



EMPLOYMENT TRIBUNALS

Claimant: Miss C Horan

Respondent: Manchester University NHS Foundation Trust

HELD AT: Manchester **ON:** 12,13,14 & 15 December 2017

BEFORE: Employment Judge Holmes
Ms F Crane
Mr W K Partington

REPRESENTATION:

Claimant: In person

Respondent: Ms Smith, Counsel

JUDGMENT having been sent to the parties on 18 December 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 the following reasons are provided:

REASONS

1. By a claim form presented on 7 December 2016 the claimant brings complaints of disability discrimination against the respondents, who are her former employers, arising out of a reference that was provided by them and in particular by her former manager Mrs Salamone which was supplied to Pennine Care NHS Foundation Trust sometime between 15 January and 1 February of 2016. The claimant had been offered a post with Pennine, but following receipt of that reference from Mrs Salamone, and indeed a reference from another referee Miss Sally Grimwood that the claimant had supplied to the Pennine recruiters, the offer of a job with Pennine was withdrawn. The claimant alleges that this was a result of the terms of the reference that was provided to Pennine by Mrs Salamone, and that in the provision of that reference in the manner in which it was provided to Pennine the respondents were guilty of one or more of three types of discrimination, her claims being put as either direct discrimination under Section 13 of the Equality Act, Section 15 discrimination by reason of something arising in consequence of the disability or alternatively, a failure to make reasonable adjustments. The disability in question is Chronic Otitis Externa, an ear condition which affects the claimant's hearing, balance and causes her pain, for which she had a number of absences during the time of her employment with the respondent.

2. Her disability is admitted. The claim was originally found to be out of time but the claimant successfully applied at the beginning of this hearing for an extension of time to present the claim which was permitted by the Tribunal. I should make a correction to the judgment that was issued in relation to that application, however, as in the course of it I mentioned, in relation to the effect of the delay on the cogency of the evidence, the discovery of certain documents subsequently after the original reference had been seen by the claimant in August 2016,. In that judgment I indicated that those documents had been found during Mr Monaghan's investigation. That was an error, they were in fact found after it, but that does not affect the Tribunal's reasoning in terms of the grant of the application, but we make that correction to the erroneous statement made in those reasons.

3. The claimant has been unrepresented, and has been supported on some of the days of the Tribunal hearing by Mr Gill, and indeed he made a witness statement which was referred to in the application to extend time. The claimant has given evidence herself, and has adduced a witness statement from Sally Grimwood who was her trade union representative, and indeed the other referee who provided the reference to the Pennine Care NHS Trust. Ms Smith of Counsel appeared for the respondents and the Tribunal has heard for the respondent's evidence from Ms Salamone, from Mr Carl Monaghan, who carried out the investigation following the claimant's complaint, and from Mrs Susan Cole of HR who also had dealings with the complaint and indeed was the person who signed the outcome letter.

4. There has been a bundle comprising of two files of documents, some other documents have been produced during the course of the hearing, there has been a list of issues prepared by the respondent, but which has been accepted by the Tribunal as being the relevant issues in the claims. There has also been a skeleton argument submitted on behalf of the respondent, which the claimant has seen. Both parties have made their submissions to the Tribunal. In the light of all that evidence and the documents the Tribunal now makes the following relevant findings of fact.

4.1 The claimant was employed by the respondent as a Healthcare Assistant in the Women's Health Unit (or Suite, as it seems to be known by both terms) at Wythenshawe Hospital. She commenced that employment on 5 July 2010. That unit comprised of a number of clinics and wards which dealt with a number of aspects of women's health, including breast cancer and gynaecological treatment,. As I have indicated it comprised a number of different rooms and clinics, and there were wards where patients would stay for overnight procedures. The Healthcare Assistants were there to provide assistance to the nursing staff, and there was usually a ratio of five nursing staff to one healthcare assistant, but on occasion, particularly when there were staffing difficulties, that could go down to there being only one healthcare assistant on duty. That occurred to the claimant from time to time as indeed it did to other colleagues of hers who also had to work on their own.

4.2 The claimant's employment ended on 28 July 2015, and by the time that her employment ended her working week was 22.5 hours which was agreed between her and the respondents. The claimant had a number of significant periods of sickness absence during her employment. This was for a number of reasons, and was not always related to her ear condition, but her

attendance was seriously affected by that, and other conditions. As a result of that she was taken through the respondent's attendance procedure on various occasions, proceeding through stage one and ultimately to stage three which resulted in the termination of her employment.

4.3 In terms of the lead up to that, on 2 June 2015 a stage three hearing was held, the result of which was that the claimant was to be redeployed for some three months, after which period her employment would be reviewed and she was at risk of termination if that redeployment did not result in her subsequently obtaining a more permanent position within the respondents.

4.4 The position at that time that the claimant was to be redeployed was based upon an occupational health report of 21 May 2015, which is at page 358 of the bundle, in which the medical opinion was given that the claimant was at that time unfit to continue with her duties on the women's health suite, and this was by reason of her ear condition which meant that she could not continue to work on a busy and noisy ward. This was a result with which the claimant agreed, in that she that she could no longer continue in that role and would therefore have to be redeployed.

