



EMPLOYMENT TRIBUNAL

BETWEEN

CLAIMANT

AND

RESPONDENT

Miss N. Wood

Liz Earle Beauty Co. Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: EXETER

On Monday, the 10th September 2018
and Tuesday, the 11th September 2018

Employment Judge: Mr D. Harris

Members: Ms S.M Christisan
Mr I. Ley

Representation:

For the Claimant: Mr M. Benzin (Claimant's partner)

For the Respondent: Mr N. Moore (Counsel)

JUDGMENT

- 1. The Claimant's claims of direct age discrimination, harassment and victimisation are dismissed.**
- 2. Having decided the claims of direct age discrimination, harassment and victimisation against the Claimant for substantially the reasons given by Employment Judge O. Harper when making the Deposit Order in the sum of £250 on the 18th May 2017, the sum of £250 that has been paid by the Claimant as a deposit shall be paid to the Respondent.**

REASONS

The background to the claim

1. By her Claim Form presented to the Tribunal on the 12th January 2017 the Claimant brought a claim of age discrimination against the Respondent.
2. The Claimant set out the background to her claim in her particulars of claim attached to the Claim Form. She stated that she commenced employment with the Respondent as a Counter Assistant on the 6th June 2016. Her place of work was the Respondent's counter in Boots on the Wren Retail Park in Torquay.
3. The Claimant's line manager was a person by the name of Kirsty Scott. She had been newly appointed to the role of Counter Manager. She was half the age of the Claimant who, at the time she started work for the Respondent, was 42 years of age. In addition to that age

gap, there was a considerable difference between the Claimant and Miss Scott in terms of their experience of working in the cosmetics industry. The Claimant had some 24 years' experience of working in the industry whereas Miss Scott's experience was far more limited.

4. On her first day of work for the Respondent, the Claimant received no support from Miss Scott or from the Respondent's management. She was on her own in a new job without any instructions or guidance. In the days that followed, she found that Miss Scott's behaviour towards her was threatening and harassing. No details of Miss Scott's behaviour at that stage were given in the particulars of claim save for an assertion that Miss Scott contacted the Claimant when she was at home by way of text message.
5. The Claimant stated in her particulars of claim that she submitted a grievance to the Respondent regarding Miss Scott's behaviour on the 15th July 2016 and on the 20th July 2016. A meeting subsequently took place on the 26th June 2016, which was attended by the Claimant, Miss Scott and a Store Manager, Ms Cheryl Fletcher. The meeting was supposed to be a one-to-one meeting between the Claimant and Miss Scott and so it came as a surprise for the Claimant to see that Ms Fletcher was also in attendance. The Claimant was told that the meeting was to be recorded for which she did not give consent.
6. Following the meeting on the 26th June 2016, the Claimant expected to receive some sort of written response from the Area Manager, Ms Debra Jones, but none was forthcoming. Around that time Miss Scott made further intimidating remarks to the Claimant in the form of "*you won't lose your job*" and "*I don't know what will happen to you if you don't sign such documents*". The latter comment appeared to be in response to the Claimant's stated intention that she did not wish to sign any notes made at the meeting on the 26th June 2016.

7. By the 14th July 2016, the Claimant had begun to suffer poor health due to work-related stress. She saw her doctor who recommended that she take some time off work and prescribed beta blocker medication. She saw the doctor again on the 22nd July 2016 and a further absence from work was recommended.

8. Whilst the Claimant was on sick leave, she attended a grievance meeting on the 11th August 2016. Following that meeting there was delay on the part of the Respondent in sending the Claimant the notes of the meeting. On the 18th August 2016, the Claimant sent some written questions and concerns to Ms Chloe Francis, an HR Manager, who had attended the meeting on the 11th August 2016. The Claimant received the notes of the meeting on the 11th August 2016 on the 19th August 2016 and on the following day she emailed Ms Francis an amended copy of the notes with 49 comments made in the margin. The Claimant stated in her particulars of claim that she did not receive a response from Ms Francis to those 49 comments.

9. On the 22nd August 2016, the Claimant was informed by Ms Francis, by way of email, that she was being offered a formal apology and was asked whether she would prefer the apology to be verbal or in writing. The Claimant responded that she wished the apology to be in writing.

10. In the expectation that she was going to receive a formal apology in writing, the Claimant felt able to return to work. At her return to work meeting on the 1st September 2016 with her new line manager, Ms Annie Betts, the Claimant indicated that there were still outstanding issues to resolve regarding her period at work from the 6th June 2016 to the 15th July 2016.

11. By the time that the Claimant returned to work, Miss Scott was no longer her line manager.

12. After her return to work, the Claimant chased Ms Francis for the promised apology. On the 4th September 2016, the Claimant discovered that Miss Scott had breached confidentiality by discussing the Claimant with work colleagues and showing them text messages that the Claimant had sent.

13. On the 9th September 2016, the Claimant sent a letter to Ms Francis concerning the “*continuous discrimination [and] harassment*” by Miss Scott. On the 21st September 2016 the Claimant was informed by Ms Francis that she was going to have a meeting with Miss Scott on the 28th September 2016 to discuss the Claimant’s complaint set out in her letter dated the 9th September 2016.

14. The Claimant sent a further letter to Ms Francis on the 24th September 2016 setting out her concerns and reminding Ms Francis that she had yet to receive the formal apology. A further reminder was sent on the 2nd October 2016 about the apology.

15. On the 3rd October 2016, the Claimant received an email from Ms Francis stating that Miss Scott had resigned from her employment with the Respondent and that the Claimant would not be receiving the promised apology.

16. On the 10th October 2016, the Claimant sent a further complaint to Ms Francis concerning the way she had been treated and informed Ms Francis that she had been advised by her doctor to go on sick leave.

17. On the 10th November 2016, the Claimant commenced the early conciliation process through ACAS.

18. Having set out the matters summarised above, the Claimant concluded her particulars of claim as follows:

- “31. As of 3 October 2016 the respondent has failed to investigate the whole issue in a timely manner and furthermore has now retracted the formal apology on behalf of Liz Earle relating to discrimination I (Nicola Wood) was supposed to be in receipt of.**
- 32. I Nicola Wood (Claimant) therefore requests compensation in accordance with the Equality Act 2010 for Age Discrimination.”**

19. The Respondent responded to the claim by way of an ET3 dated the 20th February 2017. Attached to the ET3 was a narrative response setting out the Respondent’s case. The central assertions were that the Claimant’s claim of age discrimination was misconceived and that many of the Claimant’s allegations were out of time. Paragraphs 5.2.4 to 5.2.21 of the written response sets out the Respondent’s chronology of material events.

20. On the 12th April 2017, the Claimant filed and served Further and Better Particulars of her claim of age discrimination. In paragraph 1.1.3 of the Further and Better Particulars, it is said by the Claimant that her claim is under section 19 of the Equality Act 2010 (i.e. a claim of indirect discrimination). In paragraph 1.1.4(a) of the Further and Better Particulars, it is said by the Claimant that her claims are of *“Age and Sex discrimination – Direct, Indirect and Harassment”*. The Further and Better Particulars also set out a number of factual allegations that can be summarised as follows:

20.1 Miss Scott unreasonably refused the Claimant’s offer to take home and wash dirty towels that had been used by clients at work.

20.2 On the 13th July 2016 Miss Scott called the Claimant a thief for removing a pack of muslin cloths from stock.

- 20.3 The Claimant was prevented from raising her concerns about Miss Scott's behaviour at the meeting on the 11th August 2016.
- 20.4 On the 22nd June 2016 Miss Scott contacted the Claimant by text message whilst she, the Claimant, was at home regarding sales figures and a threatened change to the work rota. The latter issue was of particular concern to the Claimant as her part-time work on Thursdays, Fridays and Saturdays suited her childcare arrangements. The Claimant contended that Miss Scott's treatment of the Claimant in respect of proposed changes to the work rota amounted to age and sex discrimination.
- 20.5 The Claimant having informed the Respondent that it was in breach of the Equality Act 2010, the Respondent failed to request details from the Claimant as to the type of discrimination that she was experiencing in the workplace.
- 20.6 The Respondent failed to investigate promptly the Claimant's complaints about her treatment at work.
- 20.7 The Respondent failed to refer the Claimant to occupational health as soon as they were aware of her ill-health.
- 20.8 The Respondent refused to allow the Claimant to raise age discrimination issues at the meeting on the 11th August 2016.
- 20.9 On the 1st July 2016 Miss Scott, in the context of a discussion regarding the work rota, said to the Claimant *"you're a bit old to have another baby really aren't you, you do know they (Liz Earle) wants someone who's really flexible"*. To put that comment in some context, when the Claimant started work for the Respondent she had a young son who, at the time, was about 12 months' old.

