



EMPLOYMENT TRIBUNALS

Claimant: Mr. P Mefful

Respondent: Citizens Advice Merton and Lambeth Limited

Heard at: London South, Croydon

On: 8 April 2016 and 6 April 2017; 7 April 2017 (in chambers)

Before: Employment Judge Sage

Members: Ms B Brown

Ms. B. Leverton

Representation

Claimant: In person

Respondent: Mr Morley Consultant

RESERVED JUDGMENT

1. The Claimant's claim for victimisation is well founded.
2. The Claimant's claim for discrimination arising from disability is well founded.

REASONS

1. By an ET1 presented 4 October 2015 the Claimant claimed victimisation and disability discrimination arising out of a reference provided by the Respondent post termination. By an amended ET1 presented on the 25 August 2016 the Claimant added a claim for discrimination arising from disability.
2. The Respondent defended the claims saying that the reference was true accurate and fair and it was denied that the Claimant was subjected to a detriment because of a protected act. In the amended response, the Respondent accepted that the reference referred to the Claimant's sickness absence but it was denied that it was unlawful discrimination.

The Issues

Were agreed to be as follows:

Section 15: Discrimination arising from disability

- 1.1. The allegation of unfavourable treatment as “something arising in consequence of the Claimant’s disability” falling within section 39 Equality Act is failing to provide a reason at section 1 of the reference at section 1 that the Respondent would not re-employ the Claimant because of his sickness absence, in the expectation that it would be assumed it was due to his sickness absence. This was also a reason why the Respondent failed to answer section 4 of the reference document.
- 1.2. Does the Claimant prove that the Respondent treated the Claimant as set out in the paragraph above?
- 1.3. Did the Respondent treat the Claimant as aforesaid because of the “something arising” in consequence of the disability?
- 1.4. Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Section 27: Victimisation

- 1.5. Has the Claimant carried out a protected act? The Claimant relies upon his previous case number 2358072/2012 against the Respondent alleging unfair dismissal and disability discrimination. The Respondent has conceded the dismissal to be unfair.
- 1.6. If there was a protected act, has the Respondent completed the reference form in the way that it did because of the protected act?

Findings of Fact

The findings of facts are agreed or on the balance of probability we find to be as follows:

3. The Claimant acted as a volunteer for the Citizens Advice Bureau in 2000 and then from 2003 he was employed as a General Adviser in the Southwark branch. In January 2004, the Claimant was appointed as a Senior Advisor in the Respondent organisation, this was after a competitive selection exercise. In this role, he undertook management for 30 volunteers across three sites. The Claimant was then appointed to the role of Specialist Services Manager “SSM”, the most senior position below that of management in May 2004. The Claimant was in this role at the date of termination. The Claimant told the Tribunal (see paragraph 3 of his statement) that the promotion he secured in May was awarded after rigorous competitive selection, involving both written and oral tests open to internal and external candidates.
4. The Claimant told the Tribunal that in his role as SSM he was responsible for the Respondent’s Legal Services Commission (LSC) contract, which was audited in 2006 and found to be “outstanding in quality and performance” (see paragraph 7 of the Claimant’s witness statement). The Claimant told the Tribunal that it was one of the proudest

moments of his life to turn around a failing project, to overcome all challenges and to assure the income generated from these projects. He told the Tribunal that under his management, the LSC project, which was audited every two years, never failed compliance or performance audit. This evidence was not challenged in cross examination and the Respondent produced no evidence to the Tribunal to suggest that there were any concerns about his performance.

5. The Claimant had two significant periods of absence during his employment, the first in 2010, for a period from the 9 November 2009 to the 10 January 2010 due to grief and stress reaction after the Claimant and his partner lost a baby. In 2012, whilst working for the Respondent he suffered with severe and constant pain to his shoulder and was later diagnosed with a subacromial impingement and supraspinatus tendinopathy. He also suffered from total hearing loss to his right ear and was diagnosed with sudden sensorineural hearing loss with bilateral tinnitus and vertigo. (a Tribunal has since concluded that the Claimant is suffering from a disability under the Equality Act – see below at paragraph 7). The Claimant was off sick in 2012 and the Tribunal saw the sick notes in the bundle at pages 132-5 of the bundle reflecting that he took 63 working days' sick leave due to his disability from the 4 April to the 8 July 2012.
6. The Claimant was made redundant in 2012 and the Tribunal saw the dismissal letter dated the 14 August 2012 at page 171-2 of the bundle. The letter stated that **“if you require a reference for any future potential employer, we will be pleased to provide one”**; there was no suggestion at the date of termination that the Claimant could not reasonably expect to receive a favourable reference that accurately evidenced his performance over his eight-year employment at the Respondent's organisation.
7. Following dismissal, the Claimant became aware from documents that came into his possession that his dismissal may be unlawful and unfair. He presented a claim for unfair dismissal and disability discrimination against the Respondent (case number 2358072/12 “the Tribunal proceedings”) on the 12 November 2012. The Respondent has since conceded that the dismissal was unfair but the claim for disability discrimination continues.
8. The Tribunal were taken to a guidance note produced by the Citizens Advice at pages 160-4 of the bundle on their internal management system called BMIS providing advice on providing references for employees and former employees'. Ms James the CEO of the Respondent at the relevant time, accepted that she had seen this document and it was referred to in her statement at paragraph 30 as “CAB guidance”. The section on references stated that **“Any reference provided by the Bureau for an employee should be well researched and avoid unfounded opinions. If negative, it should not refer to matters not previously raised directly with the employee. If asked to speculate on suitability, it should be cautious and where necessary use a disclaimer. It should aim to offer a balanced view without being too glowing or too damning unless wholly merited”**. Mr McGregor (present Chair of Trustees) stated that all CAB's followed their own local rules and procedures and could follow document on BMIS **“at their discretion”**. The

