



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr D R Freeman

Respondent

AND Maritime and Coastguard Agency

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY VIDEO (CVP)
(Southampton)

ON 18 to 21 July 2022
(parties last attended 20 July 2022)

EMPLOYMENT JUDGE GRAY

Representation

For the Claimant:

Ms Sarah Harty (Counsel)

For the Respondent:

Miss Joanne Williams (Counsel)

RESERVED JUDGMENT ON LIABILITY

The judgment of the tribunal is that the Claimant's complaint of unfair constructive dismissal succeeds. The Claimant was constructively dismissed without fair reason.

REASONS

The claim and the issues to be determined

1. In this case the Claimant claims that he has been unfairly constructively dismissed. The Respondent contends that the Claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.
2. By a Claim Form dated 14 November 2020, the Claimant brought the complaint of unfair constructive dismissal. The ACAS certificate is dated 22

October 2020 to 22 October 2020. No time limit jurisdictional issues arise in this claim.

- 3 The issues in this case were agreed at the case management preliminary hearing before Employment Judge Richardson on the 3 December 2021.
- 4 They were discussed with the parties at the start of this final hearing and were subject to the further clarifications shown below in ***bold italics***. Further, it was confirmed that no failure to give written particulars complaint was pursued and was incorrectly noted in the issues as originally recorded:

1. Constructive unfair dismissal

1.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the express term of the contract relating to his place of work and reasonable travel requirements (clause 7 of his contract of employment) ***[Claimant's Counsel confirmed that a breach of clause 5 (Job Title and Duties) was also asserted. This was not understood from the issues and time was given for Respondent's Counsel to take instructions, after which it was agreed this would form part of the issues the Tribunal would be determining]***; and the implied term of mutual trust and confidence. Those breach(es) were as follows;

1.1.1 The restructure took place which dismantled the branch of which the Claimant was the Deputy Head on 20th May 2020. This removed the Claimant's job without prior engagement with the branch of the Claimant's trade union;

1.1.2 The new organizational chart of H.M. Coastguard which Claire Hughes emailed to the staff of H.M. Coastguard on 20th May 2020 did not include a job title for the Claimant and there had been no discussion with the Claimant about the changes to the Claimant's role prior to that email;

1.1.3 The Claimant was informed of his new role in a meeting with Peter Mizen, Gary Spark, Andrew Healy and Jayne Ede on 26th May 2020 and there had been no consultation with the Claimant about the changes to the Claimant's role prior to that meeting;

1.1.4 The Claimant's role was changed from Deputy Head of branch to CPSO for Northern Island and the Scottish Islands, which was a tacit demotion as the Claimant would become the least experienced CPSO after three years as Deputy Head of branch;

1.1.5 The most recent and accurate role profile was not used in the alignment process, that role profile being the version prepared by Stan Woznicki on 1st November 2017 and authorized by Chris Thomas on 31st

March 2019. The Appeal Officer ignored the testimony of Stan Woznicki that Chris Thomas had agreed that role profile;

1.1.6 The Appeal Officer used the role profile for the role of CPSO for Northern Island and the Scottish Islands which was prepared by Stan Woznicki on 1st November 2017 and authorized by Les Chapman on 31st March 2018 despite evidence that Stan Woznicki had never seen it and Les Chapman was not employed by the Respondent;

1.1.7 The Appeal Officer ignored evidence that Peter Mizen had not told the truth when he told the Claimant on 15th June 2020 that he would forward an updated role profile to the Alignment Panel. Instead Peter Mizen provided the Alignment Panel with the role profile for the Deputy Head of Branch prepared by Stan Woznicki on 1st November 2017 and authorized by Les Chapman on 31st March 2018;

1.1.8 There was no Counter Pollution and Salvage expertise at the Alignment Panel and the Appeal. The Appeal Officer disagreed but provided no evidence;

1.1.9 The Appeal Officer did not at any stage engage with Stan Woznicki, former Head of Branch, to determine the Claimant's specific role. The Appeal Officer contended that the Claimant should have been conducting audits as part of his job, which was factually incorrect;

1.1.10 The Appeal Officer's response to the Claimant's appeal ground that there would be an increased travel burden in the role of CPSO for Northern Island and the Scottish Islands was based on an incorrect assumption and no analysis of future travel needs;

1.1.11 The Appeal Officer failed to respond to the fact that the increased travel associated with the role of CPSO for Northern Island and the Scottish Islands was incompatible with the Claimant's personal circumstances;

1.1.12 The Appeal Officer ignored the fact that the Claimant was not allowed trade union support in meetings with Richard Hackwell on 1st and 15th June 2020; and

1.1.13 The Respondent breached its duty of care by (a) removing Stan Woznicki as the Claimant's line manager and nominating three other line managers in three months being Alun Newsome, Richard Hackwell and Bill Spiers; (b) Richard Hackwell failed to provide support to the Claimant.

1.2 The Tribunal will need to decide:

1.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

1.2.2 Whether it had reasonable and proper cause for doing so.

1.3 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end. The Respondent....

1.4 Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.5 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

2. Remedy

Unfair dismissal

2.1 *The Claimant does not wish to be reinstated and/or re-engaged.*

2.2 What basic award is payable to the Claimant, if any?

2.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

2.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.4.1 What financial losses has the dismissal caused the Claimant?

2.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.4.3 If not, for what period of loss should the Claimant be compensated?

2.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.4.5 If so, should the Claimant's compensation be reduced? By how much?

2.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably

fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

2.4.7 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce his compensatory award? By what proportion?

2.4.8 Does the statutory cap of fifty-two weeks' pay or £88,519 apply?

- 5 The issues to be determined were further clarified during the oral closing submissions of the parties' Counsel as follows:
- a. The Respondent does not assert that the Claimant didn't resign for the breaches he alleges. It accepts the Claimant resigned for the reasons set out in the leaver's questionnaire (see page 281) and his email dated 29 September 2020 (page 295). The Respondent asserts there was no breach.
 - b. The Respondent accepts that if there was a constructive dismissal it would not be for a fair reason within the Employment Rights Act 1996.
 - c. The Claimant no longer relies upon issue 1.1.7 as being a breach of the implied term of trust and confidence or culminating in it.
 - d. The Claimant asserts that the remainder are asserted as a cumulative breach of the implied term of trust and confidence, where the last straw is the outcome of the appeal relying on issues 1.1.9 to 1.1.12.

The hearing

- 6 With the parties consent this final hearing was conducted by video.
7. It was agreed at the commencement of the final hearing that the time would be used as follows:
- | | |
|-------|---|
| Day 1 | 2 hours - Tribunal reading and preliminary matters
3 Hours - Claimant's evidence |
| Day 2 | 1 hour - Claimant's evidence
4 Hours - Respondent's evidence |
| Day 3 | 2 hours - Respondent's evidence
2 hours - Closing submissions |

Day 4 3 hours - Tribunal deliberations
 Judgment
 2 hours - Dealing with compensation or other remedies if
 appropriate

8. It was also agreed that a judgment on liability would be delivered first, before then addressing remedy as appropriate.
9. Unfortunately, the above timetable was not met with submissions concluding at 4:30pm on day 3. It was indicated that judgment may not be deliverable at 2pm on day 4 as anticipated by the timetable. The parties indicated that it seemed realistic for remedy matters, if appropriate, to be determined at a subsequent hearing. Enquiry was then made as to the parties' position on written reasons. The Respondent confirmed it would be requesting them. It was therefore considered proportionate and in line with the overriding objective to reserve the decision and release the parties.
10. For this hearing I was presented with an agreed pdf bundle consisting of 376 pages. I was also presented with a bundle of witness statements which included (with witnesses listed in order their evidence was heard):
11. Statements on behalf of the Claimant
 - a. The Claimant
 - b. Stan Woznicki ("SW") (the Claimant's former line manager)
 - c. Jayne Ede ("JE") (a work colleague of the Claimant)
 - d. Tom Bulpit ("TB") (the Claimant's union representative)
12. Statements on behalf of the Respondent
 - a. Chris Thomas ("CT") (SW's line manager)
 - b. Peter Mizen ("PM") (the HM Coastguard Operations team lead)
 - c. Richard Hackwell ("RH") (the Claimant's temporary manger up to termination of employment)
 - d. James Morris ("JM") (who carried out the alignment process)
 - e. Matthew Briggs ("MB") (who heard the alignment appeal)
13. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after

listening to the factual and legal submissions made by and on behalf of the respective parties.

