



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms G Excellent  
**Respondent:** Royal Mail Group Ltd

**Heard at:** East London Hearing Centre  
**On:** 17, 18, 19 and 20 November 2020  
**Before:** Employment Judge Burgher  
**Members:** Ms J Clark  
Mr L Bowman

## Appearances

**For the Claimant:** In person  
**For the Respondent:** Ms J Linford (Solicitor)

*This has been a remote hearing which has not been objected to by the parties. The form of remote hearing Cloud Video Platform and was fully remote. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.*

## JUDGMENT

1. The Claimant's claims fail and are dismissed.

## REASONS

### Issues

1. At the outset of the hearing the following issues were identified as relevant.

### Direct discrimination (Equality Act 2010 section 13)

1.1 The Claimant's age group is people in their 50s and she compares herself with people who are substantially younger than her.

- 1.2 It is accepted by the Respondent that the Claimant was asked to resume working at an Operational Postal Grade.
- 1.3 In respect of the Claimant's grievance did the Respondent do the following things:
  - 1.3.1 'Delay or ignore the Claimant's grievance until prompted by her; and/or
  - 1.3.2 Refuse or fail to hold a grievance meeting on 'neutral territory'.
- 1.4 Was that less favourable treatment?
- 1.5 The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated '- in respect of the decision to require her to work at an Operational Postal Grade the Claimant says she was treated worse than 11 other individuals described' as 'Trainee Managers' and identified page 242 of the bundle. In respect of the complaints about the grievance the Claimant has not named anyone in particular who she says was treated better than she was and relies upon a hypothetical comparator.
- 1.6 If so, applying the burden of proof set out at Section 136 of the Equality Act 2010 was any treatment found proven because of age?
- 1.7 The Respondent confirmed that detriment was not in issue and there was no justification argument being advanced.

### **Unfair dismissal**

2. Has the Respondent established a potentially fair reason for dismissal for the purposes of section 98 of the Employment Rights Act 1996. The Respondent asserts capability. If the Respondent establishes a potentially fair reason the Tribunal will consider whether it is fair and reasonable in all the circumstances having regard to consultation, relevant medical evidence and how long the employer can reasonably be expected to wait.

3. During her evidence and during her closing submissions the Claimant alleged that she was constructively dismissed, arising from her resignation that was submitted after she had been dismissed, on 19 March 2019, instead of appealing against her dismissal and that she was dismissed for health and safety reason namely that she could not return to work because it would damage her health and she was dismissed because of this.

4. If there was an unfair dismissal, the Tribunal would consider what was the chance that the Claimant's employment would have ended in any event (pursuant to Polkey).

5. The Tribunal would consider issues of remedy, if appropriate, following determination of liability.

### **Evidence**

6. The Claimant gave evidence on her own behalf.

7. The Respondent called the following witness:

7.1 Anna Reed - Head of Delivery Product Deployment North Delivery Excellence;

7.2 Eugene Mahon - Operations Manager in Deliveries;

7.3 Michael Barry - Service Delivery Leader;

7.4 Jay Brooks - Plant Manager, Grievance officer and

7.5 Luke Buaka - Delivery Office Manager, Dismissal officer

8. All witnesses gave evidence by way of affirmation and were subject to cross examination and questions from the Tribunal.

9. The Tribunal was also referred to relevant pages in an agreed 309 page bundle and permitted additional documents relating to 2 additional comparators Mr A Davies and Mr A Phipps as well as documentation we get relating to the track and trace special delivery of the grievance outcome letter 10 September 2019.

### **Facts**

10. The Tribunal has found the following facts from the evidence.

11. The Claimant was born in 1969 and was 50 years old at the time of the relevant age discrimination allegations.

#### *Contract and policies*

12. The Claimant commenced employment with the Respondent on 6 July 2016 as a postal worker. She worked part-time, 25 hours per week and her role was an Operational Postal Grade (OPG).

13. The Claimant's contract stated in relation to place of work that her initial place of work was the Docklands delivery office contract and there was a mobility clause indicating that she may be able to required to work in any other location within the UK.

14. In respect of the duties and responsibilities clause 27.1 of the Claimant's contract stated that she would perform all acts, duties and obligations and comply with such rules instructions in other directions policies and procedures may from time to time relate to her employment and be required or be made by the Respondent.

15. The Claimant's contract entitled her to the benefit of the Respondent's sick pay provisions.

16. Clause of 15 of her contract explicitly referred to the commitment to equality of opportunity which the purposes of this case included age and the responsibility of all to make this happen.

17. The Respondent has a reward policy that provides for circumstances where an employee steps up and acts at a higher grade to substitute for the absence of a substantive post holder. Where relevant, it states:

***Working in a higher grade (substitution):***

*Where an employee of a higher grade is absent from work for any reason, cover will be found, often in the form of an employee 'stepping up' to the higher grade on a temporary basis (substitution). Being a substitute can be a positive opportunity for learning and skill development.*

*Employees should be selected to substitute based solely on their performance, skills and development needs and a consistent transparent and fair process should be followed when selecting who is given the opportunity.*

***Implications to pay:***

*The employee who was substituting in the employees higher grade may be paid at the rate equivalent to the higher grade that they are temporarily undertaking.*

***Longer term:***

*If the period of substitution is expected to last longer than 13 weeks, this should be treated as a temporary promotion and normal resourcing arrangements should apply. Additionally, if the job being covered is vacant then temporary promotion is generally appropriate in any event.*

*Any substitutions will need to be reviewed by the manager to determine whether the job needs to be covered and must be authorised by the manager with the appropriate documentation returned.*

18. The Respondent operated non contractual policies, and we were referred to the grievance policy and the equality and fairness policy throughout the hearing. The Respondent's grievance policy provides:

*We expect the resolution with your manager to be completed as soon as possible, between one and fourteen calendar days*

*The resolution with the second line manager or another appropriate manager should be completed within five to twenty eight calendar days.*

*Respondent's operations*

19. The Respondent's operations included Collections and Delivery sections of the business which were which were conducted at separate locations insofar as relevant to the Claimant.