Claimant's evidence was that when he was in employment, he used the standard reference format on page 165 of the bundle (dated the 7 October 2010) and followed the above guidance; the document stated that **"it is our policy to provide references in the following format"**. The Tribunal find as a fact that the evidence of the Claimant is preferred that when he was in employment, references were provided in this format as a matter of policy, however the Tribunal concluded that this did not preclude the Respondent from completing a reference request sent to them by prospective employer. The document covered five specific areas, job title, dates of employment, main duties, disciplinary warnings in the last 12 months and reason for leaving. This document did not include details of sickness absences. The areas covered were objective and could be evidenced without the need to stray into opinion, this appeared therefore to be consistent with the guidance given on BMIS.

9. The Claimant applied for the role of Welfare Benefits Advisor at One Housing Group Limited in May 2015, by this date the Claimant had been unemployed for three years. He was interviewed on the 3 June 2015. The Claimant was offered the position on the 4 June 2015 and accepted the offer on the 8 June 2015. He was contacted by HR from One Housing Group on the 12 June 2015 (see page 106C) asking for him contact the Respondent organisation because they were keen for him to commence employment as soon as possible. By the 19 June 2015 no reference had been provided and he agreed to chase up the Respondent.
10. The Claimant emailed Ms James enquiring about the reference (see the email dated the 25 June 2015 at page 112 of the bundle timed at 11.16); he stated as follows: **"I am recovering from a disability related illness and keen to return to work after almost three years absence. A quick response from Merton and Lambeth CAB would ensure that my offer of employment is not withdrawn for lack of reference. My complaints against Merton and Lambeth CAB to the Employment Tribunal for victimisation and disability discrimination should not impede a reference as this might be deemed a continuing act of victimisation under the 2010 Eq A. As you well know a lack of reference within a reasonable time period or a faulty reference from Merton and Lambeth CAB would most certainly mean that the offer of employment is withdrawn."** Ms James stated at paragraph 8 of her statement that she felt that the Claimant had "intimated" that any failure to provide an appropriate reference would be considered to be an act of victimisation. The Tribunal noted that the Respondent was put on notice that the Claimant had been suffering from a disability related illness and they were aware that he had pursued a claim for disability discrimination against the Respondent.
11. In cross examination, the Claimant accepted that the Respondent could not ignore questions about sickness absences but in his opinion they had a duty to provide a reference using the standard format that was in the bundle at page 165 (which made no reference to sickness absence) as was their practice when he was employed by the Respondent. It was put to the Claimant in cross examination that it was his duty to highlight concerns about his attendance with Ms James (see paragraph 16 of her statement) prior to her completing the reference; he did not agree and told the Tribunal that it was not his place to do so as he did not know what

questions were going to be asked and what type of reference was to be provided. The Claimant's response appeared to concede that it was open to the Respondent to respond to a reference request by answering the questions put to them by a prospective employer. There was no evidence that the Respondent was obliged to use the form on page 165 and there was no evidence that the failure to use this form amounted to a detriment. The Claimant confirmed that he was not contending that his absence should not have been disclosed, however he expected to be consulted before the reference was finalised.

12. The Tribunal were taken in evidence to pages 115-6 which were exchanges of emails between Ms James and Ms Harris, former Chair of the Trustee Board and a Member of the Strategy Group. It was noted that within 2 hours of receiving the Claimant's email, Ms Harris had emailed Ms James on the 25 June at 13.11 (page 116) with the subject heading "**PM v MLCAB -Strategy Meeting**". Although the Tribunal requested to see the minutes of this strategy meeting, the Respondent stated that there were no minutes taken, however from the heading of this email the meeting appeared to have been convened to discuss the Claimant's case. Ms James replied to Ms Harris at 13.45 agreeing to update Ms Harris before the strategy meeting and had copied the Claimant's email to Ms Harris. In her statement at paragraphs 17-18 and 25, it was Ms James' evidence that the reason she kept Ms Harris "in the loop" was a matter of courtesy was because she was involved in the Claimant's Tribunal proceedings against the Respondent.

13. Ms Harris emailed Ms James on the 26 June 2015 at page 113 of the bundle, where she described the Claimant's reference application as being "**very problematic**". She accepted that a reference should be "**fair accurate and true**" but then commented that "**..the way that he has conducted himself within the litigation has been totally dishonest**". She went on to state "**However if this form is completed accurately the offer of a job would probably be withdrawn. Whilst Yve has suggested that MLCAB could just complete some of the form to try to avoid completing the section on performance, this makes me uneasy as Tony, a current trustee, Pauline, Stuart and myself are on record at the ET defending MLVAB's position by documenting PM's poor performance and dishonesty**". She then stated that "**If MLCAB just confirms his dates of employment, that could be perceived as victimisation, given that MLCAB normally do complete these forms and give full references**". She went on to state "**Either way, PM could sue. But as I type this email a possible solution has popped into my head which you could run past your HR advisers. I will call you later to discuss**". At page 117 Ms Harris emailed Ms James 7 minutes after this email had been sent, indicating that Ms James had suggested an approach to be adopted as Ms Harris wrote "**I will run the idea past Terry and call you afterwards**", this indicated that Ms James was not just keeping Ms Harris in the loop, she was consulting with her and others involved in the litigation and discussing the completion of the form to provide evidence on the form that was consistent with the evidence given by the Respondent's witnesses "**on the record**" in the Tribunal proceedings about the Claimant's alleged poor performance and dishonesty.

