EMPLOYMENT TRIBUNALS

Claimant: Miss K Leighton

Respondents: (1) VR Music Ltd (in voluntary liquidation)
(2) Ms R Lowe

Heard at: **London South Employment Tribunal**

On: **27-28 January 2020 and**
29 January 2020 (in chambers)

Before: **Employment Judge Ferguson**

Members: **Mrs R Bailey**
Ms S Khawaja

Representation
Claimant: Ms J Danvers (counsel)
Respondents: (1) None
(2) None

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

(1) The Claimant was not a disabled person at the relevant time and therefore the complaints of harassment related to disability and discrimination arising from disability are dismissed.

(2) The Second Respondent's conduct on 15 February 2018 constituted harassment related to sex.

(3) The complaint that removing the Claimant from marketing duties constituted harassment related to sex, direct sex discrimination and/or victimisation fails and is dismissed.

(4) The complaints of harassment related to age fail and are dismissed.

(5) The Second Respondent's threat to bring libel proceedings, in an email of 20 February 2018, constituted victimisation.

(6) The Second Respondent's email to the Claimant on 27 February 2018 constituted direct age discrimination and victimisation.

(7) The Second Respondent's letter to the Claimant's father and mother-in-law dated 6 March 2018 constituted direct age discrimination and victimisation.

(8) The complaint that the refusal to pay the Claimant's wages until December 2018 was an act of victimisation fails and is dismissed.

(9) The Claimant is awarded £9,000 plus interest of £1,402.52 for injury to feelings (total **£10,402.52**) and £4,056.07 plus interest of £314.26 for financial loss (total **£4,370.33**).

(10) The Claimant is awarded **£480** under s.12(4) of the Employment Rights Act 1996.

(11) The total award to the Claimant is increased, pursuant to s.38 of the Employment Act 2002, by **£640.00**.

(12) The First Respondent is ordered to pay the Claimant the sums awarded under paragraphs 10 and 11 above, a total of **£1,120**.

(13) The First and Second Respondents are ordered to pay the amounts awarded under paragraph 9 above, a total of **£14,772.85**, on a joint and several basis.

REASONS

INTRODUCTION

1. By a claim form presented on 27 April 2018, the Claimant brought a claim against both Respondents, which included complaints of age, sex and disability discrimination, failure to pay notice and holiday pay and unauthorised deduction from wages. The Second Respondent, Ms Rachel Lowe, is joint owner and a Director of the First Respondent, VR Music Ltd. The Respondents defended the claim and sought to bring an employer's contract claim.

2. The box for "unfair dismissal" was ticked in the claim form, but this is assumed to have been an error. It is not mentioned in the details of claim, the Claimant does not have sufficient qualifying service to claim unfair dismissal and it is clear from the various case managements hearings that no such complaint was intended.

3. In respect of the First Respondent, a period of early conciliation had taken place from 27 to 28 February 2018. As for the Second Respondent, early conciliation began and ended on 27 April 2018.

4. A telephone case management hearing took place on 30 July 2018, at which the issues were agreed and the case was listed for a final hearing on 29-31 January 2019. At that hearing it was confirmed that there was no breach of contract claim for notice pay and the employer's contract claim was dismissed for want of jurisdiction.

5. On 8 January 2019 the Respondents applied for the final hearing to be postponed on the basis that the company was in a precarious financial situation and attendance at the hearing would cause further financial loss. The application was refused. In the event, however, the hearing had to be postponed due to lack of judicial resources. A telephone case management hearing took place on 31 January 2019. At the hearing EJ Baron listed an open preliminary hearing on 13 September 2019, to identify the issues and deal with various applications, and a final hearing on 27-29 January 2020.

6. In August 2019 the First Respondent went into liquidation.

7. At the preliminary hearing on 13 September 2019 Ms Lowe attended in person and confirmed that the First Respondent would not be participating further in the case. Ms Lowe made an oral application for postponement of the final hearing. This was on the basis that following the liquidation of the business she and her partner were homeless. She had an opportunity to live in a friend's flat in France for free, and planned to take that up. She would not be able to afford to return for the hearing. The application was refused, but Ms Lowe was informed she could renew the application in writing by 29 November 2019. At the same hearing Ms Lowe's application to strike out the disability discrimination and victimisation complaints was refused on the basis that the issues were more appropriately resolved at the final hearing. The Claimant withdrew various complaints, including the complaint of unpaid wages, which were accordingly dismissed. The outstanding complaints are reflected in the list of issues set out below.

8. There was also a dispute about the authenticity of photographs the Claimant sought to rely on in respect of her disability claim. Orders were made to enable Ms Lowe to instruct an expert and provide a report, including for the Claimant to disclose to Ms Lowe the digital files for all of the photographs disclosed. On 4 October 2019 Ms Lowe made a further application to strike out the claim on the basis of the Claimant's alleged failure to comply with the order in relation to the photographs. The application was strongly resisted by the Claimant. No expert report has been submitted. We therefore considered that this matter was no longer live between the parties. For the avoidance of doubt, Ms Lowe's contention that the Claimant failed to comply with the Tribunal's order to provide digital copies of the photographs is not well founded and her application to strike out the claim on that basis is refused.

9. On 29 November 2019 Ms Lowe applied to postpone the final hearing. The application was made on the basis that the Tribunal had failed properly to deal with her various applications to strike out the claim or parts of it. Ms Lowe also claimed that she was no longer in a financial position to afford "the considerable costs required to attend a January hearing". She said that she and her partner were destitute, living in free accommodation in France. She enclosed documents relating to the financial position of the First Respondent showing

that she and her partner had invested heavily in the company. As to her personal finances, she enclosed a screenshot apparently of a mobile banking app showing an account in her name with a balance of just under £3,000. She claimed the cost of travelling to London and accommodation for the three-day hearing would be at least £500 and was not affordable to them.

10. The Claimant opposed the application for a postponement and Ms Lowe then made further written submissions in response. Ms Lowe provided evidence of her travel to France in September 2019.

11. Unfortunately, due to the stretched administrative resources of the Tribunal and the backlog of interlocutory matters being referred to judges, the postponement application was not referred to a judge as quickly as it should have been.

12. On 9 January 2020 Ms Lowe sent a further email to the Tribunal claiming that she was suffering from depression and memory loss caused by insomnia. She submitted a medical certificate in French. Ms Lowe submitted an uncertified translation of the certificate on 15 January 2020. It is dated 8 January 2020 and states:

> "I undersigned … substitute doctor, certify that I have received in consultation and examine today Mrs Racel LOWE…. During the interrogation, she describes me 'nightmares', 'memory disorders', 'mood swings'…
>
> The HAMILTON scale is 17.
>
> She is now presenting symptoms related to a moderate depressive syndrome.
>
> The physical examination this day is without particularity…"

13. The Claimant continued to oppose the application.

14. On 23 January 2020 Ms Lowe wrote again to the Tribunal noting that despite repeated efforts to chase the matter she still did not have a response to her postponement application. She said:

> "I now have no choice but to advise the court that, even if the hearing scheduled for this Monday has not been postponed and I was medically fit to attend, court delays have now made it impossible due to the low availability and high prices of booking last minute flights and hotel accommodation. Neither myself nor my partner and key witness Simon Parker have funds to cover these costs and this is entirely the fault of the court.
>
> I have already attended three preliminary hearings over the past 21 months. <u>Please be assured that I remain fully committed to the court process and clearing my name of the untrue and malicious allegations made against me</u>." (emphasis original)

15. The Claimant responded, arguing that Ms Lowe could have booked flights or hotels that were cancellable. She produced evidence of cheap flights and accommodation being available. Ms Lowe responded saying that the only flight available from their nearest airport, Montpelier, would cost over £500 for two people. She claimed accommodation would be a further £372. She enclosed evidence of both quotes.

16. The matter was referred to the Acting Regional Employment Judge and on Friday 24 January 2020 a letter was sent to the parties refusing the application for a postponement. It was noted that the medical evidence did not state that Ms Lowe was not fit to attend a Tribunal hearing, nor when she would be able to attend in future. The letter was sent to the parties by email at 10.19am.

17. Later the same day, 24 January, Ms Lowe wrote again to the Tribunal strongly objecting to the Tribunal's decision and complaining about the delay in making it.