The facts

14. The Claimant commenced employment with the Respondent on the 4 July 2017.
15. The Claimant resigned on the 10 September 2020 giving one months' notice so that his last day of employment was the 10 October 2020 (see page 245).
16. As the Claimant states in paragraph 2 of his witness statement, he ... "... was employed by the Respondent in the role of Deputy Head of Branch for Counter Pollution and Salvage from 4th July 2017 to 10th October 2020. A copy of the offer letter is within the bundle at pages 48 – 56, which confirms my job title. This also confirms that my location for work as Southampton, SO15 1EG."
17. As can be seen from the contract of employment at page 45 of the bundle the Claimant's job title is confirmed as "Counter Pollution and Salvage – Deputy Head of Branch (Mariner)".
18. Of relevance to this claim the following is noted from the Claimant's terms of employment:
19. Clause 5 (page 50) ... "**Job Title and Duties** ... You are appointed to work within DfT in Grade **SEO**. Your job title and duties will be outlined for you by your line manager. These will be recorded as objectives and reviewed regularly as part of the DfT's Performance and Development Management Policy."
20. The Performance Management Policy and the Performance and Development Policy documentation presented to this Tribunal are at pages 308 to 329 of the bundle. I was specifically referred to page 327 which reads:

"Objectives

7.1.10 our reports will assess your performance as a job holder against Agency objectives:

- which have been agreed between you and your Line Manager at the outset of each reporting period,
- Which will include, where appropriate, up to 3 mandatory corporate objectives.

- where appropriate, you must agree changes to your objectives with your Line Manager during the reporting period,
- if you move to a new post during a reporting period, you must agree your objectives for the remainder of the reporting period with your new Line Manager.

7.1.11 Any disagreements about objectives must be dealt with in accordance with the current guidance published by the Agency – see paragraph 7.1.6

7.1.12 As a Line Manager, you must ensure that jobholders' objectives are kept up to date and relevant to the jobholder's post and Band/grade."

21. Clause 6 (page 50) ... "**Place of work** ... Your normal place of work will be **Spring Place, 105 Commercial Road, Southampton, SO15 1EG.**".
22. Clause 7 (page 50) ... "**Mobility** ... You have a liability to move between posts which are within reasonable daily travelling distance of your home. Reasonable daily travelling distance will be determined on a case-by-case basis taking into account individual circumstances, Grade, location, social and health circumstances (such as child care arrangements). The Department may also assign you to work in locations other than the normal place of work due to operational or business need. The normal place of work may also change, subject to reasonable travelling distance, as a result of a move of office or business need at a later date."
23. It is not in dispute that the Claimant was recruited against the role profile at pages 148 to 151 of the bundle that includes as a key responsibility ... "- be able to undertake OPRC audits of ports, harbours and oil handling facilities to ensure compliance with the OPRC regulations and current legislation, initiating enforcement measures as appropriate." ("the OPRC audits").
24. It is not in dispute that the job role of the Claimant as formally recorded on the Respondent's management storage system is at pages 111 to 115 of the bundle.
25. At page 111 it notes about the Role Purpose ... "- be the Deputy Head of Branch, able to act on behalf of the HoB on routine policy and operational matter and act as temporary substitute in his/her absence. - represent the HoB at both national and international fora where appropriate and directed. - support the development of the UK's Maritime Pollution Prevention, Preparedness & Response policy and strategy, supported by other Government Departments. - establish and maintain close liaison with stakeholders for the provision of advice in the preparation of Pollution Response Plans in accordance with the Civil Contingencies Act. - providing,

managing and directing counter pollution resources to deal with actual, or the threat of pollution, incidents.”.

26. It also includes the OPRC audits as a key responsibility.
27. The Claimant asserts that this key responsibility was removed from his role and he never undertook it. He relies upon other job role documents that were not placed on the management storage system which are at pages 152, 156 and 160 to demonstrate what his role was, and which do not include the OPRC audits as a key responsibility.
28. The Claimant also relies upon his objective documents (as referred to in paragraph 6 of his statement) ... “My objectives in the role when I first started are as set out on pages 57- 63 of the Tribunal bundle, with the exceptions of part of Objectives 6 (liaison with 2Excel from Nov 19) and all of Objective 7 (lead on Maritime Risk Study from Nov 19) on Page 58 of the bundle. These objectives were subsequently amended/inserted as my job matured and are caveated accordingly.”. Also, at paragraph 31 ... “I was annually appraised against the objectives set out in my Performance Management Form (Bundle pages 57 – 63) which reflected my duties as Deputy Head of Branch and did not include port auditing.”.
29. The Respondent accepts that the Claimant did not undertake OPRC audits. The Respondent also accepts he was not trained on that key responsibility. The Respondent does not accept that there was a change to his role profile asserting that the one on the management storage system was the only one that applied.
30. The Respondent does not dispute the Claimant’s objectives as set out in the Performance Management Forms. As CT states in paragraph 3 of his witness statement ... “I have seen the Claimant’s Performance Management Form for 2019-20 at [57], the list of “what” objectives is a fair and comprehensive overview of the Claimant’s work responsibilities.”.
31. The formal job role (at page 114) (as all the other job role documents do) notes a ... “Moderate travel requirement, including overnight stay.”. It is not in dispute that the Claimant undertook some travel as part of his role as deputy head of branch. As the Claimant says at paragraph 66(f) of his witness statement ... “In my former role I visited Scotland for 2 days about every 3 months as part of my ETV management role.”. However, what is in dispute between the parties is the extent of travel required in the new role. As the Claimant goes on to state ... “This is significantly less than the requirements of a CPSO for the Scottish Islands and Northern Ireland (and was exacerbated by the backlog).”.

32. During cross examination of the Respondent's witnesses and in submissions Claimant's Counsel made the case that the role profile was not a contractual document. It was argued that it would have no contractual bearing on what the Claimant's role is. In short, that the Claimant could not be made to work to the contents of that document.
33. The evidence of the Respondent's witnesses on this matter was consistent in that the role profile was a contractual document.
34. This is not a matter that the Claimant or his supporting witnesses presented any evidence on. The Claimant's supporting witnesses included his former line manager and the Claimant's union representative so if this was a view they held factually, it would clearly be a significant part of their evidence to this Tribunal. It was not. To the contrary the Claimant's case is very much reliant upon the role profile being a contractual document. For example, reference was made in cross examination to the trust provisions, reliance is placed on the travel term asserting it was anticipated that would be breached by the new role. The Claimant's challenge to the alignment process is that the wrong role profile was used and not that it was not a relevant contractual document.
35. The Claimant has not proven on the balance of probability that the role profiles did not form part of his contractual terms. I have not been presented any documentation to support that to be contractual the role profile must be on the management storage system.
36. What I would also observe is it would be wrong to take the view that a role profile on its own can be the only document that definitively determines what an employee's role entails. This is not how clause 5 of the contract states it. The role profile includes a list of key responsibilities but is not a full clarification of what is actually being done and expected of the Claimant. The relevant clause of the employment contract itself refers to the line manager and the performance and development management policy which appears to relate to paragraph 7.1.10 of that policy.
37. The Claimant in paragraph 10 of his witness statement notes a positive trajectory for his career ... "On 18th October 2019 (Bundle Page 64) I received an email from the Respondent confirming that, as part of their strategic planning, succession planning had identified the Head of Branch for Counter Pollution and Salvage as a critical role. I was identified as a potential successor for this position 'as an individual with the potential skills and capability to cover this role'. I assumed from this email that my long term future at the MCA was secure."
38. The matters complained about by the Claimant in this claim arise from May 2020.