14. It was also noted that Ms Harris had expressed strong negative opinions about the Claimant's honesty and integrity formed based on the conduct of the litigation; those views were shared openly with Ms James. Although Ms James told the Tribunal at paragraph 25 of her statement that Ms Harris was no longer responsible for any decisions made by the Respondent organisation and that **"nothing she said played any part in the content of the reference"**, this did not seem to be consistent with the facts before the Tribunal. The litigation appeared to have been discussed in detail during telephone calls, meetings in emails and proposals were put forward by Ms Harris to Ms James to suggest ways in which the reference provided could show consistency with the evidence they had given in the Tribunal proceedings. The Tribunal conclude that Ms Harris had a significant involvement in the production of the reference and her views appeared to significantly influence the completion of the form.
15. Ms James conceded in cross examination that her evidence at paragraph 3 of her statement (and in the ET3) was incorrect where she stated that she held no negative opinions of the Claimant. Ms James accepted that she held strong negative views of the Claimant and the Tribunal on the balance of probability find as a fact that they had been formed out of personal antipathy against him because he had pursued a claim for discrimination against the Respondent, there being no other reason put forward in evidence for her obvious antipathy. Ms James also appeared to accept without question Ms Harris' negative opinions of the Claimant's performance whilst he was an employee; Ms Harris referred to the Claimant's performance as 'poor' as these were the words adopted by Ms James in answers given in cross examination to describe his performance to the Tribunal, this opinion was unsupported by any facts before the Tribunal; we conclude that this negative opinion was formed because he was pursuing a claim for discrimination against the Respondent.
16. Ms James completed the reference request on the advice of their legal representative Moorepay Compliance Limited. It was noted from the email exchanges above that the Respondent had the benefit of legal advice throughout.

The Reference

17. The first draft of the form was completed by an Administrative Assistant called Jackie Harvie on the 29 June 2015, the Tribunal were told that she collated the sickness absence figures and populated the form. Ms James then undertook the responsibility for the completion of the form.

Section 1 of the Reference form

18. Ms James was taken in cross examination to the completed reference at pages 111a-b of the bundle. In Ms James' witness statement at paragraph 29 she told the Tribunal that she answered "No" in Section 1, (which asked whether the Respondent would re-employ the Claimant) as in her honest opinion it was due to his high level of sickness absence. Ms James was asked why she failed to provide a reason on the form as requested and she replied **"I thought it would be assumed it was due to sickness and I did not want to provide any further information about**

the Claimant that may be detrimental” and the further information she was alluding to was a reference to an affair the Claimant had with the previous CEO of the Respondent organisation eight years earlier. The Tribunal noted that there was no reference to an affair in her witness statement or in the ET3.

19. The Tribunal did not find Ms James explanation to be credible, had the reason for failing to provide a reason for replying in the negative to this question had been an affair, this would have been in her statement but it was not. Failing to provide any reason for answering in the negative to this question was a detriment to the Claimant. It was noted by the Tribunal that there were no favourable comments made on this form about his employment history and no comments about his performance or about his clean conduct and capability history. The reference did not provide a balanced or fair picture of the Claimant’s eight year career to a prospective employer.
20. The Tribunal find as a fact that Ms James knowingly conveyed the impression to the prospective employer that she would not re-employ the Claimant due to his sickness absence, this was unfavourable treatment because of something arising from disability, namely his sickness absences in 2012. At the time the reference was provided, Ms James was aware that the Claimant was disabled as he referred in his email to disability related sickness and the Employment Tribunal had ruled in his favour and concluded he was disabled. Ms James accepted that she intended to convey the impression that she would not re-employ him because of his sickness absence and therefore intended to treat the Claimant unfavourably because of his sickness absence which in 2012 were for disability related reasons (see above at paragraph 5).

Section 2 of the Reference form: Performance details and Job Description

21. Section 2 of the reference document dealt with performance details and job description. The prospective employer asked the Respondent to fill in ten tick boxes asking for performance details. The boxes were not completed, instead the words appeared **“unable to complete due to not having not work (sic) with Mr. Mefful in a line management capacity”** (see page 109 of the bundle). The Respondent also provided the same response to the question of how suitable they felt the Claimant was for the position. The next question in this section asked if the Claimant had been the subject of any disciplinary action and the reply was **“I can find no reference to any disciplinary action”**.
22. Ms James told the Tribunal that the reason she left this section blank was because she had not personally managed the Claimant. She stated that **“I did not feel it was necessary or appropriate therefore to speculate on the Claimant’s performance”** (paragraph 16 of her statement). Ms James felt that the explanation she had given on the form was “reasonable”. Ms James added in cross examination that **“there were reams of information in your file that would not reflect well on you”** and that she would have had to put **“poor”** for some of the categories **“to be fair”**. The Tribunal noted that Ms James’ evidence to the Tribunal appeared to be contradictory, in her statement she said she did not wish to

'speculate' on the Claimant's performance because she had not managed him; however in cross examination she stated that she would have to mark him as 'poor' on some categories which suggested that she was able either to speculate or had evidence of his performance. The Tribunal found her evidence to be unreliable and inconsistent. We also concluded that her use of the word 'poor' to describe the Claimant's performance was the same word used by Ms Harris in her email. We therefore find as a fact that as Ms James had not line managed the Claimant, she could not have formed an independent opinion of his performance; the Tribunal conclude she was influenced by the opinion of Ms Harris when deciding how to complete the reference form and in her evidence given to this Tribunal about the Claimant's performance history.

