



EMPLOYMENT TRIBUNALS

Claimant: Mr M Jelley

Respondent: Royal Mail Group

Heard at: Bristol (by CVP) On: 24, 25 and 26 April 2024

Before: Employment Judge Halliday
Ms Lloyd-Jennings
Mr Cronin

Representation

Claimant: In person

Respondent: Ms Percival, solicitor

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of direct disability discrimination is not well-founded and is dismissed.
2. The complaint of unfair dismissal is well-founded. The Claimant was unfairly dismissed.

REASONS

Introduction

1. The Claimant, Mr Jelley, was employed by the Respondent until he left his employment on 12 February 2022 following his resignation on 3 February 2022.
2. The Claimant is disabled and alleges that he suffered discrimination by reason of his disability. The Claimant also claims that he has been unfairly constructively dismissed.
3. He claims that he resigned from his employment as a consequence of a fundamental breach on the part of the Respondent of the implied term within his contract relating to trust and confidence. The Respondent contends that it did not treat the Claimant in a discriminatory manner and that there was no breach of contract but that the Claimant resigned to take up another role.

Proceedings

4. The Claimant submitted a witness statement and gave oral evidence. It was identified at the start of the hearing that the correct version of his statement had not been provided to the Tribunal in advance of the hearing. The correct (and final) version of the statement was then provided to the Tribunal with the consent of both parties. The Tribunal also heard evidence from Ms Victoria Heaton-Prouse, Customer Operations Manager, for the Respondent, who submitted a witness statement and attended the hearing. Mr Leonard Pratt, also a Customer Operations Manager, submitted a witness statement for the Respondent, but did not attend the hearing so his statement was given only limited weight. Understandably given the passage of time since the events complained of, both the Claimant and Ms Heaton-Prouse struggled on occasion to give consistent evidence on the issues raised. Where the evidence is contradictory, this is highlighted in this judgment. There were also some issues relevant to these proceedings about which the Respondent did not present any (or only limited) direct oral or documentary evidence, and this was taken into account by the Tribunal in reaching conclusions on some of the facts set out below.
5. The Tribunal also reviewed the documents referred to in the witness statements and drawn to their attention during the course of the hearing contained in the bundle (217 pages) and the written submissions made by the Claimant and on behalf of the Respondent.

Claims and Issues

6. In a claim form received by the Tribunal on 5 February 2022 (Claim Form) the Claimant brought claims of constructive unfair dismissal, disability discrimination and a claim for other payments. At the Case Management hearing on 10 February 2023 before Employment Judge Roper (Case Management Hearing), the Claimant confirmed he no longer wished to pursue his claim for other payments and the complaints being pursued were identified as a claim for constructive unfair dismissal under S 94, s 95(i)c and s 98(4) of the Employment Rights Act 1996 (ERA 1996) and a claim for direct discrimination under s 13 Equality Act 2010 (EqA 2010).
7. At the start of this hearing the claims and issues were discussed, and the Claimant confirmed that he was not intending to pursue the claim for other payments or a claim for victimisation.

Disability

8. The Respondent concedes that the Claimant had a disability at all material times by reason of his depression and that it knew or ought reasonably to have known that the Claimant suffered a substantial disadvantage by reason of that disability.

Direct Disability Discrimination

9. The Claimant's disability discrimination complaints were agreed and recorded by Employment Judge Roper at the Case Management Hearing as direct discrimination (s 13 EqA 2010):
 - 9.1. In connection with the application for the position of Workplace Coach, failing to appoint the Claimant following the interview process and Ms Heaton-Prouse deliberately altering the Claimant's answers during the interview process and effectively submitting a false and unsuccessful application on his behalf; and
 - 9.2. in connection with the application for the position of Postal Higher Grade (PHG), changing the selection criteria for this role from the person with the

highest seniority (length of service) to the highest score at the interview stage in order to prevent the Claimant from securing this role [*NB clarified as being the reverse during the course of the hearing*].

10. A third and related act of discrimination is also relied on as part of this complaint, which was identified and agreed at the start of the hearing: that the Claimant's application for the PHG role was not progressed.
11. Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated (a comparator). There must be no material difference between the circumstances of this comparator and those of the Claimant. The Claimant relies on a hypothetical comparator.
12. If the Claimant did suffer less favourable treatment (as above) was this because of his disability? Is the Respondent able to prove that it was for a non-discriminatory reason unconnected to Claimant's disability?

Constructive unfair dismissal (ss 94, 95(1)(c) and 98(4) ERA 1996)

13. At the Case Management Hearing it was agreed that the Claimant's constructive unfair dismissal claim relied on breach of the implied term of trust and confidence based on the following breaches:
 - 13.1. requiring the Claimant to perform the additional role of Workplace Coach without the additional pay which that should have entailed despite repeated objections; and
 - 13.2. requiring the Claimant to run the unit in the week commencing 25 October 2021 (by assuming the management role of Ms Heaton-Prouse who was on holiday); and
 - 13.3. in respect of the vacant Postal Higher Grade (PHG) role, the Respondent changing the selection criteria for this role from the person with the highest seniority (length of service) who passed the interview stage to the highest score at the interview stage in order to prevent the Claimant from securing this role [*NB clarified as being the reverse during the course of the hearing*]; and
 - 13.4. failing to acknowledge the Claimant's written grievance which was left on the Delivery Office Manager Ms Heaton-Prouse's desk in late November 2021; and
 - 13.5. on the week commencing 29 November 2021 adding additional work to the Claimant's duty but giving him no other duties as retaliation for him raising a grievance; and
 - 13.6. failing adequately to deal with the Claimant's grievance (a) by way of Ms Heaton-Prouse inviting the Claimant to attend a meeting on one day's notice and then another manager Mr Paul Carter failing to attend that meeting, and (b) Ms Heaton-Prouse asking the Claimant if he had found a new job yet; and
 - 13.7. deliberately arranging a grievance meeting on 13 December 2021, the same day as the Claimant's doctor's appointment.
14. The Tribunal will need to decide:
 - 14.1. 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
 - 14.2. Whether the Respondent had reasonable and proper cause for doing so.
15. 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.

16. Did the Claimant delay before resigning and therefore affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.
17. At the start of the hearing the Respondent confirmed that it was not relying on an alternative defence that there was a fair reason for the dismissal but only that the Claimant was not entitled to resign, and the Claimant confirmed he was relying on the series of breaches and not on the fact that any breach in isolation was a repudiatory breach.

Findings of fact

18. There was a degree of conflict in the evidence and only limited evidence as to some elements of their pleaded case was presented by the Respondent. The Tribunal have heard the witnesses give their evidence and found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary and after having read the factual and legal submissions made by and on behalf of the respective parties.