- 20.10 No notes of the meeting were given to the Claimant to sign after the meeting on the 26th June 2016.
- 20.11 The meeting held on the 26th June 2016 was supposed to be a one-to-one meeting but, unexpectedly, Ms Fletcher attended with Miss Scott.
- 20.12 The meeting on the 26th June 2016 was recorded without the Claimant's consent.
- 20.13 Ms Francis failed to respond to the Claimant's 49 comments on the notes of the meeting on the 11th August 2016.
- 20.14 At the meeting on the 11th August 2016, Ms Jones said to the Claimant, with reference to the meeting that had taken place on the 26th June 2016, "*if not comfortable with the situation then as an adult you could say not comfortable so could say to stop, did you*".
- 20.15 The fact that Ms Francis offered a formal apology in response to the Claimant's claims of discrimination and harassment indicates that the Respondent accepted that there had been wrongdoing on its part.
- 20.16 The Respondent retracted the formal apology on the 3rd October 2016.
- 20.17 The Respondent did not address the issues raised by the Claimant when she returned to work on or about the 1st September 2016 and failed to refer her to occupational health at that time.

- 20.18 The Respondent breached a duty of confidentiality owed to the Claimant when Miss Scott discussed the Claimant's case with other members of staff and showed them text messages that the Claimant had sent.
- 20.19 The Respondent breached a duty of confidentiality owed to the Claimant by leaving her personnel file in an unsecured drawer on the shop floor.
21. At a Preliminary Hearing on the 18th May 2017, the Claimant confirmed that her claim was one of age discrimination in the forms of direct discrimination, harassment and victimisation. A claim of indirect age discrimination was dismissed by the Employment Judge. In respect of the claim of sex discrimination that had been raised in the Further and Better Particulars served on the 12th April 2017, the Claimant confirmed to the Tribunal at the Preliminary Hearing that she did not intend to pursue a claim of sex discrimination.
22. The allegations made by the Claimant in her Further and Better Particulars served on the 12th April 2017 were considered at a further Preliminary Hearing on the 15th September 2017. The Tribunal directed that the Respondent was to indicate by the 29th September 2017 whether objection was being taken to the Claimant being given permission to rely on fresh allegations set out in the Further and Better Particulars. In the event of objection being taken, it was directed that there be a further Preliminary Hearing to address the question as to whether leave was required and/or should be given for the Claimant to rely on the fresh allegations in the Further and Better Particulars.
23. In a written response dated the 20th October 2017, the Respondent set out its position in respect of the allegations contained in the Claimant's Further and Better Particulars.

24. The Respondent asserted that the following allegations were new additions to the claim and objection was taken to the Claimant being given permission to amend her claim to include the allegations:

24.1 the allegation concerning dirty towels;

24.2 the allegation that Miss Scott called the Claimant a thief;

24.3 the allegation that the Claimant was prevented from raising the above-stated allegations at the meeting on the 11th August 2016;

24.4 the allegation that the Respondent failed to inquire of the Claimant as to the basis of her allegation that the Respondent had breached the Equality Act 2010;

24.5 the allegation that the Respondent delayed referring the Claimant to occupational health;

24.6 the allegation that Miss Scott, on the 1st July 2016, said to the Claimant *"you're a bit old to have a baby really aren't you, you do know Liz Earle wants someone who's really flexible"*;

24.7 the allegation that Miss Scott discussed the Claimant's personal affairs with work colleagues;

24.8 the allegation that the Claimant's personnel file had been left in an unsecured drawer.

25. At the Preliminary Hearing on the 22nd February 2018, Mr Benzin, on behalf of the Claimant, indicated that the Claimant did not wish to amend her claim to include allegation numbered 7 above because

the Claimant took the view that that particular allegation had already been set out in paragraph 17 of her particulars of claim served with her Claim Form.

26. In respect of the remaining allegations, the Employment Judge permitted the Claimant to amend her claim to include the allegation that Miss Scott, on the 1st July 2016, had said to the Claimant *“you’re a bit old to have a baby really aren’t you, you do know Liz Earle wants someone who’s really flexible”*. Permission for the Claimant to amend her claim to include the remaining new allegations, distilled from the Further and Better Particulars, was refused on the ground that Mr Benzin was unable to explain why any of the allegations were in any way related to the Claimant’s age.

27. In summary, therefore, the case proceeded to a final hearing for the Tribunal to determine the claims of direct discrimination, harassment and victimisation on the grounds of age, with permission having been given to the Claimant to amend her claim as originally pleaded to include the allegation that Miss Scott, on the 1st July 2016, said to the Claimant *“you’re a bit old to have a baby really aren’t you, you do know Liz Earle wants someone who’s really flexible”*.

The issues

28. The issues for the Tribunal at the final hearing were as follows:

The claim of direct discrimination under section 13 of the Equality Act 2010

- 28.1 Did the Respondent subject the Claimant to the following treatment:
 - 28.1.1 failing to provide the Claimant with any support on her first day of work;

- 28.1.2 subjecting the Claimant, through the conduct of Miss Scott, to harassment and intimidation over the 2-week period after the Claimant's first day of work;
- 28.1.3 saying to the Claimant, through Miss Scott, that she was a bit old to have another baby and that the Respondent wanted someone who is really flexible in respect of the work rota;
- 28.1.4 subjecting the Claimant to work-related text messages whilst the Claimant was at home;
- 28.1.5 conducting a one-to-one meeting on the 26th June 2016 in an inappropriate manner in that a third person was present at the meeting and the meeting was recorded without the Claimant's permission;
- 28.1.6 failing to provide the Claimant with feedback after the meeting on the 26th June 2016;
- 28.1.7 failing to respond to the Claimant's requests for feedback after the meeting on the 26th June 2016;
- 28.1.8 subjecting the Claimant to intimidatory and threatening language, from Miss Scott, arising from the Claimant's refusal to sign a note of the meeting on the 26th June 2016;
- 28.1.9 failing to provide the Claimant promptly with the notes of the meeting that took place on the 11th August 2017;
- 28.1.10 failing to respond to the Claimant's 49 comments on the notes of the meeting on the 11th August 2017;
- 28.1.11 failing to respond to unresolved complaints by the Claimant after her return to work on the 1st September 2016 after a period of sick leave that had commenced on the 15th July 2016;
- 28.1.12 failing to provide the Claimant promptly with the written apology that had been offered by Ms Francis on the 22nd August 2016;

- 28.1.13 through the actions of Miss Scott, discussing the Claimant's personal affairs with work colleagues;
 - 28.1.14 failing to respond adequately to the Claimant's letters dated the 9th September 2016 and the 24th September 2016 in which the Claimant alleged that the Respondent had breached the Equality Act 2010;
 - 28.1.15 withdrawing the offer of a formal apology to the Claimant on the 3rd October 2016;
 - 28.1.16 over the period from the date of the Claimant's initial complaints to the Respondent about the behaviour of Miss Scott (namely, the 21st July 2016) to the 3rd October 2016 failing adequately to investigate the Claimant's complaints.
- 28.2 Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated a hypothetical comparator?
- 28.3 If so, are there primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the Claimant's age?
- 28.4 If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?
- 28.5 Are the allegations of direct discrimination in time?

Harassment under section 26 of the Equality Act 2010

- 28.6 Did the Respondent engage in unwanted conduct as summarised in paragraphs 28.1 above?
- 28.7 Was the conduct related to the Claimant's age?

- 28.8 Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her – taking into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?
- 28.9 Is the allegation of harassment in time?

Victimisation under section 27 of the Equality Act 2010

- 28.10 Did the Claimant carry out a protected act within the meaning of section 27(2) of the Equality Act 2010? The Claimant relies on her two letters dated the 9th September 2016 and the 24th September 2016 in which she informed the Respondent that it was in breach of the Equality Act 2010.
- 28.11 If there was a protected act, did the Respondent subject the Claimant to any treatment because of the protected act between the 9th September 2016 to the 3rd October 2016 that amounted to a detriment.
- 28.12 Is the allegation of victimisation in time?