39. As at paragraph 12 of the Claimant's witness statement ... "On 19 May 2020 at 1400 Christopher Thomas, the Deputy Director of Her Majesty's Coastguard (HMCG), held a meeting via Microsoft Teams where he unexpectedly informed the Counter Pollution and Salvage Branch that there had been a re-structure which would see the Branch disbanded when the structure came into force the following day.". The Claimant also notes ... "Given the absence of consultation, I assumed that my job would broadly remain the same." (paragraph 13).
40. This lack of consultation on matters appears to be across the whole branch, as the Claimant notes in paragraph 14 of his statement ... "In a discussion with my Branch colleagues immediately after this briefing I was made aware that no-one within the Branch had been consulted on the re-structure. Stan Woznicki had been informed 24 hours before us that a re-structure had taken place, but he had not been consulted on its structure and was deeply concerned about the impact on the team and branch delivery.".
41. As the Claimant states in paragraph 19 of his statement ... "On 20th May 2020 I was emailed a copy of the proposed new structure by Claire Hughes, the Director of HMCG (Bundle pages 174 – 177). I appeared in the HM Coastguard Operations wiring diagram (Bundle page 176). There was no role assigned to myself and I had no line manager. As the box I was in was alongside that of 3 CPSOs (Counter Pollution and Salvage Officers) I thought that this may have been what was intended for me.".
42. The Claimant complains (as set out in issue 1.1.1) that the restructure took place which dismantled the branch of which the Claimant was the Deputy Head on 20th May 2020. This removed the Claimant's job without prior engagement with the branch or the Claimant's trade union.
43. He also complains (issue 1.1.2) that the new organizational chart of H.M. Coastguard which Claire Hughes emailed to the staff of H.M. Coastguard on 20th May 2020 did not include a job title for the Claimant and there had been no discussion with the Claimant about the changes to the Claimant's role prior to that email.
44. As can be seen from the contents of the document at page 175 of the bundle a new structure is to be adopted ... "Over the last month, my Senior Team and I have turned our attention to the HM Coastguard Headquarters functions and I am writing to you now to inform you of a number of structural changes that will come into force with immediate effect and why.". Further ... "We believe that the current structures are confused and through no fault of line management, not operating as efficiently as we would wish, there are areas of duplication and overlap of workstreams. This disjointed approach does not allow us to deliver against the Big 3 or effectively discharge out

strategic Business Plans, is not fair on our current HQ teams and therefore it is clear there is a need for a more focused alignment.”.

45. It further says (at page 177) ... “To reassure you, these changes do not involve any redundancies, substantial changes in role profiles or any changes in core terms and conditions, it is just a rationalisation of similar work across the HM Coastguard HQ functions to better imbed the One Coastguard ethos and associated working practices.”.
46. The Claimant does appear to be in a unique situation as he has not been given a job title in the new structure unlike his colleagues.
47. PM confirmed in his oral evidence that of the structural diagram at page 176 of the bundle, only the Claimant lost his job title as although he explained Mark Lawson’s job title subsequently changed, it was not lost at that time.
48. It is not in dispute that this has happened without prior engagement with the branch or the Claimant’s trade union. It was also without discussion with the Claimant about the changes to the Claimant’s role prior to the 20 May 2020 email.
49. At the heart of this case is the Claimant’s assertion that there was a substantial change in his job role. Although there was some disagreement between the parties’ evidence as to the extent of the dismantling of the branch, it is clear there is a new structure and clear that the Claimant has no job title within it.
50. On the 21 May 2020 the Claimant sends a copy of his role profile to PM (see page 72). The Claimant states in the email ... “As the Deputy head of Branch I have no responsibilities for OPRC plans”. This was confirmed as the role profile at page 148, being the role profile he was recruited into. It includes the OPRC audits key responsibility. What the Claimant writes in his email and what is stated in the role profile he provides do not match.
51. On the 25 May 2020 the Claimant sends a different role profile (see page 71) referring to it as the “latest version”. This was confirmed as the one at page 111 of the bundle and being the one on the management storage system. It also includes the OPRC audits key responsibility (see page 112).
52. Chronologically we then get to issue 1.1.3 that the Claimant was informed of his new role in a meeting with Peter Mizen, Gary Spark, Andrew Healy and Jayne Ede on 26th May 2020 and there had been no consultation with the Claimant about the changes to the Claimant’s role prior to that meeting.
53. On the 26 May 2020 there is meeting which the Claimant and PM attend. The Claimant describes this at paragraphs 32 to 34 of his Statement. In

- paragraph 33 the Claimant says ... “When Peter later discussed the instigation of a fourth CPSO, I asked whether he was insinuating that that would be my new role given that I had not been allocated a position in the new structure and had been placed alongside the 3 other CPSOs in the diagram.”. Then in paragraph 34 ... “Peter accused me of ‘putting words in my mouth’ but later made several references to ‘when Russel trains as a CPSO’. I noted that, in making this comment, Peter acknowledged that I was not trained as a CPSO. At the meeting he also stated that our allocated line managers would change. So at this stage I still had no line manager.”.
54. PM refers to this meeting at paragraph 9 of his witness statement ... “On 26 May 2020 I held a meeting with the Claimant, Richard Hackwell (“Mr Hackwell”), Mr Healy, Ms Jayne Ede and Gary Spark (“Mr Spark”) via teleconference. The Claimant’s summary of the meeting at [76] is not an accurate record of the meeting. No notes were taken by myself or Mr Hackwell as it was not a formal management or grievance meeting. At the meeting, I confirmed that there would be no significant changes to the Claimant’s role function and responsibilities as a result of the restructure. I explained that to the extent that the Claimant would be required to perform functions such as undertaking audits of ports, harbours and oil handling facilities, such functions were within his role profile and if he needed any assistance, support or training that it would be provided. I informed the Claimant that he should report to Mr Hackwell as a temporary measure while we established whether we are going to have 3 or 4 CPSO operational areas.”.
55. As the Claimant notes at paragraph 35 of his witness statement ... “A copy of the record of the meeting between Peter, myself and the CPSO’s is contained within the bundle at pages 76-77. I prepared this as a record of the dialogue involving myself as no formal minutes were taken. They were forwarded to Peter, acknowledged and not contested (Page 89 of the Bundle).”.
56. Looking at page 89, PM in his email dated 29 May 2020 does not appear to challenge the content of the record of meeting, but does take issue with final part of the Claimant’s email where PM says in response ... “It is not accurate to say that you have not had a line manager since the announcement, I told you last week at the meeting that until we establish whether we’re are going to have 3 or 4 operational areas you would report to Richard Hackwell as a temporary measure.”.
57. This is in reply to the part of the Claimant’s email (dated 28 May 2020) that reads (at page 90) ... “This whole process – the imposition of re-structuring with no prior engagement and now complete uncertainty regarding my role - has caused me significant stress and anxiety. To have removed my Line Manager in the process has exacerbated the issue. I have not had any Line

- Management since the new structure came into place nine days ago, and this remains the case.”.
58. As acknowledged by PM in his oral evidence he provides no response to the Claimant where he raises that the whole process has caused him significant stress and anxiety.
59. I accept the Claimant’s recall of the meeting which is supported by a note contemporaneous to the meeting that was considered by PM at the time. However, I do also accept what PM recalls he said at the meeting about the Claimant reporting to RH as a temporary measure. PM confirms this in his email dated 29 May 2020. The Claimant does not reply in challenge to what is said. From this it is proven on the balance of probability that at the meeting on the 26 May 2020 the Claimant is led to believe that he will become a fourth CPSO and that he should report to RH as a temporary measure.
60. It is not in dispute that there had been no consultation with the Claimant about the changes to the Claimant’s role prior to that meeting.
61. Of relevance to consider now is issue 1.1.13 that the Respondent breached its duty of care by (a) removing Stan Woznicki as the Claimant’s line manager and nominating three other line managers in three months being Alun Newsome, Richard Hackwell and Bill Spiers; (b) Richard Hackwell failed to provide support to the Claimant.
62. It is not in dispute that SW ceases as the Claimant’s line manager on the 20 May 2020. The Claimant’s interaction with Mr Newsome on the matter is recorded in emails between them dated 21 May 2020. The Claimant writes to Mr Newsome saying that he believes he will be his new line manager. Mr Newsome replies that it is ... “apparently so”. However, it has not been evidenced as being so. The position is clarified at the meeting on the 26 May 2020, and by subsequent email from PM as already referred to above. From this RH is in the role during the transition from the Claimant’s old role to his new role. The Claimant has not proven on the balance of probability all of what he asserts, that the Respondent nominated three other line managers in three months.
63. In respect of the second part of what the Claimant asserts that RH failed to provide support to the Claimant, the Claimant has not proven this on the balance of probability. RH when cross examined made it clear he believed the Claimant was okay and the Claimant had not reached out to him for support. It is not in dispute that the Claimant did not reach out to RH for support. Nothing was evidenced by the Claimant that proves RH was on notice.

