EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Peter Browning	AND	The Co-operative Group Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 14 and 15 June 2023
By VHS and CVP Video

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person, assisted by his father Mr P Browning
For the Respondent: Mrs L Mankau of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claim for unfair constructive dismissal is dismissed.

RESERVED REASONS

1. In this case the claimant Mr Peter Browning 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. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Video Hearing Service. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 442 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant. I also accepted statements in support of the claimant from Mr Trevor McDonnell, Ms Clair Berry, Mr Ash Able, and Mr Matthew Courtney whose evidence was not challenged by the respondent. I have heard from Mr Alex Whitehouse and Mrs Karen Demellweek on behalf of the respondent.
4. There was a degree of conflict on the evidence. 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.

5. The Facts:
6. The respondent is the well-known national retailer and the relevant events in this case took place in and around the respondent's Plymouth Regional Distribution Centre. The claimant Mr Peter Browning was employed by the respondent at this Plymouth depot from 1 November 2006 until his resignation which was dated 4 August 2022, and which took effect on 12 August 2022.
7. The claimant had commenced employment as an HGV class I driver, and in 2011 was promoted to Transport Team Leader at the respondent's Plymouth Depot. He was most recently employed as a Transport Team Manager, reporting to his line manager Mr Trevor McDonnell who was the registered Transport Manager. He was an experienced, efficient and hard-working employee who was registered on the depot's Operator Licence, and who often covered for the Transport Manager in his absence.
8. The claimant concedes that he was dissatisfied with certain aspects of his employment and that he had openly been talking about seeking alternative employment for the last two years or so. He was dissatisfied with some of the respondent's management processes. He also perceived that the respondent had allowed its recognised trade unions to become too influential in the running of the depot, and he was dissatisfied with this state of affairs. He had a good working relationship with Mr McDonnell who left the respondent's employment in July 2021. The claimant perceived that Mr McDonald had been untreated unfairly, and this fed into his general dissatisfaction with his employment.
9. The respondent has a system of appraisals which follow performance review meetings twice a year. Various gradings can be awarded after these performance review meetings. Where the employee is achieving satisfactory performance then the appropriate grade to be awarded is Achieving. A higher grade is Exceeding, where the employee goes above and beyond achieving satisfactory performance of the normal contractual duties. The respondent has a process whereby senior managers hold a calibration meeting and discuss the performance of the various employees and the appropriate and relevant gradings to be awarded.
10. The claimant asserts that he had only ever achieved a grading of Exceeding. The respondent disputes that this was the case, but it does concede that more recently this was the case and that the claimant was a hard-working and valuable employee, who had a good relationship with his line manager Mr McDonnell, and who went above and beyond his normal contractual duties and was deserving of the grading of Exceeding.
11. Mr McDonnell left the respondent's employment in July 2021, and Mr Whitehouse, from whom I have heard, was appointed as Interim Transport Manager and the claimant's new Line Manager. Mr Whitehouse carried out a performance review meeting with the claimant on 26 July 2021, only six working days so after his appointment. He awarded the claimant Achieving.
12. The claimant took umbrage at this grading. He objected to the fact that Mr Whitehouse had awarded this grading after only six working days as his manager. He also seems to have objected to the fact that Mr Whitehouse's experience was in Warehousing, not Transport, and he did not feel that Mr Whitehouse was qualified to judge his performance. He asked Mr Whitehouse to amend and improve that grading.
13. Mr Whitehouse declined to do so and explained his reasons in a detailed email to the claimant. In the first place the decision was not that of Mr Whitehouse alone, but the decision was made after discussion with a calibration panel, and it was taken after discussion of the claimant and other managers. Mr Whitehouse made a number of positive comments about the claimant's performance and hard work, but he raised two concerns. The first was the claimant's sometimes abrupt communication style, which he accepted was borne out of the claimant's frustration with certain aspects of his employment, and which the claimant did not dispute. The second was that he wished to ensure that the claimant had completed or arranged all necessary refresher training. The matter was reviewed at the end of year review on 11 January 2022, Mr Whitehouse confirmed the

grade of Achieving at that stage, and again declined to increase the grading when requested by the claimant.