The evidence

29. The Tribunal heard oral evidence from the Claimant and, for the Respondent, Ms Debra Jones and Ms Chloe Francis. The Tribunal also read and considered the agreed hearing bundle that contained 353 pages. The Tribunal's directions in respect of the agreed bundle, given on the 22nd February 2018, had specified that the bundle should not exceed 200 pages. Though there had been non-compliance by the parties with that direction, the Tribunal, at the final hearing, was content to read and consider the 353-page bundle that had been agreed between the parties.

30. Neither party had prepared a skeleton argument for use by the Tribunal at the final hearing. That is not a criticism as there had been no direction from the Tribunal that skeleton arguments should have been filed. The Respondent produced a neutral chronology, which assisted the Tribunal in the pre-reading of the witness statements and the hearing bundle that took place before oral evidence was heard on the first day of the final hearing.

31. The Tribunal heard oral evidence first from the Claimant, commencing at 12:10pm on the 10th September 2018. Under oath, she confirmed that her witness statement dated the 20th August 2018 was true to the best of her knowledge and belief. The statement stood as her evidence-in-chief.

32. The Claimant was then cross-examined by Mr Moore on behalf of the Respondent. She stated that her son was now 3 years of old and that he had been 1 when she started work with the Respondent in June 2016. She also has two daughters, aged 15 and 18. She was asked about how she had come to apply for a job with the Respondent and she stated that Kirsty Scott had suggested that she apply. The Claimant explained that she and Miss Scott had been acquaintances. She explained that it had not been particularly difficult for her to return to work because her son was able to stay with his dad. She said that she had been annoyed by Miss Scott's suggestion that she was too old to have had a baby. She agreed that her grievance letter to the Respondent dated the 20th July 2016 (at page 90 in the hearing bundle) had not made any reference to the comment by Miss Scott. The Claimant was asked why that was and she stated that she did not think it was something of relevance to include in her grievance letter. It was not until later on that she realised that it was discriminatory. The Claimant was asked why she had not mentioned the comment at the meeting on the 11th August 2016 and she stated that she had not been allowed to elaborate on her concerns at that meeting. She said that the problems with Miss Scott had begun with niggly little things and she had wanted to get that across at the meeting on the 11th August 2016.

33. The Claimant was asked about the document at page 143 in the hearing bundle, in which she had raised concerns and questions arising from the meeting on the 11th August 2016. The Claimant explained that her partner had written the document. She agreed that it had presented an opportunity for her to have mentioned the comment made by Miss Scott. She agreed that the comment was not mentioned in the document. It was later that the Claimant thought it was a wrong statement to make.

34. The Claimant was then taken to page 209 in the hearing bundle, which was the document in which Ms Francis had set out her response to the Claimant's written questions and concerns arising from the meeting on the 11th August 2016. The Claimant agreed that she could have gone back to Ms Francis, after receiving the document at page 209 in the hearing bundle, to mention the comment by Miss Scott but had not done so. She agreed that Ms Francis was an easy person to deal with though the Claimant was left waiting for long periods of time for responses from her.

35. When asked about her relationship with Debra Jones, the Claimant stated that she did not have much communication with her. She agreed that Debra Jones had not been confrontational at the meeting on the 11th August 2016. She agreed that Debra Jones was open and interested in respect of the matters raised by the Claimant at the meeting on the 11th August 2016.

36. The Claimant confirmed that she had been absent from work on sick leave from the 14th July 2016 to the beginning of September 2016. She agreed that there had not been a long time for the Respondent to assess her performance at work. She did not agree that it was reasonable to extend her probation period but she understood why the Respondent did so. She stated that she had never been off work due to sickness before.

37. The Claimant was asked about the letter at page 229 in the hearing bundle in which she complained that her personnel file had been left in an unsecured location and that she had been bullied and harassed by Miss Scott. When asked why she had not mentioned the comment by Miss Scott about being too old to have a baby, the Claimant's response was that she did not know it was discriminatory until later on. She said that she had found the comment to be demeaning. She was asked why the first mention of the baby comment was in April 2017 in the Further and Better Particulars and her response was that she did not know the comment was discriminatory and that it was hard for her to remember every comment that Miss Scott had made to her.
38. The Claimant was asked about the text exchanges with Miss Scott at pages 42 to 44 in the hearing bundle. It was put to her that there was nothing objectionable in the text messages from Miss Scott to which the Claimant replied that the text messages had got her back up. It was the comment from Miss Scott, "*don't know what happened last week*" that got the Claimant's back up. She was annoyed that Miss Scott wanted to change the work rota. She stated that she found Miss Scott's text message at page 44 in the hearing bundle to be aggressive and that really marked the start of the problems with Miss Scott.
39. The Claimant was asked why her witness statement did not deal with any matters prior to the 26th June 2016. She replied that all her anxieties started on the 26th June 2016. She did not know at that time about the Equality Act 2010. She stated that she should have been informed that a third person was going to be present at the meeting on the 26th June 2016. She felt it was two-against-one and not a one-to-one meeting.
40. When asked when the age discrimination had occurred, the Claimant replied that it was the baby comment made by Miss Scott on the 1st July 2016. The Claimant could not say whether the meeting on the 26th June 2016 amounted to age discrimination. She stated that Miss Scott wanted to exert authority over her. She said that she thought

the meeting had been recorded. She said that she should have been informed that a written note was going to be taken and that the meeting was not going to be electronically recorded. She stated that at the second meeting with Miss Scott in the coffee shop in M&S on the 13th July she had been upset and crying. She had tried to tell Miss Scott about her concerns.

41. When pressed about the claim of age discrimination, the Claimant agreed that the age difference between herself and Miss Scott had nothing at all to do with the request by Miss Scott that the Claimant attend the informal meeting on the 13th July 2016. The Claimant also agreed that the age difference between herself and Miss Scott had nothing to do with Miss Scott's request that she sign a note of the meeting.
42. The Claimant confirmed that Miss Scott had moved to work in Bristol with effect from the 1st August 2016.
43. The Claimant agreed that the first time that she had mentioned the Equality Act 2010 was in the letter dated the 9th September 2016 at page 230 in the hearing bundle. She was asked what fell under the Equality Act and she replied, "*all of it, how I've been treated, the texts, the meetings, to when I was off sick, how would I know what bits of the Equality Act applied*". She said that the Respondent should have known which provisions of the Equality Act 2010 had been infringed.
44. The Claimant was then pressed further on the question as to how her age was related to what had happened at work. She was asked whether her age had anything to do with the meeting that had taken place on the 11th August 2016. She agreed that her age did not have anything to do with the way the meeting on the 11th August 2016 was conducted. She also agreed that her age had nothing to do with the retraction of the offer of an apology or the way in which her grievance was investigated after the 9th September 2016.

45. The Claimant stated that she felt Miss Scott should have been disciplined for what she had done. The Claimant felt she had got away with it. She felt that management did not want to know.
46. The Claimant was asked about her 49 comments on the notes of the meeting that had taken place on the 11th August 2016. She agreed none of her comments sought to amend the record of the meeting. She said that she had wanted a reply to those comments and that Miss Scott never got back to her. All the Claimant ever did was wait for a response from the Respondent, which caused her stress and anxiety.
47. The Claimant agreed that her age had nothing to do with Ms Francis' lack of response to her 49 comments on the note of the meeting on the 11th August 2016. She agreed that her age had nothing to do with the Respondent's decision to extend her probation period and she agreed that Miss Scott's resignation without making an apology had nothing to do with the Claimant's age. The Claimant was asked whether there were any acts of age discrimination after the 4th October 2013 to which she replied that she did not think so.
48. There was no re-examination of the Claimant by Mr Benzin after she had been cross-examined by Mr Moore.
49. The Tribunal next heard evidence from Debra Jones, commencing at 2.30pm on the 10th September 2018. Under affirmation, she confirmed that her witness statement dated the 10th September 2018 was true to the best of her knowledge and belief. Her witness statement stood as her evidence-in-chief.