4.5 That report confirms that the claimant's condition was covered by the Equality Act, as the respondents of course have conceded and she was recommended for a phased return to work. On the second page of the report it is recorded that she would be likely to struggle in busy environments with a lot of background noise, she would be unfit for any role involving manual handling of patients or supporting patients with impaired ability to walk on account of her slight balance issue, and it was suggested that lighter physical work and chaperoning ought to be achievable for her. It was against that background that the redeployment was suggested, and agreed to by the claimant. She was therefore to be redeployed as an Admin Assistant in the Nightingale and Genesis Centre.

4.6 The claimant indeed started that redeployment on 11 June 2015 but unfortunately she was then absent through sickness from 25 June 2015. Consequently the stage three procedure was reconvened and the respondents considered termination of the claimant's employment on the grounds of her ill health. In terms of the stage three procedure, that was carried out (as indeed had the previous meeting) by Keeley Heggarty who was the Divisional Manager of Women's and Children's Services, and it was she who chaired those meetings. The claimant's line manager Mrs Salamone was present in those meetings, but her role in those meetings was to present the management case. She had prepared a document, the management statement of case, which is undated but was prepared in March 2015, and is at pages 262 to 343 of the bundle.

4.7 That statement of case sets out the beginning pages (page 264) in fact a history of the claimant's sickness absence at that time, which was March 2015. At that time it is recorded that over the totality of her employment, that is over five years or so, the claimant's sickness absence was some 810 days over 27 occasions, and those occasions are set out in tabular form in that

document . In the second part of it (on page 265) the most recent sickness absences leading up to the further stage three are recorded in early 2015, and in February and March of that year. Consequently Mrs Salamone presented the management case in those meetings , and as a result of the stage three procedure and the claimant's further sickness absence , her employment was terminated by the respondent. At the conclusion of these proceedings however the claimant asked whether Mrs Salamone would provide her with a reference in the future , and she agreed to do so. There was no further conversation about the form of reference, there was simply a request and an agreement that such a reference would be provided. The claimant did not appeal the decision to dismiss her, and that does not form any part of the claims before us in these proceedings..

4.8 The claimant , having thus left the respondent Trust , sought alternative employment and was potentially successful in that endeavour , because she was interviewed on 13 January 2016 by Pennine Care Foundation NHS Trust for a post described as an HCA (a Healthcare Assistant), but one which was in fact to be rather different in practical terms from the role that she previously held with the respondent , in that it was to support the School Nurse Service. This would be initially an administrative role , with the possibility thereafter of the claimant going out into schools supporting the nursing staff , but in terms of the working environment compared to the Women's Health Suite which she had previously worked , and the wards upon which she had previously worked, this was to be a different environment, and one which the claimant was confident that she would be able to cope with in terms of the effects of her disability upon her ability to carry out that new role.

4.9 Consequently the claimant had the interview on 13 January 2016 and was told , either then or shortly thereafter , but entirely verbally (there is nothing in writing) that she would be offered the role subject to suitable references. Consequently it was that she then contacted Mrs Salamone to inform her to inform her on 15 January 2016, by email that she had applied for and been offered this post , and asking her to provide her with a reference. That email is at page 379 of the bundle. In it the claimant sets out the details of the post, and how she had made the panel aware , as indeed she had , during the interview of the circumstances why she could not carry on working in a ward environment , and of her time off due to her Chronic Otitis Externa. She went on to say , however , that she was feeling much better after having had intensive treatment , and that both her GP and Consultant had now agreed that she was fit to return to work, and they had deemed the new position to be very suitable for her..

4.10 That was the request that Mrs Salamone received in terms of the reference that Pennine would require from her. The claimant also provided to Pennine , as another potential referee , the name of Sally Grimwood who had been her Trade Union Representative for two years whilst employed in the Trust , and so she was put forward as another referee. Mrs Salamone had been the claimant's line manager, Mrs Grimwood however was put forward as a potential personal referee rather than as a management referee as she clearly was not in that category.