64. On the 4 June PM is sent by the Claimant (as described by PM in paragraph 14 of his witness statement) ... "... a suggested role profile that he considered to more accurately reflect the work he undertook [96], a copy of which is at [99], and a summary of his role regarding the ETV. The Claimant had removed tasks which he claimed he did not routinely undertake in his day-to-day responsibilities but nevertheless remained part of his role profile. In particular, the Claimant had removed Key Responsibilities relating to liaising with Regional CPSOs, providing support to CPSOs and undertaking OPRC audits of ports, harbours and oil handling facilities."
65. It is clear that at this point it is understood there is a significant difference of views between the Claimant and PM as to what his old role had involved.
66. PM organises for an alignment process to take place, which will compare the two roles. As he says in paragraph 16 of his witness statement ... "Whilst there was no requirement to undertake an alignment of roles, I felt that it might be a useful exercise to demonstrate to the Claimant that there had been no significant change to his role (as set out in Ms Hughes message) and I hoped that this might help the Claimant start to come to terms with his transfer to my business area."
67. Although there is a policy document concerning an alignment process presented to this Tribunal (pages 299 to 307), it was the Respondent's consistent evidence that this policy was not relevant to the Claimant's circumstances nor followed by them in the Claimant's case. In short, as PM has stated, there was no requirement to do it.
68. An alignment process is conducted though. As JM states at paragraph 10 of his witness statement ... "On 16 June 2020 at 11am I held an Alignment Review meeting via Microsoft Teams with Mr Mizen, Mr Hackwell and Mr Bulpit. I did not receive a request from the Claimant to attend. As the Alignment Review process considers one role against another and does not consider whether a particular role holder aligns to the proposed role, individual role holders are never present for Alignment Reviews. I compared the two role profiles based on seven factors which included, a) grade; b) role location; c) scale of line management responsibilities; d) role purpose; e) key responsibilities; f) skill, knowledge and behaviours; and g) other key features of the role. After careful consideration of the relevant evidence, I concluded that the overall degree of similarity between the two role profiles was close to 90%". The role profiles compared are the one from the management storage system, which includes OPRC audits as a key responsibility, and the new CPSO role.
69. When asked about this in cross examination the Claimant did not disagree with this documentary analysis but that was subject to two caveats. He said that the role profile used was not accurate of what he did and there was no

representation at the meeting with Counter Pollution and Salvage expertise. This forms the basis of his complaints about the change of role and the alignment process.

70. The Claimant considers the change to his role was a tacit demotion. As the Claimant asserts in issue 1.1.4 the Claimant's role was changed from Deputy Head of branch to CPSO for Northern Island and the Scottish Islands, which was a tacit demotion as the Claimant would become the least experienced CPSO after three years as Deputy Head of branch. The Respondent disputes this asserting that it did not consider the Claimant would be the least experienced CPSO.
71. The Claimant also asserts that (issue 1.1.5) the most recent and accurate role profile was not used in the alignment process, that role profile being the version prepared by Stan Woznicki on 1st November 2017 and authorized by Chris Thomas on 31st March 2019. The Appeal Officer ignored the testimony of Stan Woznicki that Chris Thomas had agreed that role profile.
72. Further the Claimant asserts (issue 1.1.8) that there was no Counter Pollution and Salvage expertise at the Alignment Panel and the Appeal. The Appeal Officer disagreed but provided no evidence.
73. There is a sub issue to these matters being issue 1.1.6. That is the Claimant asserts that the Appeal Officer used the role profile for the role of CPSO for Northern Island and the Scottish Islands which was prepared by Stan Woznicki on 1st November 2017 and authorized by Les Chapman on 31st March 2018 despite evidence that Stan Woznicki had never seen it and Les Chapman was not employed by the Respondent. It is clear though from considering the role profiles and witness evidence in this case that date errors are a common fault across most of the role profiles. SW acknowledged he had made a date error on some of the role profiles he had completed. Also, PM explains about the date error the Claimant complains about at paragraph 17 of his witness statement saying that ... "The original role profile was used as the base document and then amended to form the new role profile and when it was saved the amended details regarding who prepared and authorised the new role profile never saved. This was never picked up on because focus was rightly on the content of the new role profile rather than who had proposed or authorised it."
74. Considering first then, what was the Claimant's relevant role profile?
75. The Claimant's line manager up to the 20 May 2020 was SW.
76. SW states at paragraphs 4 to 6 of his witness statement that the "... Claimant was employed as the Deputy Branch Manager and, as my Deputy, had to be able to temporarily take over as Head of Branch, covering the

routine day to day matters of management, administration and operations. These were in addition to other specific functional activities noted in the role profile which was reviewed annually or when circumstances required. The role necessitated a close liaison between both Head and Deputy Head and considerable trust, this was successfully established and maintained.” SW says that in November 2017 the initial role profile was reviewed, and it was decided to remove the OPRC audit requirement.

77. As then detailed in paragraph 8 of SW’s witness statement ... “This removal was as a consequence of placing additional weight on the other component roles. This change was briefed to, examined by and approved by the incumbent Secretary Of States Representative (SOSREP) who was my Line Manager at the time. This amended Role Profile was further briefed to my next Line Manager, Mr Christopher Thomas in March 2018, though only verbally. It was again agreed to.”.
78. We have no evidence from the SOSREP (a Mr Chapman) to dispute what SW says. We do though have evidence from CT who says at paragraph 5 of his witness statement ... “I understand that the Claimant claims that I authorised the role profiles at [159] and/or [160]. Any changes made to a role profile would have been uploaded to the OMS to ensure the individual and those interacting professionally with the postholder would have access to the most recent version. Current role profiles were used by me during reviews and objective setting with those who directly reported to me. I do not believe there had been any revised role profiles for the DHoB role uploaded to OMS at the time of the Alignment Review and I had not been sent any emails or other correspondence asking me to agree changes or adjustments to the Claimant’s role profile. Neither the Claimant nor his line manager approached me to consider a draft role profile or approve any changes. Therefore I am confident that the role profile used in the alignment process was the official extant version recorded with OMS and I was not aware of anything else that had been drafted between the Claimant and Mr Woznicki and not aware or can recollect any written correspondence provided at the time or subsequently which would have supported any changes to the Profile. I would have not expected to use anything but the extant version as this would have been on OMS and would have been used for all PMR discussions where objectives were set and reviewed quarterly between the claimant and his line manager. As a previous Director of HR with the MCA I was always meticulous on HR process and would not have accepted a role profile change without a valid operational or strategic reason or an audited process of some sorts with written and signed agreement. None of which exists.”.
79. There is clearly a dispute between SW and CT as to what they recall about their interaction on the role profile. However, save for the amended role profile that SW says was already agreed with the SOSREP not being posted

on the management storage system, which SW admits should have been done, I accept what SW says of his interaction with the SOSREP, which he has confirmed to this Tribunal under oath, that is the change was briefed to, examined by, and approved by the SOSREP. This would mean that the ORPC audits were no longer part of the Claimant's key responsibilities.