50. Ms Jones was cross-examined by Mr Benzin on behalf of the Claimant. Ms Jones stated that Miss Scott had got in touch with her before the meeting on the 26th June 2016. Ms Jones thought that she might have said to Miss Scott to have a manager present at the meeting. She agreed that she would have advised Miss Scott about the meeting. She could not recall whether she told Miss Scott to have Ms Fletcher present at the meeting. She was not aware that Miss Scott and Ms Fletcher were close friends. She was asked about the document at page 115 in the hearing bundle (the written note of the meeting on the 26th June 2016) and said that she could not remember the date she signed the document. She was asked whether the Claimant had been presented with the note of the meeting on the 26th June 2016 at the meeting on the 11th August 2016 and she replied that it may have been the case that the notes were not given to the Claimant before then. Ms Jones could not recall when she received the note of the meeting on the 26th June 2016 but she did have them for the meeting that took place on the 11th August 2016. Ms Jones stated that she believed that all the outstanding issues had been resolved at the meeting on the 11th August 2016.
51. Ms Jones confirmed that Miss Scott had been new to the role of Counter Manager. She had some support in the store and had gone on a week-long induction course. When asked about the grievance letter dated the 20th July 2016 (at page 90 in the hearing bundle), Ms Jones stated that she was aware that the Claimant had ongoing concerns but Miss Scott would not have known of those ongoing concerns. Miss Scott's impression would have been that the Claimant's concerns had been resolved. It was Ms Jones who suggested that Miss Scott have a further meeting with the Claimant to discuss unresolved issues after the meeting on the 26th June 2016. Ms Jones had not been informed that the Claimant was on the verge of a breakdown. She stated that it is not always helpful to have a boss come into the store. She asked Miss Scott to invest some time in developing a good relationship with the Claimant.
52. Ms Jones was asked about the meeting that took place on the 11th August 2016. She stated that a lot of time was spent discussing the Claimant's grievance letter dated the 20th July 2016. She stated that the meeting ended positively and on friendly terms. The Claimant

raised a number of housekeeping issues that were to be followed up in the store when she returned to work. Ms Jones stated that she had seen the Claimant's 49 comments on the note of the meeting on the 11th August 2016 after she returned to work from maternity leave. She stated that the comments were noted.

53. Ms Jones was asked about the procedure for changing a work rota. She stated that proposed changes should be discussed a few weeks ahead but there were times when a shorter notice period could be given.

54. The final question for Ms Jones concerned her comment at page 119 in the hearing bundle: "*if not comfortable with the situation then as an adult you could say not comfortable so could say to stop – did you?*" To put it in context, this was a reference to the meeting on the 26th June 2016. It was put to Ms Jones that the comment was patronising. Ms Jones disagreed. She stated that the comment was not delivered in a patronising way.

55. There was no re-examination of Ms Jones.

56. The last witness from whom the Tribunal heard oral evidence was Chloe Francis. She commenced her evidence at 3.20pm on the 10th September 2018. Under oath she confirmed that her witness statement dated the 9th September 2018 was true to the best of her knowledge and belief. The witness statement stood as her evidence-in-chief.

57. Ms Francis was cross-examined by Mr Benzin on behalf of the Claimant. She stated that she had not recommended a one-to-one meeting with the Claimant following the text exchanges between the Claimant and Miss Scott at pages 42 to 44 in the hearing bundle. She was confident that Ms Jones was dealing with the matter

appropriately. She would not have expected to see any follow up notes after the meeting on the 26th June 2016. She explained that her role was to support area managers. She did not do direct line management. She provided HR support.

58. Ms Francis confirmed that she became involved with email correspondence with the Claimant after the meeting had taken place on the 26th June 2016. It was not a concern to Ms Francis that the Claimant had not been willing to sign off the note of the meeting on the 26th June 2016. Ms Francis was asked why she had not responded to the 49 comments made by the Claimant on the note of the meeting on the 11th August 2016. She replied that she had sent an email to the Claimant on the 22nd August 2016 in which she stated that the Claimant's comments had been noted. The comments were placed on the Claimant's file. Ms Francis stated that she had read through them and had checked to see if a response was required. She believed that she had responded to everything that called for a response.

59. Ms Francis was asked why the meeting on the 11th August 2016 had not been a one-to-one meeting. She replied that it was intended to be an informal meeting pursuant to the Respondent's grievance policy. She stated that the grievance policy had been sent to the Claimant.

60. On the subject of the apology that had been offered to the Claimant, Ms Francis stated that the Claimant had not ever said that it was not Miss Scott that she wanted the apology to be from.

61. Ms Francis was asked about the decision-making in respect of occupational health and she stated that referrals to occupational health are case specific. She decided, in the Claimant's case, that a referral was not appropriate. She confirmed that the Claimant's sick notes referred to depression and stress. She stated that the meeting with the Claimant on the 11th August 2016 had been positive and that the Claimant was happy to return to work. She stated that at the

Claimant's return-to-work interview, her new line manager, Annie Betts, would not have been aware of the prior situation. She stated that the text exchange between the Claimant and Miss Scott had been dealt with in a confidential manner and they had been deleted. She could not confirm the date when the text messages were deleted.

62. Ms Francis stated that she was due to meet with Miss Scott on the 28th September 2016 in order to discuss the Claimant's concerns and to obtain the apology from Miss Scott. Miss Scott, however, resigned from the Respondent's employment on the 26th September 2016. She gave a week's notice and left on the 30th September 2016. Even though Miss Scott had resigned on the 26th September 2016, Ms Francis still intended to have the meeting with her on the 28th September 2016 but Miss Scott stated that she would not attend the meeting. Miss Scott also indicated that she was not prepared to apologise to the Claimant if stress had been caused.

63. Ms Francis was asked why the apology had been offered to the Claimant in the first place. She replied that it had been requested by the Claimant and that it would close things off. It seemed reasonable to Ms Francis if that is what the Claimant wanted in order to resolve things.

64. There was no re-examination of Ms Francis.

The Respondent's closing submissions

65. In relation to the claim of direct discrimination, Mr Moore submitted that if there were facts from which the Tribunal could find discrimination, then it must do so. It would then be for the Respondent to explain its actions and show that it was not guilty of discrimination. Mr Moore reminded the Tribunal that motive on the part of the alleged discriminator is not relevant. The question for the Tribunal was what were the primary or secondary facts that might allow an inference of

discrimination to be drawn. The Respondent's case is that a prima facie case of discrimination had not been shown by the evidence in the case. Mr Moore relied on the Claimant's concessions that none of the matters raised by her in her claim amounted to age discrimination save for the comment alleged to have been made by Miss Scott on the 1st July 2016. In relation to that comment Mr Moore submitted that it was extraordinary that the comment had not been alleged by the Claimant until April 2017 when she provided Further and Better Particulars of her claim. He submitted that it was highly unlikely that the remark had been made though the Claimant has plainly convinced herself that the remark was made. Apart from that alleged comment, there was no other evidential basis from which an inference of age discrimination could be drawn. Mr Moore also submitted that the alleged acts of discrimination by Miss Scott were out of time.

66. In relation to the claim of harassment, Mr Moore submitted that there was no evidence of conduct related to the protected characteristic of age save for the single remark alleged to have been made by Miss Scott on the 1st July 2016.

67. In relation to the claim of victimisation, Mr Moore submitted that the Tribunal must find a protected act. He submitted that the earliest date of a possible protected act was the 9th September 2016 when the Claimant alleged, in her letter of that date to the Respondent, that the Respondent had breached the Equality Act 2010. He submitted that there was no detriment that could be identified after the 9th September 2016 that could be linked to the Claimant's letter of the 9th September 2016.

The Claimant's closing submissions

68. It was submitted that prior to taking up the job with the Respondent in June 2016, the Claimant had never experienced any work-related issues. She had always enjoyed her work. She regarded work life balance as important and she ensures that she is flexible when it

comes to her hours of work. She found Miss Scott's actions, as set out in the grievance letter dated the 20th July 2016, to be unacceptable. The comment made by Miss Scott on the 1st July 2016 was made in the context of three separate requests by Miss Scott to the Claimant to change her shift. The Claimant, in her evidence, confirmed that the comment was made by Miss Scott on the 1st July 2016. Miss Scott, on the other hand, had not given evidence at the final hearing. The comment amounted to age discrimination. Given that the Claimant had been through four separate Preliminary Hearings when her claim of age discrimination had been discussed, it was not acceptable for the Respondent to say that the Claimant had not referred to age discrimination whilst she was working for the Respondent.

69. The Claimant did attempt to address her concerns about Miss Scott at the meeting on the 11th August 2016 and in the 49 comments that she made in respect of the written note of the meeting. The Respondent should have questioned the Claimant about her references to the Equality Act 2010 and in that way the claim of age discrimination would have become clear. The Further and Better Particulars served on the 12th April 2017 confirmed that the case was one of age discrimination.

70. It was submitted that the cross-examination had attempted to confuse the Claimant in respect of her recollection of the meeting on the 26th June 2016 and the 11th August. The starting point for the case was the meetings that took place with Miss Scott on the 26th June 2016 and the 13th July 2016.