14. I find that the grading which Mr Whitehouse awarded cannot therefore be said to have been a capricious or unreasonable decision on the part of one individual, but rather it was confirmation of a decision by the calibration panel based on ostensibly reasonable grounds.
15. Meanwhile the respondent had identified certain management difficulties between the transport managers and the drivers at the Plymouth Depot. For historical reasons the team managers worked "4 on 4", meaning four days on then four days off, whereas the drivers were working a "5 over 7" shift pattern meaning that they worked five days in any seven. This had a serious impact on the drivers' ability to interact with their managers, because often their paths would not cross. Mr Whitehouse was given the task of seeking to change the rota patterns whereby the team managers returned to the 5 over 7 shift pattern in order to coincide with the drivers.
16. Mr Whitehouse then started a consultation process with the managers seeking their agreement to change the rota pattern as indicated. At that stage he was unaware of correspondence from 2014 which had authorised the managers to work the 4 on 4 shifts.
17. The claimant and three other managers objected to the proposed changes. There was an exchange of emails and proposed rotas under which Mr Whitehouse explained the need for the changes, made proposals, and sought comments in reply.
18. The claimant asserts that in an email to him from Mr Whitehouse dated 13 September 2021 the respondent intended to force through changes to its rota within five days come what may. In my judgment that is simply not the case. Mr Whitehouse made it clear in that email, and had done so in previous emails, that he was seeking agreement to a possible amendment to the rotas, and that he wanted feedback from the managers including the claimant. At no stage was the claimant or any other manager told that a change to the rotas would be implemented, either within five days or otherwise, and as a matter of fact no such change was ever implemented. It is true that Mr Whitehouse pointed out his view that in principle the claimant's terms and conditions allowed him to implement a change in rota patterns on five days' notice. He was mistaken in that respect, and when it was pointed out to him that the claimant had other terms and conditions which did not allow that, he accepted that position.
19. In any event the claimant and his colleagues raised a formal collective grievance on 23 September 2021. The respondent arranged a mediation meeting in reply, which took place with the consent of the claimant and his colleagues on 12 October 2021. They were assured at that meeting that the respondent recognised that it would need to embark on a formal consultation process with the employees and the relevant trade unions before there could be any change to their shift or rota patterns, and this was confirmed in writing on 15 October 2021. One of the claimant's colleagues Mr Courtney confirmed by email on 23 January 2022 that the respondent's discussions following their collective grievance had been "very productive and we felt our concerns were heard and understood". Following further discussion Mrs Demellweek emailed the claimant and his colleagues on 11 April 2022 and confirmed that: "no changes to your shift patterns will take place without formal consultation and engagement with USDAW. We are currently reviewing our options in order to make sure we are set up to give the best level of support to colleagues and/or operations, and we appreciate this is taking time."
20. The claimant is correct to assert that there was never any formal grievance hearing, and there was no final grievance decision communicated to him within the seven-month period between the grievance and his subsequent resignation. However, the respondent was of the view that the grievance had already been informally resolved for the reasons set out above, and that the claimant and his colleagues would be involved in any subsequent consultation process if it were to begin.
21. The respondent has two collective agreements with independent trade unions which cover the terms and conditions of its drivers. The more historical National Transport Agreement terms ("NTA") are more favourable than the Co-operative Transport Agreement ("CTA") terms. In late 2021 the respondent needed to recruit more drivers and advertised available driving positions on CTA terms to cover a 40 hour week. Drivers who had been engaged

on an agency basis were also invited to apply for these new full-time positions. The claimant's duties involved supervising the drivers and he was involved in the recruitment and selection process. In the event a short list was prepared with the claimant's approval and five drivers were appointed.