18. The hearing commenced before us at 10.50am on Monday 27 January 2020. There was no attendance on behalf of either Respondent. Having read all of the correspondence on the file, and with the agreement of the Claimant we adjourned the hearing until 11.00am the following day, Tuesday 28 January, and I wrote to Ms Lowe (by email sent at 11.29am) as follows:

> "The Tribunal allocated to hear the final hearing has considered all of the correspondence, including Ms Lowe's most recent email of 24 January 2020. The decision to refuse the postponement stands, but the Tribunal was prepared to delay the start of the hearing to **11am tomorrow, 28 January 2020**, to give Ms Lowe a further opportunity to attend. If she does not do so, the hearing will proceed in her absence and the Tribunal will consider the evidence she has submitted and any written submissions she wishes to make, provided they are received before the start of the hearing. If Ms Lowe wishes to renew the application to postpone the hearing on medical grounds, with evidence relating to her fitness to travel and/or attend the hearing, it will be considered at the start of the hearing."

19. Ms Lowe responded on the same day, saying that it was now impossible for her to attend. She said she could not buy a ticket to travel to the UK today because, even if she had the funds, there were no flights until next Thursday. She included a screenshot from the Easyjet website showing no direct flights from Montpelier to London Gatwick on 27 or 28 January. She said it was also impossible to secure an appointment with her doctor that afternoon. She renewed the application for a postponement on the basis that it was impossible for her to comply with what had been requested.

20. The hearing resumed at 11.10am on 28 January. Again, there was no attendance on behalf of either Respondent. We considered Ms Lowe's further application to postpone and rejected it for the following reasons.

    20.1. Although it was regrettable that the postponement application made on 29 November 2019 was not dealt with more quickly, parties must assume

in the absence of any decision by the Tribunal to postpone that the hearing is going ahead.

20.2. The financial and logistical issues raised by Ms Lowe were somewhat vague, for example she has never said where in France she is living, other than it being one hour's drive from Montpelier airport. She provided insufficient evidence to show that she could not afford to travel to the UK by any means. The particular difficulties in booking travel after the Tribunal's refusal of the postponement on 24 January 2020 were of her own making because, as noted above, she should have assumed that the hearing was going ahead and made arrangements to attend. It is also significant that none of the communications from Ms Lowe gave any indication of when her circumstances might change, enabling her to attend a hearing in the future.

20.3. The medical evidence was not sufficient to justify a postponement. Even if the medical certificate were accepted as a diagnosis of moderate depression, that alone does not necessarily mean that Ms Lowe would be unable to attend and participate in the hearing. Further, as noted by the Acting Regional Employment Judge, neither the certificate nor Ms Lowe's correspondence gave any indication of the prognosis, or when she might be able to attend a hearing.

20.4. Ms Lowe had not made any request to attend the hearing remotely, for example by video link. This was a suggestion raised by the Claimant shortly before the hearing, but there are no video link facilities at the Croydon hearing centre and it was not appropriate or proportionate for the Tribunal to instigate, in the absence of any request from Ms Lowe, a discussion with her about other methods of her participating remotely.

20.5. Ms Lowe had submitted signed witness statements from herself, Mr Parker and two others. There were also detailed Grounds of Resistance. It was therefore possible for the Tribunal to understand the basis on which the claim was defended and consider all of the matters in issue, even without Ms Lowe's attendance.

20.6. In all the circumstances, and taking into account the guidance in <u>Leeks v Norfolk and Norwich University Hospitals NHS Trust</u> [2018] ICR 1257, it was not in the interests of justice to postpone the matter further. The Claimant had attended, ready to proceed. There had already been substantial delays (albeit not through any the fault of the parties) and there was no basis to conclude that Ms Lowe was likely to be able to attend a relisted hearing.

21. The hearing therefore proceeded in the absence of both Respondents.

22. At the preliminary hearing on 13 September 2019 the parties were ordered to produce an agreed list of issues. Ms Lowe did not engage with this process because of her subsequent application to strike out the claim. The Claimant produced a proposed list of issues, which we are satisfied properly reflects the outstanding complaints and issues. A copy of the list of issues is appended to this judgment.

23. We heard evidence from Itziar Leighton, the Claimant's step-mother, and from the Claimant. We considered witness statements submitted on behalf of Ms Lowe, from Ms Lowe, Simon Parker, Louise Wakefield and David Plummer. In assessing the weight to be given to Ms Lowe's and Mr Parker's witnesses statements we took into account Ms Lowe's professed wish to attend the hearing, but also the fact that she had not established it would have been impossible for her and Mr Parker to attend, and the Claimant had been denied the opportunity to cross-examine them. Ms Wakefield's and Mr Plummer's statements were not disputed insofar as they were relevant to the issues.

24. We are grateful to Ms Danvers for assisting us in ensuring that the hearing proceeded in a way that was fair to both parties, including by providing all relevant authorities and lengthy written submissions identifying all factual and legal matters in dispute.

25. The Tribunal put a few questions to the Claimant to ensure that all relevant factual disputes were addressed, but were careful not to descend into the arena by asking questions akin to cross-examination.

FACTS

26. The First Respondent, VR Music Ltd, is a music retail business. At all material times it operated a shop in Brighton called Vinyl Revolution selling records and music-related merchandise. It was founded by the Second Respondent, Rachel Lowe, and her partner, Simon Parker. They are both Directors and major shareholders of the First Respondent.

27. The Claimant began working for the First Respondent on 1 December 2017 as a sales advisor. She was 21 years old at the time. According to Ms Lowe's witness statement, the Claimant was employed on the basis that "as soon as practically possible we would also provide her with an opportunity to assist me with marketing and Simon with arranging events". The Claimant was initially employed on a zero hours basis, with her shifts being allocated via an app. She worked 56.5 hours in December 2017 and 72 hours in January 2018.

28. On 23 January 2018 Ms Lowe offered the Claimant a new role with regular hours, 5 days a week. The Claimant accepted and Ms Lowe emailed to confirm as follows:

> "Hi Kate
>
> Have just put rota up for next few weeks. As there are only 4 of us (and Jamie only works one day) week on week its not going to change much. You'll be working a 5 day week except Weds and Sundays. As soon as we have more bodies and we can change this so you can have more Saturdays/ whole weekends off we will. Hope this is OK.
>
> We'll talk Thursday in more details about getting a contract sorted out but the general idea is that we'd like to offer you role of Marketing Assistant/Events Co-ordinator/Sales Assistant. Obviously it'll be shop

based all the time to start with until we get more staff and/or the role develops."

29. The Claimant replied, "Ok great, no problem at all!". No contract or written particulars of employment were ever provided.

30. The Claimant's duties from at least the end of January 2018 involved working as a sales assistant in the store and various marketing activities, including writing content for the weekly newsletter, posting on social media, creating brochures and assisting with event planning.

31. The Claimant says that she has suffered with a skin condition, which is a form of acne, since the early stages of puberty. She relies on this condition as a disability within the meaning of the Equality Act 2010. In her impact statement she says she constantly has red spots on her face, which are visible and, generally, sore and itchy. The condition flares up unexpectedly. The spots tend to be at their worst around her cheeks, chin, jaw and mouth. She says the condition causes her to feel low, lacking in confidence and very self-conscious. She generally tries to hide the spots by using makeup when she goes out, but when her skin is particularly bad she tries to avoid wearing makeup because it tends to spread and worsen with makeup. When her skin is particularly sore she tries to avoid leaving the house because she feels so self-conscious and lacking in confidence. She cancels social plans if her skin is bad on the day. She says she attended her GP about the condition in June 2014, but there is nothing in the GP records showing that she raised the issue then. She says she also attended in May 2015. The GP records show an appointment related to contraception and suggest that the Claimant said she was unhappy on her current contraception because "skin has erupted". Her contraception was changed to the combined oral contraceptive pill.

32. The Claimant says that in order to manage the condition she follows a daily cleansing routing, using non-prescription products to wash and soothe the skin. This usually takes around thirty minutes. She also uses face-masks twice a week and a cold flannel or ice pack when needed.

33. The Claimant has produced a medical report by Dr Anthony M R Downs, Consultant Dermatologist, which was compiled following review of her witness statements and past medical records, as well as some black and white photographs. Dr Downs did not speak to or examine the Claimant. He answers specific questions of the Claimant's solicitors as follows:

> "<u>Does Miss Leighton have a physical impairment and, if so, how would you describe it?</u>
>
> She has a medical disease called acne. This is a chronic medical condition with considerable psychological and social impact. In addition, the lesions can feel physically tender and painful.
>
> <u>If Miss Leighton has an impairment, does that impairment have an adverse effect on her ability to carry out day to day activities?</u>

Acne patients suffer from poor social assertiveness and a feeling of their faces being scrutinised. This can impact on social interactions if this is part of the day to day employment activity. Acne is known to lead to isolation and wanting to hide away if the acne flares. For example, a patient with a flare of acne may wish to want to stay indoors.