80. As SW confirms in paragraph 11 of his witness statement and which I accept ... "The focus of the Claimant's role was to be my deputy not a Counter Pollution and Salvage Officer. I confirmed this to him before the role profile was changed and officially agreed by my line manager on 30 November 2017. As such the Claimant did not undertake the duties of a CPSO prior to the restructure. Whilst some components of the CPSO are similar and I am restricted from a direct comparison due to the lack of consultation. I consider the lack of any audit duties to be a substantial departure between the two roles."
81. The Claimant's Performance Review Documents, the relevant parts of which are at pages 58 and 210 clearly show a focus on supporting the head of branch and refer to ETV work. ORPC audits are not set as objectives. As already noted, CT confirms that the list of "what" objectives is a fair and comprehensive overview of the Claimant's work responsibilities.
82. It is not in dispute that the Claimant was to be given the new role of ... "Counter Pollution and Salvage Officer - Northern Ireland and Scottish Islands (NISI)".
83. Was this a tacit demotion in that the Claimant would become the least experienced CPSO after three years as Deputy Head of branch?
84. The role purpose for that role is (see page 106) ... "- represent the MCA at both national and international fora where appropriate. - support the development of the UK's Maritime Pollution Prevention, Preparedness & Response policy and strategy, supported by other Government Departments. - establish and maintain close liaison with stakeholders in Northern Ireland and the Scottish Islands (Stornoway, Shetland and Orkney) for the provision of advice in the preparation of Pollution Response Plans in accordance with the Civil Contingencies Act. - providing, managing and directing counter pollution resources to deal with actual, or the threat of pollution, incidents."
85. Compared to the old role ... "- be the Deputy Head of Branch, able to act on behalf of the HoB on routine policy and operational matter and act as temporary substitute in his/her absence. - represent the HoB at both national and international fora where appropriate and directed. - support the development of the UK's Maritime Pollution Prevention, Preparedness & Response policy and strategy, supported by other Government

Departments. - establish and maintain close liaison with stakeholders for the provision of advice in the preparation of Pollution Response Plans in accordance with the Civil Contingencies Act. - providing, managing and directing counter pollution resources to deal with actual, or the threat of pollution, incidents.”.

86. The key responsibilities in the new role are at page 107. There is a difference in respect of ETV work ... “- be the operational point of contact of the Emergency Towing Vessel (ETV), to include monthly programming, monitoring and reporting, training and exercising -working closely with Coastal Resources when required with regards to contract management.”

87. This compares to page 112 ... “- be the contract and operational manager of the Emergency Towing Vessel (ETV), to include monthly programming, monitoring and reporting, recording of expenditure, training and exercising and audit.”.

88. The differences are acknowledged by PM in his witness statement (see paragraphs 6 and 19). As he sets out in paragraph 6 ...

“6. On 21 May 2020 I sent the Claimant, and the CPSOs Gary Spark (“Mr Spark”), Andrew Healy (“Mr Healy”) and Jayne Ede (“Ms Ede”) an invitation to a meeting to discuss proposed changes to the structure and how this would impact their roles [65]. Due to the downsizing of the CPS branch and the Claimant’s transfer to HMCG Operations, the Deputy Head of Branch element of the Claimant’s role would no longer be relevant and elements relating to the contractual management of the Emergency Tower Vessel (“ETV”) were moving to Coastal Resources. The ETV contractual management responsibility included monthly programming, monitoring and reporting, recording of expenditure and exercising and audit. I estimate that the time taken to perform the Claimant’s ETV contractual management duties would have taken no more than approximately two days a month...”.

89. PM confirmed in his oral evidence about the change to ETV work that meant 2 days a month would become free for the Claimant.

90. PM confirmed that no such analysis was undertaken of the Deputy Head of Branch work. PM said that it was absorbed across others and management of CPSOs no longer existed. He confirmed that he did not enquire as to the time taken by the Claimant on such work. In my view this is a significant oversight on the part of the Respondent in view of how significant such work was to the Claimant as demonstrated by the accepted evidence of SW and the Claimant’s undisputed performance reviews.

91. For these reasons I find that the actual change in job roles as proven on the balance of probability by the Claimant does evidence a tacit demotion in

- that the Claimant would become the least experienced CPSO after three years as Deputy Head of branch. The Respondent has not presented evidence based on the role the Claimant was actually undertaking to support why this would not be so, as it is accepted that the Claimant did not undertake the OPRC audits, was not trained to do such audits and he was losing his Deputy Head title designation and associated duties, as well as the ETV contract elements.
92. It is not in dispute that no direct input was sought from SW on this matter.
93. The Claimant does not agree with the alignment decision and appeals it.
94. As PM states in paragraph 20 of his witness statement ... "On 16 June 2020 I informed Ms Hughes that the result of the alignment exercise was that the role profiles were a 90% match [118]. I made the comment that the Claimant's appeal made me smile because it was predictable, even though the changes to the Claimant's role were not significant or complicated. The resistance of the Claimant to the change process was taking significant management resources."
95. During the cross examination of PM, he was taken to the email he sent dated 16 June 2020 (at page 118) where PM writes ... "Thanks - we did the alignment exercise this morning for Russel Freeman and James Morris scores it at 90% - they are going to appeal which did make me 😊 However the amount of time we are wasting on these people is excessive."
96. When asked about this email in cross examination PM wanted to provide substantial background about a previous grievance issue the Claimant had raised on a different matter and how he viewed the Claimant's conduct in that previous process as being unreasonable. He explained that this made him think about the current process, here we go again with time being wasted, and that is what made him smile (using the emoji). This email shows a dismissive approach by PM. He had a view about the Claimant, and his concerns and that they were eating up an inordinate amount of time. This position by PM as recorded on the 16 June 2020 demonstrates the decision had already been made to change the Claimant's role and it was a waste of time to consider it further.
97. The Claimant's appeal is then considered by MB.
98. The complaints the Claimant has about the appeal outcome are (as set out as issues 1.1.9 to 1.1.12):
- a. The Appeal Officer did not at any stage engage with Stan Woznicki, former Head of Branch, to determine the Claimant's specific role. The

Appeal Officer contended that the Claimant should have been conducting audits as part of his job, which was factually incorrect;

- b. The Appeal Officer's response to the Claimant's appeal ground that there would be an increased travel burden in the role of CPSO for Northern Island and the Scottish Islands was based on an incorrect assumption and no analysis of future travel needs;
- c. The Appeal Officer failed to respond to the fact that the increased travel associated with the role of CPSO for Northern Island and the Scottish Islands was incompatible with the Claimant's personal circumstances;
- d. The Appeal Officer ignored the fact that the Claimant was not allowed trade union support in meetings with Richard Hackwell on 1st and 15th June 2020.

99. MB confirmed in his oral evidence that he understood the complaints raised by the Claimant in his appeal were as set out in paragraph 60 of the Claimant's witness statement:

"60. I articulated my reasons for the appeal and stated that the outcome I desired was to be placed in the re-deployment pool. The reason for this was:

- a. that my previous job had been deleted;
- b. the new position was a demotion;
- c. I was not trained for this role;
- d. it involved excessive travel; and
- e. due to the management of the restructure, I felt it would be difficult to work alongside some colleagues."

100. MB confirmed in response to the matters raised that the previous job had been deleted, he did not accept that the new position was a demotion, he believed the Claimant had been trained in the role, with only one variation being the audits which was easily corrected. He did not consider the role involved excessive travel. That the Claimant was concerned it would be difficult to work alongside some colleagues, MB confirmed that he did not address that as it was not relevant to the appeal against the alignment.