71. It was submitted that there were procedural errors on the part of the Respondent. Notes of meetings were never signed and Ms Jones never contacted the Claimant despite the Claimant requesting an update from her after the first meeting with Miss Scott on the 26th June 2016. The Respondent failed to act promptly to the concerns raised by the Claimant and failed to support the Claimant.

72. Of particular concern to the Claimant had been Miss Scott's breach of confidentiality. The Claimant had made it clear on the 21st July 2016 that she wanted the concerns that she was raising to be treated privately and confidentially. Despite that, there were rumours in the workplace about the Claimant and the majority of the staff knew what had been going on. The Claimant simply wanted to go on with her role. The Respondent has said that the Claimant's text messages to Miss Scott were deleted but the texts were shown to members of staff.
73. All the Claimant had wanted was a formal apology for what had occurred. She had never said it had to be an apology from Miss Scott. The Claimant had expected an apology from the Respondent. If there had been no wrongdoing by the Respondent, then there would have been no need for an apology.
74. In summary, the Respondent failed to act promptly and failed to provide an apology to the Claimant. No notes of meetings were properly signed off and the 49 comments made by the Claimant were never addressed. The Respondent had failed to ask the Claimant about age discrimination when told by the Claimant that the Equality Act 2010 applied to her case and had failed to address her health issues. The Claimant was off work from the 4th October 2016 until her dismissal on the 5th May 2017. The Respondent had been notified of the age discrimination claim after receipt of the Claimant's sickness certificates. The Claimant is still signed off work. The effects of the harassment she suffered have been long lasting.

The law

75. The Tribunal reminded itself of the following provisions of the Equality Act 2010:
- 13 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.

26 Harassment

- (1) A person (A) harasses another (B) if-
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of-
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are-
- Age

27 Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because-
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act-
- (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.

136 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.

76. The Tribunal also reminded itself of a number of cases concerning the burden of proof under section 136 of the Equality Act 2010. Having reminded itself of the decisions in *Wong v. Igen Limited (formerly Leeds Careers Guidance)* [2005] EWCA Civ 147, *Laing v. Manchester City Council* [2006] 7 WLUK 796, *Madarassy v. Nomura International plc* [2007] EWCA Civ 33, *Hewage v. Grampian Health Board* [2012] UKSC 37 and *Ayodele v. (1) Citylink Limited (2) Paul Napier* [2017] EWCA Civ 1913, the Tribunal adopted a two-stage process to the burden of proof in respect of the Claimant's claim of age discrimination. Under that two-stage process, the burden is initially on the Claimant to establish facts from the evidence heard and read by the Tribunal from which the Tribunal could conclude, on the balance of probabilities, that the alleged discrimination occurred. At that initial stage in the process, the Tribunal has to leave out of account the Respondent's explanation for the alleged treatment. If that burden is discharged, the onus shifts to the Respondent to give an explanation for the alleged discriminatory treatment to satisfy the Tribunal that it was not tainted by a relevant protected characteristic, which in this case is age. If the Respondent does not discharge that burden, then the Tribunal must find the case proved by the Claimant.
77. The Tribunal also reminded itself of the definition of detriment given in the case of *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11. A detriment exists where, in all the circumstances, a reasonable employee might take the view that the treatment by the employer was to his or her disadvantage.

Findings of fact

78. The Tribunal made the following findings of fact:

- 78.1 The Claimant commenced employment with the Respondent as a Counter Assistant on the 6th June 2016. She spent the first week on an induction course.

- 78.2 The Claimant's first day of work in the store in which she was based was on the 12th June 2016. She worked alone on that day.
- 78.3 The Claimant worked part-time for the Respondent.
- 78.4 At the time she commenced her employment with the Respondent, the Claimant was 42 years of age.
- 78.5 At the time that she commenced her employment with the Respondent, the Claimant had a young son who was approximately 12 months' old.
- 78.6 The Claimant's immediate line manager was Kirsty Scott. She was approximately 21 years of age. She had only recently been appointed to the position of Counter Manager. She had no experience of acting as a Counter Manager. She had received some induction training and support was available to her from other managers within the Respondent's organisation.
- 78.7 The relationship between the Claimant and Miss Scott soured as a result of an exchange of text messages (at pages 42 to 44 in the bundle). The Claimant was upset by the text messages that she received from Miss Scott. She was upset that she had received the text messages whilst she was at home and she was upset with the content of the messages. The Tribunal found that the text messages from Miss Scott were not aggressive in tone or content. The Tribunal's view of the text messages from Miss Scott was that she was raising work-related matters in an appropriate and polite manner. It was the content of the Claimant's text message to Miss Scott (on page 44 of the hearing bundle) that took the Tribunal by surprise. The Claimant said to Miss Scott "... *it's not nice working with someone you don't get on with so i don't appreciate being spoken too like something stuck to your shoe because thats how you come across by txt dont care if your my counter manager or not a*

bit of respect please". That seemed to the Tribunal to be an unjustified complaint on the part of the Claimant. On the basis of the text messages produced before the Tribunal (at pages 42 to 44) there did not seem to be a proper basis for an allegation by the Claimant that she was not been spoken to appropriately by Miss Scott. In the judgment of the Tribunal, the text messages showed that the Claimant was being spoken to by Miss Scott in an appropriate and respectful manner.

78.8 The text messages took place over the period from the 22nd June 2016 to the 26th June 2016.

78.9 In a text message sent to the Claimant on the 25th June 2016, Miss Scott informed the Claimant that she had had a discussion with Ms Jones about the content of the Claimant's text messages to her and that a decision had been made to have a one-to-one meeting with the Claimant that would be "recorded".

78.10 On the 26th June 2016, the Claimant sent the following text message to Miss Scott in response to the proposal that there be a one-to-one meeting:

"Hi Kirsty this is silly can't we put it behind us and start again I really don't want to fight with you, I'm not that kind of person, I want us to get on I just didn't like your tone by text that was all, I don't want to argue, I want us both to do well and the counter to succeed. I think we've got off on the wrong foot I don't want to fall out I really like you :) can we start again please :)))) xx"

78.11 Miss Scott's response to that text message was to say that she would be present in the store at 3.30pm on the 26th June 2016 for the one-to-one meeting.

78.12 The meeting went ahead on the 26th June 2016. It was attended by the Claimant, Miss Scott and Ms Fletcher. Based on the text message from Miss Scott, the Claimant

had reasonably understood that the meeting was to be a one-to-one meeting and so she was surprised to see that Ms Fletcher was present at the meeting. The Claimant was also surprised to hear that the meeting was to be recorded. She thought that that meant that the meeting was going to be electronically recorded. The Claimant was unaware that Miss Scott had been advised on how to conduct the meeting by Ms Jones and had been informed by Ms Jones that another manager ought to be present at the meeting.

- 78.13 Ms Fletcher took a written note of the meeting on the 26th June 2016. The meeting was not electronically recorded. The note of the meeting was to be found at pages 115 to 116 in the hearing bundle. There being no challenge by the Claimant to the accuracy of the note, the Tribunal found that the note contained a fair reflection of what was discussed at the meeting.
- 78.14 Though the Claimant was expecting some sort of follow-up to the meeting that had taken place on the 26th June 2016, it appeared to the Tribunal, from the note of the meeting and from the evidence from Ms Jones, that Miss Scott regarded matters as having been resolved with the Claimant. The note recorded that there had been discussion about text exchanges and that the air had been cleared regarding miscommunication and misinterpretation.
- 78.15 The Tribunal rejected the Claimant's evidence that Miss Scott had said, on the 1st July 2016, that the Claimant was too old to have a baby and that the Respondent expected flexibility in respect of work rotas. The Claimant's evidence on the matter was unconvincing. Given that it was such a central part of the Claimant's case of age discrimination, having been identified by the Claimant during part of her cross-examination as the only instance of age discrimination, it was of concern to the Tribunal that the Claimant had not mentioned the alleged comment in her grievance letter dated the 20th July 2016, at the meeting on the 11th August, in her written correspondence to the Respondent regarding the meeting that had taken place on