<u>If Miss Leighton has an impairment with an adverse effect on her day to day activities, is that effect substantial?</u>

This question is best answered by a Clinical Psychologist

<u>If there is an impairment with a substantial adverse effect on Miss Leighton's day to day activity, is that effect long term, how long do you consider the effect might last?</u>

The medical literature supports the observation that social and psychological impact continues beyond the resolution of the disease. It could therefore be lifelong.

<u>If Miss Leighton has a physical impairment that has a substantial and long term adverse effect on her ability to carry out normal day to day activities, from when do you consider that Miss Leighton has had that impairment so described?</u>

Miss Leighton has had this impairment since she was a teenager when her acne developed.

<u>Please outline the measures that have been taken to treat or correct the impairment, please indicate if these measures are continuing</u>

Miss Leighton has self medicated with over the counter purchased treatments since she was a teenager. She has been placed on the combined oral contraceptive pill by her GP in 2015 to help the acne. In September 2018 she was seen by her GP to add in a topical anti-acne treatment. She has used make up as a camouflage to disguise the appearance of the disease on her face and neck. I don't know if these measures are continuing at present as I have not interviewed or examined this lady.

<u>If measure are being undertaken, please indicate what the effect of stopping these measures would be on the employee</u>

There would be a flare of acne and a consequential worsening of her psychological state and ability to cope socially. At some point in the future, the acne will resolve. Some patients can continue to get acne into their 60s. Periodic flares (episodic worsening) are common and normal whilst the condition persists."

34. In view of our conclusions below, it is unnecessary to make detailed findings as to the Claimant's skin condition and its effects. Largely based on the photographs in the bundle, we accept that she sometimes has eruptions of

spots and blemishes on her face. We have addressed the disability issue on the basis of the Claimant's evidence as set out above.

35. There was a smart casual dress code for staff working in the shop. The Claimant would normally wear a branded T-shirt that she was provided with at the start of her employment. She would also normally wear makeup. The Claimant's evidence as to her usual appearance was as follows:

> "Up until 15th February 2018 I always wore a lot of make-up to work. This included foundation, concealer, eyebrow pencil, eye shadow, mascara and tinted lip balm."

That is broadly consistent with the evidence of Ms Lowe, who referred to the Claimant's "usual dramatic look, which was attributed to her use of dark lip liner, dark eye liner and in particular her heavy accentuation of her eyebrows".

36. On 15 February 2018, the Claimant attended work wearing significantly less makeup than normal. She clarified in her oral evidence that she was wearing concealer, eyebrow pencil and tinted lip balm only. Again, that is consistent with Ms Lowe's evidence that the Claimant attending work on that day "not wearing her normal make up".

37. There is a dispute about the Claimant's appearance in other respects on 15 February. The Claimant claims that, apart from wearing less makeup, her appearance was normal. Ms Lowe and Mr Parker were both at the shop that day. Their witness statements are, somewhat oddly, in identical language when describing the Claimant's appearance and their reaction. They say:

> "Kate looked as if she hadn't had enough time to get ready for work that day. Her t-shirt looked creased and dishevelled, her hair was far messier than usual and she was not wearing her normal make up… It wasn't just her presentation which was unusual but her demeanour. I immediately drew the conclusion that she had had a heavy night…".

38. There is no dispute that Ms Lowe immediately raised the issue of the Claimant's appearance with her. Ms Lowe's witness statement says she immediately asked the Claimant "if she was OK and whether she'd had a big night and was hungover". It is also not in dispute that Ms Lowe asked the Claimant to come into the back office for a conversation.

39. What was said during this conversation, and the Claimant's reaction, is important and therefore the relevant passages from the Claimant's and Ms Lowe's witness statements are set out here in full.

40. The Claimant's evidence was as follows:

> "25. When Rachel Lowe saw me she said, 'what happened this morning?' saying that I looked terrible. She then asked me to go to the back office with her, away from the shop floor. She told me that I was unprofessional and unpresentable. She Rachel Lowe specifically said, 'you wouldn't not wear make up on a night out…', which I took to be an

instruction – or at least an expectation – that she expected me to wear make-up to work.

26. I found her remark to be very derogatory, and offensive – firstly to me as a woman, but also in view of my skin condition. I believed then (and still believe now) that make-up should always be a choice for women – if they want to wear it then they can but there should never be any expectation to do so and women should not be made to feel bad about their choices. To criticise a woman for going out without make-up is sexist and objectifies women. I also felt it was extremely insensitive and humiliating given my skin condition I felt that it showed no understanding at all for my condition or how a affects me, especially as it was said in such an off-hand, flippant way. I felt she inappropriately trivialised a condition which has affected my self-confidence for many years. Indeed, when my skin condition was bad I would not go out at all; when my skin is bad, I specifically try to avoid going out and have regularly cancelled arrangements because of it.

27. Rachel then asked me if I had been out the night before and asked me if I was “hung over”, due to drinking too much alcohol. Again, I felt that Rachel was trivializing my skin condition by assuming that my appearance was the result of a night of drinking, and I felt horrified that, in effect, she had assumed I had brought it on myself. As I have explained already, my skin condition is something that I have suffered for a number of years; it is a medical condition that is most likely hereditary; it is one that I try my best to hide for the sake of my self-confidence but it is certainly not one that I can cause or be blamed for.

28. I explained that I had been with my sister and that we had stayed at my sister’s flat. I explained that I was not hung over. I explained that I have a skin condition, which had flared up, and which would become worse if I continued to wear make-up without a break. I explained that I needed to wear less make-up to let my skin ‘breathe’, so that I could recover from the flare-up.

29. In the Grounds of Resistance, the Respondents claim I had said that I had ‘decided to let my skin breathe’. It is correct that I told them I needed to let me skin breathe, but this was not really a ‘choice’ and I did not lead them to believe there was any choice involved. I was explaining that wearing make-up aggravates my condition and makes my skin very itchy. As such I have no option but to let my skin breathe if I am to recover from a flare-up; there is no choice or decision to be made.

30. The Respondents also state in their Grounds of Resistance that Rachel asked me for more information about my skin condition. This is not true. As above, I was the one tell Rachel about my skin condition as an explanation for why was not wearing make-up, and to dispel her allegation that I was hung-over. Despite my doing so, Rachel didn’t apologise for her remarks and she seemed completely uninterested. For instance, she didn't ask me how long I had suffered from my skin condition, what caused it, or what helped it. She didn't show any support or any sympathy.

31. Rachel went on to tell me that I was an 'ambassador' for her shop and that without make-up I looked unprofessional. She told me that my appearance, on that particular day, was not the image they needed to promote the shop. She was telling me that I needed to wear more make-up to properly represent the shop's image. She stated that I was required to wear make-up for work because this was my expected and normal 'look' and that I looked unpresentable when not wearing makeup, which Rachel Lowe found to be unacceptable. These comments just made me feel even more awful - like I was ugly, unworthy, and unfit for my job unless I could hide my skin condition. There was no humour or sympathy in her voice. I felt utterly humiliated.

32. I cried in response to Rachel's comments and she told me to go for a walk to calm down. She did not offer me the chance to go home for the day, as the Respondents suggest in their Grounds of Resistance.

33. When I returned from my walk, because I felt so uncomfortable about my appearance, particularly around Rachel Lowe, I put on additional make-up before returning to work. Rachel Lowe saw me and said 'well, that's much better'. This comment made me feel equally bad, in all the same ways as I had felt earlier, however as the confrontation with Rachel had ended I felt able to continue working until the end of the day. Rachel said nothing further about my appearance that day and I stayed on the shop floor until the end of the shift.

34. When I went home that night I was very upset. I spoke to my step mother, Itziar Leighton, and told her what Rachel had said to me. My step-mother told me that she thought I had been treated terribly. My self-esteem was very low. I remember that I was crying for a lot of that evening because I felt so bad about myself, which was caused by my skin condition and by Rachel's comments and reaction to my appearance."