22. In January 2022 the respondent was reminded by one of recognised trade unions that one of these vacancies had arisen following the termination of employment of someone on NTA terms, and that the collective agreement required that the position was filled by someone on the same NTA terms. For this reason, one of the five new drivers, selected at random, was appointed on these historical NTA terms, but still for the 40 hour week.
23. The claimant complains that he should have been offered this NTA position, having made it clear at a previous meeting with Mr Whitehouse on 20 October 2021 that he wished to revert to a driver role. However, this was on the basis that he was to be a driver on NTA terms working 48 hours per week, Monday to Friday, and commencing at 9 am for family reasons. No such position was ever available, and the new driver on NTA terms was engaged on a 40-hour week. The claimant subsequent complained about not being offered this position, and in May 2022 the respondent confirmed by email that he was entitled to apply for an alternative driver role but the drivers' roles were for 40 hours on CTA terms and not the 48-hour NTA terms which he had requested.
24. The claimant has conceded that he decided to resign his employment in January 2022 following the appointment of the new driver on NTA terms which he perceived to be "the last straw". He had made no secret of the fact that he was already considering seeking alternative employment. The claimant has confirmed that he did not resign immediately because of his family circumstances, namely that he could not afford to be without employment. With his experience he could easily obtain an alternative HGV driving job, but he wished to wait for a suitable alternative position bearing in mind his seniority and experience.
25. The claimant then received an offer of suitable alternative employment, albeit subject to references and a medical examination, on about 2 August 2022. In reply to this offer of employment, he then resigned his employment with the respondent by letter dated 4 August 2022.
26. The claimant's resignation letter stated that he felt that the "nature and aims of the Co-op have been set aside, both in Plymouth and nationally", and he claimed that the changes in structure and the "new un-consulted rota structure" which was quickly withdrawn amounted to bullying. He also complained of a lack of support generally.
27. Mr Whitehouse acknowledged the claimant's resignation by letter dated 5 August 2022, and he invited him to pursue any concerns which he might have about his employment on a formal basis. Shortly thereafter discussions took place between the claimant, his union representative, and the respondent, and following these discussions he was not required to work out his notice in full, and his employment terminated by agreement with effect from 12 August 2022.
28. The claimant then commenced the Early Conciliation process with ACAS on 28 September 2022 (Day A); and the Early Conciliation Certificate was issued on 4 November 2022 (Day B). The claimant presented these proceedings claiming unfair constructive dismissal on 6 December 2022.
29. Having established the above facts, I now apply the law.
30. <u>The Law:</u>
31. 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.
32. 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 (4) of the Act which provides "…. 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".

33. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; and Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT.
34. I have also considered 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").
35. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
36. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
37. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. It need not be the predominant, principal, major or main cause for the resignation.
38. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: 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".

39. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
40. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
41. 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.
42. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
43. Decision.
44. In this case the claimant resigned his employment and brings a claim for unfair constructive dismissal. The burden of proof is on the claimant to establish that the respondent is guilty of conduct which was a significant breach going to the root of the contract of employment such that he was entitled to treat himself as discharged from further performance. If the claimant terminated his employment by reason of the respondent's conduct in these circumstances, then he will have been constructively dismissed. The term of the contract of employment which the claimant relies on as having been breached is the 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 (more simplistically referred to as "a breach of trust and confidence").
45. The claimant has suggested that he was subjected to a course of bullying and undermining behaviour for at least two years which amounted to a breach of trust and confidence, and which left him with no option other than to resign. It is clear that the claimant was dissatisfied with a number of aspects of his employment, including the respondent's management, its procedures, and its relationship with recognised trade unions. The claimant made it clear to a number of colleagues for approximately two years that he was sufficiently fed up to be looking for alternative employment. General unhappiness and

dissatisfaction of this nature is not sufficient of itself to amount to a breach of trust and confidence, and the claimant has confirmed that he relies on three specific and discrete issues which amount both individually and collectively to a breach of trust and confidence. These are: first, his performance reviews; secondly, the change to the working rota and the process of a subsequent grievance; and thirdly, the NTA driver role. I deal with each of these in turn.