the 11th August 2017, in her letters to the Respondent dated the 9th and 24th September 2017 or in her ET1. It was of particular concern that the alleged comment had not been mentioned by the Claimant at the meeting on the 11th August 2017. It was clear to the Tribunal, contrary to the Claimant's case, that she had been given an opportunity to raise any matters of concern at that meeting, which was also attended by Mr Benzin. In its ex tempore judgment, the Tribunal had incorrectly stated that Mr Benzin was representing the Claimant at the meeting on the 11th August 2016 when the reality was that he was there to support the Claimant. It was nevertheless clear to the Tribunal that Mr Benzin had made representations at the meeting. On page 131 in the hearing bundle, the note of the meeting shows that he sought to prompt the Claimant to elaborate her concerns about Miss Scott's behaviour, which the Claimant then did. There was no mention, however, of the alleged comment on the 1st July 2016. At page 132 of the hearing bundle, the note of the hearing shows that Ms Jones gave the Claimant opportunity to say anything else, to which the Claimant replied that everything had been clarified. The Tribunal rejected the Claimant's case that she was stifled at that meeting from raising her concerns. It was clear to the Tribunal that the meeting was conducted in a fair manner and that the Claimant, prompted by Ms Jones and Mr Benzin, was given a fair opportunity to raise any matters that she wanted to raise. The fact that the Claimant did not mention the alleged comment by Ms Scott at the meeting on the 11th August 2016 or in any subsequent correspondence with the Respondent until the Further and Better Particulars served in April 2017 led the Tribunal to make the finding that it was unlikely that Miss Scott had made the alleged comment on the 1st July 2016. Accordingly, the Tribunal was unable to make a finding that the alleged comment had been made by Miss Scott. The Tribunal was fully aware that it had not heard evidence from Miss Scott but the Tribunal was nevertheless unable to find, on the evidence before it, that the comment imputed to Miss Scott had been made as alleged by the Claimant.

- 78.16 On the 13th July 2016 there was another meeting between the Claimant and Miss Scott. This was an unscheduled meeting and it took place, at Miss Scott's suggestion, in the

coffee shop in a local M&S. The note of the meeting is at page 117 of the hearing bundle. In the absence of challenge from the Claimant as to the accuracy of the note, the Tribunal found that the note contained a fair reflection of what was discussed at the meeting. The topics that were discussed included the Claimant's misunderstanding that the meeting on the 26th June 2016 was electronically recorded, the Claimant's hours of work and the Claimant's general concerns that she was being made to feel unwanted at work. It is apparent from the note that Miss Scott sought to reassure the Claimant that she was a valued employee. The Claimant made it clear that she did not want to sign any notes of the meeting on the 26th June 2016 or the 13th July 2016, which was noted by Miss Scott. The meeting ended on the basis that Ms Jones would be in touch with the Claimant.

- 78.17 The Claimant went on sick leave due to work-related stress on the 15th July 2016. When informing the Respondent that she was off work due to work-related stress, the Claimant requested a copy of the Respondent's grievance policy. The Claimant remained absent from work until her return on the 19th August 2016. By the time that she returned to work she had a new line manager. Miss Scott had re-located to Bristol.
- 78.18 On the 15th July 2016 Debra Jones sent an email message to the Claimant stating that she was sorry to hear that the Claimant was off work due to work-related stress and that she wished to have the opportunity of discussing matters with the Claimant in order to understand the situation more clearly.
- 78.19 On the 18th July 2016, Ms Francis sent a copy of the Respondent's grievance policy to the Claimant. Ms Francis said to the Claimant, by way of email, that if the Claimant had any questions about the policy, then she should not hesitate to contact Ms Francis.

- 78.20 On the 20th July 2016 the Claimant composed a grievance letter (page 90 of the hearing bundle). The grievance letter was sent to the Respondent on the 21st July 2016. She stated that there had been an ongoing problem with Miss Scott for 3 weeks that she had been unable to resolve. Attached to the grievance letter were transcripts of text messages over the period from the 22nd June 2016 to the 26th June 2016 together with a chronology of complaints about Miss Scott over the period from the 26th June 2016 to the 13th July 2016. It was apparent that the Claimant was making no complaint about Miss Scott's conduct prior to the 22nd June 2016 (the date of the earliest text message). The Claimant's contention that she was bullied and harassed by Miss Scott for 2 weeks after the 12th June 2016 (see paragraph 5 of the Claimant's particulars of claim) was rejected by the Tribunal. On the basis of the Claimant's chronology supplied to the Respondent on the 21st July 2016, the Claimant had no complaint about Miss Scott's behaviour prior to the 22nd June 2016.
- 78.21 The Respondent was unsure whether to treat the Claimant's grievance letter dated the 20th July 2016 as a formal grievance or as an informal matter. Ms Francis suggested, in an email to Ms Jones, that there should be a meeting with the Claimant as soon as possible in order to facilitate her possible return to work. Ms Francis' view at that stage was that it was necessary to get the Claimant and Miss Scott talking again as soon as possible (see Ms Francis' email at page 97 in the hearing bundle). At that stage, the Claimant was due to return to work on the 28th July 2016.
- 78.22 On the 22nd July 2016, the Claimant informed the Respondent that she required further time off work due to her ill health.
- 78.23 In July 2016 (on a date that could not be determined), Miss Scott had contacted Ms Jones in advance of a probationary review meeting due to be held on the 8th August 2016 to say that she had not met her key performance indicators in her role as Counter Manager and that she wished to be

transferred to the role of Counter Assistant. In response, Ms Jones offered Miss Scott the position of Counter Assistant in a store in Bristol with effect from the 1st August 2016, which Miss Scott accepted. None of those matters were communicated to the Claimant at that stage.

- 78.24 On the 4th August 2016, the Claimant wrote to Ms Jones to say that she was agreeable to a meeting with Ms Jones on either the 11th or 12th August 2016. She requested that the meeting be held at her home.
- 78.25 Ms Francis felt that it was not appropriate to hold the meeting at the Claimant's home and so it was decided, with the Claimant's agreement, to hold the meeting in a local hotel.
- 78.26 The meeting went ahead on the 11th August 2016 attended by the Claimant, Ms Jones, Mr Benzin (to support the Claimant) and Ms Francis. Prior to the meeting, the Claimant received the notes of the meetings that had taken place with Miss Scott on the 26th June 2016 and the 13th July 2016.
- 78.27 The note of the meeting of the 11th August 2016 is at pages 118 to 133 of the hearing bundle. Though the Claimant subsequently made 49 comments about the note of the meeting, she did not assert that the note was inaccurate. The Tribunal therefore accepted the note of the meeting as accurate and reliable.
- 78.28 The Tribunal found that the meeting was conducted in a fair and proper manner. The Claimant was given ample opportunity to raise her concerns about Miss Scott's conduct. The Tribunal accepted Ms Jones' evidence that the meeting was friendly and open. At the meeting the Claimant was informed that Miss Scott had stepped down from the role of Counter Manager because there was more to the role than she had been expecting. The Claimant said that she

wanted to get back to work but felt that Miss Scott had “*got away with it*”. The Claimant said that there had been no apology from Miss Scott and that she should have been dismissed.

78.29 During the meeting on the 11th August 2016, Ms Jones is recorded as having said to the Claimant “*If not comfortable with the situation then as an adult you could say not comfortable so could say to stop – did you*”. The Tribunal found that there was nothing inappropriate in that observation and question by Ms Jones.

78.30 On the 18th August 2016, the Claimant emailed a list of concerns and questions to Ms Francis arising from the meeting that had taken place on the 11th August 2016. In paragraph 8(a) of her list of concerns and questions, the Claimant stated:

“As mentioned I would like a formal apology, as I have clearly presented factual evidence together with relevant documentation to justify why this has certainly caused me undue stress and anxiety and certainly should never of been allowed to get this stage in first place.”

78.31 On the 19th August 2016, Ms Francis emailed the note of the meeting of the 11th August 2016 to the Claimant and in a further email of the same date, she suggested that she have a further meeting with the Claimant to deal with the points that the Claimant had raised. Ms Francis asked whether the Claimant would be available for a meeting on the 31st August 2016.

78.32 In an emailed reply from the Claimant dated the 19th August 2016, she did not take up Ms Francis’ offer of a further meeting but indicated that she would be providing a full written response to the note of the meeting of the 11th August 2016 “*as there are clearly amendments that need to be addressed*”.

78.33 On the 20th August 2016, the Claimant sent an email to Ms Scott, stating:-

“Further to my email yesterday evening. I thank you for the transcription notes relating to our meeting dated 11 August 2016. And as per my email I promised to submit any further notes/amendments to that effect by no later than Monday morning.

I have taken the notes out of adobe into word to enable track control comments as appropriate. As you will appreciate my partner has typed the notes enabling me to capture the main points in question.

