EMPLOYMENT TRIBUNALS

Claimant: Miss E Ellis

Respondent: St Helens and Knowsley Teaching Hospitals NHS Trust

Heard at: Liverpool **On:** 12 October 2020

Before: Employment Judge Aspinall
Mr A Clarke
Mr W K Partington

Representation
Claimant: Miss Ferrario, Counsel

Respondent: Mr Williams, Solicitor

RESERVED JUDGMENT

1. The claimant's claim for discrimination arising out of a disability under section 15 Equality Act 2010 fails.

2. The claimant's claim for indirect discrimination on the protected characteristic of disability under section 19 Equality Act 2010 fails; the respondent's defence of objective justification having been made out.

3. The claimant's claim for indirect discrimination on the protected characteristic of sex brought under section 19 Equality Act 2010 fails; the respondent's defence of objective justification having been made out.

REASONS

1. By a claim form dated 18 March 2019 the claimant brought claims for sex and disability discrimination arising out of her employment with the first respondent.

2. The claimant also brought claims for maternity related discrimination which she was unable to proceed with because the acts she complained of took place outside of her protected period. The claim is withdrawn in a separate Dismissal on Withdrawal Judgment.

3. The claimant worked as an Aseptic Non-Touch Technique Clinical Nurse Specialist from 9 September 2013 until she resigned on 22 August 2019.

4. The original claim form brought claims against a second respondent which was a doctor's surgery. Claims against the second respondent were settled prior to this final hearing.

5. The respondent defended the claims in a response form dated 30 April 2019.

6. A case management hearing took place before Employment Judge Ryan on 26 June 2019. A preliminary hearing was listed to deal with the claimant's application to amend her claim. Leave to amend was granted by Employment Judge Buzzard at the preliminary hearing on 3 October 2019. Following the hearing Employment Judge Buzzard conducted a private preliminary hearing for case management purposes to prepare the case for this final hearing.

7. The amended claim was at page 44 of the bundle and the amended response at page 69.

8. The parties agreed the following list of issues to be used at the final hearing.

Sickness Absence

(1) What were the reasons for the sickness absences listed on the references dated 14 and 16 November 2018?

(2) Specifically, were the absences listed on the references related to pregnancy and/or the claimant's disability of bladder and bowel dysfunction?

Section 15 EA 2010

(3) Did the respondent treat the claimant unfavourably by commenting in the reference dated 14 November 2018 that the claimant had "extensive episodes of sickness absence"?

(4) Did Dr Mortimer know (or could she reasonably be expected to know) that the claimant was disabled?

(5) If so, was the comment that the claimant had "extensive episodes of sickness absence" because of something arising in consequence of the claimant's disability of bladder and bowel dysfunction, namely the claimant's disability related sickness absences? Alternatively, was it due to a reference request from the Penny Lane Surgery (originally the second respondent) which asked for comments on 'timekeeping and sickness'?

(6) If the respondent's comment was unfavourable treatment of the claimant because of something arising in consequence of her disability, was it objectively justified? Specifically, was it a proportionate means of

achieving a legitimate aim of replying truthfully and accurately to a reference request which did not specify that disability related absences should be flagged or disregarded?

Section 19 EA 2010

PCP1

(7) Did the respondent have a provision, criterion or practice (PCP) of listing absences within references without providing any detail of the reasons for the absence?

(8) Did the respondent apply that PCP to the claimant?

(9) Did the PCP put female employees at a particular disadvantage of "giving an incorrect impression of generally poor sickness record or poor health and make it less likely that a prospective employer would exclude pregnancy related absences from consideration" when compared with male employees?

(10) Did the PCP put the claimant at that particular disadvantage?

(11) Was it incumbent upon the respondent to specify if any of the claimant's absences were pregnancy related?

(12) Can male employees also suffer from gender specific conditions which cause sickness absence? Would those sickness absences also have been listed by the respondent within references without providing any detail of the reasons for the absence?

PCP2

(13) Did the respondent have a PCP of commenting negatively on substantial sickness absence records without specifying the reasons for the absence?

(14) Did the respondent apply that PCP to the claimant?

(15) Did that PCP put female employees at a particular disadvantage of "giving an incorrect impression of generally poor absence record or of poor health and make it less likely that a prospective employer would exclude pregnancy related absences from consideration" when compared with male employees?

(16) Did the PCP put the claimant at that particular disadvantage?