- 4.11 In terms of the reference to be provided, Pennine, in common doubtless with many other NHS Trusts, had a standard form of reference request , and this was sent to Mrs Salamone for her to complete. This was done electronically through the Apps Track system , and in due course Mrs Salamone , sometime between 15 January and 1 February , completed that reference. She did not seek any documents from the claimant's personnel file, but went solely from her recollection and experience of her.
- 4.12 The reference in question around which this case has centred starts at page 396 of the bundle , and goes through to page 400. In terms of that reference , the claimant did not see it at the time and was obviously unaware of exactly what it said It was therefore a surprise, and something of a shock for her to learn by letter of 1 February 2016 (page 380 of the bundle), that Pennine were withdrawing the job offer that they had made to her What is said in that letter is: "*unfortunately as a result of unsatisfactory references we are no longer able to pursue your application for the post of Healthcare Assistant*" and therefore the provisional offer of employment was formally withdrawn.
- 4.13 The claimant was , as one would expect , upset and surprised at that turn of events , She initially sought to obtain a copy of the reference from the respondent. Mrs Salamone , however , had not kept one and the claimant then sought advice as to how to go about obtaining a copy. The Tribunal has already dealt with the evidence in relation to the steps taken about that between March and August 2016 , in the extension of time application and nothing relevant to the findings we make in the substantive claim really turns on any of that.
- 4.14 Suffice it to say that the claimant , in due course, did make a Subject Access Request of Pennine , as a result of which , around about the middle of August 2016 , she received a copy of the reference , and could see what it is that Mrs Salamone had put on it. As a result of that she sought to raise a grievance , or complaint , with the respondents She was now of course an ex employee , so she initially made enquiries about how to go about that. On 27 August 2016 (and that is the date although there seems to have been some doubt about it ,but it is clear that there is an accompanying email at page 457 which confirms the date of the undated attachment) the claimant set out (at pages 458 and 459 of the bundle) that she complained of the reference that had been provided by Mrs Salamone to Pennine on her behalf.
- 4.15 That is a two page document in which the claimant sets out the history of the matter , but in terms of the complaints made in that document they start at the bottom of page 458 where the claimant says this:

"I feel that the reference provided by Christine Salamone is not a fair, accurate or true representation of my employment with the respondent to paraphrase and I would like to be provided with justification for such a reference. Failing such justification I believe she has failed in her duty of care as a Ward Manager by providing a defamatory reference".

4.16 The claimant then goes on , in the second page of that document , to refer to specific parts of the reference , and the assessments that were made in relation to various aspects that were ticked in the boxes provided upon it. She then goes on to assert that this was contrary , as it were , to the appraisals that she had had , effectively complaining that the reference was not a fair one, and she continued towards the end of the penultimate paragraph on that page to say this:

"I cannot understand how the conclusion was reached that my relationship with her was below average and not to standard, I always conducted myself in a professional manner towards her, that being a reference to one of the boxes that had been ticked in the reference".

4.17 She went on to say how she was seeking legal advice on the matter and had requested a copy of her personnel file to be sent through to her.

4.18 Having received that complaint , the respondent set about dealing with it , and to that end appointed Carl Monaghan , a Modern Matron , to investigate the grievance in September 2016, and he liaised with Mrs Susan Cole of HR in relation to that task . He sought out the claimant's personnel file. Upon doing so he discovered that it did not contain very much , and was somewhat surprised at the lack of documentation in it. He met with Mrs Salamone to discuss the claimant's complaint , and to go through with her why Mrs Salamone had rated the claimant as she had done in the reference. He did consider that there was a lack of documentation on the claimant's file and he would have expected rather more , having found only one appraisal upon it. The claimant had contended that she had more than had one appraisal , which is almost certainly correct but that there was only one in the file , and Mr Monaghan expected to find rather more , along with documents such as records of one – to – ones , or other discussions between Mrs Salamone and the claimant.

4.19 The purpose of Mr Monaghan's investigation was to ascertain whether or not the claimant's complaints about the reference provided by Mrs Salamone were justified , and to that end he went on to assess the answers that she had given in the light of what she said to him and the documentation that he was able to find at that time. His view was , having spoken to Mrs Salamone , was that , for the reasons that she explained to him and which she went on to explain to the Tribunal (to which we will return in a moment), in fact the assessments that she had made, particularly in relation to what could be called the assessments of the qualities of the claimant , were ones that she actually held , notwithstanding that there was not much documentation to support them . His view was that in fact she had given a reference that she considered was true and accurate , and that the claimant's complaint therefore was not likely to be upheld by him. Nonetheless because he was liaising with Mrs Cole of HR , he discussed the potential outcome with her . For various reasons it was she , and not he , who ultimately signed off the outcome letter , and consequently the letter from the Trust to the claimant dated 26 September 2016 was not signed by Mr

Monaghan but was signed by Mrs Cole on his behalf. In that letter the following appears: *"as explained in the email to you from Emma Carter dated 5 September the Trust commenced an investigation into your complaint and the contents of the employment reference provided by Christine Salamone, the investigation process has now been completed. The investigation has found no written evidence to confirm that the content of the reference provided to Pennine NHS Trust is factually correct, the investigation has highlighted learning that the Trust must undertake for providing employment references which will ensure is implemented. We would like to take this opportunity to apologise to you for the contents of this employment reference and to wish you ever (sic) success in your future employment"*

4.20 That, as I have indicated, was signed by Mrs Cole, but it is a conclusion and letter with which Mr Monaghan personally disagrees, because he would have written something different, and would not have given the impression that the Trust was accepting that the reference was not a fair and accurate one. This letter goes rather further than Mr Monaghan, and had he been able to author the letter himself, and check it before it went out, would actually not have sent out.

4.21 Be that as it may for reasons that Mrs Cole has explained in her witness statement to the Tribunal, and in her evidence to the Tribunal, that is what the claimant received, and consequently she took further advice, and ultimately brought these proceedings.