101. MB accepted that he did not engage with SW on the appeal process.

102. The Claimant had continued to undertake the old role during this process so there is no evidence of the actual travel requirements in the new

- role. There are assumptions made by both sides as to what the travel requirements would actually be.
103. The Claimant and his supporting witnesses considered the new CPSO role would have an increased travel requirement.
104. The Respondent's witnesses maintained it would not save for an initial increase. As MB states in paragraph 13(d)(iv) of his witness statement ... "... Although there may be an increase in travel in the CPSO role initially, that increase was because of a backlog of work from port audits that the Claimant should have been doing in his role but had not been doing.". MB did accept in cross examination that he was not implying any back log was the Claimant's fault (and he expressly states this in the appeal outcome at page 239 of the bundle).
105. About the potential travel requirements, MB is made aware as part of the Claimant's appeal that a medical condition of the Claimant's wife precluded significant periods of separation.
106. The appeal outcome is sent to the Claimant by email dated 2 September 2020 (see page 237) and the appeal outcome itself is at pages 238 to 240 of the bundle.
107. The appeal outcome confirms that ... "After careful consideration I have found that the decision to align you was the correct decision and as such you remain aligned to the post of Counter Pollution and Salvage Officer – Northern Ireland and Scottish Islands.". It does not address the Claimant's particular personal circumstances in respect of the travel requirements in the new role. It does not communicate any consideration of the concerns the Claimant raised about not having union representation at the meetings on the 1 and 15 June 2020. MB confirmed in his oral evidence that he could not recall reverting back to the Claimant on this issue.
108. The appeal outcome offers no alternative to the Claimant taking up the new role, such as details of any potential redeployment process. In submissions reference was made by Respondent's Counsel to an email of TB's dated 18 June 2020 (see page 163.1) as being evidence of MB attempting to communicate to assist the Claimant by setting out what the necessary processes were and what could happen. The relevant part of that email reads that MB "... advised that we still put in an appeal letter to keep the alignment process running, as that is the clearest way to the redeployment outcome we are seeking, and also protects Russel from being forced into the operational audit job. He has stated that it is now Government policy to not make people redundant due to Covid-19, which would hopefully extend the life of Russel having preferential treatment in job applications, though it does remove the (albeit very limited) option of a

redundancy payout". There does not appear to be anything further from MB as to achieving the desired redeployment though. It is not in dispute the Claimant raises it as an option at the appeal. He then gets nothing back from MB or anyone else at the Respondent about it.

109. The Claimant then resigns on the 10 September 2020 (page 245) saying ...

"Good Morning Bill,

I am tendering my resignation today. In accordance with Staff Handbook, Chapter 13, section 13.1.3 my notice period is 1 month, which makes my final day of service at the MCA as 10 Oct 2020. Outstanding leave will be calculated through ABW and HR.

At the link here I have forwarded the Leavers process. I will complete all aspects for myself, but please note that there are also some actions for the Line Manager.

We will need to arrange an Exit Meeting at some stage, which can be done in due course.

Regards

Russel"

110. The Claimant then states in his leaver questionnaire dated 22 September 2020 (see page 281):

"1. Why have you decided to leave the MCA?

A re-structure within HMCG resulted in my job changing significantly from the one I had applied for, requiring excessive travel to Northern Ireland and the Scottish Islands from Southampton. The re-structure, which saw the Counter Pollution Branch broken up, was conducted without prior engagement with any of the team including the Head of Branch.

The team has had no contact from either the Director or Deputy Director HMCG for over 6 months, and I have been given 4 line managers in 3 months. There has been no support from my line manager (prior to Bill Speirs) throughout the process.

Peter Mizen has steam-rolled a change management process without engagement, supported by his deputy who was made my line manager and never supported me.

I cannot tolerate such behaviours and have resigned as a consequence.”

111. Then by email dated 29 September 2020 (page 295), the Claimant says:

“I am hugely aggrieved by the outcome of my appeal against the alignment process, which sought to place me in the position of Counter Pollution and Salvage Officer (CPSO) for Northern Ireland and the Scottish Islands. Some elements of your response are factually incorrect. The outcome of the appeal was the basis for the submission of my resignation on 10 September 2020.

The proposed new role has a change of focus from my previous role - that of undertaking OPRC audits of ports, harbours and oil handling facilities. I know from liaising with other CPSOs that the conduct of OPRC audits would constitute the majority of my workload. I have never been required or requested to undertake this function, I have not conducted such audits previously and I am not trained for it. It also entails significantly more travel (from a Southampton base) than my previous role.

I was left with no alternative but to resign and consider this to be a Constructive Dismissal.”

112. The Respondent does not dispute that the Claimant resigned for these reasons. What it asserts is that there was no breach of contract to make such a resignation a constructive dismissal.

113. It was clear from the evidence of the Respondent’s witnesses that they did not consider the change to the Claimant’s role to require consultation or union representation. Nor did they consider it to need a formal alignment process.

114. The process the Respondent followed in this matter when changing the Claimant’s role was not based on any of its existing policy documents. The Respondent does not rely upon any job flexibility clause to make the change. Instead, they take the view the old and new roles were a greater than 70% match so the Claimant should take up the new role.

115. That is a conclusion that can be presented based on a comparison of the two written role profiles the Respondent relies upon.

116. However, this is a unique situation not apparently governed by any fixed policy meaning the Respondent could reasonably have adopted a fair and balanced process to address the issues the Claimant raised. There was nothing to prevent the Respondent conducting an alignment exercise that looked at day to day activities and weightings. The Respondent was well

aware of the extent of the dispute the Claimant had with the changes, but it continued to adopt a very narrow process of comparison.

117. I acknowledge that such an open process would be difficult to do when the decision has already been made to remove the Claimant's existing role. The Respondent though chose to implement the changes to the Claimant's role in this way, without prior consultation. It adopted the new structure requiring the Claimant to be given a new role and did not deviate from that.
118. The Respondent has not demonstrated to this Tribunal that the change communicated on 19 May 2020 required immediate activation. Although there is a recognised backlog in CPSO work it is not in dispute that it could not immediately be attended to while COVID travel restrictions remained. The Respondent was content to leave the Claimant to undertake his old role while the alignment process and appeal were conducted.
119. What appear to be legitimate concerns raised by the Claimant as part of the appeal process are ignored by the Respondent. There is nothing to suggest that the Claimant had a reasonable alternative to his resignation.
120. In cross examination of MB, he was taken to an email he wrote dated 29 September 2020 (see page 285) in reply to Head of Central HR Services email about the Claimant's exit interview which suggested further investigation was not needed to which he replies ... "I already have 😊 nfa to take for all the reasons you say".
121. When asked in cross examination about the email and the use of the smiley emoji MB said that he didn't think it did show the Claimant's concerns were not being taken seriously, but it was unfortunate he used a smiley.

The law

122. Having established the above facts, I now apply the law.
123. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
124. If the Claimant's resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 of the Act which requires the employer to show a fair reason (section 98 (1)) and provides (section 98(4)) that "... 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”.

125. I was referred to the following cases by the parties Counsel **Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA**; and both the ET and EAT decisions in **Argos Ltd v Kuldo** (ET Case No: 3302789/2018 and EAT 0225/19).

126. Before submissions the parties were also referred to **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA**.

127. I was not referred to any asserted breaches by either party relevant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 (“the ACAS Code”).

128. With regard to trust and confidence cases, Dyson LJ summarised the position in **Omilaju v Waltham Forest London Borough Council**: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: **Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761**. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example **Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D** (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as “the implied term of trust and confidence”. 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in **Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A**; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in **Malik** at page 35C, the conduct relied on as constituting the breach must: “impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer”.

129. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in **Kaur v Leeds Teaching Hospital NHS Trust**. Having reviewed the case law on the “last straw” doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer’s acts notwithstanding a prior affirmation by the employee.
130. The Court in Kaur offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? If so, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign. (5) Did the employee resign in response (or partly in response) to that breach?
131. In **Argos Ltd v Kuldo** the claimant had been mapped into a new role as part of a redundancy exercise but did not consider it suitable and asked to be made redundant instead. When Argos refused, she resigned and brought claims for unfair dismissal, wrongful dismissal and a redundancy payment. The EAT upheld an employment tribunal’s finding that the claimant had been constructively dismissed. The absence of consultation with the claimant over the mapping and the failure to properly assess the differences between the two roles were breaches of the implied term of trust and confidence, which entitled her to resign.
132. I was also specifically referred to a factual finding of the ET decision at paragraph 44 (which as noted by both Counsel is not binding upon me):
- “I find that Mr Mynard was accurate when he stated that the analysis should have been in relation to day to day activities. I am satisfied that undertaking an analysis on any other basis would be inappropriate. It is common for roles to have similar titles and broad duties and responsibilities. That itself does not make the two roles similar. It cannot be said that where two roles contain the same five broad duties and responsibilities but where one role involves working the first two duties 80% of the time and the other works the remaining three duties 80% of the time, those roles are the same or similar. To do so would be to assert that all cost manager positions are similar which is clearly an unsustainable assertion.”.
133. It is also worth noting as relevant to this case that an employee may resign in circumstances that amount to a constructive dismissal not only

where his employer has already committed a fundamental breach of contract (an actual breach) but also where the employer has indicated an intention to commit such a breach (an anticipatory breach). Vague or conditional proposals of a change in terms, conditions or working practices will not amount to an anticipatory breach and will not justify an employee resigning and claiming constructive dismissal. On the other hand, where the employer clearly indicates that an employee's contract is to be "breached", the employee is not obliged to 'wait and see' whether the employer carries out the threat. It has not been asserted in this case that what was happening to the Claimant were vague or conditional proposals of a change in terms, conditions or working practices.

The decision.

134. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the express terms of the contract relating to his job title and duties (clause 5 of his contract of employment), his place of work and reasonable travel requirements (clause 7 of his contract of employment); and the implied term of mutual trust and confidence.

135. Clause 5 reads ... "**Job Title and Duties** ... You are appointed to work within DfT in Grade **SEO**. Your job title and duties will be outlined for you by your line manager. These will be recorded as objectives and reviewed regularly as part of the DfT's Performance and Development Management Policy."

136. The Performance Management Policy and the Performance and Development Policy documentation presented to this Tribunal is at pages 308 to 329. I was specifically referred to page 327 which reads:

"Objectives

7.1.10 our reports will assess your performance as a job holder against Agency objectives:

- which have been agreed between you and your Line Manager at the outset of each reporting period,
- Which will include, where appropriate, up to 3 mandatory corporate objectives.
- where appropriate, you must agree changes to your objectives with your Line Manager during the reporting period,
- if you move to a new post during a reporting period, you must agree your objectives for the remainder of the reporting period with your new Line Manager.

- 7.1.11 Any disagreements about objectives must be dealt with in accordance with the current guidance published by the Agency – see paragraph 7.1.6
- 7.1.12 As a Line Manager, you must ensure that jobholders' objectives are kept up to date and relevant to the jobholder's post and Band/grade."
137. The Claimant's line manager up to the 20 May 2020 was SW.
138. SW states at paragraphs 4 to 6 of his witness statement that the "... Claimant was employed as the Deputy Branch Manager and, as my Deputy, had to be able to temporarily take over as Head of Branch, covering the routine day to day matters of management, administration and operations. These were in addition to other specific functional activities noted in the role profile which was reviewed annually or when circumstances required. The role necessitated a close liaison between both Head and Deputy Head and considerable trust, this was successfully established and maintained." SW says that in November 2017 the initial role profile was reviewed, and it was decided to remove the OPRC audit requirement.
139. As then detailed in paragraph 8 of SW's witness statement ... "This removal was as a consequence of placing additional weight on the other component roles. This change was briefed to, examined by and approved by the incumbent Secretary Of States Representative (SOSREP) who was my Line Manager at the time. This amended Role Profile was further briefed to my next Line Manager, Mr Christopher Thomas in March 2018, though only verbally. It was again agreed to."
140. We have no evidence from the SOSREP (a Mr Chapman) to dispute what SW says. We do though have evidence from CT who says at paragraph 5 of his witness statement ... "... Neither the Claimant nor his line manager approached me to consider a draft role profile or approve any changes."
141. There is clearly a dispute between SW and CT as to what they recall about their interaction on the role profile. However, save for the amended role profile that SW says was already agreed with the SOSREP not being posted on the management storage system, which SW admits should have been done, I accept what SW says of his interaction with the SOSREP, which he has confirmed to this Tribunal under oath, that is the change was briefed to, examined by and approved by the SOSREP. This would mean that the ORPC audits were no longer part of the Claimant's key responsibilities.
142. This is further supported by paragraph 11 of SW's witness evidence ... "The focus of the Claimants role was to be my deputy not a Counter

Pollution and Salvage Officer. I confirmed this to him before the role profile was changed and officially agreed by my line manager on 30 November 2017. As such the Claimant did not undertake the duties of a CPSO prior to the restructure. Whilst some components of the CPSO are similar and I am restricted from a direct comparison due to the lack of consultation. I consider the lack of any audit duties to be a substantial departure between the two roles.”.

143. The Claimant’s Performance Review Documents, the relevant parts of which are at pages 58 and 210 clearly show a focus on supporting the head of branch and refer to ETV work. ORPC audits are not set as objectives.
144. Through the combination of what the Claimant has proven on the balance of probability about his actual job role and the wording of clause 5 of the contractual terms, it is clear that the Claimant’s role of Deputy Head of Branch for Counter Pollution and Salvage does not require ORPC audits as a key responsibility.
145. Clause 7 reads ... “**Mobility** ... You have a liability to move between posts which are within reasonable daily travelling distance of your home. Reasonable daily travelling distance will be determined on a case-by-case basis taking into account individual circumstances, Grade, location, social and health circumstances (such as child care arrangements). The Department may also assign you to work in locations other than the normal place of work due to operational or business need. The normal place of work may also change, subject to reasonable travelling distance, as a result of a move of office or business need at a later date.”.
146. The Claimant’s normal place of work was not to change. It remained Southampton. The Respondent did not seek to exercise this clause.
147. The Claimant has not proven on the balance of probability that clause 7 has been breached. What the Claimant appears to be asserting is best understood as potentially being an anticipated breach of the moderate travel provision of the role profile document. This though has not been pleaded by the Claimant as an anticipatory breach of that express term.
148. As to the breach of mutual trust and confidence. The Claimant asserts that the following matters culminated in a breach of the implied term of trust and confidence, the last straw being the appeal outcome.
149. The alleged issues can be broken into the following broad issues:
150. Those that relate to the decision to implement a new structure: They are:

- a. The restructure took place which dismantled the branch of which the Claimant was the Deputy Head on 20 May 2020. This removed the Claimant's job without prior engagement with the branch or the Claimant's trade union;
- b. The new organizational chart of H.M. Coastguard which Claire Hughes emailed to the staff of H.M. Coastguard on 20 May 2020 did not include a job title for the Claimant and there had been no discussion with the Claimant about the changes to the Claimant's role prior to that email;
- c. The Claimant was informed of his new role in a meeting with Peter Mizen, Gary Spark, Andrew Healy and Jayne Ede on 26 May 2020 and there had been no consultation with the Claimant about the changes to the Claimant's role prior to that meeting;
- d. The Claimant's role was changed from Deputy Head of branch to CPSO for Northern Island and the Scottish Islands, which was a tacit demotion as the Claimant would become the least experienced CPSO after three years as Deputy Head of branch;
- e. The Respondent breached its duty of care by (a) removing Stan Woznicki as the Claimant's line manager and nominating three other line managers in three months being Alun Newsome, Richard Hackwell and Bill Spiers; (b) Richard Hackwell failed to provide support to the Claimant.

151. About those, although there is a dispute between the parties as to what extent the branch was dismantled it is not in dispute that a new structure is adopted (see page 175) in which the Claimant has his job title removed (see page 176). It is communicated to the Claimant that what is expected of him is he will become a fourth CPSO. It is not in dispute that the Claimant will lose the Deputy Head aspects of the role, as well as the ETV contract elements of his role. PM estimates that the time the Claimant will have free with the loss of the ETV work as being 2 days a month. No such consideration or assessment is undertaken in respect of the Deputy Head aspects of the role. It is not in dispute that there is no consultation with the Claimant or his union before the change to the Claimant's role is made. The Respondent did not accept that the Claimant would become the least experienced CPSO but has not presented evidence based on the role the Claimant was actually undertaking to support why this would be so, as it is accepted that the Claimant did not undertake the OPRC audits, was not trained to do such audits and he was losing his Deputy Head title designation and associated duties, as well as the ETV contract elements. As to the changes in line management the Claimant has not proven on the

balance of probability all of what he asserts, that the Respondent nominated three other line managers in three months. In respect of the second part of what the Claimant asserts, that RH failed to provide support to the Claimant, the Claimant has not proven this on the balance of probability. RH when cross examined made it clear he believed the Claimant was okay and the Claimant had not reached out to him for support. It is not in dispute that the Claimant did not reach out to RH for support.

