following discussions and guidance from Occupational Health before taking the decision to dismiss which is '*always a last resort*'. This consideration is not limited to employees who are considered disabled for the purposes of the EQA.
142. It is incumbent upon the Respondent to explore solutions to enable an employee to return to work, more so when their continued employment is at risk. The Claimant was absolutely clear that the removal of the minimum target (or from the scheme in its entirety) would have allowed her to return, but Ms Howard failed to consider whether this was possible. We would add that this is no criticism of Ms Howard, who was following advice from HR.
143. Mr Harris who heard the appeal, on the other hand, considered the Claimant's desire for adjustments. After the hearing he sought counsel from the Respondent's HR department, and it was agreed that the minimum target could be removed.
144. Thereafter, Mr Harris communicated the outcome of his appeal by letter and advised the Claimant that, amongst other things, the Respondent could consider removing the minimum target for surveys by way of a reasonable adjustment. Mr Harris had not told the Claimant that he would explore this as an option during the appeal hearing and the offer was made within the text of a lengthy letter and, therefore, without notice. She was given ten days to respond to the various options offered. At the time of receiving the letter, the Claimant had been diagnosed as suffering from depression and was under the care of her GP. On the deadline of 24 June 2019, the Claimant did not respond to Mr Harris's proposals but submitted a further sick note.
145. Mr Harris did not afford the Claimant opportunity to discuss his offer by phone or in person, nor was any additional time offered to her to consider it, despite

the Respondent being aware she was unwell. The Claimant was criticised during cross examination for not pro-actively requesting more time. She said she was not aware she could, and we are satisfied that was an entirely reasonable understanding. There was nothing in the letter to indicate that she could do so, and HR did not suggest this on 24 June 2019 when the Claimant submitted a medical certificate confirming she was still unwell. The Claimant was simply told that because she had not responded within the deadline, her employment remained terminated.

146. The Claimant had been clear from the outset that the bonus scheme was making her ill, she felt pressure meeting the target and wanted to be removed from the scheme. The Respondent batted away her requests at every conceivable stage, until after her dismissal. Importantly, the last-minute offer demonstrates that the Respondent *could* accommodate her reasonable request and make an adjustment to the bonus for her.
147. The Respondent took the decision to dismiss her without considering adjustments as it is required to do under its Sickness Policy. The Sickness Policy states that it is Manager's responsibility to consider adjustments, to facilitate a return to work but Ms Howard failed to do so, despite this being a recommendation by Occupational Health. When the Respondent finally offered the Claimant the solution she desired, it was after the appeal hearing, without notice, and when she was in a vulnerable state. No further opportunity or time was given to consider the offer.
148. Accordingly, even if we had found that the Claimant's dismissal was for a reason relating to capability, we would not have been satisfied that the decision to dismiss her fell within the range of reasonable responses of a reasonable employer.
149. Finally, we address the Respondent's suggestion that the Claimant had no intention of returning from sickness absence because she was planning to retire in April 2019 in any event. We do not accept that this was the Claimant's intention, nor do we find that the Claimant was culpable or blameworthy, caused or contributed to her dismissal. She continually told the Respondent what she needed to allow a return to work but her request was consistently rejected, until after the appeal hearing. Put simply, the Claimant told the Respondent the solution, but it ignored her. It also ignored two Occupational Health reports recommending the same. The Respondent's refusal to acknowledge that the Claimant was being treated less favourably because of her part-time status and make the adjustment she desired was the cause of her anxiety and consequent absence, and was not the fault of the Claimant.
150. To conclude, given that the Respondent has failed to establish a potentially fair reason for the Claimant's dismissal, her claim that it was unfair is well-founded and succeeds.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - CVP. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Victoria Butler

Date: 17 December 2020

Sent to the parties on:

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For the Tribunal:

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