4.22 In terms of how matters then progressed although they are perhaps somewhat of side relevance to the issues in the case, for completeness there then ensued some communication between the claimant and the Trust as to how references would be dealt with in the future and consequently, for example, when it came for a reference to be provided for the claimant to a medical practice in Timperley, there was an agreed reference to the effect that the Trust wrote to the claimant on 22 June 2015, page 485 to 486 of the bundle, in which an agreed form of wording was set out which is briefly this:

"To whom it may concern

Kathryn Horan was employed by the Trust from 26 January 2010 to 28 July 2015 in the role of Healthcare Support Worker. She worked on our F16 ward including the Women's Health Unit on a part time basis 22.5 hours per week. In her role she supported nursing staff with the care of patients admitted for gynaecology and breast care procedures. During the course of her employment Kathryn was honest and trustworthy and was not subject to any disciplinary proceedings, Kathryn left the Trust employment due to ill health."

4.23 That was the form of reference with which the claimant agreed and which was provided to that particular potential employer. In terms of other references there was apparently a reference internally within the Trust because the claimant applied for a job within the same Trust and there was a similarly worded reference provided internally. In terms of how references are dealt with Mrs Cole agreed that in certain circumstances what could be called

the standard format of the request from the potential employer and the “tick box” and online completion forms could be dispensed with and other bespoke agreed references , such as that provided to Park Medical Practice , could be provided in certain circumstances , but that had not , of course, occurred in the claimant's case until after she had complained.

4.24 In terms of the reference itself ,and the basis of the claimant's claims the matters which give rise to them are specifically as follows. On the first page of the reference, page 369 the request from the potential employer is to provide details of the claimant's sickness record over the past two years of her employment, Mrs Salamone entered there number of days 411, number of occasions 12. The claimant does not take issue with those as figures but thereafter in the second part of the box a comment is added, "comments" Kathryn suffered with a chronic ear condition.

4.25 The next section in the reference with which the claimant has issues is the second page, middle section which has a number of tick boxes with headings : “above average/surpasses standard, average/meets standard, below average/does not meet standard or not applicable” , and thereafter there are some seven headings under which ratings are to be provided by means of ticking the relevant box . In the particular case the relevant boxes that had been ticked that Miss Horan takes issue with are those for “team working”, “quality of work”, and “working under pressure” , where Mrs Salamone has ticked the box “below average/does not meet standard”.

4.26 Over the page , in another section with tick boxes and headings , there is a section with boxes to be ticked in relation to “relationship with line manager” and again in relation to this Mrs Salamone ticked the box “below average/does not meet standard”.

4.27 Over the page (on 399 of the bundle) there are some specific questions in relation to the claimant's application, the third of which is this:

“on reading the job description for the position that Kathryn is applying for would you consider that Kathryn is capable of carrying out this post”

to which Mrs Salamone answered "yes".

The next but one box , however , asked this:

"would you re-employ Kathryn in a similar role/offer a further period of study"

to which Mrs Salamone has then written "no". The ensuing box says : “if no please state why”, and there Mrs Salamone has written:

"the ward is a very busy surgical ward and as such Kathryn is not suited due to her ear condition",

In the next box, “any other comments” Mrs Salamone has written

"due to her ongoing health problems Kathryn was unable to fulfil her role to her best ability",

In relation to the claimant's complaints , it is the box in relation to re-employment that the claimant also complains of in these proceedings. So there are consequently six aspects of the reference which form the subject matter of the claims the claimant makes before us.

4.28 In terms of the other evidence before us , after the investigation process had been completed , and consequently not available to Mr Monaghan at the time that he made it, certain other documents have come to light which were not available either to Mr Monaghan or indeed probably to Mrs Salamone . They are an appraisal document dated 27 July 2017 , which is at pages 87 to 94 of the bundle, another appraisal dated 8 November 2012 at pages 112 to 119, the claimant's mandatory training record at pages 476 to 477, a note from Mrs Salamone about an incident on 11 November 2013 which is at page 151 of the bundle which relates to the claimant's notification of her sickness absence on that occasion. There is further a file note from Mrs Salamone dated 25 November 2014 at page 239 of the bundle. At page 255 there is a file note , apparently from one Annette Fairclough the Housekeeper which was found by Mrs Salamone on her computer, and which she has dated as being provided on, or relating to an incident on, 10 February 2015, and the claimant's mandatory training record is at page 232A of the bundle.

4.29 In terms of the history of the claimant's employment , and the various matters that are contained in these documents and which are alleged to have occurred during her employment, the claimant has disputed many of these save in respect of two incidents.

4.30 In broad terms the claimant accepts that there were occasions when she was late , but she does not accept that she notified her employer inappropriately , or late and she certainly does not accept that she disrespected Mrs Salamone in any way when she was berating her about lateness, particularly as she contends that Mrs Salamone herself was shouting on that occasion .