46. The claimant asserts that he had always received the grading of Exceeding in his performance reviews thus indicating that the respondent accepted and was grateful for his hard work and his successful performance which went beyond the minimum requirements of his contract. Mr Whitehouse graded the claimant as Achieving rather than the higher level of Exceeding, both in the mid-term review in July 2021, and the end of year review on 11 January 2022. The claimant objected to this grading, particularly because he felt that Mr Whitehouse had first given him that grading within only six working days of his appointment, in circumstances where his experience was with Warehousing rather than Transport, and thus he was not in a position or sufficiently qualified to grade the claimant in that manner. The claimant asked Mr Whitehouse to amend the grading, but he declined.
47. However, the grading was not a capricious or unreasonable decision made by a new or inexperienced manager. There was a calibration process and discussion amongst a number of senior management colleagues during which all aspects of the claimant's performance were discussed. As confirmed to the claimant there were many positive points, but equally there was a concern about the claimant's communication style caused by his frustration with the respondent's procedures (which the claimant did not dispute), and a requirement to ensure that all refresher training was in place. Given this more holistic view the calibration panel recommended the grading of Achieving.
48. Against this background I find that Mr Whitehouse was entitled to act on the recommendation of the calibration panel, and that the grading of Achieving appears to be fair and reasonable. Previous grading of Exceeding cannot be said to guarantee that all future grading will be the same. More to the point it cannot be said to be capricious or unreasonable, and I cannot find that there was any conduct in this respect which, without reasonable and proper cause, was conduct which was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. I find that there was no fundamental breach of the implied term of trust and confidence in respect of the claimant's performance review gradings.
49. The second issue is in two parts, and it relates to alleged changes to the claimant's working rota, and how the respondent dealt with the collective grievance subsequently. The background is that Mr Whitehouse was undertaking a review of the working rotas within the depot and was doing so for good reason. The managers and the drivers were working different shift patterns (namely the managers working four days on and four days off as compared to the drivers working five days out of every seven) and there was a clear "disconnect" between the two. It was entirely reasonable in principle for the respondent's management to seek to resolve that issue. One way of doing it was to seek to change the rota for the managers, including the claimant.
50. The claimant has put great store on an email to him from Mr Whitehouse dated 13 September 2021 which he asserts makes it clear that the respondent intended to force through changes to its rota within five days come what may. In my judgment that is simply not the case. Mr Whitehouse made it clear in that email, and had done so in previous emails, that he was seeking agreement to a possible amendment to the rotas, and that he wanted feedback from the managers including the claimant. At no stage was the claimant or any other manager told that a change to the rotas would be implemented, either within five days or otherwise, and as a matter of fact no such change was ever implemented. It is true that Mr Whitehouse pointed out his view that in principle the claimant's terms and conditions allowed him to implement a change in rota patterns on five days' notice. He was mistaken in that respect, and when it was pointed out to him that the claimant had other terms and conditions which did not allow that, he accepted that position. The respondent had a sensible and reasonable cause for seeking to amend the rota pattern, and in the event no change was ever introduced or forced upon the claimant.