41. Ms Lowe's witness statement reads as follows:

"67. When we first sat down I asked Kate why she had come to work looking a mess when she normally looked so good. I was not referring to her face but to her general appearance but she immediately told me that she was letting her skin breathe. This surprised me as I also like to let my skin breathe but, like most women who wear makeup as part of their daily grooming routine, I let my skin breathe when I am relaxing at home. Like most women I do not regard this as appropriate to do in the workplace but rather when having a pyjama day which would usually also include not wearing a bra and donning slippers. I responded to Kate that I also liked to let my skin breathe during a day off or whilst out walking the dog but not when I was at work where it was important for me to be well groomed.

68. Other members of staff (both male and female) do not wear makeup and I have never had another conversation about wearing makeup or letting skin breathe. I was only having this conversation with Kate

because she had raised the subject and because the state of her overall appearance had dramatically declined. The one area of her appearance that hadn't dramatically declined ironically was her facial skin. There was no redness or blemishes that I can recall and certainly no sign of a visible skin condition.

69. The visible impact of Kate not wearing makeup was that her usual dramatic look, which was attributed to her use of dark lip liner, dark eye liner and in particular her heavy accentuation of her eyebrows was missing. Kate had not, as the saying goes, not ‘put her face on’. This combined with her dishevelled clothing and a lack of the usual sleek styling of her dramatically coloured silver grey hair made her look as if she had turned up for work looking unprofessional.

70. When I asked Kate why she had felt it appropriate to let her skin breathe at work, when she knew how important good personal presentation was, she told me that she had sensitive skin and a bit of a skin condition or words to that effect. I cannot recall the exact words she used but I can state categorically that she did not use the words medical condition, health problem or disability. Despite Kate not having used any of these words I knew that I had to tread carefully and asked her to tell me what type of skin problem or skin condition she had. She did not do so. As she had not answered the question I tried to probe for some more information.

71. I asked Kate how bad the skin problem or skin condition was but again she did not answer. I then asked her if she would be going out that evening and she said no. She had the following day off work so I asked her if she was going out the following day and she said that she would be. I asked her if she would be wearing makeup when she went out and she said that of course she would and seemed very surprised that I would think otherwise. I asked her why she would be wearing makeup she went out the following day and not letting her skin breathe as she had today. She responded that of course she would be wearing makeup because she was going out and always wore makeup when she went out. I asked her why this was and she said it was because she wanted to look good.

72. Everything Kate had said, combined with the fact that her skin looked perfectly normal suggested that there was no serious issue with her skin and she was either being lazy with her presentation or had had a heavy night out and wasn't being honest about it, I told her that based upon what she'd just told me the problem with her skin did not sound very serious and she said nothing to contradict me. I reiterated to her how important good personal presentation was as a brand ambassador, and gently asked her didn't she think it was a bit disrespectful to make an effort to look good when she went out but not when she was representing us?

73. I was extremely aware that Kate and I had just spoken at length about makeup. I have a basic understanding of sex discrimination law and wanted to make absolutely sure that Kate hadn't gained the

impression that I was telling her that she had to wear makeup. I told her that Simon and I hadn't been concerned about her lack of makeup but were concerned about her overall appearance and the fact that she hadn't styled her hair and generally looked a mess.

74. To be on the safe side, and to put her at ease, I spent several minutes explaining to Kate that we would never dream of dictating anyone's personal style or telling them to wear makeup. I distinctly remember telling Kate that I didn't care if she dyed her hair blue or wore bondage gear as long as she put care into her appearance. By this stage of the conversation Kate's whole demeanour had changed and she seemed comfortable again. She laughed when I commented about her wearing bondage gear.

75. I also referred to the fact that Tilda Swinton is famous for her fierce no makeup look and looks incredible because she always has immaculate hair and is dressed impeccably. I particularly remember this part of the conversation because I couldn't remember Tilda Swinton's name and described some of the films she'd been in and Kate recognised her as the actress from The Lion, The Witch and The Wardrobe.

76. I also told Kate about an experience I had as a 16 or 17 year old who had recently left school and was interviewing in London for one of my first jobs. I went to interview for a receptionist's job in Park Lane. My interview went well and I was offered the job. As we were discussing (the surprisingly high) salary and other employment terms I was told that I would need to wear high heeled black patent shoes and red lipstick. The lady interviewing me even took out a red lipstick and showed me the colour I should wear. I told Kate that even at this young age I could recognise sex discrimination, had been outraged and had immediately left the office after telling the interviewer that I was not interested in the job. I reiterated that I was only asking her to retain a smart appearance and was asking no more of her than I did every other member of male and female staff. At this point she got very upset and started to cry and apologised, saying that she had let me down.

77. I told Kate that she hadn't let me down and that she shouldn't take things so personally. I asked her if she was OK and she said she was. I then asked her if she would like to go home and she said she wanted to stay at work. I asked her if she wanted to go and get some fresh air and suggested that she take Treacle [Ms Lowe's dog] for a walk as this was something she enjoyed doing.

78. Kate left with Treacle and I went out to the ground shop floor so that Simon could go downstairs. Simon and I had a brief conversation about my meeting with Kate and then I worked on the shop floor until Kate returned.

79. Kate returned after around 20-30 minutes and seemed much calmer. She said that she was going to pop out to the office before she came back onto the shop floor so I stayed out on the shop floor. After several

minutes I walked out to grab something from the office. I saw Kate sitting on the staircase next to the office applying makeup. I told her that she didn't need to put on makeup and made sure that she understood that I hadn't asked her to do so. She responded that she had wanted to.

80. Kate came back out onto the shop floor to begin work and I asked her if she was OK. It is blatantly untrue that I made any comment on her appearance and I most certainly did not say that she looked better.

81. Kate continued to work on the shop floor for about another 6 hours including her break. As usual Simon and I interacted with Kate throughout the day, she was normal and chatty, she did a great job and said a friendly goodbye and went home wishing me a Happy Birthday for the following day. Simon and I both believed that the situation had been amicably resolved."

42. Although there are discrepancies in these two accounts, there is also substantial common ground. There is no dispute that Ms Lowe said words to the effect that the Claimant looked terrible, unpresentable and unprofessional. Further, it is clear even from Ms Lowe's account that the main topic of conversation was makeup. She does not mention any discussion about clothing or hair, or suggest that the Claimant changed her clothing, hair or appearance in any other way when she returned to the shop floor. It is also common ground that the Claimant was upset by the conversation, went for a walk to calm down, and when she returned to the shop she applied more makeup.

43. Having heard direct evidence from the Claimant, we give her account more weight, and the fact that Ms Parker's and Ms Lowe's accounts of first seeing the Claimant on 15 February are identical gives us some concerns about their credibility. Overall, we prefer the Claimant's account.

44. In particular, we accept that the only difference in the Claimant's appearance on 15 February was the fact that she was wearing less makeup than usual. Further, we find that the gist of what Ms Lowe was saying was that the Claimant was required to wear makeup, to maintain her 'usual' look, while at work. This is notwithstanding that there was no general rule that female staff, or any staff, had to wear makeup. Ms Lowe made it clear that it was a requirement for the Claimant; on the one day she wore less makeup, she was not "presentable". Ms Lowe also made it clear that if the Claimant would wear makeup on a night out, she should wear it at work. Ms Lowe's witness statement mentions that she remembered the Claimant as a customer of the shop, before she started working there, "due to her friendly nature and striking appearance". She also mentioned the Claimant's "attractive, styling and well-groomed" appearance when she attended interview. Ms Lowe's stance was consistent with that; she wanted the Claimant to maintain the look she had when they first hired her.

45. We do not accept that the Claimant said she had let Ms Lowe down, and that was why she was upset. Giving greater weight to the live evidence we heard from the Claimant, and consistent with our findings above, we find that the Claimant was visibly upset at the suggestion that she did not look presentable without her usual makeup. She applied more makeup in order to comply with

the instruction from Ms Lowe, and we accept that Ms Lowe said that she looked better having done so.

46. It is not in dispute that the Claimant spoke to Mr Parker about the incident on 17 February, when Ms Lowe was off work for her birthday. The Claimant's evidence was; "I explained to him that I was upset and uncomfortable with the conversation that I had with Rachel on 15th February, and with the requirement to wear make-up." Mr Parker says in his witness statement: "she said she was confused as to why Rachel had told her that she had to wear makeup at work". He says he was shocked by the Claimant's "accusatory manner". He took exception to the suggestion that Ms Lowe was somehow not being "feminist" and denied that there was a requirement to wear makeup, as long as she looked presentable.