Background

19. The Claimant was employed by the Respondent from on or around 21 November 2013 as an Operational Postal Grade (OPG). As a postman he had a regular route.
20. The Claimant had had three periods of absence due to stress in late 2017 and early 2018 but no further absences due to stress (or any significant absence due to other issues) after then until November 2021.
21. The Claimant had a disability for the purposes of the Equality Act 2010 by reason of his depression at all material times which was known or ought reasonably to be known to the Respondent. Ms Heaton-Prouse was aware that the Claimant had workplace stress and of a previous mental health incident but was not aware of his detailed medical history or that he had a disability for the purposes of the Equality Act.
22. Although he had no formal additional duties, the parties agree that the Claimant was a supportive, able and helpful colleague and was relied on by Ms Heaton-Prouse who was the Operations Manager (Delivery Office Manager) (DOM) (along with other colleagues) for additional duties. The Claimant described them as being "work friends", for example, Ms Heaton-Prouse attended the Claimant's evening wedding do. Ms Heaton-Prouse described them as being "friends". It is further accepted that the OPGs appointed as Workplace Coaches before Ms Heaton-Prouse took up the position as DOM in 2017, and who continued in post under her management, did not perform all the duties expected of them adequately. These duties included training, induction and support responsibilities for new and existing employees. The Claimant undertook in particular a significant volume of induction training without any additional remuneration.

PHG role

23. In or around early August, a position was advertised for a Postal Higher Grade (PHG) role. This role was a more senior role to the OPG role and involved additional duties including sorting mail, covering the customer service counter and assisting with some administrative work, as well as delivery work. The Tribunal was not provided with a copy of the advert for this role or any contemporaneous documentary evidence about the selection or appointment process and the Respondent provided no evidence about the timeframe during which the application process was open.

24. The Tribunal accepts the Claimant's and Ms Heaton-Prouse's evidence that information about the role was communicated by way of verbal briefings (a huddle) and on a poster in the delivery office and then on a one to one basis with those who expressed an interest in the role. The Tribunal further finds that initially it was communicated that the candidate who scored the highest at the interview stage would be appointed but that the correct and agreed selection process (which was the one applied) was for the candidate who passed the interview with the most seniority to be appointed. The Tribunal accepts that this meant that the Claimant was less likely to be appointed as he was well qualified for the role but not the most senior OPG likely to apply. The Tribunal does not find that either Ms Heaton-Prouse's initial view or the change in the communicated criteria were directed personally at the Claimant with a view to discouraging him from applying. The Tribunal does find that the change arose from Ms Heaton-Prouse's initial belief that the appointment would be based on the highest qualifying score after the interview, and then following advice from HR that the correct selection process, was firstly a "pass" at interview when the set interview questions were asked, and then appointing from amongst the successful interviewees on the basis of seniority.
25. The Claimant wrote out an application for this role dated 9 August 2021 and attached a CV which the Tribunal finds was given to Ms Heaton-Prouse on or around the same date. The Tribunal prefers the Claimant's evidence on this point to that of Ms Heaton-Prouse. Ms Heaton-Prouse's evidence on this point was unclear and contradictory. Specifically, the Tribunal notes Ms Heaton-Prouse's response in the grievance appeal to the question whether a paper had been handed to her or her placed on her desk or in fact anywhere to apply for the position before the closing date, was a straight "no" and no reference was made to the fact that the Claimant had handed her note and do not find Ms Heaton-Prouse's responses in the hearing on this point that she had been handed a note but not an application to be persuasive. The Tribunal also notes that the existence of the application was not admitted to by the Respondent until a copy was obtained by the Claimant by way of a Data Subject Access Request. The Tribunal concludes that this was in fact the same "note" referred to by Ms Heaton-Prouse in her verbal evidence and which she refers to as an application-letter in her statement and that it was handed to her.
26. The Tribunal accepts Ms Heaton-Prouse's evidence that on or around this time the Claimant referred to the fact that "if none of them are any good, then take this as my application for the job" (or words to that effect), but concludes that the application by the Claimant, was unambiguously intended as a genuine application for the job. It is accepted however that due to the clarification of the correct selection criteria that were to be applied and the fact that as a consequence the Claimant was unlikely to have been successful given the seniority of the other applicants, Ms Heaton-Prouse may not have understood this to be the case. Given the lack of evidence put forward by the Respondent as to the deadlines for the PHG appointment process, and notwithstanding Ms Heaton-Prouse's evidence as set out in her witness statement (noting that it was inconsistent with her oral evidence in the hearing and the inconsistency in her response in the grievance interview), the Tribunal concludes on balance that the application for the PHG role was made and intended as a genuine application by the Claimant before the interviews took place and that he reasonably expected his application to be progressed. However, Ms Heaton-Prouse who did receive the application did not understand this to be the intention given the unlikely hood of the Claimant being appointed and his comment.
27. There was some discussion in the hearing about the relevance of an email included in the bundle, from Paul Webber DOM Barnstaple dated 13 October 2021, who questioned in relation to an unrelated PHG appointment the advice from the union that if everyone passes the interview then the most senior person gets the job. Mr Webber believed (as had Ms Heaton-Prouse), that it should be the person with the

highest score who was appointed following a successful interview. It is not clear to the Tribunal why this email chain was included in the bundle by the Respondent rather than the union agreement referred to or documents relevant to the PHG role at Okehampton, but it was noted that when Ms Heaton-Prouse was asked by Paul Carter to send what she used in Okehampton and in order that the correct process was set out in writing, Ms Heaton-Prouse forwarded the request to HR and the response from Sophie Gambles (Peoples Case Advisor) confirms that the correct process (as set out in the way Forward Agreement clause 15.2) is that the role: "Will be filled by the most senior person who has achieved the right standard for the job during the selection process. Therefore, it is appropriate that the individuals that pass the interview are then measured against one another and the most senior of the passing group will receive the role as per the agreement with the union."

28. The Tribunal accepts that there may have been a miscommunication about the appointment process, but conclude that this was a genuine error, and does not accept that this was aimed at the Claimant because of his depression or that he was treated differently from any other potential candidate who did not have depression. To the extent that he suffered a detriment by the apparent change in criteria, the Tribunal finds that this was linked to his seniority.
29. The Claimant states in his witness statement that he believed he had the expertise to fulfil this role, which the Tribunal concludes may well have been the case. However, his assertion that as he was the only person in the office that knew the role and would therefore have to be the one training the PHG, this therefore meant that this almost guaranteed him the role is not logical. The Royal Mail is a unionised environment and processes that have been collectively agreed would need to be followed whether or not they result in the best candidate being appointed. The Tribunal accepts that Ms Heaton Prouse as DOM would not have had the discretion to apply different processes. Ms Heaton-Prouse's comment in the grievance appeal meeting that "I feel Mr Jelley would have been the perfect person for the job" is noted and the Tribunal accepts this as a genuine statement but finds that this was not a decision that she was empowered to take without the proper process being followed.
30. The Claimant suggested that there was a "hidden agenda" not to appoint him because this would impact on the KPIs relating to absence which Ms Heaton-Prouse was targeted to achieve but presented no evidence to support this contention. Ms Heaton-Prouse confirmed under cross-examination that there were absence targets which applied across the unit. The Tribunal do not find this to be a credible suggestion in the absence of any supporting evidence. It is also noted firstly that any absence would be included in the Delivery office figures whether the Claimant was in an OPG or in an PHG role and secondly, from the start of 2018 until the end of November 2021 (when his absence in connection with the issues that gave rise to these proceedings began), the Claimant's absence was not high.