51. The second aspect of this complaint is to the effect that the respondent ignored the collective grievance raised by the claimant and his colleagues on 23 September 2021. It is true that this grievance was not formally resolved in the sense that there was no formal grievance hearing or final grievance decision. However, it is simply not the case that the grievance was ignored. The respondent arranged for a mediation meeting which took place on 12 October 2021, just over two weeks after the grievance, with the consent of the claimant and his colleagues, at which they were assured that there would be no change to the rota patterns without formal consultation and engagement with them and the recognised trade union USDAW. They were grateful for that clarification. The respondent's view was that the grievance was thus informally resolved at that stage. There was further discussion in 2022 about the collective grievance, and on 11 April 2022 Mrs Demellweek again confirmed by email that there would be no changes to the shift patterns without first having formal engagement and consultation with the union. She then assumed that the grievance had been concluded on this basis.
52. Against this background I find that the respondent commenced an informal consultation process about the change of rota patterns for good reason, and at no stage did the respondent threaten to impose, or actually impose, a change to rota patterns without first arranging discussion, consultation and engagement with the Trade Union. In addition, I find that the collective grievance was not ignored, and that the respondent was entitled to assume that it had been informally resolved pending potential further consultation with the employees and the recognised Trade Union. I cannot find that there was any conduct in this respect which, without reasonable and proper cause, was conduct which was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. I find that there was no fundamental breach of the implied term of trust and confidence in respect of the proposed change to the rota and/or the collective grievance.
53. The third specific complaint relates to the respondent's failure to offer the claimant an alternative role as a driver on NTA terms. In general terms the respondent had historic NTA terms and conditions which were more favourable than the more recently adopted CTA terms and conditions. The claimant made it clear to Mr Whitehouse at their meeting on 20 October 2021 that he wished to change roles and become a driver on a 48-hour contract on NTA terms, commencing at 9 am on Monday to Friday. Mr Whitehouse explained that there were no vacancies for a job on those terms, but that the respondent was recruiting for drivers on CTA terms for a 40 hour week. The claimant did not wish to be considered for such a position, and he did not apply for it. Five drivers were recruited on CTA terms. In January 2022 the respondent was informed by one of its recognised trade unions that one of the vacancies had been on previous NTA terms, and these needed to be replicated for one driver position in accordance with the collective agreement with that union. Accordingly, one of the new drivers was appointed on NTA terms. The claimant asserts that he made it clear that he wanted an NTA driving role, and that this should have been offered to him.
54. The respondent asserts that there is no duty on the respondent to offer the claimant a different role just because he might prefer it. I do not accept that proposition as such, because there could be circumstances where an employee has made it clear that he would wish to apply for a certain vacancy, and if that vacancy is then given to a new recruit, that arguably could amount to conduct which without reasonable cause seriously damages trust and confidence between them.
55. However, the position is different in this case. In the first place the claimant was an experienced manager, who was responsible for drivers, and was well aware of, and was involved in, the recruitment process for new drivers. He made it clear that he wished to become a driver but only if it was on NTA terms for a 48-hour week, working Monday to Friday, commencing at 9 am. It was made clear to him that there was no such vacancy, and there never was. The new driver recruited on NTA terms was for a 40 hour week only. It is not the case that there was a vacancy available which met the claimant's preferences, and for which the claimant applied, only to find that the vacancy was given to an alternative

new driver. His complaint relates to his non-appointment to a driving position which did not suit his earlier stated requirements and for which he did not apply.

56. Against this background I cannot find that there was any conduct in this respect which, without reasonable and proper cause, was conduct which was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. I find that there was no fundamental breach of the implied term of trust and confidence in respect of the NTA driving position.
57. For the above reasons I find that the respondent did not act in breach of contract and in particular there was no breach of the implied term of trust and confidence. In any event, even if there had been a breach, it is clear to me that the claimant affirmed the position and his contract in that he continued working, and he is not therefore in a position to rely upon any arguable breach of contract.
58. The claimant has accepted that he decided in January 2022 to resign his employment but did not wish to do so because of his family and financial position before securing an appropriate alternative job. That is an entirely laudable aim, and there are circumstances in which working on temporarily in order to find alternative employment does not amount to affirmation of the contract. However, in this case the claimant worked on for another seven months or so before resigning, and at no stage indicated that he was doing so under protest and/or reserving his rights to claim that there had been a fundamental breach of contract.
59. Furthermore, after the expiry of the seven months or so, the claimant has also conceded that he resigned his employment only when he had received a conditional offer of an acceptable alternative job. It seems clear that his reason for resigning was merely upon receipt of an acceptable alternative job, rather than the alleged breaches of contract some months earlier.
60. For all these reasons I find that the claimant's resignation cannot be construed as his constructive dismissal. The claimant resigned his employment and was not dismissed. Accordingly, his claim for unfair dismissal is hereby dismissed.
61. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to ; a concise identification of the relevant law is at paragraphs to ; how that law has been applied to those findings in order to decide the issues is at paragraphs to .

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Employment Judge N J Roper
Dated 15 June 2023

Judgment sent to Parties on
30 June 2023 By Mr J McCormick