*Deputy Manager*

20. The Claimant applied for the position of Deputy Manager in September 2017. The Deputy Manager role was a substitute role, in accordance with the Respondent's reward policy that enabled the Claimant to substitute as a manager when required. On 17 January 2018 the Claimant had an assessment for this position which she passed and she was subsequently informed that her application of the Deputy Manager in London EC had been successful. This entitled the Claimant to act as a substitute manager in the London EC depot when required. Whilst substituting she would benefit from the manager pay grade. When she was not required to substitute she would be required to revert to her substantive OPG grade.

21. By 20 March 2018 the Claimant had not undertaken any Deputy Manager duties and she sent an email enquiring when she would be able to start the training and act as a Deputy Manager. The evidence we heard was that she continuously worked as a Deputy Manager from May 2018 covering different management roles in London Collections from May 2018 up until January 2019 when she moved to Deliveries. Notwithstanding this the Claimant substantive grade was OPG grade and she could have been asked to return to that grade at any time if operational requirements demanded. It is clear from the Claimant's evidence that she did not appreciate this and had a mistaken expectation that she would be able to continue acting as Deputy Manager regardless of operational needs. She emphatically stated that she was a 'manager' and she was a 'Deputy Manager' without acknowledging that in fact her substantive grade was OPG.

*Managerial Cover Project*

22. Between 2017 and 2019, Anna Reed Head of Delivery led a project called the Managerial Cover project. This was a joint initiative with the relevant unions to provide a stable cover model for managers to address the daily, weekly, monthly workload in Deliveries. It is necessary to observe that this initiative did not apply to Collections where the Claimant was initially working. Collections continued with the same operational structure including the use of Deputy Managers. The overall aim of the Managerial Cover project was to introduce substantive Cover Managerial roles into the Deliveries business. The roles were designed to cover Delivery Office Managers or Delivery Line Managers. It is significant that when these roles commenced the former use of OPGs acting up as Deputy Managers in Deliveries would cease.

23. The Managerial Cover Project was rolled out in 3 phases. In London the phase was 2018. Prior to the changes being implemented, the Respondent took a number of steps to ensure that all employees and OPGs who acted up as Deputy Managers were aware of the changes and opportunities. Firstly, Work Time Listening and Learning sessions were held with OPGs, to explain the changes through a film, encouraging them to apply for the new Cover Manager roles. Secondly, each Delivery Leader held a conference call with their OPGs who acted up as Deputy Managers and a script was provided explaining the changes. The script set out that the Deputy Manager roles would cease and that the business wanted to give them the opportunity to apply for the roles. Thirdly, a letter was sent out to all OPGs who acted up as Deputy Managers. This letter set out the changes of introducing Cover Managers and explained that the use of OPGs as Deputy Managers would cease. It explained that the Deputy Manager model would be replaced by Cover Managers and Trainee Managers and encouraged the OPG to apply with a link to the application process. In addition to the above there were wider communications that took place in all delivery offices. Posters were placed in delivery offices and it was also communicated on Royal Mail TV screens.

24. As part of the information that was distributed there was reference to training managers. The leaflet stated that:

***Introducing Trainee Managers***

*When Cover Managers go live, the former Deputy Manager role will officially cease. A new role similar to that traditionally undertaken by Deputy Managers will be introduced called the Trainee Manager role.*

*In addition to substantive DOMs, DLM and Cover Managers, Trainee Managers are the only other employees who should Cover Managerial roles within Delivery.*

*Trainee Managers provide short-term managerial cover in Delivery where there is managerial absence due to sickness absence, training or vacancies. Trainees remain as OPGs and are substituted to managerial roles when required.*

*Training Managers are different to the former Deputy Managers in that candidates are required to pass a more comprehensive assessment for the role (to demonstrate they have skills required) and have to attend two weeks training for the role (so they have the necessary skills). Trainees are accountable for all parts of the role when working as manager.*

25. On 5 August 2018 Ms Reed email all delivery directors, delivery managers and delivery leads nationwide the following email

*Use of non Trainee Managers beyond 2nd September*

*Hi all,*

*Further to the email below from Anton and my email to you to confirm the master Trainee Manager list, activity continues in preparation for the introduction of the PSP change request on 3rd September.*

*The Managerial Cover project has replaced former Deputy Managers with Trainee Managers – all of whom have been assessed (and so have demonstrated the skills for the role) and have been/will be trained (and have the knowledge to carry out the role). This will help ensure that we always have skilled and trained cover in place which will help areas achieve their delivery scorecard. As you will be aware the change request includes the introduction of a list of all Trainee Managers into PSP, and a system change which means that it will only be possible to substitute to operational managerial grades listed Trainee Managers.*

*Anton and the Delivery Directors have agreed we will have a short-term exemption process for any areas who believe they will need to continue to use non Trainee resource after 2nd September.*

26. On 6 August 2019, Emma Bamford Executive Assistant to the London Delivery Director forwarded Ms Reed's email to all of the Delivery Managers in the London region and wrote:

*Hi All,*

*This is a really important piece of work, can you please read the email below, complete the attached and return to me by this Friday so I can collate and return. We need to ensure we are on point with this as we will not be allowed to use any deputies who are not listed after 2nd Sept!! If you do not have any deputies and they have now all been converted to trainees then please let me know there will be no return.*

27. It was therefore clear to all in Deliveries that, unless there was a specified exemption, Deputy Managers could no longer be used as Trainee Managers unless they had passed the assessment from 2 September 2018.