Workplace Coach Role

31. On or around 25 September 2021, the role of Workplace Coach was advertised internally. Staff were notified of the vacancy in the same way as for the PGH role, by way of briefings (Huddle), and the advert being placed on the noticeboard.
32. The selection process was a set process agreed with the trade union. The first stage of the application process was to complete an on-line questionnaire. 7 candidates applied including the Claimant, and the Claimant and three others were shortlisted for interview. Ms Heaton-Prouse was notified of the four short-listed candidates on 12 November 2021.
33. In the week commencing 25 October 2021. Ms Heaton-Prouse was absent on holiday. The Claimant agreed under cross-examination that a cover manager was

put into place for that week and that he was not left to run the Delivery Office as he alleges in his claim. The Tribunal accepts that the cover manager may have been inexperienced, and that Ms Heaton-Prouse as DOM left a note saying, "see Matt for help" (referring to the Claimant). The Tribunal concludes that this was on the basis that he was an experienced and helpful colleague. The Claimant says that he felt he was being put upon or taken for granted by this, which may have been the case to some degree. The Tribunal find, however, that asking an experienced colleague to support a cover manager is not unreasonable and that the Claimant became more unhappy with this fact retrospectively after he had not been appointed to the Workplace Coach role.

34. Shortly after 12 November the Claimant was interviewed for the Workplace Coach role along with the three other short-listed candidates using set questions included in the interview briefing pack and on which he was scored between 1 and 5 for each answer. The interview took place in Ms Heaton-Prouse's office, and his answers were typed up onto the screen by Ms Heaton-Prouse as the Claimant gave them while he was sat by her.
35. The first question related to his motivation for applying for the role and his answer is recorded as "More money for the work I already do, been training staff for 4-5 years unpaid, will make my working life easier." He scored only one for this answer. The guidance for a good answer suggests multiple sound reasons such as career progression, desire to help others, opportunity to learn more about the business etc. The answer he is recorded as having given was noted contemporaneously and is consistent with the evidence he gave to Tribunal about his key concerns and with the issues he raised in his grievance and the Tribunal accepts that it is not a strong answer when assessed against the guidance for a good answer.
36. Generally, the Claimant's recorded answers were good in some areas and weaker in others and the scores do not appear inconsistent with the recorded answers.
37. In total the Claimant scored 27 which was firstly below the required level for the role and secondly was a lower score than at least one other candidate, who was appointed to the role. He also scored below the required minimum score of 3 on more than one question. The Claimant refers to the fact that the interview was interrupted by another OPG coming to the door of the office whilst he was being interviewed but this is not material to the facts in dispute between the parties, and the Claimant does not allege that this affected his performance in the interview but relies on this as evidence that his application was not being prioritised. The Tribunal does not draw this conclusion.
38. The Claimant alleges that his answers were not recorded correctly and were in essence falsified but was unable (perhaps understandably given the time that has passed since the incidents complained of) to explain how he had in fact answered the questions and where and in what respects the answers recorded were inaccurate. The Claimant was further not able to explain on what basis he was alleging that the fact that his scores were low (whether or not the record of the interview was accurate and whether or not any such inaccuracy was deliberate or not) was linked to his depression.
39. Taking into account that the answers were typed up contemporaneously by Ms Heaton-Prouse on screen whilst sat by the Claimant during the interview; the Claimant's lack of evidence about how he had in fact answered the questions differently and the fact that at least one of the poor answers (that to question 1) was consistent with his evidence in this hearing, the Tribunal does not find that the Claimant's answers were summarised incorrectly or that his scores were manipulated.

40. The process for appointment to the Workplace Coach role is set out in detailed documents and guidance (including a collective agreement with the CGWU) and these provide (as summarised by Ms Heaton-Prouse in her evidence), that if more than one candidate passes the interview then the candidate with the highest score would be appointed. If two candidates have the same score, then the candidate with the most seniority (length of service is appointed). The Tribunal note that the selection criteria for the PHG and the Workplace Coach role are not consistent and that this may have caused or contributed to the Claimant's confusion, made worse by the mistake that was made in communicating the correct criteria for the PHG role initially.
41. The Tribunal does not accept that there was a miscommunication of the criteria that applied to the Workplace Coach role or that they were changed (whether deliberately or otherwise). The Claimant says initially he was informed that the same criteria applied as for the PHG role, but the Tribunal does not find this to be the case. The Tribunal therefore does not find that the criteria were deliberately changed by Ms Heaton-Prouse to exclude the Claimant from the role. It is clear from the detailed documents provided that this is an agreed process, and Ms Heaton-Prouse as DOM has no discretion to change this.
42. In the appeal meeting when asked: "so, would it be fair to say that Vicky simply did an interview and another person scored higher? the Claimant responded: "surely Vicky would know that I was better suited to the role". This appears to the Tribunal to miss the point. The process to be followed is set out and agreed with the trade unions and Ms Heaton-Prouse could not manipulate the Claimant's scores upwards even if she did think he was the better candidate, she had to apply the agreed process.
43. The Claimant is asserting that he was a better candidate for the Workplace Coach role than the individual appointed. This may well have been the case as appointment processes do not always succeed in appointing the best candidate and self-evidently if an able individual does not perform well in interview, they may not be successful whilst another less able colleague who interviews well may be.
44. The Tribunal accepts Ms Heaton-Prouse's evidence that she verbally communicated that the Claimant had not been successful in his application for the Workplace Coach role to him on or around Saturday 20 November 2021, and that he informed her that he would start looking for another job. It is further accepted that he asked her to be a referee for him. The Tribunal finds that Ms Heaton-Prouse did not inform the Claimant of his score in the interview or provide any feedback and he did not seek any feedback at that time.
45. The Claimant was signed off sick from the 22 November 2021 for stress, initially for three weeks. He did not return to work before his resignation took effect.

Grievance

46. The Claimant raised a grievance on 25 November 2021 by placing a completed grievance form on the desk of Ms Heaton-Prouse. The grievance stated that he had been performing the role of Workplace Coach for the last four years without pay; referred to the fact that those previously appointed to the roles were not performing, that he had been left to run the office in week commencing 25 October and given responsibilities without pay and that the new coach had no experience, qualifications or skills. He referred to a separate group holiday pay claim that was on-going and discrimination on grounds of mental health. The resolution requested was to be paid for his work and for the appointed workplace coaches, both existing and new, to be reviewed. There was no mention of the PHG role in the grievance.