47. Mr Parker told Ms Lowe about the conversation. Ms Lowe was clearly annoyed by it because in her own witness statement she says she did not want to talk about it and "spoil" her birthday.

48. It is not in dispute that Ms Lowe telephoned the Claimant in the evening on 19 February to tell her that she had advertised for a new marketing role. The Claimant described the conversation as follows in her witness statement:

> "On the evening of 19th February 2018, Rachel Lowe telephoned me to tell me that a job had been advertised for full and part-time staff. She also told me that a full-time member of staff had been employed for a marketing role and that I would no longer be required to carry out the marking aspect of my job."

49. Ms Lowe, in her witness statement, denies having removed the Claimant's marketing duties. When the Claimant was asked about this in questions from the Tribunal she said Ms Lowe had definitely said they were recruiting someone else for the marketing role, which she "took" to mean that her marketing duties were removed. She could not remember if Ms Lowe had explicitly said that they were removed.

50. Later that evening, at 10.56pm, the Claimant emailed Ms Lowe and Mr Parker as follows:

> "Dear Rachel and Simon Thank you for your call today regarding your plans to hire new staff and revoke my responsibilities in marketing. After thinking over this, I have decided that I feel that I could no longer work at your establishment. I took the role at Vinyl Revolution due to my passion for music and to help you build your dream, one I support and admire. However, since your demands that I wear full face make up on shifts in order to fulfil the look you require, I believe that the atmosphere has become unpleasant. I remained professional and discussed this with you both however, it remains that this is still a necessity to you which I do not agree with. Unfortunately, I feel that this disagreement has influenced you in your decision to revoke my marketing responsibilities and therefore providing a demotion. I would like to thank you for the opportunity and chance to watch your business blossom. I will be leaving my position effective immediately as I do not have a legal written contract

> and therefore do not require to provide any notice time. Please ensure that you pay me the amount you owe me for the remaining hours I have worked by the end of this month. Yours sincerely, Kate."

51. Ms Lowe replied the following day. As the content of the call on 19 February, she said:

> "I did not phone you regarding our plans to hire new staff or revoke your responsibilities in marketing. I phoned you as a courtesy to reassure you that although we were about to start advertising to replace the office based position that Louise had vacated late last year, and to hire additional shop staff, that you were not to worry as it did not affect you in any way. I advised you that we would discuss your future role with the company when we were both in the office."

52. Given the Claimant's clarification in her oral evidence, we consider it more likely that the conversation took place as Ms Lowe described in her email. We find that Ms Lowe did not say, or even imply, that the Claimant's marketing duties were being "removed". We accept that the suggestion that they would discuss the Claimant's future role gives rise to a question as to whether her duties would be affected, but we find that the Claimant drew her own conclusions from the mere fact of the role being advertised. We do not accept it would necessarily follow from the recruitment to the new position that the Claimant's marketing duties would be removed. Ms Lowe's witness statement says that the person who was intended to fulfil the role "would have been working in tandem with Kate and would have supplemented her skills and assisted in her skill development." We consider that to be entirely plausible.

53. Ms Lowe's response on 20 February took issue with the Claimant's resignation email in a number of other respects. She said that the Claimant had never had formal marketing duties, and alleged that there had been many difficulties because the Claimant's marketing skills were not as strong as she had claimed. As to the makeup issue, Ms Lowe said:

> "This statement is a cynical, blatantly dishonest and deeply unpleasant attempt to suggest that you have been discriminated against. You know very well that this was not the case. I stated very clearly that my concern was about a sudden and significant fall in your personal grooming and presentation and was not about make up. We would not dream of dictating an employee's 'look' or personal style and had no interest in whether you dyed your hair blue, came to work in bondage gear or adopted a dramatic make-up free look like Tilda Swinton, as long as you took pride your appearance and maintained the same high standards that you had previously observed and would adhere to when going out in the evening. I clearly explained that all shop employees are expected to maintain a high level of personal grooming and presentation due to their public facing role as a brand ambassador. This is standard employee policy and we asked nothing of you that we do not expect from ourselves and all other members of staff.
>
> We cannot stress strongly enough that making an untrue allegation of discrimination against us is something we take extremely seriously.

> Furthermore we are aware that not only have you made this accusation against us in writing but have repeated it verbally. We would very strongly advise you against repeating such an allegation again. Your actions constitute libel and we will forced to take action if you continue."

54. On the subject of notice, Ms Lowe claimed that the Claimant's failure to give them enough notice to arrange alternative cover at the shop that day resulted in financial losses. She continued:

> "You are absolutely correct in that due to the lack of a legal contract you have no legal obligation to work a notice period. We would however had welcomed the opportunity of having agreed one. We would have been disappointed to hear that you had changed your mind about a long term career at Vinyl Revolution but would have been more than happy to negotiate a fair and amicable end to our relationship.
>
> As you have chosen to act upon the rule of law however, instead of choosing the route of goodwill, you have forced us to do likewise. Due to the unexpected and damaging financial losses your actions have caused us today we cannot now afford to pay you for the work you undertook in February. We urge you to learn from this unpleasant situation. Burning bridges is usually avoidable and should always be a last solution. There are no winners here."

55. It should be noted at this juncture that Ms Lowe's email of 20 February and all subsequent correspondence she sent to the Claimant (and the Claimant's relatives – see below) was marked "without prejudice". There was a dispute about their admissibility and EJ Balogun ruled at the preliminary hearing on 13 September 2019 that these documents were not privileged because their contents did not amount to a genuine attempt by Ms Lowe to resolve a dispute.

56. On 24 February the Claimant sent Ms Lowe an email with the subject "Notification Of Further Legal Action". She wrote:

> "To Rachel, In response to your email and specifically you informing me that you will not be paying me for the work I have completed, I'm informing you that I have now sought legal advice and future communication will be made under this guidance. You'll receive further correspondence shortly."

57. The Claimant commenced early conciliation on 27 February. On the same date she wrote to Ms Lowe setting out all of the shifts for which she was owed wages. She said the final amount owed was £764.40. Ms Lowe replied on the same day as follows:

> "Dear Kate
>
> I am surprised to receive this email from you as I made our position very clear in my previous communication. Maybe you have now been advised that you have no valid legal claim against us or maybe it has dawned on you that throwing tantrums, telling lies and issuing threats might have worked for you as a child but is not working for you now. Whatever the

reason it is now too late, you have well and truly burnt the bridge between us and destroyed all the goodwill we had towards you.

Kate you are not a child, you are 22 years of age. Part of being an adult is taking responsibility for the consequences of your actions and you are going to have to do that now.

We are decent, honest and hardworking people who treat others with fairness and respect. We take both our moral and legal responsibilities to everyone we meet during the course of business very seriously.

You however do not and negated all responsibility we had towards you when you decided a) to provide us with zero notice of your decision not to return to the shop b) to make untrue and malicious allegations against us.

You will be aware that you have no legal rights for a claim against us due to the lack of a legal contract. However even if you had been under contract your actions would have negated your right to receive final pay. Your actions constituted gross misconduct and would have given us the right to deduct losses from your final salary which would have exceeded your final pay.

Furthermore by contacting a member of our staff and making false allegations against us you have committed libel which has given us the right to claim damages against you. Are you really so immature and professionally naive as to not understand this?

Due to the above I would strongly suggest that you accept the situation and take the opportunity to learn a valuable life lesson. You have behaved like a spoilt and malicious child and let yourself down. Instead of blaming others grow up, get your ego under control, think before you act and don't make enemies out of people who could have been your friends.

I advised you previously that this was my last communication. This email is. Please however be aware that if you decide to repeat untrue allegations against us or seek to damage our business in any other way we will not hesitate to take legal action against you.

Rachel”

58. On 6 March 2018 Mr Parker and Ms Lowe wrote a letter to the Claimant’s father and step-mother. It read as follows:

“We are writing to invite you to meet with us to discuss Kate's determination to pursue a legal claim against us. We are doing so in the assumption that you are supporting Kate's actions and financing her legal representation.

You met us and I am sure that you recognised us as decent and hardworking people who were genuinely delighted to have Kate join us

at Vinyl Revolution. You must entertain at least some level of doubt about the claims that Kate is now making against us. We can assure you that we were both completely shocked when Kate emailed us late at night to advise us that she wouldn't be working at Vinyl Revolution the following day. We had hoped, and expected, that Kate would work with us far into the future as a valuable and respected member of our team.