23. Ms James also stated that as she had not line managed the Claimant, the notes in his file were not her own records and this was another reason for not completing this section on performance. She then added that **"the files were complex and he was in the Employment Tribunal process, I was attempting not to bring all this in to a reference"**. Ms James' answer given in cross examination referred to the Respondent having access to considerable information about the Claimant's employment history therefore the Tribunal concluded it would not be a matter of "speculation" or conjecture to complete this part of the form accurately and objectively. The Respondent could complete the reference using information in his file, but chose not to do so. The Tribunal find as a fact and on the balance of probabilities that Ms James decided not to complete this section after discussing this with Ms Harris who had suggested that they **"try to avoid completing this section on performance"**. Although it was suggested by Ms James that if she completed this part of the form it would have resulted in the Claimant receiving a poor rating for some categories; there was no objective evidence before the Tribunal that this was the case, this view had been formed out of her discussions with Ms Harris.
24. The Claimant told the Tribunal in answers to cross examination that it was not fair or reasonable to leave this section blank because he had worked with Ms James for 6 months; she would have had some knowledge of his performance, attendance, and managerial skills. The Claimant stated that this was unfair and a detriment to him because it would be reasonable for the HR department to fill out the form, they would not necessarily know the person but they could complete the form from the contents of the personnel file. The Claimant's unchallenged evidence was that whilst working for the Respondent he had received no warnings about his sickness absence and no warnings about his performance and his appraisals had always been good.
25. The Tribunal find as a fact that Ms James failed to complete part 2 of the form because he was pursuing a claim in the Employment Tribunal. The failure to complete this part of the form was a detriment to the Claimant because the Respondent provided no positive information about his career history despite the "reams" of information that were held on file about him. It would have been reasonable and appropriate to access the objective information about the Claimant in his role to complete this part of the form honestly and objectively to provide a balanced view. Ms James

failed to do so and produced no objective information about the Claimant's performance; the Tribunal conclude that this was done because he had presented and was pursuing a claim in Tribunal for discrimination.

Section 3: Attendance Details

26. This section asked about the number of sickness absence days taken. The list of sickness absence recorded on the reference was put to Ms James in cross examination. It was put to Ms James that (in the supplementary bundle R4 at page 5) that most of the sickness absences may be disability related and she replied **"it doesn't immediately say to me it was disability related or not"**. She also conceded that the Respondent had no records for 2011 but it was stated on the reference form that the Claimant was absent on the grounds of sickness for 43 days; Ms James was unable to refer the Tribunal to any documents to corroborate this number of sick days. The Claimant's evidence was that he took no sick days in 2011. Ms James told the Tribunal that the only information she had before her were the spreadsheets of the Claimant's sickness absence; they did not locate the SSP documents until sometime after the reference had been sent.
27. It was conceded by both the Respondent's witnesses that their sickness absence records were inaccurate. The disparity between the Respondent's records on the reference as compared to their evidence before Tribunal showed that his absences had been overstated by the Respondent by approximately 64.5 days. It was put to Ms James in cross examination that the Claimant's absence due to stress/grief reaction was a one off in 2009/10 which she accepted but in her view, she felt the Claimant had **"significantly high levels of absence in 2009/10 and 2012"**.
28. It was put to Ms James in cross examination that if the disability related sickness absence in 2012 and the grief and stress absence were taken out of the equation, the Claimant's sickness absence would be limited to 9 days per annum; she was asked whether she still stood by her paragraph 29 where she stated she would not re-employ the Claimant due to his poor attendance; she said she would still stand by it. She stated that she stood by this due to his sickness absence and due to the affair and dishonesty. The Tribunal again note that her view appeared to reflect the views expressed by Ms Harris despite there being no evidence before the Tribunal that the Claimant had been dishonest about his sickness or grief absence.
29. The Tribunal put to Ms James that there was no evidence of the Claimant's dishonesty and the affair as being part of the evidence considered by her in paragraph 29 and she stated **"it may well have been an error on my part but I refer to it in paragraph 29, I accept it wasn't detailed in any way that would be useful"**. The Tribunal find as a fact that there was no evidence of the Claimant's dishonesty during his employment. There was also no evidence provided why an affair was relevant. The Tribunal conclude that the sickness absence had been significantly overstated by the Respondent because the Claimant had presented a claim in Tribunal and as a result the Claimant was subjected to a detriment. The Tribunal find as a fact that Ms James answers in cross

examination reflected that she had formed the view of the Claimant's alleged dishonesty from the discussions with those involved in the Tribunal proceedings.

Section 4: Do you know of any reason why OHG should not appoint the [Claimant] to this post?

30. Ms James was asked why she did not complete section 4 of the reference which asked the question whether she knew of any reason why One Housing Group should not employ the Claimant; she left this blank. Her explanation for leaving this section blank was that she considered the **“information I was privy to about the other ET claim, not for disability and I did not wish to reveal the affair between the Claimant and the previous CEO and concerns as to how he had come across documents in the other ET, he was not someone we would re-employ”**. Ms James accepted that one of the reasons she left this blank was due to his ET claim, and the evidence and or information disclosed during those proceedings. The Tribunal conclude this this was the predominant reason for leaving this section blank. Ms James also appeared to have been swayed by what she had been told by Ms Harris (see above at paragraph 13) where she referred to the Claimant's conduct during the litigation proceedings. The Tribunal find as a fact that Ms James was significantly influenced by those involved in the litigation and consequently took the decision not to complete this part of the thus putting the Claimant's position with One Housing Group at risk.
31. Ms James added to her statement the details of a telephone conversation that took place after submitting the reference to One Housing Group, where she alleged that they had asked about the Claimant's sickness levels. In her statement, she then stated that she was **“unsure as to whether the Claimant had disclosed a disability. Whether sickness was due to disability is still outstanding”**. Ms James accepted in cross examination that she was aware at the material time that he was disabled. Ms James also conceded that although she was not fully up to speed on the judgment made by Judge Hall Smith concluding that at the material time, the Claimant was a disabled person under the Equality Act (sent to the parties on the 11 June 2015), she accepted that this was discussed at the strategy meeting on or around the 25 June 2015. Ms James also confirmed to the Tribunal that they had the benefit of legal advice throughout.
32. Ms James then amended the form and corrected the typographical error that appeared twice in Section 2 (see above paragraph 21) and removed reference to special leave in the attendance details (see page 111b). The completed reference was sent to OHG on the 30 June 2015. OHG withdrew the offer of employment on the 6 July 2015 (see page 117c). The reason the job offer was withdrawn was that they considered the Claimant's sickness absences to be disproportionate and they were influenced by the fact that the Respondent stated that they would not re-employ the Claimant (see C1 paragraph 6 and 7 of the One Housing Group's ET3 in case number 2302440/2015).

The Law

Equality Act 2010 Section 15 “A person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B’s disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim”.

Section 27 “A person (A) victimises another person (B) if A Subjects B to a detriment because B does a protected act”.

Section 27(2) “each of the following is a protected act: (a) bringing proceedings under the Act; (b) giving evidence or information in connection with proceedings under this Act”.

Section 27(3) “Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith”.

Submissions

The Submissions of the Claimant

33. These were in writing and will not be replicated in this section but are referred to in our decision, where relevant. The Claimant also relies on the following case law:

Ministry of Defence v Jeremiah [1980] ICR 13

AB v A Chief Constable [2014] EWHC 1965

Spring v Guardian Assurance [1994] IRLR 460

Pnaiser v NHS England and another UKEAT/0137

Nagarajan v London Regional Transport [1999] IRLR 572

34. The Claimant also added to his written submissions, that his Section 15 claim was linked to his sickness absence, his absences were overstated and disability absences were 45% of the total and it was admitted that Ms James left the section blank because of his disability absence.

The Submissions of the Respondent.

35. These were in writing but in outline stated that Ms James evidence was an extremely honest witness and there was sufficient basis on which the Tribunal could conclude that she fully intended to provide an accurate reference and it would be “completely senseless” to act in a manner that could prolong the losses to increase the Respondent’s exposure in the original claim. It was also added in oral submissions that Ms James provided evidence of the inaccurate figures and in doing so “put bullets into the gun” but also accepted that they were under a duty to disclose. They attempted to provide an honest and reasonable reference.

36. It was submitted that the Respondent could not provide a reference without referring to the Claimant’s sickness absences and if they had not provided the Claimant with a reference (or had dealt with it in a different way; see paragraph 27 of their submission) but would have a faced a claim for victimisation. It was submitted that the error contained in the reference was innocent. It was submitted that it was not credible that Ms James would re-check another person’s work (paragraph 30).

37. The Respondent distinguished between completed and pending proceedings and referred to the case of Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830. It was submitted that in the case of pending proceedings, an employer ought to be able to take steps to preserve their position without laying themselves open to allegations of victimisation. The test of the honest and reasonable employer was referenced. He submitted that the facts of Khan were analogous to this present case as they were aware there were ongoing proceedings and they “walked the line between balancing the obligations to One Housing and their perceived obligations towards the Claimant” (paragraph 36). It was stated that it could easily be concluded that the “substance of the reference was influenced by the fact that there was ongoing litigation, but this is worlds apart from a conclusion that the instigation of proceedings (as opposed to their continuance) affected the nature of the reference” (paragraph 37).
38. The Respondent stated that the protected act must be the reason for the treatment complained of and a simple but for test is not enough. It was stated that there were no grounds whatsoever to conclude that “the fact that proceedings had been issued, as distinct from the fact that they were ongoing, was in any way the reason for the way the reference was formulated”.
39. In oral submissions, he referred to the case of Kent Police v Barker UAEAT/0214/16 which dealt with inferences that can arise out of references, some of the questions from the Tribunal and some of the Respondent’s admissions show that things could have been done better.
40. He stated that from all the facts the Tribunal could not infer victimisation.
41. He then dealt with the Section 15 complaint, he stated that the treatment was not in consequences of a disability, it was an error by someone in HR. He stated that the aim of a reference was to be fair to all the parties and it was a proportionate means of achieving a legitimate aim. He stated that they got it wrong and it was “entirely justified”.

Decision

The unanimous decision of the Tribunal is as follows:

42. The first issue for the Tribunal is whether the Claimant has done a protected act, the Respondent accepts that the Claimant’s previous ET proceedings case number 235072/2012 is a protected act. The Tribunal conclude that the protected acts in this case are the bringing of proceedings and the continuance of those proceedings under the Equality Act. Although the Respondent in closing submissions makes a distinction between what he describes as the instigation of proceedings and the continuance of the proceedings, the Tribunal did not feel that this was a distinction that could properly be made under the Act. It was noted in the case of **Pothecary Witham Weld and another v Bullimore and another [2010] IRLR 572** handed to the Tribunal by the Respondent, an analysis

of the case law was seen at paragraphs 18-19 and more specifically of the cases of Khan and Derbyshire v St Helens Metropolitan Borough Council [2007] IRLR 540. It was noted that in the case of Derbyshire no distinction was made between employees pursuing and persisting in the pursuit of their claims. It was also noted by the Tribunal that the wording in Section 27 states that the protected act is the “bringing of proceedings” which is wider than the presentation of a claim. We therefore do not distinguish between the fact that the Claimant had “instigated” proceedings as opposed to the continuation of his claim, they are both an integral part of the bringing of proceedings against the Respondent under the Equality Act.

43. It was also held that the case Derbyshire that the case of Khan should not be read as providing for an honest and reasonable defence. It was concluded in the Potheary case that in the case of an act done by an employer to protect themselves in litigation involving a discrimination claim (paragraph 19), **“the act should be treated as straightforwardly as done by reason of the protected act i.e. the bringing/continuance of the claim..”** It was confirmed that employers are entitled to take honest and reasonable attempts to protect themselves in litigation, however if those actions could be regarded from the employees point of view as undue pressure to abandon their claim, it may amount to a detriment because they had pursued a claim. The reasonableness of the Respondent’s conduct should be judged when the burden of proof moves to them to show they acted in no sense whatsoever on that ground.
44. The Tribunal would like to make some observations about the credibility of the witness evidence before us. Ms James’ evidence was found to be inconsistent in that she “alluded to” considering matters that were not referred to in her statement when deciding not to answer the question in Section 1 of the reference document. She referred in cross examination to an affair that had ended eight years earlier but could provide no explanation as to why she did not refer to this in her statement and why it was a relevant consideration when providing the Claimant with a reference. The Tribunal conclude that this was intended to reflect the Claimant in a bad light. Ms James also intended to convey the impression that the Claimant’s inaccurate and significantly overstated sickness absence was the reason for failing to provide a reason of answering in the negative.
45. The documents in the bundle also showed that Ms James had sought the input of Ms Harris and Mr McGregor and we refer to this above; she did so because she was aware that the Claimant had previously pursued an ET claim against the Respondent. Ms Harris’ opinion was that in her view the Claimant had been “totally dishonest” in the litigation. There was consistent evidence that Ms James discussed the reference with Ms Harris and did not just keep her in the loop. Although the email evidence referred to above referred to the Claimant’s “poor performance and dishonesty” there was no evidence before the Tribunal to support this opinion and no evidence that this had been discussed with the Claimant at any time during his employment. The Tribunal also noted that the Claimant’s evidence in chief on his performance during his career went unchallenged in cross examination which cast into doubt the veracity of the Respondent’s evidence on this point.

46. Ms James accepted in cross examination that the reason why she did not complete section 4 of the reference form (which asked if she knew of any reason why the Claimant should not be employed by One Housing) was because she had considered the information about the Claimant's previous ET claim (see above at paragraph 30). The Tribunal found as a fact that Ms James' evidence in her statement at paragraph 25 that nothing Ms Harris said played a part in the content of the reference, was not credible as the evidence before us suggested otherwise as we have found as a fact above. Ms James' evidence at paragraph 29 of her statement that she failed to respond to this question due to his high sickness level was also inconsistent as she told the Tribunal that she considered evidence from the ET claim and his "affair".
47. It was conceded by the Respondent's witnesses that the Claimant's sickness absence records were inaccurate. Having been alerted to the fact of the Claimant's disability in his email to her and from her knowledge of his previous Tribunal proceedings, she failed to consider the reason for the sickness absences and whether they may be disability related. Ms James accepted in cross examination that she was aware that the Claimant was disabled at the relevant time. Ms James failed to check the sickness absence figures and could not explain why high sickness absence figures were recorded for the Claimant in 2011 where no records existed.
48. In comparison, the Claimant's evidence to the Tribunal was consistent, clear and was measured. The Tribunal took specific note that the Claimant conceded that it was reasonable for the Respondent to refer to his sickness absences in the reference but stated that the figures were inaccurate and no account was taken of his disability and the impact that this had on the level of his absences. As we have found the Claimants' evidence to be consistent and measured, where there is a dispute on the facts we will prefer the evidence of the Claimant where it is appropriate to do so.
49. The next issue for the Tribunal is whether the Claimant was subjected to a detriment. The Claimant refers to four detriments in his closing submission at paragraph 3. The Claimant states that failing to use what he described as the standard reference document (see page 165) placed him at a disadvantage as he had a reasonable expectation that they would use this document to provide a reference. The Tribunal have seen in the bundle other references provided by the Respondent and the consistent evidence was that if a form was provided by a prospective employer, this would be completed. It was taken into account that Ms Harris stated in her email (see above at paragraph 13) that the Respondent "normally" completed the forms provided by prospective employers and give full references therefore the Tribunal conclude that this was an accurate description of the procedure followed by the Respondent at the relevant time. There was no evidence that failing to use the form at page 165 was a detriment. The Tribunal concluded that it was the contents of the reference that was detrimental to the Claimant, not the format used to relay the information. Even if the Respondent had a policy or procedure that required them to use a standard document to provide references, there

was no evidence that failing to follow this policy placed the Claimant at a detriment.