47. Ms Heaton-Prouse was absent on holiday that week and the Tribunal accepts that she did not see the letter until her return on 30 November 2021.
48. On 27 November 2021, the Claimant emailed the grievance to Ms Heaton-Prouse asking her to forward it to Mr Paul Carter. As she was absent on holiday, she did not see this email until her return on 30 November 2021.
49. From week commencing 29 November 2021, the Claimant says that additional work was added to his duty, he says because he had raised a grievance. Ms Heaton-Prouse asserts that, after a routine review of time taken to complete their rounds, a number of OPGs were allocated additional work and this was not related to the Claimant's grievance. On the basis that the change in duties came into effect on 29 November 2021 and by that time Ms Heaton-Prouse had not seen the grievance, the Tribunal concludes that the reallocation of work and the additional work notified to the Claimant was not a consequence of the Claimant raising a grievance.
50. On her return to work on 30 November 2021, Ms Heaton-Prouse forwarded the email from the Claimant with the grievance to Mr Paul Carter. She refers in that email to the fact that she had told Mr Carter about the grievance that morning and it is accepted that she had done so.
51. The Grievance Policy and Booklet sets out a process whereby concerns should usually be addressed by the First Line Manager within 14 days but provides that if the concern relates to that manager the Second Line Manager should address them. The Second Line Manager can (by exception) assign another appropriate manager to deal with the concern. A concern escalated to a Second Line manager should be resolved within 28 days. Employees should be informed of delays outside the agreed timescales. There is a right of appeal against the grievance outcome. Appeals should be addressed within 42 days.
52. On 6 December 2021 the Respondent's Employee Relations Case Management Team wrote to the Claimant confirming that a request for early conciliation had been received and that the Respondent would be prepared to engage in early conciliation as there was no record of a complaint under the Respondent's internal processes. The Claimant relies on this as evidence that the grievance had not been actioned by Ms Heaton-Prouse. The Tribunal do not conclude that this supports any deliberate attempt by Ms Heaton-Prouse to "bury" the grievance as alleged by the Claimant, but conclude that Ms Heaton-Prouse did not log the grievance immediately or in the alternative, if she did, there was delay in this being registered.
53. On the 7 December 2021 Ms Heaton-Prouse wrote a letter to the Claimant inviting him to a grievance meeting on 13 December 2021. This invite was expressed as being to meet with her. Ms Heaton-Prouse's evidence was that the intention was for the meeting to be with Mr Paul Carter but that as she was the allocated line manager who had submitted the grievance to the case management system her name was automatically inserted into the letter. However, Mr Carter says in his email of 18 December 2021 that he cannot intervene because a formal process has been commenced and does not refer to being involved in the process and the Tribunal was presented with no direct evidence of his involvement in the grievance prior to this email. The Respondent's position as to whether it was Ms Heaton-Prouse or Mr Carter who was charged with hearing the grievance in line with the Respondent's grievance procedures from the time that it was lodged on 25 November 2021 until Mr Leonard Pratt was asked to hear the grievance has not been made clear in the course of these proceedings. The Tribunal concludes that the Claimant reasonably understood that Ms Heaton-Prouse was dealing with his grievance which was a breach of the Respondent's Grievance Policy.
54. The Tribunal heard evidence that it is the practice for Royal Mail to place post in a

franked envelope and for this to be hand delivered by the relevant OPG on that round. The letter was not tracked. The Tribunal accepts the Claimant's evidence that he did not receive this letter until the 14 December 2021, which was after the initial grievance meeting had been scheduled.

55. The Tribunal finds that the grievance was registered on the Respondent's case management system (PCM) on 8 December 2021 as indicated in the heading on the letter sent by the Mr Carterr to the Claimant on 30 December 2021 but note that Ms Heaton-Prouse sent the letter of invite on 7 December 2021. The Tribunal concludes that this is a result of inefficient HR processes and not a result of any deliberate manipulation of the grievance process by Ms Heaton-Prouse.
56. On the Thursday 9 December 2021 there was an informal text exchange between Ms Heaton-Prouse and the Claimant in which Ms Heaton-Prouse said: "Paul [Carter] is going to be on Okehampton tomorz if you wanted to chat with him about your work stress and grievance". The Claimant responded: "Are there any particular times I should avoid if I can make it?" The response was: "He said ideally between 10.30-11". No response was disclosed as being received from the Claimant.
57. The Tribunal finds that it was not made clear to the Claimant whether this was a meeting arranged as part of the formal grievance process, or not. As he had not yet received an acknowledgment of his grievance and specifically, he had not received the formal invite to his grievance meeting scheduled for 13 December 2021, the Tribunal finds that he concluded that this was intended as a grievance meeting.
58. The Claimant did come into the Okehampton delivery office on 10 December 2021 in order to meet with Mr Carter, but they did not meet. The Tribunal does not accept that Mr Carter deliberately failed to attend an arranged meeting as alleged by the Claimant but finds that due to the informal nature of the arrangements they missed each other. Due to the lack of clarity about the purpose of the meeting the Tribunal accepts that the Claimant believed Mr Carter had failed to attend a grievance hearing.
59. The Claimant did then speak to Ms Heaton-Prouse. In that conversation the Tribunal finds that he was told that the grievance meeting had been scheduled with Mr Carter on Monday 13 December 2021 although there is no documentary evidence that this was in fact the intention and Ms Heaton-Prouse's evidence that this was the intention contradicts the email from Mr Carter of 18 December 2021 as referred to above). The Tribunal also finds that in that conversation the Claimant advised Ms Heaton-Prouse that he had a medical appointment booked for Monday morning (13 December 2021) so would not be able to make the scheduled hearing. This was confirmed by the Claimant in his evidence and is supported by the text he sent at 12:54 that day to Ms Heaton-Prouse asking: "Is Paul around anytime next week to do it on that day instead of Monday?".
60. On balance the Tribunal does not accept that in response to being informed that the Claimant had a doctor's appointment on Monday morning, Ms Heaton-Prouse suggested that he come in after that appointment preferring the Claimant's evidence that this suggestion was not made. Ms Heaton-Prouse's evidence was generally less consistent than the Claimant's and no other contemporaneous evidence supports this account.
61. The Tribunal accepts that the suggestion made by Ms Heaton-Prouse of an informal catch up on 10 December 2021 was made with the intention of being helpful but find that due to the miscommunication about the nature of the meeting and the fact that the Claimant and Mr Carter did not manage to meet up, this worsened the situation.
62. There was also a failure by the Respondent to communicate who was dealing with

the grievance. The Tribunal concludes that in the absence of Mr Carter on 10 December the Claimant asked Ms Heaton-Prouse to deal with his grievance. The Tribunal accepts that she did not “refuse to do so” because she did not want it to be addressed, but because under the Respondent’s process, and given it was raised against her, a Second Line Manager had to deal with it. However, this was not explained clearly to the Claimant. Further the letters (when received) suggest that Ms Heaton Prouse was intending to deal with the grievance (and not Mr Carter).