We are even more shocked about the very serious and deeply offensive claims Kate is now making against us, as they are totally without foundation. We can only assume that she has somehow backed herself into a corner and instead of coming clean is making things a whole lot worse without any real understanding of the consequences.

We are prepared to strenuously defend ourselves against the allegations Kate is making against us, in court if necessary. We will bring our own claim and will countersue for slander and damages but would much prefer not to have to do so. If Kate continues there will be no winners here apart from the lawyers. Going to court will be deeply unpleasant, expensive and stressful for both parties but we are in our 50's, have experience of litigation and giving evidence in court, have the truth on our side and will weather the storm. Have you really considered the effect it will have on Kate's career and reputation if she isn't being entirely honest with you and loses her claim against us? Have you thought about how this could play out if it enters the public domain?

If you have any doubt at all about the truth of Kate allegations against us then please meet with us and hear our side of the story rather than blindly support Kate on this ill-advised journey

We hope to hear from you soon."

59. The Claimant's evidence was that this letter did not arrive until around 9 April. She gave evidence about the effect of both the email of 27 February and the letter to her relatives. As to the former, she said that it felt like Ms Lowe was trying to use her age to intimidate her, and to con her into sacrificing her pay. She found it patronising and insulting. As to the latter, she said she felt this was another attempt to bully her, and to force her not to pursue her wages. She felt Ms Lowe and Mr Parker were suggesting the Claimant was incapable of thinking for herself, or unable to know what was right or wrong. It suggested she was answerable to her father and step-mother, like a small child or teenager might be.

60. The Claimant's outstanding wages were ultimately paid on or around 30 December 2018.

61. The Claimant applied for several jobs and was offered work at a pub in April 2018. Her hours are variable and she is paid the national minimum wage of £7.38 an hour. As at the date of the hearing the Claimant was still working in the same job and had not applied for other work. Her evidence was that she likes the new job and gets on very well with her colleagues and managers.

THE LAW

62. A person has a disability for the purposes of the EqA if he or she has a physical or mental impairment, which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities (s.6 EqA).

63. The burden of proving disability rests with the claimant.

64. "Substantial" means more than minor or trivial (s.212 EqA). Pursuant to paragraph 3 of Schedule 1 EqA:

> (1) An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person to carry out normal day-to-day activities.

65. The EAT gave some guidance on the meaning of "severe disfigurement" in Hutchison 3GUK Ltd v Edwards (2014) UKEAT/0467/13. It held that when deciding on the question of severity, a tribunal is entitled to look at the impact of the disfigurement on the claimant. It is not a subjective test, but the impact on the claimant might be helpful in assessing the severity of the disfigurement. The tribunal need not carry out a visual examination of the claimant, or of photographs of the claimant. However, the burden is on the claimant to establish that he or she falls within the protection of the EqA. He or she may rely on a medical report to describe the disfigurement in question.

66. Schedule 1 EqA further expands upon the definition in s.6, providing at paragraph 2:

> (1) The effect of an impairment is long-term if—
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

67. Paragraph 5 of Schedule 1 provides:

> (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
>
> (a) measures are being taken to treat or correct it, and
>
> (b) but for that, it would be likely to have that effect.
>
> (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

68. The EqA further provides, so far as relevant:

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.

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.

69. Disability, age and sex are all protected characteristics under the EqA.

CONCLUSIONS

Disability

70. There is little medical evidence to assist us in determining whether the Claimant was disabled within the meaning of the EqA. We place very little weight on Dr Downs's report. It was produced on the basis of the Claimant's account of her symptoms, a review of the GP records and some black and white photographs (not attached to the report) only. It is also largely phrased in very general terms, describing how acne *can*, or tends to, affect people, not how it has affected the Claimant. Further, some of the opinions expressed seem contradictory. For example, he was not prepared to say whether the effect on day to day activities was substantial, saying that the question was best answered by a Clinical Psychologist, but when asked about the effect of stopping measures to treat the impairment he said there would be "a consequential worsening of her psychological state and ability to copy socially". It is not clear why he felt able to answer the latter question in such specific terms, but not answer the former at all.

71. As to the GP records, they contain very little reference to any problems with the Claimant's skin. There is the one reference to her skin having "erupted" in May 2015, long before the relevant period for these proceedings, but there is no mention of a diagnosis of any skin condition. Further, although the Claimant's contraception was changed, apparently because of the issues with her skin, that is somewhat different to saying that she was prescribed the combined oral contraceptive pill *in order to treat* a skin condition. It is an equally possible reading of the notes that the earlier form of contraception was what had *caused* the skin problems. There is an appointment in September 2018 at which the Claimant appears to have presented with concerns "about acne", but this is several months after the Claimant left the First Respondent's employment and after she had commenced these proceedings. Further, again there is no diagnosis noted.

72. We have seen the photographs of the Claimant's face and, in view of our conclusions below, do not consider it necessary to resolve any dispute about the timing of those photographs. We do not understand there to be a dispute that they are photographs of the Claimant, and we accept that they show that at times she has had relatively bad outbreaks of spots, particularly around her mouth and chin.

73. In view of our conclusions below it is unnecessary to determine whether the Claimant had a physical impairment at the relevant time. We concentrate on the issue of the claimed effects.

74. Ms Danvers argued that we should disregard measures taken to treat or correct the impairment, including the contraceptive that the Claimant has taken since 2015, makeup that the Claimant uses to cover the spots, and the washes, creams and ice packs that she uses. There are a number of difficulties with this argument. First, as noted above, there is insufficient evidence to establish that the contraception is *medical treatment* for the condition. Secondly, given our concerns about Dr Downs's report, we do not consider there is sufficient

evidence to make any finding as to the effects if the Claimant were not taking the contraceptive. We are doubtful whether makeup is properly considered a measure to correct the impairment, but in any event there is a logical difficulty with this argument because the effects the Claimant relies upon as being substantial occur when she is *not* wearing makeup; when she experiences a flare-up, she needs to let her skin breathe, and therefore feels unable to participate in normal social activity. As to the washes and creams, etc, again there is insufficient evidence to make any findings as to the deduced effects.

75. We are not satisfied that the Claimant suffered from a "severe disfigurement" at the relevant time. Mr Downs's report cannot assist because he did not examine the Claimant, he only saw black and white photographs, and he does not describe any disfigurement except by reference to the Claimant's own account. He says the photographs show "a young woman with moderately severe facial and neck acne". That accords with our impression of the (colour) photographs in the bundle. We take into account our own knowledge that acne, or a tendency to spots developing on the face, is not uncommon among young people including those of the Claimant's age. While the photographs do show what appear to be moderately severe flare-ups, we do not consider that the Claimant's condition is properly described as a "severe disfigurement".

76. We must therefore apply the standard test and consider whether the Claimant's condition had a substantial adverse impact on her ability to carry out normal day-to-day activities. In her written submissions Ms Danvers invited us to find that the Claimant had experienced the following effects on her ability to carry out normal day-to-day activities to fluctuating degrees from her adolescence to date:

    76.1. Avoidance in respect of leaving the house;

    76.2. Diminishment in self-confidence and self-consciousness in social situations;

    76.3. Cancelling social events;

    76.4. Covering her mouth and avoiding eye-contact in social situations;

    76.5. Low mood; and

    76.6. Lengthening her face cleansing process to 30-minutes a day.

77. We do not accept that lengthening a face cleansing process constitutes a substantial adverse impact on the Claimant's *ability* to carry out a normal day-to-day activity.

78. As to the other effects, this is an unusual case where the Claimant relies on a physical impairment but almost all of the effects relied upon are psychological. The Claimant relies principally on her own impact statement, but that evidence is in vague terms. She has given no examples of occasions when she has not been able to leave the house when she otherwise would have done, or where she has missed particular events. She does not mention ever having had to miss work or college/ university. There is no mention of such effects in the GP

records. Dr Downs's report, as noted above, does not assist on these claimed effects. His report is in generalised terms. He suggested a Clinical Psychologist could assist with the severity of the claimed effects, but the Claimant has not produced any other medical report.

79. Further, the evidence we have about the Claimant attending work with the First Respondent calls into question whether the effects were as severe as she says. We note that she attended work on more or less full-time basis from 1 December 2017 to 19 February 2018. She had one apparent "flare-up" during that time, on 15 February, but she still attended work, and there is no suggestion that there would have been any difficulty if Ms Lowe had not raised the issue of the lack of makeup.