50. The Claimant states he was subjected to a detriment because the Respondent referred to sensitive personal data “without his specific consent”. He states that the way in which the sickness absence figures had been compiled and presented on the form showed inaccuracies and was disclosed without obtaining his specific consent. In cross examination, the Claimant confirmed that he did not object to the Respondent providing sickness absence details but he expected them to contact him first. The Tribunal did not consider that providing the number of sickness days of was a detriment however failing to provide accurate information of his sickness absences was (see below). The Claimant did not indicate to Ms James when he sent her an email that he would like to be consulted on his sickness absence, if such details were to be provided. The Claimant has failed to show that providing sickness absence details without his permission amounted to a detriment.
51. Turning to the next detriment relied upon by the Claimant, that the information provided on the reference was not true accurate and fair. It was accepted by the Respondent that the sickness absence information was inaccurate to a substantial degree. It had been conceded by the Respondent that they had significantly overstated his sickness absence by 64.5 days (see above at paragraph 27 and in the Claimant’s submissions). The Respondent failed to take all reasonable care in the completion of this form; the reference could not therefore be described as well researched and no credible explanation could be provided as to why this occurred. The failure to provide a prospective employer with accurate data placed the Claimant at a detriment, it placed him in a bad light and resulted in the withdrawal of the job offer; One Housing Group taking the view that his absences were disproportionate.
52. The Tribunal then must consider whether the Claimant was subjected to a detriment because of the protected act. We have found as a fact that Ms James accepted that she felt animosity towards the Claimant and she felt he was dishonest; we have found as a fact that these opinions were formed out of her communications with Ms Harris. Ms James admitted that the Claimant’s Tribunal claim was a consideration when deciding how she would complete the form; the Tribunal therefore concludes from this evidence that she was significantly influenced by this fact and the comments by Ms Harris. The Tribunal therefore conclude that the burden of proof moves to the Respondent to show that the less favourable treatment had nothing whatsoever to do with the Tribunal proceedings.
53. The Respondent has failed to discharge the burden of proof. Insofar as they seek to rely on the actions of a reasonable employer seeking to defend themselves in legal proceedings, the Tribunal did not consider it to be the actions of a reasonable employer to include inaccurate and significantly overstated figures in a reference. Ms James confirmed that she intended to provide the impression that they would not re-employ this person due to his sickness absences and the Tribunal found those sickness absence figures to be significantly inflated. Ms James also confirmed that she considered the Employment Tribunal proceedings and how the Claimant came across documents in those proceedings; that was

the real reason why she failed to indicate why she would not re-employ the Claimant. It was put to the Tribunal by the Respondent in closing submissions that this was a mere error by Ms James and to expect her to check someone's work would not be credible (paragraph 30) however it was Ms James evidence to the Tribunal that the evidence on the reference was accurate, honest and fair (paragraph 26). She did not state it was an error by her administrative staff. The Respondent has failed to show that the less favourable treatment had nothing whatsoever to do with the Tribunal proceedings. The Claimant's claim is therefore well founded.

54. The last detriment relied upon by the Claimant is that the reference created an **"unduly selective and misleading impression"**; he specifically relies upon the failure to complete section 2 of the form and answering "No" to the question of would you re-employ the Claimant and the failure to answer question 4. We have found as a fact above that Ms James' evidence for not completing section 4 was not consistent or credible; she accepted that it would be assumed the Respondent would not re-employ due to his poor sickness record and the figures had been significantly overstated thus presenting the Claimant in an unduly poor light as someone who was unlikely to be able to attend work regularly.
55. Ms James accepted that she held strong negative views about the Claimant and we have concluded from the evidence that her personal antipathy had been formed because of his pursuit of employment Tribunal proceedings and she appeared to adopt the views expressed by Ms Harris in her evidence given to the Tribunal that the Claimant was "dishonest" without providing any credible evidence in support of this view. Ms James accepted that she consciously considered the employment Tribunal proceedings (at paragraphs 23 and paragraph 30 above in our findings of fact) and this had influenced the way in which the reference was completed.
56. The Respondent failed to provide any favourable information about the Claimant personally or about his performance on the form. This amounted to a detriment and it created what appeared to be an entirely false and misleading impression of his successful eight-year career with the Respondent. Ms James' accepted that one of the reasons (and we conclude that this was the predominant reason) that no information was provided in section 2 of the was because **"he was in the Employment Tribunal process"**. The reference that was provided did not present a fair or a balanced view of the Claimant as an employee. Although Ms James referred to the Claimant's "poor" performance, there was no evidence that any performance issues had been raised with him during his employment and the Claimant was not challenged on his evidence that his performance was always considered to be good. The Tribunal also found as a fact that Ms James gave conflicting evidence on whether she could provide a view of the Claimant's performance on the form (see above at paragraphs 22-23 above in our findings of fact); it was noted that description of the Claimant's performance to the Tribunal as 'poor' corresponded with the view communicated to her by Ms Harris. We concluded therefore that Ms James had been significantly influenced by those involved in the Tribunal proceedings. We conclude that this created a misleading and unduly negative view of the Claimant and was a detriment to him.