4.31 In relation to an occasion when (unwitnessed , in fact, by Mrs Salamone but reported to her) the claimant was allegedly in breach of the uniform policy because , it was alleged , she was wearing false nails. The claimant denies that, but does accept that there was an occasion when, contrary to that policy, she presented at work wearing nail polish, which she then indeed did remove . In terms of the disputes as to the various incidents the claimant does not accept everything that is recorded in these documents and her contention is that these are not accurate accounts.

5. Those then are the relevant facts. In terms of the law , as has already been set out to some extent in Ms Smith's submissions , we are dealing with three sections of the Equality Act and they are, firstly Section 13, which is direct discrimination, which simply provides that 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 . The relevant part , of course, is that the treatment must be because of the protected characteristic , and for that purpose of course has to be a comparator and that comparator can either be a real comparator, an actual comparator or a hypothetical one, in this case the claimant does not point to anyone else as an actual comparator , and relies as indeed most claimants would in these circumstances, upon a hypothetical one.

6. The other section engaged in relation to the second claim that the claimant makes is discrimination arising from disability under Section 15 of the Act , which provides that a person discriminates against another if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

7. Finally the third type of claim the claimant is making is that of failure to make reasonable adjustments. The duty to make reasonable adjustments arises under Section 20 , and failure to comply with the duty to make reasonable adjustments is of course itself a form of discrimination.

8. So those are the three types of claim that the claimant makes. The parties made submissions, Ms Smith for the respondents went first , and provided a skeleton argument and spoke to it. Given that her submission have largely been what is contained in that document the Tribunal does not propose to rehearse its contents in any great detail here.

9. The claimant being unrepresented took the time overnight to consider the respondent's submissions, and made her own this morning. She is not a lawyer and, of course, is not expected therefore to make any legal submissions. In relation to her submissions they were largely to this effect. The reference that was provided was not a true and balanced review of the five years that the claimant worked with the respondent, that it focussed upon what she could not do, it focussed upon when she was ill and not when she was fit for work, it was unfair, inaccurate and not a true reflection . Consequently it was discriminatory, because it effectively was something to do with her disabilities , or the absences she had because of those disabilities. She questioned why it would be , in these circumstances, that Mrs Salamone could not , as was clear to the Tribunal in Mrs Cole's evidence, have gone to HR if she had any difficulty in providing a good reference for the claimant , and seek some sort of alternative of the type which clearly can be , and has been, provided in certain circumstances. She suggested in overall terms that the evidence in support of Mrs Salamone's assessment of her was light weight, had not been available at the time, was clearly not considered at the time by Mrs Salamone and was therefore not supportive of the conclusions that she had made and which she had put into the reference which of course had had such the damaging effect for her. So, in summary and hopefully doing justice to those submissions but they were largely factual as one would expect , she urges the Tribunal accordingly to find for her on that basis.

Discussion and Findings.

10. In terms of the claims therefore , and their determination , the Tribunal proposes to deal with them in the order suggested by Ms Smith . In terms of the types of claim to go through them in that order , the first , of course , is the direct

discrimination claim, and that is to say the claimant claims that the discrimination in the form of the provision of the reference that Mrs Salamone did provide for her was an act of direct discrimination, she treated her that way, which was less favourable than she did treat , or would have treated a hypothetical comparator. Ms Smith points out that in those circumstances the hypothetical comparator must be someone with the same characteristics and history as the claimant , and that is to say a previous employee who had a history of long term and high number of sickness absences for varying reasons , who requested a reference in the same format from the respondent . That does indeed seem to us to be the correct hypothetical comparator.

11. Of course , the initial issue is as to whether or not the reference provided was less favourable treatment, the primary submission is that it was not, it was not a bad reference , and indeed Mrs Salamone considered that it could in fact be viewed in that way. The claimant clearly did not view it that way, but in relation to those, what could be called “qualitative” assessments on the second page Mrs Salamone's evidence was that she would regard those, as a manager receiving such a reference, as matters that could be addressed in training, or development in the job, but the claimant clearly does not take that view and she considers that she was thereby being treated less favourably than a non- disabled person would be.

12. In terms of the test to be applied the Tribunal has to be satisfied (and there is an initial burden on the claimant in this regard) the Tribunal accepts that this could be less favourable treatment than would have been meted out to a hypothetical comparator. The Tribunal must be satisfied also that if that is the case that the reason why the reason for the treatment was the claimant's disability, and so both of those matters have to be satisfied. In terms of the first of those, in terms of whether a hypothetical comparator would be treated differently the Tribunal is not so satisfied, it seems to us that the form of reference request that came to Mrs Salamone was indeed (and there was no dispute on this) a very standard form of reference request and the manner in which she filled it out was ,it seems to us, highly likely to be the way in which most managers would complete it for most employees regardless of whether they did or did not have a disability. In terms of the hypothetical comparator who had had the same number of days off for whatever reason, for non disability related reasons , our view is that it would have been completed in the same way, the only difference perhaps being there would not be any reference to any specific condition but in relation to for example the number of days absence that would be the case for anybody, the same would also be the case in relation to re-employment, if the respondents were not willing to employ somebody in that role for other , non- disability related, reasons, the answers would have been the same.