63. The Tribunal also concludes that given it was known to the Respondent that the Claimant was of sick with stress, the Respondent should have taken particular care to ensure that the grievance was acknowledged and that it was clear who was dealing with the grievance.
64. During the same conversation on 10 December 2021, Ms Heaton-Prouse agrees that she asked the Claimant if he had found another job yet. The Tribunal accepts her evidence that this was in the context of the Claimant previously having informed her that he was looking for another role and asking her if she would be prepared to provide a reference for him, but given the Claimant’s confusion about why his grievance had not been acknowledged earlier, who was dealing with his grievance and the delay in him receiving notification of the grievance hearing, it is understandable that he interpreted this as a suggestion that he should leave his employment.
65. The Claimant did not attend the meeting on 13 December either at the appointed time or after his medical appointment.
66. The Tribunal does not conclude that the date and time of the grievance hearing was initially deliberately set for a time the Claimant could not attend. His evidence is that he told Ms Heaton-Prouse that he could not attend on 10 December 2021, and the Tribunal has accepted that the letter had already been written and sent by then. However, the Claimant did tell Ms Heaton-Prouse about his medical appointment on 10 December 2021 and he was not notified by the Respondent that this hearing would be re-scheduled after he had informed Ms Heaton-Prouse that he could not attend.
67. The grievance meeting was rescheduled to the 16 December 2021 by letter dated 13 December 2021 which stated that this was: “Due to the failure [by the Claimant] to attend the meeting with myself on the 13 December at 10.30.” This letter did not refer to the conversation about the doctor’s appointment; and still referred to the meeting being with Ms Heaton-Prouse (and not Mr Carter). The Tribunal on balance accepts Ms Heaton-Prouse’s explanation that these letters are standard letters produced by a case management system but find that they were inadequate and confusing because they were not adapted to the specific circumstances that applied in this situation.
68. By the 13 December 2021, the Tribunal concludes that the Respondent had not effectively deal with the Claimant’s grievance (and did not do so until 17 January 2022 when Mr Pratt wrote to the Claimant to ask him to attend a grievance hearing which was then held). The Respondent’s HR processes from the date that the Claimant submitted his grievance on 25 November 2021, and as evidenced by the above findings, were inefficient, slow, not joined up and not sufficiently flexible to reflect the particular circumstances of the situation and this resulted in contradictory information being provided to the Claimant (both initially and later) which exacerbated his genuine feeling that he was being overlooked, taken for granted and ignored and that his genuine concerns were not being addressed. The Respondent were aware of his absence by reason of stress and his pre-existing mental health condition and should have taken more care to ensure that communication was timely and effective and that the process to be followed,

including who was dealing with the grievance, was explained and consistent with the Respondent's grievance procedure.

69. The Claimant sent an email on 16 December 2021 to Ms Heaton-Prouse: acknowledging receipt of the invitation letter; referring to it as invitation to an informal meeting; setting out his understanding that the informal meeting on 10 December 2021 with Paul Carter was to discuss the grievance and referring to a refusal by Ms Heaton-Prouse to go through the grievance with him. He also stated that she had said that the Respondent had no intention of putting things right. He refers to the fact that the 13 December 2021 grievance meeting was deliberately scheduled when he had a doctors' appointment and to the comment about finding another job. He again refers to ACAS and a potential claim for constructive dismissal. He suggested a further meeting with Mr Carter to avoid an employment Tribunal.
70. On 18 December 2021, the Claimant emailed Mr Carter asking to meet with him as it was no longer appropriate for Ms Heaton-Prouse to deal with his grievance. The Tribunal finds that at this point the Claimant was still confused as to whether Ms Heaton-Prouse would be hearing his grievance as his First Line Manager or not. He refers to the fact that he wants to return to work and that the issues are solvable in the short-term. Mr Carter responded the same day stating that he could not intervene because a formal process had commenced, but that he could discuss the Claimant's sick absence with him.
71. The Claimant emailed Mr Carter 20 December 2021 saying a long term sick review would not help as his illness was caused by his grievance and pointing out that he had been informed that the grievance had not been raised on the system and it was inappropriate for a line manager to deal with this complaint. Mr Carter responded the same day to say he was in contact with HR and would get the grievance assigned so it could be investigated.
72. On 30 December 2021 a letter was sent by Mr Carter confirming that with effect from that date, the matter had been raised to the Second Line Manager and that the Second Line Manager assigned to investigate would be in touch shortly. It contains a section for the complainant to complete to explain why the outcome with the line manager was not satisfactory. This letter is also confusing and inappropriate and does not address what was or was not supposed to happen previously, or what had in fact happened.
73. On 6 January 2022 the Claimant sent Mr Carter an email (timed at 11:20 am, chasing for progress. Mr Carter responded at 12:47 to check whether the Claimant had received the letter of 30 December 2021. The Claimant acknowledged receipt of that letter by email of 9 January 2022 and pointed out that he had raised his grievance over 6 weeks ago and he still had not had a grievance meeting. He referred to the conciliation period being exhausted and to Employment Tribunal Proceedings.
74. On 9 January 2022 Mr Carter emailed the Claimant to say that the matter had been referred to the Royal Mail HR team and a manager would be in touch in due course.
75. On the 11 January 2022 a letter was sent by Ms Heaton-Prouse to the Claimant about the Claimant's long term sick absence, seeking to arrange a meeting on 14 January 2022. Although signed by Ms Heaton-Prouse it contains a handwritten note explaining that the meeting would be with Paul Carter.
76. On 17 January 2022, Mr Leonard Pratt, the DOM for Bideford, sent an email to the Claimant inviting him to a meeting to discuss his concerns on 24 January 2022.
77. The grievance meeting took place on 26 January 2022. The Claimant was still absent on grounds of stress. The grievance discussed was broader than the one

originally raised on 25 November 2021, The Claimant raised the fact that he had applied for two different roles and had been unsuccessful and referred to the criteria being changed “numerous times” by Ms Heaton-Prouse. He summarised his complaints which are in essence the same ones which are before the Tribunal at this hearing: the failure to appoint him to the PHG and Workplace Coach role; the change in the criteria for both roles; the delay in the grievance/the invitation to a meeting which did not happen; and the fact that he had effectively been undertaking the Workplace Coach role for 5 years. He said that he felt he was, “being pushed out”. He referred to the comment made by Ms Heaton-Prouse about asking if he had another job yet. The Tribunal concludes that the delay in addressing the grievance and failing to resolve the narrow issues relating to the Workplace Coach role initially raised in the Claimant’s grievance resulted in the Claimant dwelling on his situation and extending the scope of his grievance including on a sound basis that there had been a delay in addressing his grievance.