80. In those circumstances, we are not satisfied that the Claimant's skin condition had a substantial adverse effect on her ability to carry out normal day-to-day activities. She was not therefore disabled within the meaning of the EqA.

<u>Harassment related to sex: Ms Lowe's conduct on 15 February 2018</u>

81. We have found above that the gist of the conversation between the Claimant and Ms Lowe was an instruction from Ms Lowe that the Claimant was required to wear her "usual" level of makeup at work. We have also found that Ms Lowe described the Claimant as "looking terrible" and "unpresentable and unprofessional". It is not in dispute that Ms Lowe removed the Claimant from the shop floor by taking her into the office to discuss the matter. We are satisfied that all of this was unwanted conduct. The Claimant expected to be able to work as normal, her appearance having changed only by wearing less makeup, but she was prevented from doing so and Ms Lowe maintained her position even after it was obvious that the Claimant was upset by it.

82. We are also satisfied that it was "related to sex". Ms Lowe's own account shows that her position was closely connected to the Claimant being female. She used "women who wear makeup as part of their daily grooming routine" as a benchmark for judging the Claimant's decision to "let her skin breathe". There is also the strong implication in her account of the conversation that wearing makeup is an indicator, in women only, of making an effort to look good. We find that she would not have imposed the same requirement on a male employee, even if he normally wore makeup.

83. We must therefore consider whether the conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We consider that the conduct may not have had that purpose, but we are satisfied it had that effect. In terms of the immediate effect, it left the Claimant in tears and she had to go for a walk to calm down. She then applied makeup when she did not want to do so, in order to comply with the instruction. We accept the Claimant's evidence that the comments made her feel like she was ugly, unworthy and humiliated. We also accept that she was very upset that evening and for some time afterwards, evidenced by the fact that she raised the matter with Mr Parker on 17 February.

84. We have taken into account whether it was reasonable for the conduct to have that effect, and we consider that it was. We have found that the only difference in the Claimant's appearance was the fact that she was wearing less makeup than usual. Even if that was a substantial change to her appearance, it was entirely her prerogative to choose to wear less makeup. We do not accept that she would have looked "unpresentable". Ms Lowe made unacceptably derogatory comments about the Claimant's appearance that understandably made her feel extremely uncomfortable. The whole conversation involved an intense focus on the Claimant's face and whether it looked acceptable without makeup. That is highly personal and it is unreasonable for an employer, even with a "brand" to maintain, to suggest that an employee cannot look professional or presentable without makeup.

<u>Harassment related to sex: removal of marketing duties</u>

85. We have not accepted that Ms Lowe removed the Claimant's marketing duties as alleged, so this complaint fails.

<u>Direct sex discrimination</u>

86. There is no need for us to address the complaints of direct sex discrimination because they were relied upon in the alternative to the harassment complaints that have succeeded, and the complaint about the removal of marketing duties would fail for the same reason.

<u>"Dismissal"</u>

87. The claim includes a complaint that the Claimant's resignation constituted constructive dismissal and that this was a further act of direct sex discrimination and/or victimisation. It was agreed with Ms Danvers during the hearing that it was not in fact necessary for the Tribunal to make any finding as to whether there was a constructive dismissal. The only necessary finding was whether the Claimant's resignation flowed from any unlawful discrimination, such that her consequential loss of earnings would be recoverable. Since the remedy would not be affected by any express finding of constructive dismissal, it is not necessary or proportionate for us to apply that alternative analysis.

88. We accept that the Claimant's resignation flowed from Ms Lowe's conduct on 15 February, which we have found constituted harassment related to sex. Although the resignation email also refers to the removal of marketing duties (which we have not accepted happened), it is clear that the requirement to wear full face makeup, and the fact that this was "still a necessity to [Ms Lowe]" despite the Claimant's objections, was the main reason for her decision to resign. The Respondents have not put forward any other reason and according to their own evidence the relationship with the Claimant was good up until 15 February.

<u>Harassment related to age: Email of 27 February and letter to relatives</u>

89. We are satisfied that both the email of 27 February and the letter to the Claimant's relatives, which Ms Lowe must have anticipated the Claimant would see, were acts of unwanted conduct related to the Claimant's age. The

language of the letter of 27 February speaks for itself: "throwing tantrums", "you are not a child", "Part of being an adult is taking responsibility", "Are you really so immature and professionally naïve?", "You have behaved like a spoilt and malicious child". The Claimant's age, being a young adult in her early twenties, was central to that email. As for the letter to her relatives, we accept that it carries the implication that Ms Lowe and Mr Parker viewed the Claimant as a child.

90. We do not find, however, that those communications had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Claimant may have felt insulted, patronised, and/or bullied, but she was out of the workplace by this stage. They were not sufficiently offensive to "violate her dignity" and they did not create the proscribed "environment" for the Claimant.

<u>Direct age discrimination: Email of 27 February and letter to relatives</u>

91. We find that both communications amounted to less favourable treatment because of the Claimant's age. In a supplemental witness statement Ms Lowe expressed regret that the tone of her emails "was less than professional and respectful", but denied that she had treated the Claimant differently based on her age. Based on the language used, and the implication in writing to the Claimant's relatives that they continued to be responsible for her actions, we are satisfied that Ms Lowe would not have written to an older employee in the offensive terms of the 27 February, and would not have written to an older employee's relatives at all. The reason for the treatment was the Claimant's age.

92. It is claimed in the Grounds of Resistance that any direct age discrimination was justified by the Respondents' need to protect themselves from vexatious and untruthful allegations. We do not accept that this is capable of amounting to a justification because it does not satisfy the test in <u>Seldon v Clarkson Wright and Jakes (A Partnership)</u> [2012] ICR 716, i.e. the aim is not related to the public interest and does not relate to intergenerational fairness or dignity.

<u>Victimisation</u>

Protected acts

93. The Claimant relies upon her conversation with Mr Parker on 17 February as a protected act. We are not satisfied that, in the course of that conversation, the Claimant was "making an allegation (whether or not express) that [Ms Lowe] or another person has contravened [the EqA]". Ms Danvers argued that it is obviously implicit that the Claimant was making an allegation of unlawful sex discrimination, and/or the conversation led the Respondent to believe that she may make an allegation of sex discrimination in the future. Even based on the Claimant's own account of the conversation, however, we consider that she was doing no more than objecting to Ms Lowe's treatment of her and the requirement to wear makeup. There is a difference between that and alleging that the treatment amounted to unlawful discrimination. Mr Parker may have taken the Claimant to imply that Ms Lowe was being "unfeminist", but again, that is not the same as saying that she acted unlawfully under the EqA.

94. We consider much the same analysis applies to the resignation email, which is also relied upon as a protected act. The Claimant said in her email that since Ms Lowe's "demands that she wear full face make up" the atmosphere had become unpleasant, and she said she did not "agree with" it. That is quite a long way from saying that it constituted unlawful discrimination. It is true that Ms Lowe interpreted it as an allegation of discrimination (an "attempt to suggest that you have been discriminated against"), but we must interpret the email for ourselves and determine whether it in fact constituted a protected act. Even if it were "an attempt to suggest" discrimination, we consider it did not contain an implied allegation that Ms Lowe *had contravened the EqA*. It was said to be something that had created an unpleasant atmosphere, rather than something that was unlawful or gave rise to any cause of action.

95. We do not accept that the Claimant sending the email of 24 February with the subject "Notification of Further Legal Action" was a protected act. There is nothing in the email to suggest any intention to bring a discrimination claim. The email relates to Ms Lowe's refusal to pay the Claimant her outstanding wages.

96. We accept that notifying ACAS of a potential discrimination claim on 27 February 2018 was an act done "in connection with or for the purposes of" the EqA.

Detriments

97. We have not accepted that Ms Lowe removed the Claimant's marketing duties, so that complaint cannot succeed. For the avoidance of doubt, we would not accept that the mere decision to advertise the marketing position could constitute a detriment. Even if it had a potential impact on the Claimant's duties, there was no express agreement as to her duties and the Respondent was entitled to change them to suit its business needs.

98. As for the email of 20 February, the Claimant characterises this as part of the "detrimental and aggressive correspondence" from Ms Lowe. We do not accept that the email of 20 February, as a whole, is properly described in this way. Some of it simply takes issue with facts asserted by the Claimant. We do find, however, that the threat to bring proceedings for libel was detrimental to the Claimant. We have not accepted that the Claimant had done a protected act prior to this email, but we do find that the threat of libel proceedings was made because Ms Lowe believed the Claimant may do a protected act in the future. The email specifically makes the link with the "untrue allegation of discrimination", and says if the Claimant pursues this they will sue for libel. We find that this was an act of victimisation.