152. There are then those that relate to the alignment process. They are:

- a. The most recent and accurate role profile was not used in the alignment process, that role profile being the version prepared by Stan Woznicki on 1st November 2017 and authorized by Chris Thomas on 31st March 2019. The Appeal Officer ignored the testimony of Stan Woznicki that Chris Thomas had agreed that role profile;
- b. The Appeal Officer used the role profile for the role of CPSO for Northern Island and the Scottish Islands which was prepared by Stan Woznicki on 1st November 2017 and authorized by Les Chapman on 31st March 2018 despite evidence that Stan Woznicki had never seen it and Les Chapman was not employed by the Respondent;
- c. There was no Counter Pollution and Salvage expertise at the Alignment Panel and the Appeal. The Appeal Officer disagreed but provided no evidence.

153. What is clear from the evidence in this case is that the Claimant and his then line manager thought the Claimant was working in accordance with a role profile that was different to the one stored on the formal management storage system. It is also clear from considering the various role profiles that they contain authorisation date errors on both sides. SW acknowledged he had input the wrong dates on some of the forms, just as PM acknowledged happened on the role profile for the new role. About the alignment process it is something done outside of any formal procedure so that would have given the Respondent plenty of scope to be flexible in what it considered and how it considered it when comparing the roles. This though is of course on the basis that the decision to remove the Claimant's job role had not already been made. However, this is clearly not possible when the job role has already been deleted. There is nowhere else for the Claimant to go, so an alignment process that was based on what the Claimant actually did, as informed by his line manager at the relevant time, compared to what he was expected to do, was not undertaken.

154. Then those that relate to the final straw, the appeal outcome:

- a. The Appeal Officer did not at any stage engage with Stan Woznicki, former Head of Branch, to determine the Claimant's specific role. The Appeal Officer contended that the Claimant should have been conducting audits as part of his job, which was factually incorrect;
- b. The Appeal Officer's response to the Claimant's appeal ground that there would be an increased travel burden in the role of CPSO for Northern Ireland and the Scottish Islands was based on an incorrect assumption and no analysis of future travel needs;
- c. The Appeal Officer failed to respond to the fact that the increased travel associated with the role of CPSO for Northern Ireland and the Scottish Islands was incompatible with the Claimant's personal circumstances;
- d. The Appeal Officer ignored the fact that the Claimant was not allowed trade union support in meetings with Richard Hackwell on 1 and 15 June 2020.

155. About these it can be observed that it is not in dispute that MB did not at any stage engage with SW to determine the Claimant's specific role. This is surprising in light of the way clause 5 of the employment contract is worded and the stated linkage of job title and duties to an employee's line manager and the performance management documentation. The Claimant had not been required to undertake OPSR audits while in his role as Deputy Head of Branch for Counter Pollution and Salvage. As to the travel requirements in the role of Counter Pollution and Salvage Officer - Northern Ireland and Scottish Islands (NISI) it is not in dispute that these would be greater at least initially (see paragraph 13(d)(iv) of MB's witness statement), but MB did not respond to the Claimant about his personal circumstances. MB did not present any evidence that he had responded to the Claimant on the concerns he raised that he was not allowed trade union support in meetings on 1 and 15 June 2020. This does therefore appear to have been ignored at the time of the appeal.

156. As Claimant's Counsel summarised in her oral submissions the Claimant submits that collectively all these issues led to a breakdown of trust and confidence, starting with a lack of consultation then a flawed alignment process using an out-of-date role profile. The alignment process was just a paper exercise and no efforts were made to ascertain what the Claimant actually did. The lack of line management clarity followed by an appeal process that replicated the alignment process, dismissing the Claimant's concerns with no attempt to talk to the Claimant's former line manager. No offer of support was given. This, it is submitted, amounts to a breach of the implied term of trust and confidence.

157. It was clear from the evidence of the Respondent's witnesses that they did not consider the change to the Claimant's role to require consultation or union representation. Nor did they consider it to need a formal alignment process. As acknowledged by PM in his oral evidence he provides no response to the Claimant where the Claimant raises that the whole process has caused him significant stress and anxiety.
158. The process the Respondent followed in this matter when changing the Claimant's role was not based on any of its existing policy documents. The Respondent does not rely upon any job flexibility clause to make the change. Instead, they take the view the old and new roles were a greater than 70% match so the Claimant should take up the new role.
159. That is a conclusion that can be presented based on a comparison of the two written role profiles the Respondent relies upon.
160. However, this is a unique situation not apparently governed by any fixed policy meaning the Respondent could reasonably have adopted a fair and balanced process to address the issues the Claimant raised. There was nothing to prevent the Respondent conducting an alignment exercise that looked at day to day activities and weightings. The Respondent was well aware of the extent of the dispute the Claimant had with the changes, but it continued to adopt a very narrow process of comparison.
161. I acknowledge that such an open process would be difficult to do when the decision has already been made to remove the Claimant's existing role. The Respondent though chose to implement the changes to the Claimant's role in this way, without prior consultation. It adopted the new structure requiring the Claimant to be given a new role and did not deviate from that.
162. What appear to be legitimate concerns raised by the Claimant as part of the appeal process are ignored by the Respondent. There is nothing to suggest that the Claimant had a reasonable alternative to his resignation
163. To consider the five questions that the Court of Appeal has said in **Kaur** will normally be sufficient to ask in order to decide whether an employee was constructively dismissed (with the answers in **bold italics**):
- a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his resignation? ***This was the outcome of the appeal.***
 - b. Has he affirmed the contract since that act? ***No, and this is not in dispute.***

- c. If not, was that act (or omission) by itself a repudiatory breach of contract? ***The Claimant does not rely upon the “last straw” matters as being so.***
 - d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? If so, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign. ***The Claimant submits there was such a course of conduct which viewed cumulatively amounted to a repudiatory breach of trust and confidence. I find this to be so. What happened to the Claimant as set out above impinged on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. The Claimant’s contracted job title and duties (as defined in clause 5 of the contract) was removed without consultation. The alignment process and appeal were not adapted to consider the Claimant’s actual duties which could have easily been achieved with input from the Claimant’s former line manager. No offer of support was given. The appeal outcome does not set out other options such as redeployment.***
 - e. Did the employee resign in response (or partly in response) to that breach? ***Yes, and this is not in dispute.***
164. The Claimant also asserts that clauses 5 and 7 of the written employment contract were breached and that they are fundamental terms.
165. I find for the same reasons found to support the breach of the implied term of trust and confidence that the Claimant was going to be required to perform a different job title and duties than had been in place pursuant to clause 5 of his contract. This would be a breach of a fundamental term of the employment contract.
166. As already said though, I do not find that there was a breach of clause 7. There was no change proposed to the Claimant’s normal place of work which remained Southampton. One of the issues for the Claimant was the anticipated travel requirements associated with the work in his new role from that place of work, not that the place of work was being changed.
167. For all these reasons I find that the Claimant has been constructively dismissed. That dismissal is unfair as no fair reason within section 98 of the Employment Rights Act 1996 has been shown (asserted or evidenced) by the Respondent.

168. The judgment of the Tribunal is that the Claimant's complaint of unfair constructive dismissal succeeds. The Claimant was constructively dismissed without fair reason.

169. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 4 and 5; the findings of fact made in relation to those issues (as they relate to liability) are at paragraphs 14 to 121; a concise identification of the relevant law is at paragraphs 122 to 133; how that law has been applied to those findings in order to decide the issues is at paragraphs 134 to 168.

Employment Judge Gray
Date: 25 July 2022

Judgment sent to Parties on
28 July 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE