EMPLOYMENT TRIBUNALS

Claimant: Mr A Gregory

Respondent: Royal Mail Group Limited

HELD AT: Manchester **ON:** 3, 4, 5 and 6 April 2017

BEFORE: Employment Judge Holmes
Mrs J V Bolton
Ms E Cadbury

REPRESENTATION:

Claimant: Mr G Turner, Solicitor
Respondent: Mr N Newman, Solicitor

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The claimant was constructively and unfairly dismissed.

2. The claimant is entitled to a remedy. In respect of the unfair dismissal the Tribunal awards him a basic award of **£10,577.00** and a compensatory award of **£8,486.29** which sums the respondent is ordered to pay him.

3. The tribunal makes no reduction from, or uplift to, the compensatory award pursuant to s.207A of the Trade Union and labour Relations (Consolidation) Act 1992.

4. The claimant's constructive dismissal was also a wrongful dismissal, and he is entitled to damages for breach of contract in respect of notice pay. The tribunal awards him the sum of **£3,008.43** as damages for breach of contract, which sum the respondent is ordered to pay him.

5. The claimant's claims of detriment by reason of having made flexible working applications are dismissed upon withdrawal by him.

6. The claimant's claims of sex discrimination are dismissed.

7. The recoupment regulations do not apply.

REASONS

1. By a claim form presented on 25 August 2016 the claimant complains of unfair dismissal, sex discrimination, breach of contract (a claim for notice pay) and of detriment under section 47E of the Employment Rights Act 1996 in respect of an application for flexible working. The respondent disputes the claims, contending that the claimant was not constructively dismissed, and that his other claims have no merit. The claimant was represented by Mr G Turner, solicitor, and the respondent by Mr N Newman, solicitor.

2. The claimant gave evidence, but called no supporting witnesses, and for the respondent Mr M Smith, Mr R Langhorn and Mr A Kaye gave evidence. There was an agreed bundle and an agreed List of Issues. Further, the tribunal was provided with a chronology. The Tribunal heard evidence on 3, 4 and 5 April 2017, and concluding submissions on 6 April 2017. The claimant submitted a further document following the conclusion of the hearing which confirmed the dates, and rates at which, he was paid Jobseekers Allowance. Judgment was reserved and is now given.

3. Having heard the evidence, considered the documents in the bundle and the submissions made by both parties' representatives, the Tribunal unanimously finds the following relevant facts:

3.1 The claimant was employed as a postman (OPG) by the respondent at the Burnley Delivery Officer initially under a fixed term contract, and subsequently a standard contract. His continuous service began on 5 July 1993, and the standard contract to which his employment was subject is dated 30 September 1994 and is at pages 98-101 of the bundle. Under clause 8 of that contract the claimant's initial weekly hours of work were 41½ hours per week, and his employment was subject to clause 9 which reads as follows:

> *"(9) The Royal Mail has the responsibility of providing a public service. This puts a special obligation on all employees to play their part in maintaining the kind of service which the public has a right to expect. For this reason, it is a condition of your employment that you are liable to work overtime and to attend at varying times on Wednesdays, Sundays and Post Office, Bank and Public Holidays as the needs of the service demand."*

3.2 The respondent operates a flexible working policy, and the version of that policy dated 28 March 2013 is at pages 68-72 of the bundle. That policy provides a process whereby eligible employees should make a request for flexible working using Flexible Working Request Form under the terms of which, if a formal request is made and accepted, employees whose requests for flexible working were accepted under the formal procedure would have permanent changes made to their contracts of employment to reflect their new working arrangements (see page 71 of the bundle).

3.3 The claimant is divorced, and has a child, a daughter, from his marriage. He had access or contact arrangements in place, under the terms of which he saw his daughter at weekends, and took her to school on certain weekdays. As a result of these responsibilities, in 2012 he made an approach to his then manager, Mr Paul Shaw, under the Flexible Working Policy, so that his working days were confined to Monday to Friday. The respondent, at that time, and still, has a number of duties, particularly delivery and collection duties, which are required to be carried out six days per week. Whilst the majority of employees on such duties only actually work five days a week, with one day a week off, the claimant at this time made an application that he not be required to work Saturdays at all, and hence only worked a Monday to Friday pattern to enable him to meet his childcare responsibilities.

3.4 By a letter dated 30 August 2012, at pages 119 and 120 of the bundle, the claimant's then Delivery Office Manager, Paul Shaw, granted his application for flexible working. In that letter he informed the claimant that his request to remain on an attendance pattern of 11.00am to 7.00pm Monday to Friday had been accepted. The letter goes on to state:

"If you choose to accept this offer your Terms and Conditions of employment will change to reflect your new working hours and location requirements."

3.5 The claimant was invited to return a signed reply slip if he wished to accept that offer, and did so on 30 August 2012. No actual change was made to the claimant's physical contract of employment dated 30 September 1994, but the effect of this application and Paul Shaw's letter was in fact to vary the claimant's contract of employment so as to include a term that his working days were Monday to Friday. Thereafter, the claimant worked that working pattern and did not work Saturdays.

3.6 In or about August 2012 a new Delivery Office Manager, Nigel Smith, took over from Paul Shaw and became the claimant's line manager. On 5 July 2013, an incident occurred whilst the claimant was on duty involving the scanning of a post box. As a result of this incident the claimant was suspended on 8 July 2013, by Luke Smith, and subsequently was subjected to disciplinary proceedings conducted by Nigel Smith. The allegations against the claimant were set out in a letter dated 16 July 2013 (pages 141-143 of the bundle) and were of intentional delay of mail, failure to follow a reasonable request and dishonesty, the first and third allegations potentially amounting to gross misconduct. Nigel Smith conducted the disciplinary hearing, and as a result by a letter of 22 August 2013 he dismissed the claimant without notice with effect from 22 August 2013 (see pages 185-192 of the bundle).

3.7 The claimant appealed this decision, and his appeal was heard by David Houle on 19 September 2013. His appeal was successful, and by letter of 30 September 2013 (page 220 of the bundle) David Houle allowed the appeal, and substituted instead of the dismissal a six month suspended dismissal. The claimant returned to work following his reinstatement, and

continued to work the Monday to Friday shift pattern that had been agreed with Paul Shaw.

3.8 In early 2015 the respondent embarked upon a restructuring exercise, the aim of which was to produce efficiencies and savings in (amongst other places) the Burnley Delivery Office. Negotiations with the relevant union (the CWU) were undertaken, which resulted in a mediation agreement dated 19 March 2015 (pages 231-234 of the bundle). Richard Langhorn, the Delivery Office Manager, and the claimant's second line manager (i.e. there was a manager between the claimant and Richard Langhorn), was heavily involved in this process and negotiated with the union. This restructuring exercise was likely to involve a new structure for duties from the Burnley office, and would require all the relevant employees to be reallocated duties. There was to be a reduction in headcount, but this was to be achieved by voluntary redundancy, and the agreement with the union that was eventually arrived at was that there would be three voluntary redundancies. As part of this exercise, however, it was necessary for the union to ascertain from the workforce preferences and any relevant working arrangements that the workforce wished to have taken into account in the restructure. Consequently a questionnaire (page 236) was issued via the union to the workforce. It is unclear as to whether the claimant ever returned or completed such a questionnaire, but amongst the questions contained in it are whether the employee required any "family friendly working arrangements" and whether they had any "care arrangements". The claimant of course did at that time have the flexible working arrangement agreed with Paul Shaw from 2012.

3.9 The various duties that were available to the relevant employees could be "picked" by them, and could be picked on the basis of seniority. This was in effect a preference exercise, but the respondent did operate a system whereby seniority would be taken into account and duties would be allocated on that basis.

3.10 The claimant, at the time that this exercise was being undertaken at the end of May or early June, was on holiday, and consequently he did not personally return any form indicating his personal preference or "pick". This was in fact done for him by his union representative, Stuart Caddy, and at that time the duty that Mr Caddy put the claimant forward for was duty number 44, then known by the name of "Barden". That was what was known as a hybrid duty, in that it involved therefore delivery and collection, and, in common with most other types of delivery or collection duties for OPGs, was in fact a six day a week duty under the terms of which the claimant, if he worked that duty, would only have one Saturday per month off, and would be required to work the remaining three Saturdays. That was not a unique feature to duty 44, however, and as was clarified in the evidence, any similar duty would have a similar working pattern.

3.11 This clearly was not compatible with the claimant's working arrangements agreed with Paul Shaw, and consequently on his return from holiday when he discovered that he was to be put onto this duty, he objected, although he initially began to work it, being sent home on a Thursday which was to

have been his day off under this arrangement, in that particular week, but which he did not agree to. As a result, although he considered that he should not have to in the light of his previous application to Paul Shaw that had been granted, he completed a Flexible Working Application, on 17 June 2015 (pages 253-256 of the bundle) in which he gave his reason for the application, the upbringing of a child, and described what had been his existing working arrangements of Monday to Friday 9:45-18:15 as being his existing working pattern and the working pattern that he wanted in the future.

3.12 At this time, although the claimant did not see any relevant documentation, other employees who had flexible working arrangements for one reason or another had them recognised and were allowed to continue with them. A document prepared around about that time, but which is undated and is at pages 266-269 of the bundle, refers to duties being "ring-fenced" and either DDA, care or skills preference in accordance with the Way Forward Agreement. Those duties were numbers 90, 96, 302, 304, 308, 309 and 517. In that document, however, the claimant is not so shown, but was assigned the duty 44 Casterton, as it had then become.

3.13 Richard Langhorn held a meeting with the claimant on 20 July 2015, to discuss his flexible working application. Some notes of that meeting are contained in the bundle at page 269A. In this meeting the claimant informed Mr Langhorn of the letter he had received from Paul Shaw in August 2012. Mr Langhorn at this time did not see that letter or did not see both pages of it. Mr Langhorn invited the claimant to put forward ideas as to how his request could be accommodated and his work on Saturdays covered in his absence at no cost or without reorganising the workload between his colleagues. The claimant was unable to do so, but did suggest that it could be put onto overtime as there was always someone wanting overtime. He suggested that the respondent simply carry on as it was doing at the time that the arrangement had been made and was still in place.

3.14 Mr Langhorn considered the claimant's request, but refused it. The reasons for his refusal are set out in an undated letter at pages 270-272 of the bundle. In that letter Richard Langhorn referred to the claimant's previous flexible working request, and the claimant's contention that this had been agreed. Richard Langhorn referred to and indeed provided a copy of the claimant's latest contract dated 30 September 1994 and observed that no permanent contractual changes had been made. He went on to say that upon reviewing the original request the duty structure attracting the attendance pattern of 11:00-19:00 was removed in the delivery methods revision in 2013, as he put it, and the role was removed with a planned structural change. This was a reference to changes that had been made in 2013, under which the structure had been changed but the claimant's working arrangements had not been changed at that time and he continued to work Monday to Friday. Richard Langhorn went on to say that as the claimant had chosen to rescind his previous local agreement and had come out of what he described as "a specialist role", in the re-pick of the duty structures which was based on seniority. He went

on to say that this supported that the original flexible working offer in 2012 “no longer applies”. He went on to refer to the planned structural changes that were occurring within the unit, and consequently set out some five reasons why he was unable to accept the claimant's request for, as he put it, more flexible working. Those five reasons were, in summary:

(1) The burden of additional costs;

(2) Inability to reorganise work amongst existing staff;

(3) Inability to recruit additional staff;

(4) Detrimental impact on performance;

(5) Planned structural changes.

3.15 That last reason was expressed as, “Planned structural changes take into account individuals covered under the Equality Act”. That appears to be a reference to four individuals whose working arrangements had been “ring-fenced” despite the new structure as they were considered to be covered under the Equality Act 2010. Richard Langhorn’s letter therefore ends with a statement that the new duty structure for which the claimant had signed (although he had not, his union representative had) would commence on 10 August, and would attract a one-in-four Saturdays off. He set out what the claimant's hours of duty will accordingly be in a table, and concluded the letter by reference to the claimant having a right of appeal against this decision.

3.16 The claimant did appeal by a letter of 5 August 2015 (page 278 of the bundle), and his appeal was heard by David Riggs, the “Optimisation Champion” on 14 August 2015. Notes of that appeal hearing were at pages 279-280 of the bundle. David Riggs rejected the claimant's appeal, and set out his reasons in a letter dated 19 August 2015 (pages 282-283 of the bundle). In giving his reasons he said that he had concluded that the arrangement put in place in 2012 was an “informal arrangement”. He said he had come to this conclusion on the grounds that the change did not require any contractual change and he had confirmed that there was no contractual change made. He went on to say that he considered that it was therefore acceptable for the arrangement to be varied at any time, and as neither the claimant nor his representative had been able to put forward any means of accommodating the flexible working request other than the current arrangement, this lack of alternative indicated that the arrangement was neither practical nor acceptable and consequently he rejected the claimant's appeal whilst expressing sympathy with the difficulties this may create for the claimant’s childcare arrangements.

3.17 The claimant did not work this new arrangement but around this time commenced a period of sickness absence due to stress. He consulted his GP on 18 September 2015, as is recorded in the letter from his GP Practice at pages 404-405 of the bundle. The claimant, with the assistance of his union, then presented an Employment Tribunal claim on 28 October

2015, case number 2408129/2015. In that claim he complained of "unauthorised change of contract", but in the particulars that were provided with the claim form, it was clear that he was bringing a complaint under section 80H of the Employment Rights Act 1996 in respect of flexible working. The particulars of his claim set out at pages 299-303 of the bundle rehearse the matters set out above, and conclude with allegations that the new hours being forced on the claimant at that time were radically different and were detrimental to him, and he was now working (although he had not actually started this it seems) three our of four Saturdays, where before he was working no Saturdays. At that time the claimant accordingly was seeking a remedy under section 80I of the Employment Rights Act 1996, was seeking a reconsideration of his application and compensation.

3.18 The respondent resisted that claim, and in its response form served on 2 December 2015 (pages 306-316 of the bundle) denied the claimant's entitlement to flexible working, and contended that in the light of the revisions to duties that had taken place the claimant's flexible working application had been rejected on the basis that the claimant had not been included in the ring-fenced duties but had been allocated duty four, which was the one that he had indicated a preference for.

3.19 The claimant continued with this claim, and in the meantime an application was made for him to return to work to do some work over the Christmas period, but this was rejected. A preliminary hearing was held on 28 January 2016 in relation to the claimant's claims, at which the claimant was represented by a union representative and the respondent by a paralegal. The notes and orders made on that occasion are at pages 319-324 of the bundle. In the course of the discussion, recorded at paragraph 5 of Annex A on page 321 of the bundle, the Employment Judge had identified that the real dispute between the parties was one of construction of the claimant's terms of employment. The Employment Judge accordingly considered, and the parties' representatives agreed, that the matter to be determined was one under section 11 of the Employment Rights Act 1996, namely a determination of the particulars of employment that should appear in a section 1 statement. In other words the issue became one not of the entitlement of the respondent to reject the claimant's most recent flexible working application, but whether the claimant's contention that his contract of employment had been varied by the agreement made with Paul Shaw in 2012 was in fact correct.

3.20 Consequently the Tribunal claim was to be determined on that basis and was listed for a hearing on 17 May 2016. In Annex B of the Tribunal's Order (page 323 of the bundle) the Tribunal recorded that the sole complaint being pursued was a section 11 complaint, and that the sole issue was what particulars as to the days on which the claimant could be required to work should have been included in a statement of changes under section 4 of the 1996 Act. It is also recorded that the claimant's case was that following his contractual variation in 2012 the respondent failed to issue a written statement of change to his particulars under section 4. It is recorded at paragraph 3 of that Annex that the respondent resists the

reference on the basis that the claimant subsequently agreed to vary his contract, either in 2013 or in 2015, and therefore the statement should include confirmation that he can contractually be required to work at weekends. The Tribunal made Case Management Orders, including that by 11 March each party should exchange witness statements with the other.

3.21 The claimant at that time was represented by his union, and not by his current solicitor. Shortly after the preliminary hearing on 28 January 2016, on 25 February 2016 the respondent's solicitor wrote to the claimant's then representative contending that the claimant's claim was misconceived and had no reasonable prospects of success, and making a costs warning in the event that he continued to maintain his applications. The claimant consulted his current solicitor around about the end of March 2016.

3.22 On 1 April 2016 that solicitor, Mr Turner, submitted a formal grievance to the respondent (via in fact the respondent's solicitor). That grievance is at pages 331-333 of the bundle. In section 1 of that document the formal grievance is submitted in relation to the following:

"(a) Unilateral changes to my contract of employment.

(b) Breaches of duties regarding flexible working.

(c) Direct sex discrimination.

(d) Injury to my health."

3.23 The document goes on to refer to the main facts being set out in the claimant's particulars of ET1 which had been submitted in the Employment Tribunal claim, in respect of which no grievance hearing had previously taken place. This document then continues to set out the claimant's contentions in relation to the unilateral changes to his contract that he says had occurred since 2015 in terms of the removal or attempted removal of his flexible working arrangement, and at paragraph 7 on page 331 of the bundle he says that he believed this approach was a breach of his contract of employment, and was also a breach of the implied term of trust and confidence.

3.24 He then went on in relation to the second of his grievances, breach of duties regarding flexible working, to set out his contention that the rejection of his most recent application was based on incorrect facts, the first of which was that the change of his hours was not an informal arrangement but was indeed a binding one, and that the other reasons advanced by the respondent in terms of burden of additional costs and inability to reorganise work amongst existing staff was also based on incorrect facts.

3.25 In relation to his third complaint of direct sex discrimination he said that he believed that he had been treated less favourably due to a protected characteristic, namely his gender, and that he did not believe that a female in his position would have received such a "hard nosed" approach. He

then set out some details under that section, and then went on to refer to the injury to his health caused by the stress of the recent events at work.

3.26 Finally, in terms of continued employment, he said this:

"I am remaining in employment under protest. I believe that these issues either individually or looked at altogether amount to serious breach of my contract of employment. I am remaining in employment under protests [sic]."

3.27 The document goes on to seek acknowledgement of this grievance and asks for provision of all relevant policies and the timescale for investigation of the matters raised in the grievance.

3.28 Around about this time the claimant apparently received a letter dated 5 April 2016 from Richard Langhorn (a copy of which does not appear in the bundle but is referred to several times) in which he was apparently told that the Burnley Delivery office could not support his request for flexible working. The claimant's grievance had been referred to Andrew Kaye, and he had written to the claimant an undated letter (which again does not appear to be in the bundle) in which he was invited to a grievance meeting on 8 April. This was subsequently changed to 11 April, and Andrew Kaye did indeed hold a grievance meeting with the claimant on 11 April 2016.

3.29 In the meantime, on 6 April 2016, the claimant wrote to Richard Langhorn in response to his letter of 5 April 2016 (see page 337 of the bundle). In that letter the claimant reiterated his position, and how he had found the last six months massively stressful and a considerable strain on his mental health. He said he wanted a peaceful life and to be able to look after his daughter at weekends as he had done so for years. He went on to say he was happy to consider any realistic working alternative. He had never worked nights and did not really relish the idea of it, but said he would consider working nights and would also consider working from Preston.

3.30 The notes of the claimant's grievance meeting with Andrew Kaye on 11 April 2016 are at pages 338-339 of the bundle. Andrew Kaye had recently been employed at the Burnley Delivery Office, but had no previous involvement with the claimant or anyone else, and so the grievance had been assigned to him by Mr Richardson, his line manager. In this meeting the claimant explained his position, and was asked in relation to the original flexible working application if he had anything signed from HR. The claimant informed Mr Kaye that he had not. The claimant's union representative, Andrew Kaym, accompanied the claimant to this meeting. The meeting ended with Mr Kaye telling the claimant that he would send him the notes of the interview, but giving no further information as to how the grievance would be progressed.

3.31 Thereafter there is a dispute as to whether the claimant was or was not sent the notes of that interview for him to comment upon and sign. The respondent contends that he was not, but the claimant contends that he was and that he returned the notes. In the bundle at page 344 is a copy of

an acknowledgement of the letter that Andrew Kaye sent to the claimant dated 14 April 2016 in which the notes were enclosed. The acknowledgement is signed and dated by the claimant on 15 May 2016. It seems highly unlikely that that document at page 344 can be anything other than a copy of an original received by the respondent as an organisation. It also seems highly unlikely that if the claimant sent by the acknowledgement he would not also have sent back with it the notes with any amendments or signature. Whilst Andrew Kaye may not personally have received that document and the notes back, the Tribunal is quite satisfied that the claimant did indeed return those notes.

3.32 Thereafter, however, there is an undated letter in the bundle at page 345 in which Andrew Kaye purports to raise with the claimant the absence of any response to his letter of 15 April 2016. The claimant does not recall receiving that letter and was apparently unaware that his interview notes had not been received. Whatever the reason, however, Andrew Kaye did not receive the interview notes, but did not on that basis consider that he should not deal with the grievance.

3.33 Unfortunately, however, Mr Kaye's own personal circumstances took a turn for the worse when around about this time he had family problems arising from the illness of his young daughter. Consequently he was off work sick, then moved to the Keighley Office, whence he never returned to Burnley. He did not seek to hand over the grievance to anybody else, and indeed considered it was still his responsibility, but he did not in fact progress it any further and certainly did not respond to the claimant before the middle of May 2016 when negotiations between the claimant's then new solicitor, Mr Turner, and the respondent's solicitor resulted in a settlement of his ongoing Tribunal claim.

3.34 That settlement resulted in a COT3, a copy of which is at pages 360-362 of the bundle. Under the terms of that agreement the claimant firstly agreed to withdraw his claim in the Manchester Employment Tribunal, and at clause 2 it is recorded that:

> *"(2) This agreement is in full and final settlement of all other claims, if any, whether statutory, contractual or otherwise, which the claimant could bring against the respondent up to and arising out of the facts the circumstances of his claim under case number 2408129/2015 that the claimant is aware of at the time of entering into this agreement."*

3.35 The agreement goes on to record that the respondent, without admission of liability, warranted that the claimant's current contractual status was as set out at Annex 1 to the agreement. Thereafter the respondent agreed to make a contribution towards the claimant's legal costs, and at clause 5 it is recorded that the agreement did not prevent the claimant from bringing any claim for personal injury, save for any personal injury arising out of the circumstances which formed the basis of the claim under the existing case number. That agreement was signed on behalf of the claimant by Mr Turner on 11 May 2016 and on behalf of the respondent by their solicitor

on 13 May 2016. The Annex, which was entitled "Statement of Contractual Terms" reads as follows:

"Royal Mail group Limited warrants that Mr Adam Gregory's terms and conditions of employment were varied by way of a letter from Mr Paul Shaw on 30 August 2012. For the avoidance of doubt, the effect of that letter was to vary Mr Adam Gregory's attendance pattern to 11.00am to 7.00pm on a Monday to Friday basis. The remainder of Mr Adam Gregory's contractual terms of employment were not varied by this letter and remain as per his contract of employment dated 30 September 1994. Royal Mail Group Limited warrants that as of 5 May 2016 that contractual variation remains in place."

That was signed and dated 17 May 2016 by Adrian Buckley, Service Manager, Appeals – North.

3.36 Richard Langhorn was not, apparently, involved in the negotiations and discussions which led to that COT3, but he was subsequently aware of it.

3.37 The claimant at this time remained on sickness absence, but it would appear that he was subject to a medical certificate from his GP for one month from 17 May 2016 under the terms of which he could undertake a phased return. Indeed the claimant's position was that once the Employment Tribunal claim had been dealt with he felt he could return to work, and consequently although the Tribunal has not seen this medical certificate, it is presumed that its terms were that the claimant could resume a phased return to work, because he in fact did so under what was termed "rehabilitation". Consequently the claimant did return to work and worked various duties, and in the last week of the period of his rehabilitation worked Monday to Friday on what had been his original duty at the time that he went off sick in 2015.

3.38 Richard Langhorn met with the claimant on 9 May 2016 (before he had had the interviews with the other employees referred to below). This was as part of his sickness absence process, and the notes of this meeting are at pages 351-352 of the bundle. There was a discussion about what would resolve his current absence and the claimant said going back to work on the shift he was doing before, a Monday to Friday hybrid. Richard Langhorn asked if this was the only pattern he would consider, and the claimant said a Monday to Friday with an attendance pattern of 9.30am at the earliest and 7.00pm finish at the latest. He was also waiting to see what came out of the Tribunal on 17 May 2016. Richard Langhorn asked if he would commit to a return to work after his current fit note expired, and the claimant said, "Yes, on a Monday to Friday when the outcome of the Tribunal had been communicated". He had requested a phased return on a rehabilitation basis due to lack of fitness, and Richard Langhorn stated he could resume on 50% of his contractual hours. In the meantime Richard Langhorn would "look into accommodating his Monday to Friday working request", as he put it.

3.39 Around this time, although the precise date is unclear save in respect of Stephen Smith who apparently was seen on 12 May 2016, Richard Langhorn spoke to Stephen Smith, Shirley Morley, Mark Croasdale, and James Whiteman. The notes of his discussions with these four employees are at pages 363-371 of the bundle. In his interviews with these four employees, all of whom had had their duties "ring-fenced" in the restructure in July 2015, he invited them to consider voluntarily waiving their current duty structure and agreeing to work Saturdays. None of them would do so. In terms of the reasons for their ring-fenced positions, Stephen Smith's was protected under the Equality Act he considered because of his breathing difficulties. Shirley Morley did have childcare responsibilities, but her position was slightly different in that, as she said to Richard Langhorn, when the new structure was proposed in July 2015 although she discussed with her union how to protect her working arrangements rather than apply for a flexible working arrangement, she instead invoked protection under a previous 2010 agreement (probably the "Way Forward Agreement", and consequently her position had been ring-fenced on that basis. Mark Croasdale did not rely upon any medical reason of his own, and indeed did not believe his duty was protected. He declined, however, a voluntary waiver and to work a duty structure whereby he would be required to work Saturdays. Finally James Whiteman whilst not having a medical reason did refer to his wife's medical condition which required him to assist her in the mornings and on Saturdays, and consequently he too considered that his duty was not protected but his seniority was enough to get him the Monday to Friday position that he required. He too would not change so as to work Saturdays. This was part of what Richard Langhorn terms a "scoping exercise".

3.40 The claimant remained in work on his rehabilitation, still not working Saturdays.

3.41 There was an attempt on or around 15 June 2016, the precise date being unclear, to hold a further meeting between Richard Langhorn and the claimant. This was not documented, nor was the claimant given any indication that this would be some form of "final" meeting before changes would be made to his contract. The claimant was unable, however, to arrange a union representative to accompany him, so the meeting did not take place.

3.42 Following this exercise Richard Langhorn wrote to the claimant on 16 June 2016 (pages 379 to 381 of the Bundle). The claimant received this letter as he was about to start a period of leave. He did see it, but did not have time to respond to it before he went on holiday. This letter is headed *"Proposed changes to your contract of employment"*. In it reference is made to the claimant's attendance pattern contained in the letter dated 30 August 2012 of 11am to 7pm Monday to Friday. The letter states:

"Your attendance pattern will be amended to Monday & Tuesday 10:15 to 18:15, Wednesday & Thursday 10:00 to 18:15, Friday 10:10 to 18:15 and Saturday 08:00 to 14:00 attracting 1 in 4 Saturdays off. The remainder of

your contractual terms of employment will remain as per your contract of employment dated 30 September 1994."

3.43 The letter goes on to set out the reasons for this change. These are contained in 7 paragraphs, similar to, but not identical with, those set out in Richard Langhorn's letter of July 2015 (pages 270 to 272 of the Bundle), wherein there were 5 paragraphs of reasons, as set out in para. 3.14 above. In relation to paras. 3 and 7 of these reasons, Richard Langhorn referred to his recent enquiries and how no other employees were willing to change their duties to accommodate his requirements. Reference was also made in para. 7 to some recent changes agreed with the CWU which removed two further Monday to Friday duties. Richard Langhorn went on to refer to the discussions about the possibility of the claimant working a night duty at Preston, and his discussions with Stephen Smith, Shirley Morley, Mark Croasdale, and James Whiteman. He went on to mention that he had explored the possibility of the claimant becoming a leave reserve to cover those on annual leave with their rotational duty off being a Saturday. He had rejected this, however, because the majority of duties would start earlier than the claimant's requested start times, and there would be a need to re-organise workload amongst existing staff, which was not possible *"without a burden of additional cost or a detrimental impact on quality and performance"*. He referred to the claimant being given a *"final opportunity"* to attend a meeting on 16 June 2016 to provide any further suggestions, but he had *"declined to attend."* The letters ends:

"Please note that we are entitled to change your employment terms under clause 9 of your contract of employment. The change is proposed to take effect from 14 July 2016."

3.44 Unlike the previous letter of July 2015, this letter made no mention of any right of appeal against this decision.

3.45 A recurrent feature of Richard Langorn's reasoning, and his evidence to the tribunal, has been that the claimant, through his union, had selected the "44" duty in the March 2015 re-structure.

3.46 On his return from holiday the claimant contacted his trade union. On 4 July 2016 Tony Williams, CWU Divisional Rep sent an e-mail (pages 383 to 384 of the Bundle) to the respondent's HR department , enclosing a copy of the COT3 agreement, and complaining of the fact that within a month the respondent was seeking to amend the agreement, which he said appeared to be *"cynical"*. The claimant was at that time working a hybrid duty, which roughly complied with the terms of the COT3, but the e-mail requested that this arrangement continued until a more suitable solution could be found.

3.47 After an initial reply, on 5 July 2016 Nick Turner of the respondent's HR department replied (pages 382 to 383 of the Bundle) , saying that the COT3 did not *"warrant that this attendance pattern was to be protected in the future and there is no restriction on varying those terms with effect from 14 July 2016."* He went on to refer to Richard Langhorn's explanation,

and stated that it was clear that the claimant's current attendance pattern was unsustainable within the Burnley unit, and that the proposed change, due to take effect on 14 July 2016, would proceed.

3.48 The claimant further consulted his solicitor, Gordon Turner , and he wrote to the respondent on 15 July 2016 (pages 385, 386 to 387 of the Bundle, wrongly dated due to printing data). In this letter the claimant resigned, with immediate effect. The letter sets out the history of the previous claim and the conclusion of the COT3 agreement. It goes on to then set out the events in July, and the receipt of Richard Langhorn's letter by the claimant. It alleged that the manner in which the change to the contract took place was *"very undermining of trust".* It went to allege that the decision had been made without any meeting with the claimant, and (wrongly, it is now accepted) asserted that there had been a refusal to release a union representative to attend a meeting with the claimant.

3.49 The letter goes on to say:

"The history of denials of what appears to be a crystal clear contractual arrangement coupled with the timing of the change of approach near the hearing seriously undermined trust but my client resolved to try the return to work . That the COT3 was almost immediately traduced within a matter of weeks has undermined trust to the point that my client can no longer remain in employment.

In addition to the impact on the contractual relationship , my client believes that he has been victimised for asserting statutory rights and very much doubts that a female in similar circumstances would have been treated in this way. He is asserting that he has been constructively dismissed and is therefore resigning with immediate effect.

My client is willing to discuss this through a grievance procedure before going to ACAS ."

3.50 The letter ends with mention of other outstanding issues, and says that it is not a comprehensive account of the claimant's reasons for resigning.

3.51 There was no specific response to that letter, but by letter of 20 July 2016 the claimant was invited to an exit interview by Daniel Birch, the BB10 Line Manager. He mentions in this letter that the claimant had referred to a potential grievance, and said that he was aware of the investigation by Andy Kaye *"into these matters"* , and informed him that he had been absent from work and had moved to another Delivery Office. He apologised if the claimant had not been made aware of this.

3.52 Gordon Turner replied to that letter by e-mail of 29 July 2016 (page 391 of the Bundle), declining on behalf of the claimant to attend an exit interview. He invited any questions to be put in writing for the claimant to answer. He referred to the outstanding grievance, and stated that it was up to the respondent to show that it intended to investigate it thoroughly, promptly and fairly.

3.53 In due course, though precisely when is unclear as the letter bears no date, Andrew Kaye produced, with substantial input and assistance, the tribunal finds from HR, a grievance outcome letter (pages 392 to 396 of the Bundle). That was based on, and expressly made findings upon the 4 heads of grievance identified in the grievance letter of 1 April 2016, and discussed in the meeting held on 11 April 2016. The findings can be seen in the letter, and it is not intended to repeat them here. The claimant was offered the right of an appeal against the outcome, which the claimant did not exercise.

3.54 Following his resignation the claimant claimed JSA from 19 July 2016, and received it until 18 January 2017. He appears, however, to have been medically unfit for work from 5 September 2016 to 4 December 2016 (see pages 404 to 405 of the Bundle) .

3.55 Since January 2017 he has started his own painting and decorating business, or has helped friends as a labourer, from which he has earned :

January	£300
February	£750
March	£1,100

3.55 The claimant has had leaflets prepared for his decorating business, and has hopes of returning to carry out further work for customers he has already done some work for.

4.Those then, are the relevant facts as found by the tribunal. There was not much dispute on the facts, but where there was the tribunal found the evidence of the claimant was to be preferred to that of the respondent. This was largely due to the respondent's somewhat surprising failure to retain, or be able to produce relevant , clearly or correctly dated, documentation , though in the final analysis the tribunal does not find that the respondent's witnesses have not been honest, merely that their recollection has not always been reliable. Further, with all due respect to him, and the respondent, the evidence of Andrew Kaye's grievance outcome was of little relevance. As ever in cases such as this, all he did was to consider the claimant's complaints which he now, largely, makes to the tribunal, and express a view upon them. As it is for the tribunal to determine those issues, and not merely (as in unfair dismissal, for instance) to consider whether the respondent's views were correct, or even merely reasonable ones to hold, the relevance of his conclusions is minimal.

The Submissions.

5.Mr Newman made his submissions for the respondent. He had prepared a written outline, to which he spoke, which is on the tribunal file, and which it is not intended to repeat here. Similarly Mr Turner had prepared written submissions , which he augmented by some further handwritten submissions , based on the evidence as it had emerged in the hearing. The main points made in submission will be clear from the discussion and findings below, and it is not intended to repeat the submissions here.

The law – statute.

6.The relevant statutory provisions relating to the unfair dismissal claim are those of s.95 and s.98 of the Employment Rights Act 1996. In relation to the claim of direct sex discrimination, s.13 of the Equality Act 2010 applies. The parties' solicitors agreed upon the relevant law to be applied, and it is not proposed to recite these provisions in this judgment.

The claims and the effect of the previous COT3.

7.Before going any further, the tribunal considers that it is important to set ut the claims before it. Of the claims originally presented, those of detriment for having made a flexible working request, i.e claims under s.80H of the Employment Rights Act 1996, were withdrawn, and are dismissed on withdrawal. That left claims of unfair (constructive) dismissal, breach of contract, in the form of notice pay (also dependent upon a finding of constructive dismissal) , and sex discrimination. Of these latter claims it was unclear how far back the claimant was seeking t go. Whilst the tribunal can see how he alleges, and is entitled to allege that the treatment between 13 May 2016 and 15 July 2016 that led to his constructive dismissal was also discriminatory, Mr Turner seemed to be seeking to claim in respect of alleged acts of discrimination which pre-date 13 May 2016.

8.The significance of that date, of course, is that it is the date of the COT3 (pages 360 to 362 of the Bundle) by which the claimant's previous claim to the tribunal was settled. Whilst the claim that the claimant originally brought in those proceedings was once of detriment for having made a flexible working request, under s.80H of the ERA 1996, it in fact proceeded as a s.11, determination of statement of particulars of employment claim. It was, of course, never heard, being listed for hearing on 17 May 2016, as it was settled by the COT3 agreement dated 13 May 2016. Clause 2 of that agreement reads as follows:

"2. This agreement is in full and final settlement of all other claims, if any, whether statutory, contractual or otherwise , which the Claimant could bring against the Respondent up to and arising out of the circumstances of his claim under case number 2408129/2015 that the Claimant is aware of at the time of entering into this agreement."

9.That is, of course, wide terminology, and the question arises of whether it precludes the claimant from bringing in these proceedings any complaint of sex discrimination that pre-dates the date of the agreement. Mr Turner argued that it did not, as the agreement only compromised claims of which the claimant was aware, and not having , until disclosure in these proceedings , had sight of Richard Langhorn's interview with Shirley Morley which was probably after the date of the COT3 agreement, the claimant was not aware of her more favourable treatment , or the reason for it.

10.In terms of the effect of such a clause in a COT3 or other agreement, it is clear from the authority of ***Bank of Credit and Commerce International SA v Ali [2001] IRLR 292*** that such a clause can have the effect of preventing a claimant from seeking to raise in subsequent proceedings claims which he could, and arguably

should, have raised in previous proceedings which have been compromised by such an agreement containing such a clause. The question for the tribunal, accordingly, is whether any claims of sex discrimination pre – 13 May 2016 have been thus compromised. The test, from the House of Lords judgment in ***Ali*** is whether the claims now being advanced were in the actual or imputed contemplation of the parties at the time of the settlement agreement being made. It is the tribunal's view that they have. This is for a number of reasons. Firstly, the wording of clause 2 is very clear, and any claim at the time of the COT3 is potentially caught by it. Secondly, in any event, the possibility of any such claim had already been alluded to in the grievance that had been submitted by the claimant (and in fact had been drafted by Mr Turner who was by then acting for him) of 1 April 2016 (pages 331 to 333 of the Bundle). Sex discrimination is expressly referred to, and is complained of. Further, that grievance also expressly refers to the facts set out in the "particulars of ET1". Thirdly, whilst the claim before the tribunal in the previous proceedings was to be dealt with as a section 11 determination, there was nothing to prevent the claimant seeking , in those proceedings, either by way of original claim, or amendment, from complaining that his treatment was discriminatory, on the same facts that he was alleging, and of which he was aware.

11.Finally, Mr Turner's submission that the claimant's claim of sex discrimination is not one of which he was aware, because he was not aware of the evidence that would then emerge as to Shirley Morley's interview with Richard Langhorn, confuses, with respect to him, awareness of a claim, with awareness of evidence to support such a claim. The claimant was, as his grievance of 1 April 2016 shows, clearly aware that he was the victim of sex discrimination in the manner in which he was being denied his flexible working arrangements, and the fact that he was unaware of evidence which may have assisted him to establish such a claim does not mean that he was unaware of the right to claim. For all those reasons, the tribunal considers that no claims of sex discrimination which pre-date 13 May 2016, when the COT3 was made, can be entertained by this tribunal.

12.The same is probably true of allegations of conduct on the part of the respondent relied upon in support of the claimant's constructive dismissal claims (both unfair dismissal and the notice pay claims) , in so far as those too pre –date the COT3. This may be a more moot point, however, as, whilst there may have been conduct pre – 13 May 2016 upon which the claimant may seek to rely so as to entitle him subsequently to resign and claim constructive dismissal on 15 July 2016, the COT3 can only have the effect of compromising claims , and the tribunal would not regard it as also having the effect of precluding the claimant from relying upon antecedent conduct contributing towards a fundamental breach of the implied term of trust and confidence for the purposes of a subsequent constructive dismissal. In any event, the grievance of 1 April 2016 expressly refers to the claimant continuing in employment "under protest". At most, the tribunal considers that the COT3 would preclude the claimant from relying upon any antecedent conduct which could, of itself, have amounted to a fundamental breach of contract, but not from relying upon such conduct as contributing, subsequently, to any cumulative breach.

Discussion and Findings.

i)The unfair and wrongful dismissal claims,

13.The tribunal will start its discussion with these claims. In essence the same issue falls to be determined for both claims, which is whether the claimant was constructively dismissed. Whilst the respondent had pleaded (para. 8 of the Grounds of Resistance, page 35 of the Bundle) , in the alternative, a plea of any dismissal being fair on the grounds of "some other substantial reason" , without, however, specifying what that reason was, this has not been pursued, and was not addressed in Mr Newman's closing submissions. Thus, if there was a constructive dismissal , no potentially fair reason has been advanced for it, and hence it will be unfair. If it was wrongful, no notice was given, the claimant being entitled to resign without notice in circumstances where he had a contractual entitlement to 12 weeks notice, and he will succeed in this claim too.

14.The law on constructive dismissal is well settled. It has its origins in the classic statement of Lord Denning in the case of ***Western Excavating (ECC) Limited v Sharp 1978 ICR 221*** in which he held that in order for an employer's conduct to give rise to a claim of constructive dismissal it must involve a repudiatory breach of contract. As Lord Denning MR said "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 the employers conduct. He is constructively dismissed". Thus in order to succeed the claimant must establish that there was a fundamental breach of contract on the part of the employer, that that breach caused him to resign, and that he did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

15.In this case the respondent has sought to argue that in delaying between 16 June 2016 , when he received Richard Langhorn's letter telling him that his working pattern would include working three out of four Saturdays, and 15 July 2015 , when he did resign, the claimant lost the right to complain of constructive dismissal. This was put as waiver, but it could equally be said to be affirmation.

16.In this case there is an express term relied upon by the claimant as having been broken so as to entitle him to resign, that is the express term , as agreed in the COT3, and appended thereto, that his attendance pattern was 11.00 a.m. to 7.00 p.m, on a Monday to Friday basis. This was expressly warranted to be contractual variation that remained in place, as of 17 May 2016. The claimant's first contention is that there was break of this express clause, in Richard Langhorn's letter to him of 16 June 2016. The respondent's response to that has been, firstly, that Clause 9 of the claimant's contract of employment provided the respondent with the right to vary his hours. This was asserted by Richard longhorn in his letter, as well. The clause reads as follows:

"The Royal Mail has the responsibility of providing a public service. This puts a special obligation on all employees to play their part in maintaining the kind of service which the public has a right to expect. For this reason, it is a condition of your employment that you are liable to work overtime and to attend at varying times on

Wednesdays, Sundays and Post Office, Bank and Public Holidays as the needs of the service demand."

17.With all due respect to Mr Newman and the respondent, the tribunal cannot read that clause as entitling the respondent to make the variation to the claimant's contact that is contended for. Firstly, it refers to overtime, which is not the same as normal contracted hours, and the claimant was not required to work Monday to Friday as overtime. Secondly, whilst it mentions weekdays, Sundays, and other specific holidays, it does not actually refer at all to Saturdays . Finally, at most it entitles the respondent to require attendance "as the needs of the service demand", which suggests an ad hoc, occasional requirement, not a change in an employee's working week for the duration of his contract. As submitted by Mr Turner, and supported by the authorities he cites, any clause relied upon by an employer as entitling it to vary a contract of employment must be very clear. This is not. Thus, the tribunal rejects the respondent's first argument.

18.Having found that the respondent had, in fact, no express contractual right to vary the claimant's contract as it purported to do , the next question is whether, in doing so, the respondent acted in fundamental breach of the claimant's contract of employment entitling him to resign. Mr Newman sought to argue that the respondent had not actually forced the claimant to work this new pattern, it had merely proposed it, and hence this was not an actual breach of his contract. That is, with respect to him, a specious argument. Richard Langhorn's letter was clear, that the new pattern would start on 14 July 2016,.and there was no right of appeal. Further, the e-mail communication that followed from Nick Turner of HR on 5 July 2016 confirmed that the new working pattern "will start" on 14 July 2016. This was, in the tribunal's view a unilateral and unwarranted variation of an express and important term of the claimant's contract of employment, and was in itself a fundamental breach of contract entitling the claimant to resign and claim constructive dismissal.

19.If, however, that was wrong, the claimant can, and does in the alternative, rely upon is what is often referred by the shorthand term the "implied term of mutual trust and confidence". That term in full is an implied term that the employer will not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. That formulation was approved in ***Courtaulds Northern Textiles Limited v Andrew 1979 IRLR 84*** by the EAT, and further in ***Woods v W M Car Services (Peterborough) Limited 1981 ICR 666, EAT***.

20.The tribunal is quite satisfied that even if not on the basis of the unilateral variation of the express term referred above, the respondent was guilty of fundamental breach of this implied term in the manner in which it sought to vary the claimant's contract. The tribunal considers that in agreeing in the COT3 on 13 May 2016 that the had the express term as to his working pattern , and then within 4 weeks taking it off him, the respondent, as an organisation was either, as has been suggested, acting cynically, in settling one tribunal claim knowing perfectly well that it was not going to honour the term it had conceded, late in the day that the claimant had in his contract, or, at the very least, ineptly, with Richard Langhorn proceeding to take away from the claimant within weeks the very benefit he had taken tribunal proceedings to assert. Whichever it was does not matter, because the respondent's

actions must be viewed objectively. To breach the implied term of trust and confidence the respondent does not have to have intended to destroy or seriously damage the relationship of trust and confidence, it is enough if it actions were likely to have that effect. In the view of the tribunal the respondent's actions, taken as a whole in, on the one hand, conceding the claimant's contractual entitlement so as to settle his tribunal proceedings in May, and then, on the other, in June to seek to remove that entitlement, and to do so with only one month's notice, with no right of appeal, must clearly be conduct likely to destroy the (already fragile, as conceded by Richard Langhorn) relationship of trust and confidence.

21.The tribunal appreciates that there is a qualification to be considered, and that is that the employer's actions have also to be without reasonable and probable cause. The focus has been upon the difficulties that Richard Langhorn faced in accommodating the claimant's Monday to Friday working pattern in June 2016. The tribunal recognises and understands those problems, which, from a management perspective were doubtless real and genuine. The respondent's actions, however, are not just to be judged at that point in time, some consideration has to be given to the totality of the conduct in question. In this instance, the issue goes back, in the tribunal's view to 2015, and the refusal, wrongly as was ultimately conceded, of the respondent, particularly Richard Langhorn, to recognise that the claimant had an agreed, and contractually binding, term in his contract of employment that he would only work Monday to Friday. Had this been recognised and acknowledged at that stage, however inconvenient and costly for the respondent in terms of the re-structure, it would have had no choice but to accommodate that working pattern, as indeed, it did for the other four persons identified as having particular protected duties, or anyone else with recognised adjustments or arrangements in place at the time. The respondent cannot contend , in these circumstances, that its decision to impose the change that it did in June 2016 was with reasonable and proper cause.

22.Having determined, therefore, that on either basis the respondent acted in fundamental breach of contract entitling the claimant to resign, and that he did resign, with no issue being taken but that he did so in response to the breach, the sole remaining issue is the respondent's contention that in delaying doing so until 15 July 2016, the claimant affirmed the contract and thereby lost his right to complain of constructive dismissal.

23.Although the classic formulation by Lord Denning in ***Western Excavating*** speaks of the employee making his or her mind up 'soon', there is no fixed time within which the employee must do so and so a delay per se will not amount to affirmation in law, albeit it will often be an important factor: ***Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13 (26 June 2014, unreported)***. A reasonable period is allowed. It depends upon all the circumstances including the employee's length of service (***G W Stephens & Son v Fish [1989] ICR 324, EAT***, where three months was held not to be excessive), the nature of the breach, and whether the employee has protested at the change. On the other hand, mere protest will not necessarily prevent an inference that the employee has waived the breach, although a clear reservation of right might do so (***W E Cox Toner (International) Ltd v Crook [1981] ICR 823)*** .

24.Where the employee is faced with giving up his or her job and being unemployed

or waiving the breach, it is not surprising that tribunals are sometimes reluctant to conclude that they have lost the right to treat themselves as discharged by the employer merely by working at the job for a further period. This was accepted expressly by the EAT in ***Chindove*** (above), and was said to be particularly so in the case of a longer-serving employee (as here) with serious financial commitments and more uncertain prospects of alternative employment.

25.It need not follow that even had the employee been at work for the period being challenged by the employer, he must be treated as having accepted the new terms and lost his right to treat himself as discharged. In ***Sheet Metal Components Ltd v Plumridge [1974] IRLR 86***, employees worked for almost two months before resigning without losing their right to claim that they had been dismissed. As the EAT held in ***Air Canada v Lee [1978] IRLR 392***, the employee will be entitled to a reasonable period to decide whether to leave or not. In ***W E Cox Toner*** (above) the EAT held that a month was too long to remain at work where six months had already elapsed since the alleged repudiatory act occurred, but it accepted that a month from the initial breach might not be fatal. If, further, the employee specifically makes clear his objections whilst he continues working, he may remain for a longer period without disentitling himself from claiming for unfair dismissal.

26.In this case, for the first two weeks after the claimant received the letter from Richard Langhorn, he was on holiday. Upon his return, his union representative took up the issue and questioned the proposed variation of the claimant's contract. On 5 July 2016 the respondent replied saying that the variation would take effect, then the claimant consulted his solicitor, who sent his letter of resignation on 15 July 2016. Affirmation is a question of fact, and the tribunal finds that by the short period of delay, for half of which the claimant was on holiday, and during which he did not work any Saturday duty, and during which he consulted his union, and his solicitor, who then sent his resignation with immediate effect within 4 weeks of the letter from Richard Langhorn, the claimant did not in these circumstances affirm the contract so as to lose his entitlement to resign and claim constructive dismissal.

27.The claimant, accordingly, was constructively, and unfairly, dismissed.

The sex discrimination claims.

28.Having withdrawn the claims of detriment for having made a flexible working request, the claimant still pursues a complaint of sex discrimination. This is in the form of direct discrimination, in that he complains that he was treated less favourably that a woman in the same circumstances either was, i.e an actual comparator, in this instance Shirley Morley, was, or a hypothetical comparator would have been.

29.This claim is resisted on the basis that the claimant has been unable to produce any evidence of any female in the same circumstances, who was actually treated better than the claimant was, nor that any hypothetical female comparator would have been so treated. For the claimant, Mr Turner in his submissions contends that the burden of proof is reversed on these facts. He says that the respondent made stereotypical assumptions, and cites ***South Wales Police Authority v. Johnson [2014] EWCA Civ. 73*** and ***Veolia Environmental Services v. Gumbs [2014] EqLR 364*** in support of the claimant's case.

30.The key to this aspect of the claims, the tribunal considers, is the position of the comparators. Dealing with the actual comparator relied upon , Shirley Morley, the evidence shows that she was treated more favourably than the claimant was, because she was allowed to retain her working arrangement of Monday to Friday working only. It is true that the reason she required that arrangement was that she could not get childcare at weekends. To that extent her situation was the same as the claimant's in terms of why she needed that arrangement. The reason why, however, she had, and was allowed, post the March 2015 restructure, to retain it was the operation of an agreement, the "Way Forward Agreement", whereby, because of the post she occupied she was allowed , under this agreement, to retain it, and her working arrangements were protected. She explained in her interview with Richard Langhorn (which was not challenged) on the re-structure she was advised that this would afford her better protection, and hence she applied for and was granted that protected status under that Agreement, and not as the result of any flexible working request.

31.Indeed, an analysis of her situation and that of the other three persons interviewed by Richard Langhorn whose working arrangements were similarly favourable shows that what all four of them had in common is that, as at the time of the re-structure in early 2015, each of them had arrangements in place which had been accepted as protected, and which were immune from any changes as a result of the restructuring exercise.

32.It is this feature, which in the tribunal's view, is the reason for his treatment. Had his position too been recognised in early 2015 as protected, which it clearly should have been, he too would have been treated the same. It was this difference in status that caused his problem which was, the tribunal considers, nothing to do with his gender. So, in terms of the actual comparator relied upon, Shirley Morley, the tribunal finds that her circumstances were not the same as the claimant's , because her arrangements were protected by virtue of the role she held and the effect of the Way Forward agreement. In terms of any hypothetical comparators, the claimant cannot expect the tribunal to ignore the fact that the others in the group of better treated employees were in it for different reasons, and in one case, for reasons which did fall under the Equality Act at all. What they have in common, however, is that their positions were all accepted and validated at the time of the restructure, whereas the claimant's was not. That was the root case of his problem. The tribunal has no hesitation in finding that had the claimant's position been clarified , and accepted in early 2015, his position too would have been treated as "inviolate" for want of a better word. It was the fact that , wrongly, as it turns out, it was not so accepted that he found himself in the position that he did.

33.To some extent the tribunal sympathises with Richard Langhorn when faced with the pressures he was under in early 2015. As the documents show, it was a difficult task to achieve, with the co-operation of the union, the staff reductions and efficiencies required. Maintaining certain employees in certain positions doubtless reduced the scope for what he needed to achieve, and limited the savings that could be made without needing to impose cuts in other areas of the workforce. Having the claimant in what seemed to be an anomalous position, without any apparent formal entitlement to be there, doubtless caused headaches for the reasons set out in his

letters of July 2015 and June 2016. But, as the treatment of the four other persons shows, if an employee was in such position at the time, they could maintain it, and unless they did so voluntarily, could not be forced to relinquish it.

34.Thus, whilst it may not have been fair that the claimant was in this position, the tribunal is quite satisfied that it was not because of his gender. As it is the highest the claimant has put this aspect of his case has been that he "believes" that a female employee would not have been treated this way, he has not been able to demonstrate that, so as to raise a prima facie case reversing the burden of proof. The claimant's sex discrimination claims are accordingly dismissed.

Remedy.

35.The claimant is, of course, entitled to a remedy. For the wrongful dismissal he is entitled to 12 weeks notice pay. This will be subject to deduction of any benefits received in this period, by way of mitigation, the recoupment regulations not applying to awards of damages for breach of contract. Further, the award should be net, not gross. The claimant's pre-termination net weekly wage is agreed at £313.36.

The tribunal proposes therefore to make an award of

£313.36 . x 12		£3,760.32
Less benefits received from 15 July 2016 to 7 October 2016		
8 August 2016	£167.09	
22 August 2016	£146.20	
5 September 2016	£146.20	
19 September 2016	£146.20	
3 October 2016	£146.20	
Total received		£751.89
Damages		**£3,008.43**

36.Turning to the unfair dismissal, the claimant is entitled to a basic award. Based on his age, and his 23 years of service, this will be capped at 20 years service. The gross weekly wage is agreed at £423.08, but in the Schedule of Loss the claimant's solicitor appears to have miscalculated, as whilst he has used the gross weekly wage for the last 10 years of the claimant's employment, he has used the net amount for the preceding 10 years. Correcting that error produces this calculation:

10 x £423.08 x 1.5 (for each year the claimant was over the age of 41)	£6,346.20
10 x £423.08 x 1 (for each year under 41)	£4,230.80
Total Basic Award:	**£10,577.00**

The compensatory award – uplift or reduction.

37.Turning to the compensatory award, leaving aside any issues as to quantification, the respondent, in the alternative, argues for a reduction in any compensation payable, pursuant to s.207A of the 1992 Act, because the claimant did not seek to grieve the decision of Richard Langhorn before he resigned. The response of Mr Turner to that submission, factually, is that he did, in his letter of 15 July 2016, in which the claimant resigned, raise a grievance. With respect to Mr Turner, that is overstating the case. All the letter says is that his client "is willing to discuss this through a grievance procedure before going to ACAS" . That is not instigating a grievance, it is indicating a willingness or intention to do so. Further, the claimant in the same letter resigned, with immediate effect. Hence any grievance would be after the event. The purpose of the grievance procedure would be to preserve the position, before either side took final action. The claimant did take such action, without waiting for the outcome of any grievance. A better argument, however, is that the claimant did indeed grieve before he resigned, he did so in April 2016. It may well be that the grievance was not, and could not be, about the terms of the letter of 16 June 2016, in terms, but it raised, in effect the same subject matter. This was referred to in Daniel Birch's invitation letter of 20 July 2016.

38.Taking the respondent's position, however, at its highest, that there may have been a failure to comply with a relevant Code of Practice, i.e that on Discipline and Grievances at Work (2015) , this would entitle the tribunal to consider reducing any award of compensation under s.207A if , and this is an important part of the section, the tribunal considered that such a failure was unreasonable.