28. The Tribunal does not accept that the roll out steps outlined were communicated in as clear and methodical manner to staff in Collections. The Claimant stated that she was not fully aware of this and stated in her evidence that she was as she was Deputy Manager in Collections and the roll-out for Trainee Managers in Deliveries did not apply to her as she was not OPG grade. Whilst the Claimant was mistaken in her position about her grade the Respondent has not established that the Cover Manager changes were clearly communicated to Collections staff. Having said that we find that the Claimant was aware of some of the changes to operations in Deliveries as she had applied numerous times for Cover Manager roles for which she was not successful and as such she would have been aware of the duties, responsibility and structure.

29. The Claimant was frank in her evidence that she needed to better herself, that she was ambitious and needed to seek promotion which she was doing that on a regular basis by applying for senior roles. The Claimant stated that she was

advised to continue to keep applying for substantive roles internally. The Claimant applied for numerous Cover Manager roles whilst working as a Deputy Manager in Collections and we find that she was aware that it was necessary for her for a substantive permanent role and that her Deputy Manager did not afford substantive grade status to her. We find that the Claimant was aware that this new Cover Manager role was being introduced and that she was assessed against the criteria for such a role and that she was not successful in achieving the minimum grade. Curiously, the Claimant declined to receive what could have been useful feedback to aid her development. Had the Claimant attended feedback sessions she may have also been provided further information about the application process regarding the Trainee Manager roles and become clearer about the process.

30. Specifically, whilst working in Collections the Claimant applied for the Cover Manager role and was assessed on 26 October 2018 and was not successful. The Claimant was advised in December 2018 that there would be more opportunities to develop in Deliveries and she then decided to move to Deliveries. The Claimant applied for another Cover Manager role in Romford and was assessed for this on 16 and 17 January at 2019 and was not successful.

31. An underlying disputed factual matter in the case was whether the Claimant had applied for any Trainee Manager roles at all. The Claimant was emphatic in her evidence that she only applied the Cover Manager roles as she said 'voluntarily' and these had nothing to do with Trainee Manager roles. As far as she was concerned she was a Deputy Manager and was trying to improve her position by applying for permanent Cover Manager roles and she had nothing to lose by continuing in her position as a Deputy Manager. Against that Ms Reed stated that any application for Cover Manager was automatically assessed the applicants' capability to be a Trainee Manager. It was exactly the same test and assessment but the qualification score for Cover Manager was higher more exacting than the score for Trainee Manager. However there was a minimum score that was required in order to be considered the Trainee Manager and on each of the Claimant's separate applications for Cover Manager, the Claimant failed to make the grade.

32. From the evidence we have heard we find that applicants for Cover Managers are automatically assessed against the Trainee Manager criteria at the same time as the assessment was the same. Mr Mahon referred us to the Claimant's assessments for her Cover Manager application, where Trainee Manager qualification was also assessed. However, we do not accept that this dual assessment process was clearly communicated to the Claimant. As far as the Claimant was concerned she was applying for Cover Manager roles and was not specifically informed that she was being assessed as qualification criteria for Trainee Manager at the same time. Further, we are not satisfied that the assessments that Mr Mahon referred us to were communicated to the Claimant at the relevant time. Had this been done any misunderstanding that the Claimant had may have they been cleared up at a much earlier stage and the Claimant may have then appreciated that she had not passed a Trainee Manager assessment, which was essential in order for her to continue to act up as a manager in Deliveries. Sadly, this was not done and the Claimant continued under the misapprehension that her Deputy Manager appointment was sufficient for her to continue to act up in



Deliveries. The Respondent's poor communication in this regard contributed to the confusion.

33. There was no evidence to contradict the Claimant's assertion that she did not know that her 'voluntary' self developing applications for Cover Manager were also being considered against the Trainee Manager criteria. We find that the Claimant had a justifiable sense of grievance in this regard. However, there was no evidence advanced by the Claimant that she had undertaken, and passed, any Trainee Manager assessment which would have been necessary for her to act up in Deliveries from 2019. The Claimant sought to rely on her previous Deputy Manager assessment which we do not find was applicable to the Trainee Manager role. The Claimant continued to refuse to acknowledge or accept this. In summary the bare fact was that the Claimant had not actually passed the Trainee Manager assessment which was necessary for her to act up in Deliveries.

*Claimant work in Deliveries*

34. The Tribunal also finds that Mr Mahon did not fully adhere to the conversion process otherwise he could not have reasonably permitted the Claimant to go on a Trainee Manager training course or allow the Claimant to work as a Deputy Manager in Deliveries when following her transfer to Deliveries under his line reporting structure from January 2019. He stated that he was mistaken and assumed that the Claimant had passed the assessment as she had come from Collections. He did not check at the time and this resulted in the Claimant wrongly continuing to work in Deliveries, acting up as a manager from January 2019 until the error was discovered by Ms Reed on 25 April 2019.