I hope you appreciate that having had the opportunity to air my views and having reviewed the transcriptions notes I do wish to comment further of which is attached to the notes.

I can confirm that I have returned to my work environment yesterday, however I still feel anxious as it currently stands as there are still some issues which remain outstanding. Whilst I feel our informal meeting was productive, there are areas that have not been addressed and have been noted in my further questions to you dated 18 August 2016.

I want to assure everyone that I am certainly not one to cause unnecessary issues as I do not like conflict in any format. However because of nature of this issue I felt very strongly and was not prepared to be treated in such way.

Finally, regarding my mileage claim, do you have an update?

Once again I appreciate your involvement and support at this time.”

78.34 On the same date, the 20th August 2016, the Claimant sent her comments on the note of the meeting of the 11th August 2016 to Ms Francis. The Claimant made 49 comments in the margin of the note of the meeting. By her comments, the Claimant did not seek any material amendments to the note of the meeting.

78.35 On the 22nd August 2016, Ms Francis sent an email to the Claimant stating that her 49 comments on the note of the meeting of the 11th August 2016 had been noted. Ms Francis also sent to the Claimant her written response to the written questions and concerns that had been raised by the Claimant on the 18th August 2016 before she had received the note of the meeting of the 11th August 2016. Ms Francis noted that the Claimant wanted a *“formal apology from [Miss*

Scott]” and asked whether the Claimant would like to receive the apology from Miss Scott in writing or verbally. Ms Francis ended her email as follows:

“You indicated in our meeting that as an outcome you did wish to return to work and move forward in working with us. In light of this, it is now considered that this brings this matter to a close and we look forward to now working with you alongside your new Counter Manager Annie Betts.”

- 78.36 The Claimant, however, did not regard the matter as having been brought to a close. There remained the matter of the formal apology and there were fresh matters that arose following her return to work. It was then that she had learned that Miss Scott had discussed her case with other people within the store in which the Claimant worked (non-employees of the Respondent) and had shown them some of the Claimant’s text messages.
- 78.37 In another email sent on the 22nd August 2016, Ms Francis asked the Claimant whether she would be available for a meeting on the 31st August 2016 to discuss how her return to work was going and to conduct the Claimant’s probationary review.
- 78.38 On the 24th August 2016, the Claimant sent an email to Ms Francis to confirm that she would appreciate a formal apology in writing *“with appropriate signature if that could be organised”*. She did not make it clear whether she was expecting the apology to come from Miss Scott or someone else within the Respondent’s organisation. Ms Francis, however, as the Tribunal found, was proceeding on the basis that the apology was to be made by Miss Scott.
- 78.39 The Tribunal’s findings in respect of the apology were as follows. The subject of the apology was first raised by the Claimant at the meeting on the 11th August 2016 and in her subsequent email to the Respondent on the 18th August 2016. Having stated that she felt entitled to an apology because she had been caused stress and anxiety by Miss

Scott, the Respondent agreed to take steps to arrange for Miss Scott to provide the apology. It was never intended by the Respondent that the apology was to be an apology for subjecting the Claimant to age discrimination, harassment or victimisation. The Tribunal did not take the view that the Respondent's agreement to the provision of an apology by Miss Scott amounted, in any way, to an admission of liability by the Respondent in respect of the Claimant's later allegations of age discrimination, harassment or victimisation. It was evident that the Respondent had taken the pragmatic view that there was a benefit to be had from the apology from Miss Scott if it supported and facilitated the Claimant's return to work. There had been no finding by the Respondent that Miss Scott had mistreated the Claimant though at the time when Miss Scott resigned there remained an active investigation by Ms Francis into her conduct towards the Claimant in response to the Claimant's ongoing concerns expressed in her letter of the 9th September 2016. The fact that the Respondent was willing to accede to the Claimant's request for a formal apology was a strong indicator that the Respondent wanted to support the Claimant. It was unfortunate that the Respondent was unable to deliver the apology but that was because the apology was to be forthcoming from Miss Scott personally and she resigned from her employment before the apology could be obtained.

- 78.40 At a return-to-work meeting with her new line manager on the 1st September 2016, the Claimant stated that she did not require any support at work but that there were still issues to resolve, which were causing the Claimant to suffer stress-related symptoms.
- 78.41 On the 5th September 2016, Ms Francis wrote to the Claimant to invite her to a probationary review meeting on the 8th September 2016. The Claimant was informed that the possible outcomes of the meeting were extension of the probationary period, dismissal or the offer of alternative employment.

78.42 The Claimant's probationary meeting took place on the 8th September 2016. The note of the meeting was at page 226 of the hearing bundle. The outcome of the meeting was that the Claimant's probationary period was extended. At the conclusion of the meeting, the Claimant raised with Ms Francis that she had heard rumours that Miss Scott had been discussing her case with other people who worked in the store in which the Claimant was based. The Claimant stated that she would send Ms Francis a letter concerning the rumours that she had heard.

78.43 On the 9th September 2016 the Claimant emailed a letter to Ms Francis in which she elaborated on complaints that there had been a breach of confidentiality in relation to her personnel file and that she had been bullied and harassed by Miss Scott. The latter allegation arose from the Claimant's discovery that Miss Scott had discussed her case with other people in the workplace. The date on which that was alleged to have occurred was not given by the Claimant. Having summarised her complaints, the Claimant stated:

"As you are aware I had been signed off work due the nature of issue but wanted to get back to some normality, however this has now made me feel more anxious and intimidated and clearly falls under the Equality Act 2010."

78.44 The Tribunal was unable to make any clear finding as to whether Miss Scott had discussed the Claimant's case with other people who worked in the same store as the Claimant. The evidence on the issue consisted of a number of text messages sent by another beauty advisor who worked in the store, Hayley Roberts, to the Claimant and a supplementary witness statement made by the Claimant to which she had exhibited the relevant text messages from Hayley Roberts. The relevant parts of the text messages are as follows:

Claimant to Hayley Roberts 04/09/2016, 17:50
Hi Hayley, after our conversation today about Kirsty Scott could you confirm to me that she showed my

message to staff on shop floor and you were also told by a member of staff about my meeting with her and Cheryl Fletcher this is just for my area manager as Kirsty Scott was supposed to keep this information private and confidential. see you Friday x

Hayley Roberts to Claimant: Hey yeah what do you mean write it on here? Lol xx

Kirsty showed the message to other members of staff and I was told about the message and your meeting with Kirsty, Cheryl and you xx

Is this what you mean lol, cxx

Claimant to Hayley Roberts: Thanks Hayley much appreciated x x x yes that is just wot I needed see you Friday x

- 78.45 That being the sum of the evidence concerning Miss Scott's alleged breach of confidentiality, the Tribunal was unable to make a finding of fact that Miss Scott had discussed private and confidential matters concerning the Claimant with other people in the workplace. The evidence was too vague and imprecise for findings of fact to be made as to what Miss Scott had shown other people in the workplace and what Miss Scott might have said about the meeting on the 26th June 2016.
- 78.46 The effect of the disclosure from Hayley Roberts about Miss Scott's breach of confidentiality nevertheless had a serious impact upon the Claimant. It was a major contributor to the Claimant's decision to write the letter of the 9th September 2016 to Ms Francis and it plainly had an adverse effect upon her health.
- 78.47 On the 14th September 2016, Ms Francis emailed the Claimant to say that she would be looking to meet with Miss Scott to investigate the matters that the Claimant had raised in her letter dated the 9th September 2016.

- 78.48 On the 21st September 2016, Ms Francis informed the Claimant that she had arranged to meet Miss Scott on the 28th September 2016 to undertake an initial investigation into the points that the Claimant had raised in her letter of the 9th September 2016.
- 78.49 On the 24th September 2016 the Claimant sent a further detailed letter to Ms Francis in which she stated that her health was being adversely affected and that she was awaiting the formal apology which she wanted Kirsty Scott to sign. She repeated her assertion that her “*case falls under ... Equality Act 2010*” and she indicated that she objected to the extension of her probationary period to December 2016 on the basis that the extension had been caused by a period of sick leave due to work-related stress.
- 78.50 In an email sent on the 3rd October 2016, Ms Francis informed the Claimant that Miss Scott had resigned from the employment of the Respondent and that she had done so without providing an apology letter. As she had left the Respondent’s employment, Ms Francis was of the view that she could not take any action to compel Miss Scott to provide the apology.
- 78.51 In a detailed letter dated the 4th October 2016, the Claimant informed Ms Francis that she was very disappointed at the turn of events, which had resulted in further stress and anxiety for her. She gave notice to Ms Francis that she intended to complete the early conciliation process through the offices of ACAS and repeated her assertion that her case fell under the Equality Act 2010. As she had done in her letter of the 24th September 2016, she also asserted that her case fell under the Data Protection Act 1998. The Claimant then went on a long period of sick leave. She was dismissed from the Respondent’s employment on the 5th April 2018 on the grounds of capability.
- 78.52 On the 10th November 2016 the Claimant notified ACAS of her claim against the Respondent and the appropriate

ACAS certificate was issued on the 24th December 2016. The Claimant's ET1 was presented to the Tribunal on the 12th January 2017.