39.The tribunal does not so find. The claimant's failure to go through a further grievance process, in the circumstances was not unreasonable, for a number of reasons. Firstly, unlike the previous time that his flexible working request (for that it what it was) was refused, this time the claimant was given no right of appeal. There was thus no indication that the decision could be further challenged. Secondly, the claimant had recently brought tribunal proceedings in relation to the respondent's last refusal of his request, which had been settled in mid - May 2016. .He had effectively "won" that claim, in that his assertion as to his contractual entitlement to work only Monday to Friday had been conceded. Having been through that process once, all the way up a tribunal hearing, the tribunal does not consider it unreasonable of him not to embark upon a yet further grievance in relation to what was, in effect, the same issue. Thirdly, the claimant had already grieved in April 2016, and was still awaiting the outcome of that grievance when he resigned. Finally, given that the respondent has in fact argued that the delay in resigning between 16 June 2016 and 15 July 2016 amounts to affirmation , thereby depriving the claimant of his right to claim constructive dismissal, the tribunal does not consider it unreasonable of him to resign promptly, as the law requires him to, rather than risk such an argument arising if he stayed in employment , but went through a further grievance. For all those reasons the tribunal does not fid the claimant's failure to bring a grievance before he resigned was unreasonable, and hence there is no basis for making a reduction in any award pursuant to s.207A.

40.In the alternative, however, if the tribunal were wrong, and his failure to grieve was unreasonable, the tribunal would then have a discretion whether to make any such reduction. The tribunal would not have exercised its discretion to do so. This is not a case where, had the claimant grieved, the respondent would have had any change of heart, or been able to assuage the claimant's sense of unfair treatment. The tribunal has seen precisely what would have happened in any grievance played out in front of it in the evidence given. There has been no change of heart by Richard Langhorn, even now, nor would there have been in any grievance process. The most a grievance may have done is delay the claimant's departure by a few weeks, but the tribunal does not consider that it would be just and equitable to reduce the totality of his award by any per centage.

41.That leaves the counter application made by the claimant for an uplift, which is made for similar reasons. The tribunal has considered whether to make such an award. The tribunal would find that in failing to address the claimant's grievance of 1 April 2016 for many months, indeed, before he resigned, there was, technically at least, an unreasonable failure to comply with the Code of Practice. That said, the settlement of the previous tribunal claim on 13 May 2016 appeared to resolve the issues, and neither the claimant, nor his solicitor on his behalf thereafter pursued his grievance any further. There is no mention in the resignation letter of the previous grievance, nor any complaint made that this was one of the reasons for the resignation. Given that Richard Langhorn set out a very full explanation of the reasons for the change in contractual terms, and there had been discussion about it for some time, and the claimant had not actually raised a fresh grievance , or sought to resurrect the previous one, before resigning , when the previous one had somewhat "withered on the vine", the tribunal would not consider it just and equitable to increase the claimant's compensation on this basis.

The compensatory award – loss of earnings.

42.The tribunal therefore must now assess over what period it should award the claimant compensation for loss of earnings. The respondent argues that the claimant was likely to have his working arrangements changed sooner or later, quite fairly, and hence would have been likely to either have been dismissed, or to have left, perhaps to pursue the painting and decorating business he has since established. Whether this is, strictly speaking , a ***Polkey*** argument is perhaps not important, the tribunal has to decided for what period it would be just and equitable to award the claimant loss of earnings.

43.Dealing with the respondent's first contention, the tribunal does not accept that the claimant's working arrangements could not have been preserved and protected for as long as he was likely to continue to need them, probably for the next few years whilst his daughter grew up, and his contact arrangements with her changed. The main reason for the tribunal so concluding is its finding that, had the claimant's arrangements concluded in 2012 with his then line manager, been recognised and acknowledged at the time of the 2015 re-structure, the evidence is that he would have remainder covered by those arrangements. By way of confirmation, one need only look at other employees, whose arrangements were so recognised, and maintained, despite the re-structure. Thus, whilst doubtless unsatisfactory, inconvenient, and more costly to the respondent, the claimant could and should have

been in that position. Furthermore, as demonstrated by the arrangements made when he did return to work in May 2016, and for two weeks in June 2016, when he was given hybrid duties in line with his Monday to Friday working pattern, it was possible to make these arrangements for him, if only on an ad hoc basis.

44.In short, it was not physically impossible for the respondent to maintain his Monday to Friday working pattern, it was merely unsatisfactory, inconvenient, and more costly to the respondent. Thus, the tribunal is not persuaded that the claimant's employment would have been, or could have been, fairly ended within a particular period from June 2016 in any event.

45.Turning to the period of loss, however, the tribunal must also look at the mitigation achieved, or that ought to be achieved, by the claimant. It has not been suggested that the claimant, in starting his own painting and decorating business in early 2017, has not mitigated his loss. Further, for the period from his dismissal until December 2016, the claimant was ill, the medical evidence (pages 404 to 405 of the Bundle) confirming that he was under the care of his GP and given certificates in this period. He ceased to be entitled to benefits in January 2017, and thereafter has mitigated his losses by taking labouring jobs, and starting his own painting and decorating business.

46.Given that he had worked for the respondent, and only the respondent , for 23 years, the tribunal considers that he has acted reasonably in not continuing to seek other employment (which he did whilst receiving benefits) , but starting his own painting and decorating business. The evidence is that this is growing, and he will be likely to earn a reasonable living from it. It is, however, in its early stages, and will take time to replace his pre – termination earnings.

47.Taking all the circumstances into account, the tribunal considers that a reasonable period over which to award him loss of earnings as part of his compensatory award would be one year from the date of his resignation. This is for two reasons. The first is that, whilst rejecting the respondent's arguments for a ***Polkey*** reduction, the tribunal has to accept that there would be some chance that the employment would have ended anyway. Secondly, whilst appreciating that it will take time to build up his business, the tribunal considers that it is likely that after a further period of six months from when he started it, the claimant is likely to be earning as much from that business as he did when employed by the respondent. The tribunal therefore proposes to make an award of loss of earnings for 12 months from the date of the resignation.

48.The first 12 weeks of this, of course, are covered by the award of notice pay. Thereafter, he has been able to mitigate his losses partially, and the tribunal will deduct those sums, up until the end of March 2017. Whilst those sums are gross, and have been paid in cash, the claimant at present will be under the Personal Allowance threshold, so can receive this sums without any tax liability, certainly in the current tax year, but there will come a time when he has to account for tax and national insurance.

49.The claimant has, in the first full month, March 2017, that he has been painting and decorating, and also labouring for friends, earned in total £1,100.00, a gross

sum. That is encouraging, and he hopes to return to do more work for customers he has done some work for. The tribunal therefore considers he will continue to mitigate his loss of earnings for the months up to the anniversary of his resignation, doing the best it can, at the rate of £750.00. per month. It proposes to award loss of earnings on the following basis:

15 July 2016 to 15 July 2017

52 weeks' net loss at £313.36		£16,294.72
Less:		
Notice pay awarded		£ 3,008.43
Mitigation: 18 January to 27 March 2017	£ 2,150.00	
Mitigation likely to be achieved March to July 2017 @ £750.00 per month	£ 3,000.00	
Net Loss :		£8,136.29

50.The claimant is entitled to an award for loss of statutory rights, which the tribunal assesses in the claimed sum of £350.00

51.The awards for breach of contract , and the total basic and compensatory awards therefore are:

Damages for breach of contract		**£ 3,008.43**
Basic Award		**£10,577.00**
Compensatory Award:		
Loss of earnings	£ 8,136.29	
Loss of Statutory Rights	£ 350.00	
Total Compensatory Award		**£ 8,486.29**

52.The recoupment regulations do not apply, as the tribunal makes no award for loss of earnings as part of the compensatory award for any period during which the claimant has been in receipt of benefits.

Other issues.

53.The claimant appears to have paid tribunal fees. There is not, as yet, an application for the respondent to be ordered to pay those fees, though they would normally follow the event. Further, Mr Turner's written submissions went on to make mention of costs , but he did not address this issue any further, and awaits this

judgment. Of course , the threshold conditions would have to be satisfied for the tribunal to consider making any award of costs, other than fees. If any further application is to be made by either party, it should be made within the period specified in the rules (28 days in the case of rule 77).

Employment Judge Holmes

Dated: 2 May 2017

RESERVED JUDGMENT SENT TO THE PARTIES ON

2 May 2017

FOR THE SECRETARY OF THE TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2402587/2016

Name of case Mr A Gregory v Royal Mail Group Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 2 May 2017

"the calculation day" is: 3 May 2017

"the stipulated rate of interest" is: 8%

MR S ARTINGSTALL
For the Employment Tribunal Office