35. The Claimant attended a Trainee Manager induction course 28 January 2019 to 8 February 2019. On 11 February 2020, Trainer Lee Harvey sent the Claimant a congratulatory letter for completing the 2 week basic skills and standards. The Claimant alleged that she attended the Trainee Manager induction course with other managers, some of whom were also Deputy Managers who had not undertaken the Trainee Manager assessment. She maintained that it was an automatic process for Deputy Managers to transfer to Trainee Managers and do the induction course and she feels that she was singled out by not been able to continue as a Deputy Manager in Delivery.

36. The Tribunal considered this assertion against the evidence in particular the list of the alleged comparators. The Claimant referred to a list of 12 Trainee Manager comparators at page 241 of the bundle. Leaving aside the comparators Bipin Puthawaia and Kamran Sephmi (who are older than her and over 50) who the Claimant says had far more experience than her and the other Trainee Managers and as such are not relevant. The Claimant refers only to the Trainee Managers with her level of experience who were younger than 50 for the purposes of her claim. The Tribunal had difficulty unravelling this aspect of the Claimant's case as there was no evidence of the respective experience of the other comparators. Further the Claimant had initially specifically named comparators Bipin Puthawaia and Kamran Sephmi as comparators as part of her claim, and their ability to as continue working as Trainee Managers seemingly points against age being a relevant factor as to who remained as a Trainee Manager.

37. In any event the Claimant asserts that a number of younger individuals were able to proceed as Trainee Managers and she was not. She emphasised that it was evident that Mr Phipps and Mr Davis were stated as having no trainee assessment [201 – 202]. Further, whilst on the Training Induction course she asserts that she was told by James Clifford that he was a Deputy Manager and had not had a Training Manager assessment.

38. In advancing her case in this regard, the Claimant referred to an undated letter from Alex Boetang, Cover Manager stating that he attended the Cover Manager/Trainee Manager induction training with the Claimant in January /February 2019 [232]. Mr Boetang writes that out of the 12 that attended the course he was the only new substantive manager and 7 were Deputy Managers and 4 were new Trainee Managers that were OPG just before applying for the position of a Trainee Manager. However, this document does not specify whether or not the attendees had in actual fact passed a Trainee Manager assessment.

39. The Tribunal requested further information about the scoring of Mr Davies and Mr Phipps and additional documentation was provided stating that both Mr Phipps and Mr Davies had passed the Trainee Manager assessment seemingly following a failed Cover Manager application. In respect of Mr Davies there is a response to a question as to whether the candidate be used as a Trainee Manager in Deliveries [201]. The answer provided is unable to comment. This answer is curious when, on the documentation that was provided, Mr Davies had passed the Trainee Manager assessment. We find therefore that there is merit in the Claimant's assertion that the assessment and selection process and how it was implemented at local level was not as clear and precise as the Respondent sought to assert. We also accept that there was confusion at a local level as evidenced of Mr Mahon about who could attend the induction course and who could continue as Trainee Managers. However, we do not consider that there was any confusion at a national level by Ms Reed who sought to oversee the proper implementation of the policy. In her subsequent reviews she sought to identify who had passed the Trainee Manager assessments and who had not. Following this review, we accept that the Claimant was identified as not having passed the Trainee Manager assessment. We have no evidence to support the Claimant's assertion that her comparators had not in actual fact been actually assessed and had not actually passed the Trainee Manager assessment. On the evidence we find that they were assessed during their failed Cover Manager applications albeit that they may not have appreciated this at the time. Therefore, we do not find that any of the Claimant's comparators had not met the assessed minimum criteria to qualify as a Trainee Manager.

40. On 1 April 2019 the Claimant apparently mentioned to James Clifford, a Trainee Manager, that she was 50. She thought nothing of this at the time but on reflection now maintains that Mr Clifford must have gossiped with Mr Mahon and disclosed her age to Mr Mahon. Despite inviting the Claimant to do so this was not put to Mr Mahon who in any event categorically denied that any decisions he had taken has anything to do with the Claimant's age.

41. The key concern for the Claimant against Mr Mahon was been asked to return to OPG grade on 26 April 2019. The Tribunal therefore had to assess what the catalyst was for this. The Tribunal referred to the following emails involving Ms Reed on 24 and 25 April 2019:

*From: Anna Reed  
Sent: 24 April 2019 17:01  
To: Sarah Bolsover ; Susan Bullimore  
Subject: Trainee Manager?  
Hi both  
Have the two employees below passed a Trainee assessment and are on the BAU Log?  
East London Bonefansi Buwembo 1024 7570  
East London Gloria Excellent 1060 9578  
Thanks  
Anna  
Anna Reed*

*From: Sarah Bolsover  
Sent: 25 April 2019 09:35  
To: Anna Reed; Susan Bullimore  
Subject: RE: Trainee Manager?  
Hi Anna,  
**Gloria Excellent** – Failed the cover manager assessment.  
Job title: Cover Manager Romford – ML402 (97693)                      Date  
29/10/2018  
Recruiter: Susan Crate  
Status: Mgt Assessment Int - Fail  
**Bonfans**- Passed the Trainee manager assessment.  
Job title: Trainee Manager – South East London (82630) Date 14/11/2017  
Status: Offer sent – Non - Ref – Mgt – Int*

*Many thanks.  
Sarah*

*From: Anna Reed  
Sent: 25 April 2019 21:55  
To: Moira Milne ; Maxine East  
Subject: FW: Trainee Manager?  
Hi Maxine – thanks for the update  
For info see below – Gloria Excellent has not passed a Trainee Assessment and so shouldn't be used for cover.*

*Thanks  
Anna  
Anna Reed*

42. Given the content of the above email chain, the Tribunal consider it unlikely that the Claimant would have been removed from her role as manager at Deputy Manager in Deliveries had Ms Reed not undertaken the audit at this stage. The

mistake that Mr Mahon had made in assuming the Claimant had passed the Trainee Manager assessment was exposed.