13. In relation to the qualitative assessments ,however, again that would depend upon the individual , and that does give rise to the question “to what degree did those assessments have anything to do with the claimant's disability?”, and we will come to that in due course. But in terms of whether a hypothetical comparator would have been treated more favourably by getting a different reference, we are not satisfied that that would be the case. That in itself would be sufficient to dispose of the Section 13 claims , but in any event if we went on to consider that there had been less favourable treatment , and the hypothetical comparator would have been treated better ,we would still have to ask ourselves “the reason why” question, and

we would have to ask ourselves whether the reason why Mrs Salamone gave that reference was because of the disability. In those terms, that requires an examination of her motivation and ultimately an examination as to whether the reasons that she gave for giving the reference in the terms that she did were honest and genuine ones, not necessarily whether they were good ones, not necessarily whether they were careful ones and whether she was negligent or in any other way breached any alleged duty of care. The test, it seems to us , in this stage of the proceedings is “was she genuine in making those assessments” or was she motivated or influenced in any way by the claimant's disability, or secondarily, although this does not strictly arise on the Section 13, claim by the absences that the claimant had had by reason of her disability. It is to be remembered , of course, in any event that this is not a case where the whole of the claimant's absences were attributable to her disability anyway , only about a third were. So even if Mrs Salamone was influenced by absence , that is not necessarily the same thing as being influenced by disability related absence.

14. Ultimately, we have accepted Mrs Salamone's evidence as to the genuineness of her reference. It is true that she did not refer to any documentation and indeed there was not much for her to refer to,. She candidly told us she did this from her recollection and knowledge of the claimant, and indeed the claimant says she knew her over five years, and she would probably expect her to do so. Ultimately Mrs Salamone approached this reference , which was being requested , of course, some six months after the claimant's employment had ended , in a perfectly proper way relying upon (perhaps unduly and unwisely) upon her memory of the claimant, and the impression that she formed of her over that period of employment. Consequently, we do accept that when she made the qualitative assessments which are the ones probably most at issue in this reference, that she did so genuinely, from her impression of the claimant , and from her recollection of working with her. Although the claimant has put again in her submissions today the complaint that, in making this reference, Mrs Salamone has focussed on the times when she was not there and upon her illness , Mrs Salamone expressly rejected that in her evidence before us , which we accept, particularly in relation to those qualitative assessments. She was clear in her evidence, which we do accept, that they were based upon when the claimant was working not when she was not.

15. Now in terms of any other support for Mrs Salamone's conclusions it is right that she did not have the benefit of the documents that have subsequently been put before the Tribunal, which have been enumerated in this judgment. However, those documents , if nothing else , do lend some support to the views that Mrs Salamone had. It is not our task to decide whether , on any particular date any particular things happened or did not happen in the course of the claimant's employment, our task is to assess the genuineness of Mrs Salamone's opinion expressed in the reference. To the extent that the documents that have now been unearthed support tor undermine those views, then we can taken them into account. We consider that to an extent they have done so, albeit in a limited way, because they are only snapshots over a number of years , and there are not many of them. Where they do exist they clearly indicate that there was documented , at various points, issues with the claimant. Fairly or unfairly, rightly or wrongly, does not matter too much in this context, but they clearly were there indicating there were some issues at those times.

16. Further , in relation to one of the more hotly disputed aspects of what doubtless are now appreciated to be highly subjective reference criteria (which is also doubtless why these criteria have now been revised) in the section “relationship with line manager”, where Mrs Salamone indicated that the relationship was below average or did not meet the standard , with which the claimant disagrees, we note that from the witness statement of Sally Grimwood , in paragraph 3 , she sets out her recollection , which would be over a period of two years in which she was assisting the claimant, of issues between the claimant and Mrs Salamone . We note that whilst having some criticism of Mrs Salamone in terms of her management of the claimant and her sickness absence, Ms Grimwood does say in paragraph 3 that during one exchange Christine Salamone and Kathryn Horan became “snappy with each other”. That seems to us to be an indication of some difficulty in their relationship, so there is yet more support for Mrs Salamone expressing , as she did in the reference that the relationship was below average. Clearly that is a subjective opinion and also it does not ,of course, as the respondents doubtless appreciate (and I think particularly Mrs Cole appreciates) indicate whose fault that may be , and ultimately one may say “it does take two”. But in terms of Mrs Salamone's assessment of that relationship we consider that was one that she genuinely held, albeit one of which the claimant perhaps was herself unaware , and one would not expect her necessarily to be aware of it , not least of all because, even if appraisals were carried out and duly recorded , that would not be a matter necessarily that would be recorded in any event , since it is not something capable of objective performance assessment .

17. Be that as it may, for all those reasons in relation to the direct discrimination claim, we find , firstly , that the claimant would fail in relation to the treatment of a hypothetical comparator, and secondly, in any event we are satisfied that the reason for the alleged treatment was not the claimant's disability and consequently the Section 13 claims must fail.

18. We now turn to the Section 15 claims , which are a little different in that there is no need for a comparator in relation to these claims. This is the sort of discrimination claim which , frankly, these days is probably the easiest for a claimant to make , because, once disability is established , the treatment is then considered and if treatment is found which arises from something as a consequence of the disability , there then arises the need for a respondent to justify such treatment. So this is a lower hurdle , as it were, for a claimant to satisfy. In relation to that , however, the respondents say primarily that she does not get past the first limb of Section 15 , because reference is made to the definition of unfavourable treatment. The test of unfavourable treatment being set out in Ms Smith's skeleton correctly based on the case of **T - System Ltd v Lewis (UKEAT/0042/15)** which is that unfavourable treatment is that which the putative discriminator does or says , or omits to do or say , which places the disabled person at a disadvantage, and the submission goes on to point out that it is distinct from less favourable treatment, or detriment , and there must be a measurement against an objective sense of that is which is adverse as compared to that which is beneficial.

19. The respondents invite us to hold, first of all, that the treatment is not unfavourable when based upon that definition. We are not able to do so, the reasons for that being that , in terms of the reference, we consider that it would objectively be

viewed as unfavourable, it would be viewed as unfavourable in a number of respects certainly those in respect of which the claimant is recorded as being below average, that must be unfavourable by any yardstick and to the extent that reference is made to the number of days absence that she had, and indeed as to whether the respondents would re-employ her, again we consider that that would have to be regarded rightly as unfavourable treatment.

20. So in terms of the first hurdle that would be satisfied, the second limb of that, of course, is that that must itself be because of something arising in consequence of B's disability. We have identified, as will be apparent, six aspects of the reference in which the claimant has sought to claim under each of the various heads of claim, and in relation to those six, the unfavourable treatment arising because of something in consequence of the disability, in our view cannot extend to all six of the reference responses. It does not, we consider, arise in relation to the four tick boxes, the four qualitative appraisals made on page 2 and 3 of the reference, in other words the team working, quality of work, working under pressure and relationship with manager. We accept Mrs Salamone's evidence, on all the evidence in the case, that those assessments were made on the basis of the claimant being in work, when she was in work and they were not influenced by either her absences or more importantly her disability, so we do not find that any unfavourable treatment was because of something arising in consequence of her disability in respect of those four aspects of the reference.

21. The same is not true however of item one, the number of days absence and the comment thereafter in relation to it, nor indeed item six which is the "would you re-employ the claimant" and the comments thereafter,. They are because of something arising in consequence of the claimant's disability, because they relate to the absences, and the reasons for them. Indeed the reasons why the claimant would not be re-employed are health reasons, which are, of course, expressly said to be related to her ear condition. So in terms of those satisfying the first limb of Section 15, we consider that those two aspects do, in which case the question then becomes one of justification, the claimant having effectively satisfied the first limb it is then for the respondents to satisfy us that to give the reference in those terms, although unfavourable treatment under Section 15, is none the less justified.

22. In terms of justification, the respondents argue in paragraph 37 of Ms Smith's skeleton that the treatment was a proportionate means of achieving a legitimate aim, that being to provide true and accurate references for previous employees, I think one could add the words "to prospective employers". In terms of the legitimate aim so identified, we find that that is indeed a legitimate aim. It clearly is a legitimate aim of an employer to seek to provide a true and accurate reference to a future employer, for the benefit of the previous employee, and indeed the prospective employer, particularly one in the same sector of providing NHS healthcare, and so we are satisfied that this satisfies that test.

23. So the remaining issue is whether to provide the reference in the form that they did, the respondents were seeking to achieve that aim by proportionate means. That requires us to look at the terms of the reference and to look at the totality of the terms of the reference, because one cannot, as it were, "cherry pick", it seems to us, in these circumstances. The immediate observation we make is that, in relation

to both of the as it were offending aspects of the reference, the number of days absence and the "would not re-employ" they are both qualified, and they are qualified with comments. The comment in relation to the numbers of days absence is that the claimant's ear condition is referred to, and the comment in relation to not re-employing her is explaining why she was not suited to the ward because of that condition, and the problems that this then went on to create difficulties in the claimant fulfilling her role to her best ability. So there is a recognition there that her condition may have hampered her in doing so.

24. Furthermore, and importantly, in relation to the new post, the third question (on page 399) is "on reading the job description for the position that Kathryn is applying for would you consider that Kathryn is capable of carrying out this post" to which Mrs Salamone has answered "yes". This was a reference to a new post, not the same post the claimant had previously applied for, so in terms of whether this is a proportionate means of achieving the legitimate aim we have identified, we consider that answer is also very important because one looks at the terms of the reference in totality. The alternative might have been, and the claimant perhaps almost suggested this, that no reference was made at all to her ear condition, but in terms of proportionality and the relevance of making reference to that, we bear in mind that the claimant had herself disclosed this to the panel as she accepted in evidence and indeed told Mrs Salamone, about that condition. She had also explained that she had time off because of it, her email of 15 January makes that clear, and she accepted that in her evidence. So, again, looking at proportionality in terms of the legitimate aim, taking the totality of the terms of the reference referring the prospective employer, as it does to the claimant's condition (and one appreciates that this is double edged) but effectively explaining the effects of that condition have been to prevent the claimant continuing her existing role, but at the same time saying that the claimant was suitable for the new role, we do consider that the respondents have successfully established justification, and consequently in relation to the Section 15 claims, they must fail as well.

25. That leaves, then, the claims in respect of reasonable adjustments, and from the very outset the respondent, and indeed the claimant, perhaps in descending order have sought to define what the practice, criterion or provision could be, the PCP as it is known in shorthand, and it has been difficult to define but it seems to us that in terms of the reference there are certainly two potential PCP's, and they relate to different parts of the reference. In relation to the first page of the reference, and the first question that the claimant takes exception to, as it were, it must be in relation to the provision of the dates of absence from work, that seems to us to be the practice, it is the practice of the respondents to reply to such requests factually in respect of the number of days, and consequently that we can see is a PCP. In terms of the test as to whether or not that PCP puts a disabled person at a substantial disadvantage in comparison to persons who are not disabled, of course it must do, because if an employer has a practice of putting the actual number of days of absence that will affect disabled people who are likely to have more days of absence, rather more than persons who do not have a disability. So we do think that is a PCP that will have that requisite effect.

26. Similarly in terms of the answer to the question "would you re-employ the claimant in a similar role" "no", we consider that it would be the respondent's practice

to answer those questions correctly, and honestly, and in this case with a "no". In the case of persons with a disability we take the view that it would be more likely that they would not re-employ a person with a disability, because of their likely high sickness absence record, similar to the claimant and that that PCP too would be a relevant one in relation to the disadvantage it would put persons with a disability compared with those who are not disabled.

27. That relates to items one and six, we struggle however to find that items two, three, four and five could amount to a PCP. Those are answers, they are answers that are particular to the claimant's circumstances, whereas we can discern a "practice" in the other two aspects, one and six, because it would be the respondent's practice to answer those questions in that way in every case, that would not be the case in relation to the qualitative assessments, we cannot elevate them into any "practice" because they are bespoke to the claimant's position, and so we cannot find that there are any relevant PCP's in relation to those.

28. In relation to the two that we do however, we then have to consider that if there were such PCP's, as we find there were, and they did put the claimant at the relevant disadvantage, we then have to ask as to whether the respondent took such steps as it was reasonable to have to take to avoid that disadvantage, and it is in that regard that we find in fact that they did, and they did we find for very similar reasons to those for which we found justification in respect of the Section 15 claims, namely by adding the comments that she did Mrs Salamone, as it were, threw open to the proposed employer (and maybe the claimant) the possibility of further discussion about those elements. By making it clear in relation to the number of days absence, for example, that the claimant had suffered with a chronic ear condition but not necessarily saying one way or the other as to whether that was the cause of all the absences, which clearly it was not, but equally in relation to the re-employment question, making it clear that it was her ear condition which was preventing her working back on the wards, that at least gave the prospective employer the opportunity to look further into those matters to then see as to whether they would be relevant and proper matters to prevent the claimant getting the new job.

29. So in terms of taking steps to avoid the disadvantage by saying nothing, particularly in relation to the dates of absence that we consider would have put the claimant at an even bigger disadvantage, and at least to mention the ear condition in that context was a reasonable step to avoid that disadvantage arising from that number of days absence. Similarly in relation to the reason for re-employment, if no reason had been given, the claimant would have been at a bigger disadvantage. By going onto explain why they would not re-employ her, for the perfectly genuine and, indeed, accepted reasons for that view, the respondents were, we consider, taking such steps as it was reasonable to have taken to avoid the disadvantage. In those circumstances, and for those reasons the reasonable adjustments claims also must fail.

30. That therefore means that the claimant's claims of disability discrimination do not succeed. The technicality of this judgment and the legal tests to be applied may well have been difficult for the claimant at various stages, and she doubtless appreciates that this is a highly complex and difficult area. Clearly she had issues with the reference and one can understand that. Indeed the respondents, of course,

apologised, and , in fact, in due course withdrew it. The respondents provided the reference, but it was Pennine who did not employ her. Whether or not Pennine should have been the respondents is a matter of speculation, but clearly, it will be appreciated that , just as the duty to make reasonable adjustment arises in the course of employment , it also arises in respect of prospective employment. Section 15 claims , as the case of **Pnaiser v NHS England and another [2016] IRLR 170.** makes clear , can be brought not only against the giver of the reference but also against the person who did not give the job. But the only respondent before us is this respondent , and whilst we have sympathy for the claimant , for all these reasons, these claims must fail.

Employment Judge Holmes

Dated : 29 January 2018

REASONS SENT TO THE PARTIES ON
5 February 2018

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FOR THE TRIBUNAL OFFICE

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