78. The notes of the meeting with the Claimant were sent out by Mr Pratt to the Claimant on 29 January 2022.
79. The Claimant was offered a job with AF Maintenance Limited with an original start date of 31 January 2022. The Tribunal accepts the Claimant’s evidence that his start date in this new role was delayed until 14 February 2022.
80. Ms Heaton-Prouse was interviewed by Mr Pratt on 1 February 2022. She confirmed that the staff had initially been informed incorrectly about the criteria for the PHG role, but that there was no change in the communicated criteria for selection for the Workplace coach role and referred to the agreed process. She stated that she has asked the Claimant whether he had obtained an alternative role on the 10 December 2021 and that Paul Carter had been in the office until 11.00 on the 10 December 2021 but that the Claimant has missed him as he came in shortly after 11.00. She was not asked to explain the delay in addressing the Claimant’s grievance.
81. On 3 February 2022 the Claimant submitted his resignation by email with effect from 12 February 2022. It stated: “I have been the subject of discrimination and victimisation”, and “that attempts to solve the matter through Royal Mail’s grievance procedure have been next to pointless with attempts made to hide the grievance and ultimately the issues have been ignored.” He says he had been constructively unfairly dismissed and had been targeted after the grievance was filed, with an increased workload, fake grievance meetings being set up, being told his grievance would not be investigated and being asked whilst off sick with stress if he had found another job yet.
82. On 5 February 2023, the Claimant submitted his claim to the Employment Tribunal.
83. On 9 February 2022, Mr Pratt visited the Okehampton delivery office and met with two of the other applicants who were also short-listed for the Workplace Coach role. They verified that there was an on-line assessment and then an interview and that they understood throughout that the candidate with the highest score would be offered the role.
84. The same day, Mr Pratt sent a grievance outcome letter to the Claimant. The grievance was not upheld. He noted that the Claimant had not applied for the PHG role and that the applications for the Workplace Coach role had followed the correct process. He did not address the other points raised in the grievance.
85. On the 14 February 2022, the Claimant was notified that his concern had been raised to an appeal. A copy of the appeal letter was included in the bundle.
86. After some email exchanges about the practical arrangements, the Claimant

attended a grievance appeal meeting with Mr Henderson remotely by facetime on 11th March 2022. The appeal grounds were:

- 86.1. The criteria kept changing for the PHG role and it was said the Claimant did not apply when he did. He felt he was the most qualified but not the most senior. He did apply and handed the letter to Ms Heaton-Prouse.
- 86.2. Months later, the workplace coach role, the Claimant completed tasks without pay and then the criteria were changed to his detriment;
- 86.3. The grievance has been handled poorly; it has been “whitewashed”.
87. On 16 March 2022 the meeting notes from the appeal hearing were sent out to the Claimant to review.
88. On 3 May 2022, the grievance appeal outcome letter was sent to the Claimant by Mr Luke Henderson. The appeal was not upheld.
89. On 25 June 2022 the Claimant chased for a response to a request to raise a Stage 3 grievance. On 12 July 2022. Mr Henderson confirmed on 12 July 2022 that there was no further right of appeal.

The Law

Constructive Unfair Dismissal

90. 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.
91. 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”.
92. 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.”
93. With regard to trust and confidence cases, which this case is, *Morrow v Safeway Stores plc* (2001) EAT/0275/00, [2002] IRLR 9 holds that all breaches of the implied term of trust and confidence are repudiatory, and *Dyson LJ* summarised the position

in *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35 CA: “The following basic propositions of law can be derived from the authorities:

- 93.1. 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*).
- 93.2. 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). This is referred to as “the implied term of trust and confidence”.
- 93.3. 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”.
94. 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”.
95. In addition, it is clear from *Leeds Dental Team v Rose* [2014] IRLR 8 EAT 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* [2001] IRLR 727 EAT 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.
96. 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*).
97. The judgment of *Dyson LJ* in *Omilaju* has been endorsed by *Underhill LJ* in *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA. Having reviewed the case law on the “last straw” doctrine, including *Kerry v Motorworld*, 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 ie, if there has been prior repudiatory breach of contract (whether arising from a one-off incident or previous cumulative breaches), and the employee has in the interim affirmed the contract but subsequent actions on the part of the employer might constitute a breach of the implied term of trust and confidence then the employee is entitled to rely on the previous breaches as the start of the series of actions which might cumulatively amount to a breach of the implied term of trust and confidence.

98. The employee must resign in response to the breach and not because of some other unconnected reason. The breach need not be the sole cause, but it must be an effective cause of resignation but as noted above, it need not be the predominant, principal, major or main cause for the resignation.
99. On affirmation and waiver, the Tribunal have also considered the case of *WE Cox Toner (International) Limited v Cox* (1981) ICR 823, and specifically the premise that at some stage the employee must elect between affirming the contract or waiving the breach. Although there is no need to do this in a reasonable time and delay by itself does not constitute affirmation, if the innocent party calls on the guilty party for further performance, s/he will normally be taken to have affirmed the contract. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract.
100. The case of *W Devis & Sons Ltd v Atkins* [1977] AC 931, [1977] 3 All ER 40 HL confirms that in considering the principal reason for the dismissal the tribunal must not take account of events subsequent to the dismissal although such conduct should be taken into account when considering contribution.

Disability Discrimination

101. Section 13 Equality Act 2010 sets out the provisions relating to direct discrimination.
(i) A person (A) discriminates treats another (B) if, because of a protected characteristic, A treats B less favourably than A treats, or would treat, others.
102. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
103. These provisions need to be considered carefully where it is not clear on the facts whether discrimination has or has not occurred bearing in mind that discrimination is often not obvious or overt, but do not need to be considered if a tribunal is in a position to make positive findings of fact based on the evidence one way or another (*Hewage v Grampian Health Board* [2012] IRLR 870 SC).
104. *Igen v Wong* [2005] IRLR 258 CA sets out guidelines on the burden of proof. Once the burden of proof has shifted it is for the respondent to show that they have not committed an act of discrimination. In order to discharge that burden the respondent must show, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.
105. *Madarassy v Nomura International Plc* [2007] ICR 867 CA is authority for the proposition that: "The burden of proof does not shift to the employer simply on the claimant establishing a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination".
106. In their submission the Respondent has also referred the Tribunal to the cases of:
 - 106.1. *Macdonald V Advocate-General for Scotland; Pearce V Governing Body of Mayfield Secondary School* [2003] IRLR 512, HL in considering comparators;

106.2. Nagarajan V London Regional Transport [1999] UKHL 36; [1999] IRLR 572 in relation to the reason for the treatment afforded;

106.3. Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332; Khan and another v Home Office [2008] EWCA Civ 578) and Laing v Manchester City Council 2006 ICR 1519 and Glasgow City Council V Zafar 1998 ICR 120, HL in relation to the burden of proof and drawing inferences.

107. The Tribunal takes these cases as guidance and not in substitution for the law.

Decision

Direct Discrimination

108. The Tribunal first considers the Claimant's complaint of direct discrimination.

109. The Respondent acknowledges that the Claimant has a disability by reason of his depression and that it knew or ought reasonably to have known that this was the case.

110. The Claimant asserts three incidents of direct discrimination which are addressed in chronological order.

111. In relation to the complaint that the selection criteria for the PHG role were changed, the Tribunal have accepted that Ms Heaton-Prouse did not change the criteria but having originally misunderstood them, then communicated the correct criteria to the potential candidates. This was therefore self-evidently not done because of the Claimant's disability, or in any way directed at the Claimant nor does the Tribunal find that it was done as alleged in order to prevent the Claimant from securing this role or was in any way linked to his depression. This complaint therefore does not succeed.