43. In order for fairness and consistency it was necessary for the Claimant to be removed from acting as a Trainee Manager in Deliveries. Mr Mahon made the point that the Claimant had transferred from Collections and therefore he had made a mistaken assumption that she had passed the Trainee Manager assessment whereas he made no such assumptions were made with Deputy Managers in Deliveries and there were at least two Deputy Managers who worked in Deliveries individuals who were unable to continue in any managerial capacity, as they had not passed the Trainee Management assessment.

44. We find that the catalyst for removing the Claimant from the acting up duties that she was undertaking at this stage was this the email chain. This was not led by Mr Mahon and there was no evidence that Ms Reed knew the Claimant's age. Ms Reed checked upon two people who seemingly had not satisfied the Trainee Manager assessment.

45. Immediately following being informed of the mistake by Ms Reed, Mr Mahon spoke to the Claimant. He informed her that she had not passed the Training Manager assessment and could not continue in a managerial capacity in Deliveries. The Claimant was shocked by this, she mistakenly believed that she was qualified to continue undertaken the role that she had been undertaking since January 2021 and she referred to the fact that she had applied for and passed the Deputy Manager role in January 2018 and had been working as a Deputy Manager since April/May 2018. She told the Tribunal that she was deeply upset that she was asked to go back to a lower grade role with less pay. She is a single mother who had to provide for her family and needed the extra money.

46. The Claimant had not specifically been informed that she had not passed the Trainee Manager assessment prior to this stage and was operating on the basis that her Deputy Manager status equated to Trainee Manager status. This was mistaken and unsustainable given the documentary evidence that the Claimant had access to. In any event the Claimant was unable to evidence that she had actually passed the Trainee Manager assessment and that she should have been sufficient to continue acting up as a manager in Deliveries.

#### *Absence and grievance*

47. The Claimant subsequently worked from home, then took holiday before signed off work sick on and did not return to work. The Claimant was concerned and upset. She sought support to be able to continue and pass the Trainee Manager assessment instead of removing her from her managerial duties.

48. The Claimant made enquiries and complaints to Lee Harvey from the training course, to Ricky McAulay who was Mr Mahon's line manager at the time and sent emails to the Just Say it Team on 29 April 2019. The Claimant initially sought to resolve matters formally with Mr Mahon with a view to remain as a Trainee Manager and Delivery. Mr Mahon and clearly communicate the Claimant his mistake and the Claimant alleged that Mr Mahon was discriminated against but she did not state

what basis what he was discriminated. Given the seriousness of the concerns the Claimant was raising Mr Mahon refused to subsequently meet with the Claimant and referred her to HR to for her to formally raise a grievance to subsequently did 25 May 2019.

*Thinking about the situation I felt that if Eugene is not discriminating against me and I did not pass the deputy manager's assessment as he was insinuating, considering the fact that I am not a new trainee manager, he should go all out to ensure that I complete the assessment without hindering my job. If he can employ new trainees then he could invest on me to bring out the best in me. He chooses not to do this but opted to unreasonably demote me. This is so humiliating! discriminating! and harassing!*

49. The Claimant expected her grievance to be dealt with by Mr Mahon's line manager Mr Barry. However, Mr Barry did not deal with the Claimant's complaint and referred it to her line manager in Docklands depart. This was subsequently transferred to Mr Brooks was the Plant manager to deal with. No action was taken in respect of to the Claimant's grievance until the Claimant had a meeting with Mr Jason Bryant, her line manager at some stage in late July to discuss her sickness absence. She discussed with Mr Bryant that she had raised a grievance, following which Mr Brooks started to communicate with the Claimant on 29 July 2019.

50. The Respondent's grievance policy set's out the usual timescale of up to 14 days in relation to the first line manager and up to 28 days for relating to the second line manager. The Claimant had over 2 months before she was contacted regarding her grievance. Mr Brooks invited the Claimant to a meeting for 1 August 2019. The Claimant responded on 8 August 2019 by saying she needed more time to arrange for a friend to attend the meeting. Mr Brooks rearranged the meeting to 9 August 2019. The Claimant responded by stated that her friend was not available until the end of August and she wanted the meeting to be to be held away from Royal Mail premises.

51. Mr Brooks did not respond to the Claimant's correspondence. He did not consider that it was appropriate to meet off Royal Mail premises. Mr Brooks decided to continue the grievance process in the Claimant's absence. He investigated the grievance by speaking to others. He stated that it was appropriate to do this as the Claimant would have had two other rounds of appeal against his grievance outcome. We find that his approach was unreasonable. The fact that there may have been two other rounds of appeal did not absolve him of the responsibility to properly communicate with and consider the Claimant's grievance in the first instance.