- 78.53 The Tribunal was satisfied that the Respondent had acted promptly, fairly and reasonably in attempting to investigate and resolve the work-related issues that the Claimant had brought to the Respondent's attention in her emailed correspondence dated the 20th July 2016, the 18th August 2016, the 20th August 2016, the 9th September 2016 and the 24th September 2016 and in her return-to-work interview on the 1st September 2016 and her probationary interview on the 8th September 2016

Decision

79. On the basis of its findings of fact, based upon the evidence that it heard and read, and taking into account the concessions made by the Claimant during cross-examination as to the scope of her claim of age discrimination, the Tribunal was not satisfied that the Claimant had established primary or secondary facts from which discrimination on the grounds of age could be inferred. In particular, and having regard to the Claimant's pleaded case, as amended:-

- 79.1 The Tribunal was not satisfied that age discrimination on the part of the Respondent could be inferred from the fact that the Claimant had spent the first day of work on the 12th June 2016 on her own.
- 79.2 The Tribunal rejected the Claimant's case that she was subjected to bullying and harassment by Miss Scott over a 2-week period commencing on the 12th June 2016.

- 79.3 The Tribunal rejected the Claimant's case that Miss Scott had said to her, on the 1st July 2016, that she was a bit old to have another baby and that the Respondent wanted someone who is really flexible in respect of the work rota.
- 79.4 The Tribunal was not satisfied that age discrimination could be inferred from the fact that Miss Scott sent work-related text messages to the Claimant whilst she was at home or from the content of those text messages.
- 79.5 The Tribunal was not satisfied that age discrimination could be inferred from the fact that Ms Fletcher had attended the meeting on the 26th June 2016, on the advice of Ms Jones, though the Claimant had been told that it was to be a one-to-one meeting.
- 79.6 The Tribunal was not satisfied that age discrimination could be inferred from the fact that Miss Scott had informed the Claimant that the meeting on the 26th June 2016 was to be recorded.
- 79.7 The Tribunal was not satisfied that age discrimination could be inferred from the fact that Ms Fletcher took a handwritten note of the meeting on the 26th June 2016.
- 79.8 The Tribunal was not satisfied that age discrimination could be inferred from the fact that the Claimant was not provided with feedback following the meeting on the 26th June 2016.
- 79.9 The Tribunal was not satisfied that age discrimination could be inferred from the fact Miss Scott sought a further meeting with the Claimant on the 13th July 2016.
- 79.10 The Tribunal was not satisfied that age discrimination could be inferred from the way in which the meetings on the 26th June 2016 and the 13th July 2016 were conducted.

- 79.11 The Tribunal did not accept the Claimant's case that she was harassed by Miss Scott in relation to the Claimant's refusal to sign notes of the meetings on the 26th June 2016 and the 13th July 2016.
- 79.12 The Tribunal was not satisfied that age discrimination could be inferred from the way in which the meeting on the 11th August 2016 was conducted.
- 79.13 The Tribunal was not satisfied that age discrimination could be inferred from the time it took the Respondent to send to the Claimant the note of the meeting on the 11th August 2016.
- 79.14 The Tribunal was not satisfied that age discrimination could be inferred from Ms Francis' response to the 49 comments made by the Claimant in relation to the note of the meeting on the 11th August 2016.
- 79.15 The Tribunal rejected the Claimant's case that the Respondent had failed to attempt to resolve work-related issues raised by the Claimant after her return to work on the 19th August 2016.
- 79.16 The Tribunal was not satisfied that age discrimination could be inferred from the fact that the Claimant was not provided with an apology either from Miss Scott or from the Respondent or both.
- 79.17 The Tribunal was not satisfied that age discrimination could be inferred from the fact that the Claimant was told by Hayley Roberts that Miss Scott had been discussing confidential matters relating to the Claimant with other people who worked in the Claimant's store.

80. Taking the findings of fact individually and collectively, the Tribunal was not satisfied that its findings of fact gave rise to an inference of age discrimination on the part of the Respondent. There were no findings of fact from which the Tribunal could conclude that age discrimination had occurred. Accordingly, the claim of direct age discrimination shall be dismissed. The Claimant's case fell at the first of the two stages set out in paragraph 76 above.
81. The claim of harassment shall also be dismissed. The Tribunal's findings of fact could not justify a conclusion that the Respondent, through Miss Scott or otherwise, had engaged in unwanted conduct relating to the age of the Claimant that had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.
82. The claim of victimisation shall also be dismissed. The alleged protected act under section 27(2) of the Equality Act 2010 was the Claimant's reference to the Equality Act 2010 in her letters dated the 9th September 2016, the 24th September 2016 and the 4th October 2016. The Tribunal accepted that the Claimant's express reference to the Equality Act 2010 in those letters amounted to an express allegation that the Respondent had contravened the Act. There was no other express or implied reference to the Equality Act 2010 that fell within the meaning of section 27(2)(d) of the Act. Having accepted that there was a protected act, it was nevertheless the case that the Tribunal's findings of fact could not justify a conclusion that the Respondent had subjected the Claimant to a detriment because of the protected act. The alleged detriment was the failure on the part of the Respondent to provide the apology that the Claimant had requested and which the Respondent had promised. Prima facie, the failure to provide the apology could amount to a detriment under section 27(1) of the Equality Act 2010 but there was no basis for an inference or conclusion that that detriment had been caused by the protected act alleged by the Claimant. The evidence showed that the apology was ultimately not forthcoming because Miss Scott had left the employment of the Respondent and had refused to give the apology. It was clear that the Respondent had wanted Miss Scott to give the apology to the Claimant but it was a matter that became beyond the control of the Respondent when Miss Scott resigned. The

Tribunal was satisfied on the evidence that the Respondent had done what it reasonably could to obtain the apology from Miss Scott.

83. Having dismissed the claims of direct age discrimination, harassment and victimisation, the Tribunal heard a submission from Mr Moore that the deposit of £250 ordered to be paid by Regional Employment Judge Harper on the 18th May 2017 should be paid to the Respondent.

84. The Claimant objected to that application on the ground that Employment Judge Reed, at a Preliminary Hearing on the 15th September 2017, had indicated that he could not understand why a deposit order had been made in the case. In light of that submission, the Tribunal looked carefully at the Case Management Order made by Employment Judge Reed. There was nothing contained therein that indicated that the deposit order should not have been made or should be set aside.

85. A submission was made on behalf of the Claimant that inquiries should be made of Employment Judge Reed with a view to supporting the Claimant's case that he had expressed doubt that the deposit order should have been made. The Tribunal, however, took the view that it was entitled to read Employment Judge Reed's Case Management Order as a full and proper account of the hearing that took place on the 15th September 2017 and accordingly the Tribunal found that there was no merit in the Claimant's submission that remarks had been made by Employment Judge Reed that contradicted or undermined the deposit order made by Regional Employment Judge Harper.

86. The Tribunal refused to adjourn or postpone the final hearing in order to make inquiries of Employment Judge Reed as suggested by the Claimant.

87. Having read the reasons given by Regional Employment Judge Harper for making the deposit order and having regard to the reasons why the Tribunal had dismissed the Claimant's claims of direct age discrimination, harassment and victimisation and noting that the Claimant had not sought to set aside or appeal the deposit order made by Regional Employment Judge Harper, the Tribunal was satisfied that there was a proper basis to order that the deposit of £250 be paid to the Respondent and so made that order.
88. The Tribunal's decision to dismiss the claims of direct age discrimination, harassment and victimisation for the reasons set out above and the decision to order the Claimant to pay the deposit of £250 to the Respondent for the reasons set out above were unanimous.

Employment Judge David Harris

Dated: 28th April 2019

Judgment entered in Register
and copies sent to parties on

29 April 2019

for Secretary of the Tribunals