99. The refusal to pay the Claimant, apparently in retaliation for her failure to give notice, and despite accepting that she had no obligation to give notice, was vindictive and clearly constituted a detriment. It was not, however, causally linked to any belief that the Claimant may do a protected act. It is clear from the email that it was prompted by annoyance at the manner of the Claimant's resignation.

100. The Claimant also relies upon the 27 February email as a further act of victimisation. We consider the same analysis applies as to the threat of libel proceedings in the 20 February email. The tone and content of the 27 February email were clearly detrimental. It constituted direct age discrimination and it threatened libel proceedings. The only protected act we have found, namely notifying ACAS of a potential claim of discrimination, occurred on the same day as this email and there is no evidence to suggest that ACAS had contacted Ms Lowe by the time she sent the email; it seems unlikely they would have done. We do accept, however, that the letter was motivated by Ms Lowe's belief that the Claimant may do a protected act in the future. It was designed to deter her from doing so: "if you decide to repeat untrue allegations against us or seek to damage our business in any other way we will not hesitate to take legal action against you".

101. In light of our finding above that the letter to the Claimant's relatives constituted an act of direct age discrimination, we also find that it was a detriment to the Claimant. As with the email of 27 February, it was designed to deter the Claimant from bringing discrimination proceedings. We accept that both this letter and the email of 27 February constituted acts of victimisation.

<u>Remedy</u>

102. We have upheld the following complaints:

102.1. Ms Lowe's conduct on 15 February constituted harassment related to sex.

102.2. The threat of libel proceedings in the email of 20 February was an act of victimisation.

102.3. The email of 27 February constituted direct age discrimination and victimisation.

102.4. The letter to the Claimant's parents dated 6 March constituted direct age discrimination and victimisation.

Injury to feelings

103. We have found that the Claimant was upset by Ms Lowe's conduct on 15 February and had to go for a walk to calm down. Her resignation four days later is also a clear indicator of hurt feelings. We note the evidence of her step-mother that she was tearful and withdrawn around this time. We accept that it had a particular impact on the Claimant because of her skin condition. It did not amount to disability discrimination because the Claimant did not satisfy the definition of a disabled person, but this is still a relevant factor for the purposes of assessing injury to feelings.

104. We accept the Claimant's evidence that she found the email of 20 February bullying and hurtful. As to the 27 February email and the letter to her relatives, she also found these "bullying", "patronising" and "insulting".

105. We accept that the whole episode had an effect on her confidence.

106. The applicable Vento bands are the updated bands issued in March 2018 as an amendment to the September 2017 Presidential Guidance, applicable to claims brought on or after 6 April 2018:

106.1. A lower band of £900 to £8,600 (less serious cases),

106.2. A middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band),

106.3. An upper band of £25,700 to £42,900 (the most serious cases).

107. We consider the injury to the Claimant's feelings resulting from the unlawful acts found falls at the lower end of the middle band. We would have awarded a higher amount if we had accepted all of the allegations. We do not consider the lower band would be appropriate. The original discriminatory act led the Claimant to resign and Ms Lowe continued to discriminate against her and victimise her over the course of the following weeks. On the other hand, the effect on the Claimant was not such that she had to seek medical assistance or was prevented from looking for alternative employment.

108. In all the circumstances we consider the appropriate amount of compensation for injury to feelings is £9,000.

Aggravated damages

109. The Claimant has claimed aggravated damages on the basis that the Respondents have acted in a high-handed, malicious, insulting or oppressive manner. She relies in particular on the tone of the correspondence and the continued threats to sue the Claimant for libel, as well as the failure to pay the Claimant her outstanding wages until December 2018. She also relies on the Respondents' conduct of these proceedings, including their repeated attempts to strike out the claim. We do not consider that this is an appropriate case for aggravated damages. The matters relied upon are already reflected to a large extent in our findings on liability and award of compensation for injury to feelings.

110. As to the Respondents' conduct of these proceedings, the Claimant relies on the dispute about whether the Claimant had tampered with the photographic evidence. We heard no evidence about this. Ms Lowe has not raised any issue before us as to the genuineness of the photographs and the Claimant did not call any evidence about the Respondents' previous conduct on this issue. We consider we are not in a position to determine reasonableness of the Respondents' conduct, taking into account that the Ms Lowe was not present at the hearing and therefore has not responded to this claim.

111. Similar considerations apply to the attempts to strike out the claim. We have very little information as to the merits of these applications. We note that the Respondents had requested a strike out of the disability claim. Given that we have found the Claimant was not a disabled person we do not accept that that application was misconceived.

Financial loss

112. We are satisfied that the Claimant made reasonable efforts to mitigate her losses by finding alternative employment by 20 April 2018, two months after her resignation. It is at a lower level of pay, but the Claimant has remained in the same role to date. The impression given in her evidence was that she had remained in the role, despite the lower pay, because she enjoys it. She has not looked for higher paid roles. We consider that it would have been reasonable for her to do so within six months of resigning from the First Respondent, so we cap her losses at 20 August 2018.

113. Her net weekly pay at the First Respondent was £282.62. Her losses up to 20 August 2018 were 282.62 x 26 weeks = £7,348.12. The Claimant has calculated her earnings from the new job at £193.65 net per week. We accept that figure. In the relevant period (20 April to 20 August 2018; 17 weeks) she earned £3,292.05. Her total financial loss attributable to the discrimination found is therefore £4,056.07.

114. The Claimant has claimed pension loss, but we consider this claim to be insufficiently clear for us to award anything. She received no pension contribution from the First Respondent, so it is based on what she says they ought to have contributed. She has not given any credit for pension contributions in her new job. Further, her losses would be capped at August 2018 when we say should have obtained equivalent employment, so they would be negligible. We make no award.

Interest

115. We award interest on the injury to feelings award at 8% for the period from 15 February 2018 to 27 January 2020 (711 days): £1,402.52.

116. On the financial loss, we award interest at 8% from the mid-point between the date of termination (19 February 2018) and 27 January 2020 (353.5 days): £314.26.

Additional awards (failure to provide contract or payslips)

117. The Claimant has claimed an additional award under s.12(4) of the Employment Rights Act 1996 (“ERA”) as a result of the First Respondent’s failure to provide payslips for January 2018 and February 2018. The relevant provisions in the ERA are as follows:

> **8 Itemised pay statement**
>
> (1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.
>
> …
>
> **11 References to employment tribunals**

(1) Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

…

12 Determination of references

…

(3) Where on a reference under section 11 an employment tribunal finds—

(a) that an employer has failed to give a worker any pay statement in accordance with section 8, or

(b) that a pay statement or standing statement of fixed deductions does not, in relation to a deduction, contain the particulars required to be included in that statement by that section or section 9,

the tribunal shall make a declaration to that effect.

(4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made (from the pay of the worker during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.

(5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the worker, in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.

118. It is not in dispute that deductions were made from the Claimant's wages for sums that should have been received on 31 January 2018 and at the end of her employment, totalling £960. This is within the 13-week period referred to in s.12(4) ERA. The only issue in dispute is whether the Respondent failed to provide payslips for January and February 2018, such that s.12 comes into effect. The Respondents have denied that they failed to provide payslips. They have produced a payslip for January 2018, but the Claimant's evidence is that she did not receive it and the Respondents have not produced any evidence that it was given to the Claimant. We find that it was not given to the Claimant. Ms Lowe did not intend to pay the Claimant for February and did not do so until December 2018. No payslip has been produced. We find that the First Respondent failed to give the Claimant a payslip for February 2018.

119. We therefore have a discretion under s.12(4) to make an award up to the total of the unnotified deductions (£960). We take into account the fact that the wages have now been paid, but we also note that this was a deliberate refusal to pay wages that Ms Lowe knew or ought to have known were owed to

the Claimant. We award 50% of the deductions as a penalty under s.12(4): £480.

120. It is not in dispute that the First Respondent failed to provide a written statement of initial employment particulars. We make an award under s.38 of the Employment Act 2002 at the lower amount of two weeks' gross pay because the Claimant was employed for a very short period and we saw some evidence of other employees having been given contracts, so we would not accept that this was a deliberate or particularly serious failing. The Claimant's gross weekly pay was £320, so the award is £640.

Employment Judge Ferguson

Date: 17 April 2020