52. Mr Brooks concluded his part of the grievance on 10 September 2019. However, the Claimant had not heard anything from Mr Brooks at all. From the evidence we had, the grievance outcome letter was not sent by special delivery until 22 October 2019. This letter was subsequently returned undelivered to the Respondent on 12 December 2019. There was no evidence given by the Respondent of any steps it took to ensure that the Claimant had actually received

the grievance outcome letter or to remind her of her entitlements to appeal under the grievance policy. We find that it was reasonable for the Claimant to have believed that her grievance was ignored and as no written outcome or communication relating to it was received by her. However, the Claimant did not do anything to chase up the grievance process that in her mind had stalled from August 2019.

53. The Claimant presented her first Employment Tribunal complaint on 16 September 2019 alleging age discrimination.

*Return to work meeting*

54. The Claimant was signed off sick on grounds of stress at work shortly after being asked to return to OPG grade in April 2019. The Claimant had attended occupational health in July 2019. Mr Buaka, Delivery Office Manager and dismissal officer met with the Claimant off Royal Mail premises at a McDonalds fast food restaurant on 21 November 2019 to discuss her absence and possible return to work. Mr Buaka informed the Claimant that he had not seen the occupational health report because the Claimant had not provided consent for the report to be released, however, Mr Buaka understood that she had in fact showed the report to Jason Bryant and the report stated that she was fit to return to work. The Claimant stated that the report said that she was fit to work and can take any type of work, but not in Royal Mail unless conditions change. She asserted that Mr Mahon had discriminated against her because of her age by demoting her and that she could not understand why she had been removed as working as a manager. Mr Buaka explained that he was not there to consider her grievance and that he was there to discuss her continued sick absence and how the Respondent could help her return to work. The Claimant stated that she could not return to work and that she did not want to work in Royal Mail again and that she just wanted to be paid for the damage and loss of earnings that the unaddressed grievance had cost her. However, the Claimant stated if she could become a permanent manager, then she would come back into work, but if not, she would not return. Mr Buaka explained to the Claimant that she was an OPG grade and in Deliveries and that Deputy Manager roles were changed to Trainee Manager and that the Claimant had not passed the assessment. The Claimant did not accept this maintained her position that she should be given a permanent managerial position. Mr Buaka questioned whether the Claimant was saying that she would only return to a position that she had not been assessed for. The Claimant replied that she just needed to be compensated for the damage and that she would amicably resign and go her way.

55. The Claimant did not resign. She was not assessed as entitled to become a permanent manager. There was an impasse.

56. Mr Buaka wrote to the Claimant on 22 January 2020 stating that the present position was untenable and he was not confident that she will return to work in the foreseeable future. He stated that he was considering her continued employment. A meeting was arranged for 29 January 2020 to discuss this. The Claimant did not respond to this letter.

57. Mr Buaka wrote to the Claimant again on 25 February 2020 providing a further opportunity for her to meet the Claimant with him on 6 March 2020. The Claimant responded to this letter by email on 28 February 2020 that having a meeting was unsafe for her health situation and that she was volunteering at the moment to get herself into the job market. She said that she was a manager and that she was not invited to the training in error and that this had arisen from discriminatory treatment by Mr Mahon. She said that she had nothing else to discuss with Mr Buaka.

58. The Claimant did not attend the meeting arranged for 6 March 2020. Mr Buaka dismissed the Claimant in her absence and provided a number of reasons for dismissal. He concluded there was no reasonable expectation that the Claimant would return to work. He stated that the Deputy Manager roles were removed and from Deliveries; that the Claimant applied for Cover Manager roles and did not meet the criteria; the Claimant was unwilling to accept or hear that she had not passed a managerial assessment, despite evidence to the contrary. She made it clear that she did not want to return to the Respondent and that she had nothing else to discuss with me. Mr Buaka concluded that the Claimant had been absent from work for 316 days, the present position was untenable, and he was no longer confident that you will return to work in the foreseeable future. He wrote that the situation was unacceptable to the business and he therefore decided to dismiss the Claimant. The Claimant was informed that she would be paid her contractual notice payment in lieu of her notice. The dismissal letter provided the Claimant with notice and provided a right of appeal within five working days.

59. The Claimant once wrote a letter on 19 March 2019 saying effectively that she was resigning at this stage. Her letter states amongst other things:

*I cannot continue to work in a place where my feelings are injured and no one is ready to bring a solution to heal the injury. Hence I expect to be paid for the cost of all the injuries I had to go through that has hindered me from carry out a role that I did not commit any offence undergoing. I was carrying out my role as a trainee manager, paid on substitution basis when this injury took place from the discriminatory demotion request of Mr Eugene to myself on the 26th of April 2019.*

*I am very surprised that you can submit yourself to be used to coin up lies against your fellow human being and you can be bold enough to say that you want to dismiss me despite all the I had mentioned to you about the truth of the situation. I cannot stop you from whatever you want to do but I know a God that is the Judge of the whole universe.*

60. It is unclear whether this email could amount to a resignation, but even if it could be construed as such the Claimant had already been dismissed by the time she wrote this letter.

## **Law**

### **Unfair Dismissal**

61. Section 98 of the Employment Rights Act 1996 states:

*General*

*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it—*

*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

*(b) relates to the conduct of the employee,*

*(c) is that the employee was redundant, or*

*(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

*(3) In subsection (2)(a)—*

*(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

*(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.*

**Age Discrimination**

62. The legislation and case law for age discrimination is as follows:



**Section 5 Equality Act 2010 (EA) - Age**

*(1) In relation to the protected characteristic of age—*

*(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;*

*(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.*

*(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.*

**Section 13 EA Direct discrimination**

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

*(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

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

*(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*

*(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.*

*(6) If the protected characteristic is sex—*

*(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*

*(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*

*(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work)*

*(8) This section is subject to sections 17(6) and 18(7).*

**Section 136 EA Burden of proof**

*(1) This section applies to any proceedings relating to a contravention of this Act.*

*(2) 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.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

*(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

*(5) This section does not apply to proceedings for an offence under this Act.*

*(6) A reference to the court includes a reference to—*

*(a) an employment tribunal;*

63. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ 33, stated at paragraph 56.