112. In relation to the complaint that the Respondent failed to progress the Claimant's application for the role of PHG in or around August 2021 (identified at the start of the hearing and with the consent of the Respondent added to the list of issues) unless this formed part of a continuous act, this claim would be out of time and no application was made to extend the time limit on the basis that it would be just and equitable to do so. This complaint therefore fails. In any event, although the Tribunal has concluded that the Claimant did apply for the role and that the application was made in time, the Claimant has presented no evidence of any link between his depression and the failure to action the application, either directly because of his depression as claimed, or on the basis that a promotion would affect the delivery office's KPIs. The Tribunal has concluded that the application (which was received) was not actioned as Ms Heaton-Prouse did not understand that the Claimant seriously intended to apply given the unlikelihood of the Claimant being appointed (agreed by both parties) and on the basis of the Claimant's comment. The Tribunal has also concluded that Ms Heaton-Prouse was not aware that the Claimant suffered from depression (although was aware of a previous mental health incident and workplace stress). Applying the principles set out in Madarassy, the Tribunal is not satisfied that the bare fact that the Claimant's application was not progressed without any link to the Claimant's depression shifts the burden of proof to the Respondent.

113. In relation to the complaint raised in connection with the position of Workplace Coach role, that the Respondent failed to appoint the Claimant following the interview process and Ms Heaton-Prouse deliberately altered the Claimant's

answers during the interview process and submitted a false application on the Claimant's behalf, the Tribunal have found that the Claimant's answers were not deliberately altered, and that no false application was made. This complaint therefore fails.

114. The Claimant's claim for disability discrimination therefore fails.

Constructive Unfair Dismissal

115. In order for the Claimant's complaint of constructive unfair dismissal to succeed the Tribunal first needs to conclude that there has been a fundamental breakdown in the implied duty of trust and confidence between the parties.

116. The Claimant is relying on the seven incidents set in the Case Management Order starting with the concerns raised about his application for the PHG role in August 2021 with the last act relied on being deliberately arranging the grievance meeting on 13 December 2021 on the same day as the Claimant's medical appointment.

117. The Claimant confirmed in the hearing that he is not seeking to argue that any single alleged breach in itself was a fundamental breach of the implied duty of trust and confidence by the Respondent but that taken together they cumulatively destroyed the trust and confidence between the parties.

118. Dealing first with the incidents which the Tribunal concludes have not been made out.

119. Firstly, in relation to the Claimant being required to perform the additional role of Workplace Coach without the additional pay which that should have entailed, despite repeated objections; the Tribunal has found that whilst the Claimant did perform additional duties that could properly have been undertaken by the appointed workplace coaches, he did so without objection and was not forced to do so. He had not previously asked for any additional pay for undertaking these tasks and the Tribunal has concluded that after he had been unsuccessful in his application to the Workplace Coach role the Claimant felt increasingly aggrieved by the additional time he had previously spent supporting colleagues. However, the Tribunal finds that voluntarily assisting colleagues is not something which is unusual in a workplace, and that the Respondent allowing him to do this, does not support his claim that there has been a breach of the implied duty of trust and confidence.

120. Secondly, in relation to the complaint that the Claimant was required to run the unit on the week commencing 25 October 2021 (by assuming the management role of Ms Heaton-Prouse who was on holiday); the Tribunal has concluded that he was not running the unit but had been referred to as a colleague who could assist the cover manager should the need arise and conclude that this does not support the Claimant's claim that there has been a breach of the implied duty of trust and confidence.

121. Thirdly, in respect of the complaint that the Respondent changed the selection criteria for the PHG role from the person with the highest seniority (length of service) who passed the interview stage to the highest score at the interview stage in order to prevent the claimant from securing this role, this was clarified during the hearing as being an incorrect statement. Both parties agreed that the alleged change in criteria was from the person who passed the interview with the highest score to the person who passed the interview with the most seniority (length of service). The Tribunal has concluded that Ms Heaton-Prouse initially misunderstood the criteria but that they were not in fact changed, although the incorrect information that Ms Heaton-Prouse had originally communicated was corrected. The Tribunal has found that this change was in no way directed at the Claimant although as the Claimant

was not among the more senior of his colleagues, it made it less likely that he would have been appointed to the role. However, the Tribunal concludes that this error does not go to the trust and confidence between the parties and in the alternative that there was a reasonable and proper cause, being the application of the correct criteria.

122. Fourthly, in relation to the complaint that on the week commencing 29 November 2021 additional work was added to the Claimant's duty as retaliation for him raising a grievance, The Tribunal has concluded that as the grievance was not received by Ms Heaton-Prouse until the 30 November 2021 and the additional duties were added to the rota for the week commencing 29 November 2021, this allegation is not made out.
123. The Tribunal next considers the remaining incidents.
124. In relation to the failure to progress the Claimant's application for the PGH role, the Tribunal has found that the Claimant did make an application and that this was not progressed. The Tribunal has noted that the existence of the application was not acknowledged by the Respondent until it was produced pursuant to a Data Subject Access Request and that no clear explanation has been provided as to why it was not progressed when if it was self-evidently made. The Tribunal has concluded that the application was not actioned as Ms Heaton-Prouse did not understand that the Claimant seriously intended to apply given the unlikelihood of the Claimant being appointed (agreed by both parties) and on the basis of the Claimant's comment. However, the Tribunal concludes that the failure to progress the Claimant's application without discussion was conduct that was likely to damage the trust and confidence between the parties. However, by continuing to work in the OPG role without raising a complaint at the time, the Tribunal concludes that the Claimant did subsequently affirm the contract.
125. In relation to the failure to acknowledge the Claimant's written grievance which was left on the Delivery Office Manager Ms Heaton-Prouse's desk on 25 November 2021 the Tribunal has concluded that there were reasonable grounds for this not being acknowledged before 30 November 2021. However, from that point on and particularly given the Respondent was aware that the Claimant was off sick with stress, the Tribunal has found that there was an ongoing failure to acknowledge the grievance including by failing to ensure that the grievance hearing scheduled for 13 December 2021 was promptly and effectively communicated to the Claimant. The Tribunal concludes that considered objectively that this was conduct which was likely to damage the trust and confidence between the parties
126. In relation to the failure to deal with the Claimant's grievance adequately, the Tribunal has found that the informal text invitation to a meeting with Paul Carter on 10 December 2021 was sent the day before the meeting without context and without clarity on timing or purpose. If intended as a Grievance Hearing it was outside of the Respondent's agreed Grievance Procedure and if intended as an informal discussion the lack of clarity in communicating this to the Claimant, and the failure to ensure that it actually took place added to the Claimant's confusion and distress. In relation to the question asked by Ms Heaton-Prouse about whether the Claimant had found another job yet, the Tribunal has accepted Ms Heaton-Prouse's explanation about the context of her making that comment, but nonetheless, given that it was said whilst the Claimant's grievance was unresolved, and in light of the lack of clarity about the purpose of the meeting on 10 December 2021, the Tribunal concludes that this too considered objectively was conduct which was likely to damage the trust and confidence between the parties.
127. Although the Tribunal has concluded that the grievance hearing was initially not deliberately scheduled for 13 December 2021 when the Claimant could not attend,

(the last straw incident relied on by the Claimant), after the Claimant had informed Ms Heaton-Prouse that he would be unable to attend on that date when they met on 10 December 2021, the Respondent did not postpone the grievance meeting and the Claimant was not told expressly that the meeting would be re-scheduled; the apparent expectation being that he would turn up in any event. The Respondent's case relies on Ms Heaton-Prouse's evidence (which is not accepted) that the Claimant was told to come after his medical appointment. The Tribunal concludes that the failure to reschedule this meeting and communicate this to the Claimant after he had been informed verbally of the meeting on 10 December 2021, as evidenced by the standard letter sent by Ms Heaton-Prouse on 13 December 2021 which referred to his "failure to attend" the meeting on 13 December 2021 as well as inviting him to a further meeting on 16 December 2021, and which did not refer to the previous conversations or process when considered objectively was also conduct which was likely to damage the trust and confidence between the parties.

128. The Tribunal further concludes that the last straw act of continuing to maintain that the Claimant had been invited to a grievance hearing on 13 December 2021 firstly without ensuring that his grievance had been acknowledged in writing to him by the 13 December 2021 and secondly after he had notified the Respondent in his conversation with Ms Heaton-Prouse on 10 December 2021 that he had a medical appointment on that day, contributed to the earlier (and ongoing) failure to acknowledge the grievance and to the lack of confidence in the process caused by the incidents on 10 December 2021 applying Omilaju.
129. The Tribunal have found that the Respondent had not effectively deal with the Claimant's grievance by 13 December 2021 and that the Respondent's HR processes from the date that the Claimant had submitted his grievance on 25 November 2021, were inefficient, slow, not joined up and not sufficiently flexible to reflect the particular circumstances of the situation and this resulted in contradictory information being provided to the Claimant which exacerbated his genuine feeling that he was being overlooked, taken for granted and ignored and that his concerns were not being addressed. The Tribunal has also found that the Respondent was aware that the Claimant was absent due to stress and of his pre-existing mental health condition and that they should have taken more care to ensure that communication was timely and effective and that the process to be followed, including who was dealing with the grievance, was explained and consistent with the Respondent's grievance procedure.
130. Taken cumulatively the Tribunal is satisfied that the events that occurred from 30 November 2021 when Ms Heaton-Prouse returned from leave until 13 December 2021 when the Respondent failed to re-schedule the grievance hearing knowing that the Claimant was not able to attend are a breach of the implied duty of trust and confidence.
131. The Tribunal applies the principle that all breaches of the implied term of trust and confidence are repudiatory and conclude that the Respondent acted in repudiatory breach of the contract of employment and the Claimant was therefore entitled to treat himself as discharged from his contractual obligations and resign from his employment and leave at once.
132. Although the Tribunal have concluded that there is a repudiatory breach of contract on the part of the Respondent based on the incidents which occurred between submission of the Claimant's grievance and the scheduled grievance hearing on 13 December 2021, for completeness the Tribunal also considers the separate breach of failing to progress his application for the PHG role. The Tribunal have concluded that the contract was affirmed after this breach but applying the principles set out in Kaur, the Tribunal conclude that the Claimant would also be entitled to rely on this previous breach given the subsequent breaches, although his case is made out

without taking this breach into account.

133. The Claimant did not however resign immediately after 13 December 2021 but delayed resigning until giving his contractual notice of one week on 3 February 2022. The Tribunal therefore goes on to consider firstly whether the Claimant affirmed the contract during this period, and secondly whether the employee resigned in response to the breach.
134. The Tribunal is satisfied that the Claimant did not affirm the contract prior to his resignation. Whilst the Claimant sought to engage the Respondent in the ongoing grievance process, engaging in a dispute resolution process is not in itself an affirmation of the overarching contract. The Claimant remained off sick, did not perform his duties and maintained his position throughout that he believed the Respondent had acted in breach of contract by their actions.
135. The Tribunal is also satisfied that the breach of the implied term of trust and confidence on the part of the Respondent was an effective cause of the Claimant's resignation applying the principle that the breach need not be the sole, or even the main cause of the employee's resignation, but that it must be an effective cause. The Claimant was evidently committed to his job with the Respondent, and although he was unhappy at the failure to appoint him to the workplace coach role, the Tribunal concludes that had the grievance been acknowledged in a reasonable time-frame, the miscommunications in relation to the 10 December 2021 not occurred, and if the grievance meeting scheduled for 13 December 2021 had been rescheduled and heard promptly once the Respondent knew the Claimant had a medical appointment (and the Claimant informed of this fact), then matters may have been resolved and he would not have felt he needed to resign. The fact that the Respondent continued to fail to deal with the Claimant's grievance (and indeed had still not done so by 3 February 2022 when the Claimant resigned), and that these subsequent failings also contributed to the Claimant's decision to resign, does not mean that the earlier breaches were not in themselves an effective cause of the Claimant's resignation as trust and confidence had already been broken by 13 December 2021.
136. Lastly the Tribunal considered carefully the Respondent's submission that the Claimant resigned after he had delayed because he had found another job and not because of the Respondent's behaviour. The Tribunal has concluded: firstly that the initial failure to acknowledge and address the Claimant's grievance and the chaotic miscommunication up to and including the 13 December 2021, including continuing with a grievance hearing which the Respondent knew the Claimant could not attend, broke the trust and confidence between the parties, entitling the Claimant to resign at that point; and secondly, that it was an effective if not the sole cause, of his resignation when reviewed against the later and subsequent failures in the grievance process. The Tribunal has also concluded that the Claimant did not affirm the contract between the 13 December 2021 and 3 February 2022 as he remained off sick and continued to pursue his grievance. On balance the Tribunal are satisfied that the actions of the Respondent from 25 November 2021 to 13 December 2021 remained an effective cause of the Claimant's resignation as at 3 February 2022. The fact that the Claimant waited to obtain an alternative role, (which he stated under cross-examination was a necessity given his need to pay his mortgage) whilst it is a relevant factor, (and one which few employees could choose to ignore), does not mean that the original breach of the contract is no longer an effective cause of the resignation. The Tribunal does not conclude that the Claimant delayed unduly particularly given the grievance process was still on-going.
137. The Tribunal therefore concludes that the Claimant resigned in circumstances in which he was entitled to terminate his employment without notice by reason of the Respondent's conduct and was therefore dismissed. The Respondent's pleaded

defence to the unfair dismissal claim is firstly that it did not act in breach of the implied term of trust and confidence and in the alternative that the Claimant did not resign in response to that breach. The Respondent does not rely on a fair reason for the dismissal in the alternative. The Claimant's claim for constructive unfair dismissal therefore succeeds.

Employment Judge Halliday

Date: 25 May 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
15 June 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

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