57. The Respondent failed to answer question 4 and the Claimant states that this was a detriment. Ms James told the Tribunal that the reason she did not answer this question was because she had considered his ET claim and other matters (i.e. the affair). Ms James also indicated on the form that she would not re-employ the Claimant (see above at paragraph 18-20 and paragraph 30) and she told the Tribunal that she did not provide a reason because she thought that One Housing Group would assume it was due to his sickness absence. Ms James's failure to respond to this question honestly and objectively placed the Claimant at a detriment as it conveyed a negative impression of his career as an employee of the Respondent and resulted in a job offer being withdrawn.
58. The next issue is whether the Claimant was subjected to a detriment because the Claimant had done a protected act. The Tribunal has made detailed findings that reflect that Ms James was aware of the protected act and was in communication with those involved in the ET proceedings on behalf of the Respondent. The findings of fact made by the Tribunal have concluded that Ms James was influenced by the hostile views of Ms Harris and those views were expressed by Ms James in Tribunal. Ms James also confirmed that the reason she completed the reference in the way she did (which we have concluded was a detriment) was because of the protected act.
59. The Tribunal also noted that on termination of the Claimant's employment, the Respondent indicated that they would be pleased to provide him a reference however the only matter that intervened between the date of dismissal and the reference being provided was that the Claimant issued proceedings against the Respondent and pursued his claim. The Tribunal therefore conclude that the Claimant has shown facts from which the Tribunal could conclude that he has been subjected to a detriment because he had instituted proceedings against them. Ms James also conceded to the Tribunal that she had formed a negative opinion of the Claimant because of the claim raised by him and this negatively impacted on the way that she completed the form. The burden of proof therefore moves to the Respondent.
60. The Respondent in closing submissions stated that Ms James made an innocent error but Ms James accepted that she discussed the matter with Ms Harris and Mr McGregor and they went to the rest of the Board to discuss the issue, she also took professional advice. We conclude on the balance of probabilities that Ms James had not made an innocent mistake or error; the wording of the reference was discussed with those involved in his previous ET and their views influenced Ms James. The Respondent failed to provide a credible explanation as to why they failed to check the sickness absence figures and why they did not use their reasonable endeavours to ensure that the reference was populated with well researched and accurate information (see above at paragraph 8). The Respondent's conduct in the compilation of the figures could not be described as reasonable.
61. In this case a reference was provided and we therefore prefer the Claimant's submissions and conclude that the case of Khan should be distinguished on the facts. Ms James stated that the Claimant's previous claim played no part in the content of the reference (paragraph 30), there

was no evidence therefore that the Respondent was protecting its position by deciding the completed the form in the way that it did, the Respondent's position was that they were in no sense whatsoever influenced by it.

62. The Tribunal have concluded that the reference was not honest fair or accurate. The only facts that were entered on to the form were highly prejudicial to the Claimant. There were no facts that evidenced his work for the Respondent or to indicate his achievements over his eight-year career. No positive views or opinions were expressed by Ms James and it was therefore inevitable that the job offer would be withdrawn once the reference was received. The Respondent has failed to discharge the burden of proof. The Tribunal unanimously conclude that the Claimant's claim for victimisation is well founded.
63. The Claimant claims that he has been treated unfavourably because of something arising in consequence of his disability. We have found as a fact that Ms James was aware of the Claimant's disability at the time the reference was completed (see above at paragraph 20).
64. The Tribunal have found as a fact that Ms James confirmed that the reason why she responded in the negative to the question in section 1 about whether the Respondent would re-employ the Claimant was because of his sickness absence. Ms James also accepted that she failed to respond to question 4 for the same reason.
65. The Tribunal found as a fact at paragraph 5 above that the Claimant was off sick for a disability in 2012 for 63 days and at paragraph 20 Ms James intended to give the impression that she would not re-employ him because of his sickness absence. We conclude that disability related absences formed a significant proportion of the absences relied upon by Ms James to create this impression and that his sickness absence had been significantly overstated. The Tribunal therefore conclude that the Respondent treated the Claimant unfavourably because of something arising in consequence of his disability namely his disability related sickness absences. The burden of proof therefore moves to the Respondent to show that the treatment was a proportionate means of achieving a legitimate aim.
66. The Respondent in their closing submissions submit that the provision of a reference is a proportionate means of achieving a legitimate aim and they got it wrong; they state that it was entirely justified. The Respondent stated that there was no connection between the consequences of the administrative error and the Claimant's disability, the Tribunal conclude however that this was inconsistent with the evidence before the Tribunal. The Tribunal found as a fact that Ms James was aware of the disability and filled out the form knowing that it conveyed the impression that they would not re-employ the Claimant due to his high sickness level; that is why she provided no explanation.
67. The Respondent has failed to provide any evidence to show why their conduct in completing in the form in the way that it did was a proportionate means of achieving a legitimate aim. The Claimant's claim for discrimination arising from disability is well founded.

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68. The matter will now be listed for a remedy hearing; the parties are to see if they if they avoid the need for a further hearing. However, if settlement cannot be reached, the parties are to indicate to the Tribunal within 28 days how long the remedy hearing should be listed and their dates to avoid for a period of three months. The Claimant is also ordered to provide an up to date schedule of loss 28 days before the remedy hearing. The parties are ordered to agree a bundle of documents for the remedy hearing containing all the evidence the Claimant wishes to rely upon in respect of his attempts to mitigate his loss. This bundle is to be agreed 28 days before the hearing and shall be put together by the Respondent. The Respondent shall bring five copies of the bundle to the hearing. The parties are to exchange witness statements 14 days before the hearing.

Employment Judge Sage

Date: 2 May 2017