*“The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the Respondent ‘could have’ committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment 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). It was confirmed that a Claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a tribunal will be in a position where it ‘could conclude’ that an act of discrimination had been committed.”*

64. The burden is therefore on the Claimant to prove, on a balance of probabilities, a prima facie case of discrimination.

65. The Tribunal considered the case of Ayode v City Link Ltd [2017] EWCA Civ 1913, CA where Singh LJ 34 – 54 provides an extensive summary of the current law which we apply. At paragraph 62 Singh LJ observed that there are three relevant questions to consider, namely:

65.1 Did the alleged act occur at all?

65.2 If it did occur, did it amount to less favourable treatment of the Claimant when compared with others?

65.3 If there was less favourable treatment, what was the reason for it? In particular, was that reason discriminatory.

## Conclusions

### Direct age discrimination (Equality Act 2010 section 13)

*OPG Grade*

66. The Claimant was asked to return to OPG grade by Mr Mahon on 26 April 2019. The Claimant had been working as a Deputy Manager, acting up for nearly a year by this stage, initially in Collections and then in Deliveries from January 2019. We fully accept that it was very upsetting for the Claimant to be asked to revert to her substantive OPG given that she was working as a Trainee Manager by a mistake. It seems that there were no discussions as to whether there were Deputy Manager opportunities back in Collections, which the Claimant was qualified to do. Mr Mahon simply said the Claimant had to return to OPG grade. However, Mr Mahon was working in Deliveries and the Claimant could not be a Deputy Manager in Deliveries by that stage even though there was a continuing need for Trainee Managers. Mr Mahon made the Claimant aware of Cover Manager opportunities in Romford but the Claimant at the time and the Claimant sought to convince Mr Mahon that he had made a mistake and that she was in fact qualified to continue in a Deputy Manager capacity within Deliveries.

67. Whilst the request for the Claimant to return to OPG grade was upsetting for the Claimant we do not conclude that it amounted to less favourable treatment of the Claimant when compared with others. On the contrary, the fact that the Claimant was mistakenly working as a Deputy Manager in Deliveries from January 2019 until April 2019 was in fact more favourable treatment than relevant comparators who had to pass the assessment for Trainee Manager to do so.

68. We accept Mr Mahon's evidence that there were former long serving Deputy Managers who had worked in Delivery that had to return to OPG grade because they had neither achieved the Cover Manager or Training Manager minimum grade following assessment. The Claimant's assertion that Deputy Managers automatically transferred to Trainee Managers in Deliveries is not accepted.

69. In respect of the comparators the Claimant refers to we conclude that they had been assessed as making the minimum grade for Trainee Manager. It was evident that the Claimant was assessed against the Trainee Manager competencies, albeit without her knowledge, under her separate Cover Manager applications, and that she was unsuccessful in achieving the minimum grade. Importantly, there was no evidence that the Claimant had actually passed the minimum grade to qualify as a Trainee Manager.

70. We accept that all of the Claimant comparators were assessed Trainee Manager criteria. It is evident that some Deputy Managers, including the Claimant, who applied the Cover Manager roles did not know that they would be automatically assessed to see if they met the Trainee Manager grade. We accept that this was a requirement and that the grade should have been met before any individual was asked to attend the induction course. We conclude that all those who attended the cover manager/trainee manager assessment course between 28 January to 8 February had been assessed against the criteria and satisfied it apart from the Claimant. The Respondent provided evidence of this assessment scores of the claimant's comparators and they met the minimum qualifications to qualify for as Trainee Manager. Mr Mahon was mistaken in his assumption that the Claimant had

made the Trainee Manager grade when she had not. Therefore, we reject the Claimant's assertion that Deputy Managers were automatically converted to Trainee Manager status.

71. If we would have found that there was less favourable treatment we would have been unable to collude, on the evidence before us that age was a relevant consideration at all. The high watermark of the Claimant's claim in this regard is that she mentioned her age to Trainee Manager, James Clifford on 1 April 2019 and that he must have mentioned this to Mr Mahon who subsequently concluded that the Claimant should not continue in her role.

72. The fact that two of the initial comparators that the Claimant sought to rely on, Bipin Puthawaia and Kamran Sephmi, were over 50 and the fact that they were able to continue in Training Manager positions does not assist the Claimant's case. Even if the Tribunal were to discount those two more experienced Deputy Managers, and reference only the comparators with similar experience to the Claimant who are less than 50, we do not to conclude that there was any less favourable treatment on grounds of age. The Claimant's comparators had been assessed and met the minimum grade for Trainee Manager and the Claimant did not. As such the Claimant's comparators were not in the same or similar circumstances.

73. Finally, in this context It is clear to the tribunal that the clear reason for the Claimant being asked to return to OPG role was following the audit, undertaken by Ms Reed on 25 April 2020 that discovered the Claimant had not in fact passed any trainee manager assessment and should not be working as a substitute manager in deliveries.

74. Therefore the Claimant's claim for age discrimination in relation to being asked to return to OPG grade fails and is dismissed.

#### *Delay and ignoring grievance*

75. The Claimant has established that there was a delay and ignoring of grievance was discrimination on grounds of her age. The Tribunal is very critical about how the Claimant's grievance was conducted. There were significant delays, breakdowns in communication and a failure to engage with the Claimant's concerns about where meeting should be held.

76. Mr Brooks dealt with the grievance in a perfunctory and disengaged manner and his failure to communicate with the Claimant that he was going to continue the grievance process in her absence was wholly unreasonable. We also accept that the Claimant was left wondering what was happening in respect of her grievance, whilst on sick leave. Even on the Respondents case the special delivery letter was returned and no attempt was made re send the outcome of the grievance to the Claimant. It is possible that had there been a timely and clear response the Claimant's grievance the impasse that subsequently set in may have been avoided Having said that, Mr Buaka had clearly communicated the Respondent's position regarding her role at the meeting 21 November 2019. The Claimant was not entitled to a permanent manager position.

77. The Respondent's non contractual grievance policy requires timelines for the with grievances. There are timelines of 14 and 28 days respectively. We had no evidence that there was general non-compliance with the Respondent's grievance policy timelines within the Respondent. In the absence of evidence to the contrary we therefore conclude that a hypothetical comparator would have had their grievance dealt with in accordance with the grievance policy. We therefore conclude that the Claimant was less favourably treated when compared with hypothetical person in the same or similar circumstances.

78. When considering whether the less favourable treatment was on grounds of age we had no basis whatsoever to conclude that the Claimant's age played any part in the failure of the Respondent to comply with its grievance procedure. The Claimant accepted that Mr Brooks did not know her age and that he had never met her before. There was no surrounding background evidence or inferential basis for age to be considered as a reason for the serious shortcomings by Mr Brooks in dealing with the Claimant's grievance.

79. In these circumstances the Claimant's claim for age discriminatory regarding the delay and ignoring her grievance fails and is dismissed.

*Neutral territory*

80. The Claimant asserts that failing to hear the grievance on a neutral territory was age discriminatory. Mr Brooks ignored the Claimant's request in this regard and proceeded to hear the grievance in her absence. However, we do not conclude that the failure to allow a grievance hearing away from the Respondent's premises on neutral territory amounts to less favourable treatment. Whilst it may have been reasonable for Mr Brooks to have explored this further with the Claimant there was no indication that a hypothetical comparator would have been entitled to benefit having a grievance hearing away from the Respondent's premises. There is nothing in the Respondents grievance procedure that provides for this and therefore we do not conclude that this amounted to less favourable treatment.

81. In any event, as mentioned above we do not consider that the way which Mr Brooks dealt with the Claimant's grievance amounted to age discrimination. There was no indication that the Claimant's age played any part whatsoever in this regard.

82. Therefore the Claimant's claim that she was discriminated against on the basis of age by not having a grievance hearing at a neutral venue fails and is dismissed.

83. Consequently, all of the Claimant's claims for age discrimination fail and are dismissed.

**Unfair dismissal**

84. In respect of unfair dismissal it is for the Respondent to establish a potentially fair reason for dismissal. The Respondent asserted capability. It is clear that the Claimant was initially off sick and claiming sickness pay. However, there was a meeting with Mr Buaka held on 21 November 2019 where the Claimant expressly stated that she was not sick and that she would be able to return to work in a permanent position or alternatively she would wish to be paid off. She remained absent claiming sick pay. By this stage the Claimant had presented an Employment Tribunal complaint on 16 September 2019.

85. When assessing the reasons for the dismissal, it is clear that the reason for dismissal was not capability but was some other substantial reason. The Claimant was not at work, she was unwilling to return to work or engage in discussions about this unless she was offered a permanent managerial position. The Respondent reasonably believed that she would be unwilling to return to work in future.

86. As far the procedure was concerned, the Respondent was seeking to facilitate the Claimant's return to work and the Claimant did not wish to do so unless she had a permanent managerial role. The Respondent could not offer the Claimant her a permanent managerial role because she had not qualified for one. The Claimant remained absent and refused to engage in any meetings or return to work.

87. The Claimant was dismissed on 6 March 2020 and paid in lieu of notice.

88. Following this, on 19 March 2019 the Claimant states that she did not appeal and resigned by email instead. It is doubtful whether this email could be construed as a clear resignation and even if it could be the Claimant had already been dismissed. We reject the Claimant's submissions made that she was dismissed for a health and safety reason or that she was constructively dismissed.

89. Whilst the Claimant may have had a persuasive argument for constructive dismissal in view of how her grievance had been dealt with, she did not resign before being dismissed. She chose to continue to receive sick pay and importantly maintained that the employment relationship could continue if she was given a permanent managerial role. Had the Claimant engaged with the Respondent she could have sought to return to work to explore any further (temporary) Deputy Manager opportunities in Collections. However, the Claimant's position was uncompromising, she would only return if she was given a permanent managerial role. The Claimant was not entitled to a permanent managerial role and it was not a reasonable demand for her to make in the circumstances.

90. The Respondent sought to take steps to facilitate the Claimant's return to work but the Claimant's actions and words clearly indicated that this was not a possibility. In the circumstances dismissal was inevitable. We conclude that the dismissal was on fair and reasonable in circumstances.

91. The Claimant's claim for unfair dismissal therefore fails and is dismissed.

**Employment Judge Burgher  
Date: 10 December 2020**