(17) Was it incumbent upon the respondent to specify if any absences were pregnancy related?

(18) Can male employees also suffer from gender specific conditions which cause sickness absence? Would those sickness absences also have

been listed by the respondent within references without providing any detail of the reasons for the absence and comments made accordingly?

PCP3

(19) Did the respondent have a PCP of commenting negatively on employee's substantial sickness records?

(20) Did the respondent apply that PCP to the claimant?

(21) Did that PCP put disabled people at a particular disadvantage of "having negative comments included in their reference"?

(22) Did the PCP put the claimant at that particular disadvantage?

(23) Was it incumbent upon the respondent to reply truthfully and accurately to a reference request from a prospective employer?

Objective justification – PCPs 1 to 3

(24) Did the respondent have a legitimate aim of a desire to provide true and accurate reference information to prospective employers?

(25) Was the comment regarding the claimant having had "extensive sickness absence" true and accurate?

(26) If so, was the approach taken by the respondent proportionate?

(27) Were the respondent's actions therefore objectively justified?

Remedy

(28) If the claimant has been unlawfully discriminated against as alleged, did she suffer injury to feelings as a result of the respondent's actions?

(29) If so, what Vento band applies to the claimant's injury to feelings award?

The Hearing

9. The parties and their witnesses all confirmed that they were content with the arrangements in place for their health and safety during the corona virus pandemic at our socially distant, in person hearing.

10. At the outset of the hearing the Employment Judge disclosed having worked at the same solicitor's firm as Mr Williams between 1997 and 2000, and not having had any contact with him, to the best of her recollection since autumn 2000. The claimant made no objection.

11. The parties had prepared an agreed bundle of documents of 402 pages and following some changes to the bundle provided an updated Index. Pages (which had been attached to the claimant's supplemental witness statement) were inserted by agreement at 129A and B, and page 403.

12. The claimant's representative had prepared an Opening Note. Its contents were not agreed by the respondent.

13. The claimant and the respondent's three witnesses had prepared witness statements. The claimant then prepared a supplemental witness statement. The respondent objected to some of the supplemental content on the outline basis that 1) it went beyond being a remedy statement which was how it had been presented to the respondent, and 2) it sought to extend the claimant's arguments into claims of victimisation. The claimant confirmed that there was no claim for victimisation. Following a short adjournment an agreement was reached to redact part of the claimant's supplemental witness statement. The redaction was made and on that basis the respondent was able to agree that the witness would be cross-examined on both liability and remedy.

14. We heard evidence from the claimant. She gave her evidence in a straightforward and helpful way.

15. We heard evidence from Doctor Mortimer. She readily admitted having an issue with the quantity of the claimant's sickness absence. She was credible when she said that she did not know the reasons why the claimant had been off sick. She knew that the claimant had had maternity absence but had no reason to think that the absence might be disability related.

16. We heard evidence from Mrs McGugan. She admitted not having checked the personnel file within her office before conducting keep-in-touch and return to work discussions with the claimant.

17. We heard evidence from Mrs Lewis. Mrs Lewis described the process and procedures in place for responses to reference requests and was a credible witness as to the custom and practice within the respondent Trust and broader NHS given her length of service in NHS HR.

18. An outline timetable was agreed and the Tribunal adjourned to read the witness statements.

Other Claim

19. During the hearing the respondent informed the Tribunal that the claimant has brought a claim for constructive unfair dismissal against the respondent which is listed for a five-day hearing in February 2021. That case relates to the claimant's decision to resign following what she says were failures to accede to flexible working requests.

The Facts

20. The claimant worked as an Aseptic Non-Touch Technique Clinical Nurse Specialist at the respondent from 9 September 2013 until her resignation on 23 August 2019. She worked in a small, specialist team of seven people. Their clinical lead was Dr Mortimer. The nursing team lead was Ms Valya Weston until she was replaced by Mrs McGugan on 23 April 2018. The team also comprised two band 8 nurses: an 8 is equivalent to ward manager level, and the claimant who was a band 7 nurse, a band 6 nurse and an assistant practitioner and an audit and surveillance assistant.

The claimant's sickness absence

21. The respondent recorded sickness absence electronically on its system known as ESR. A manager would use a drop down menu to categorise the reason for absence based on information provided by the employee either directly or from a GP fit note. The reasons were coded with an "S" and then a number and then a narrative description for example S13 cold, cough, influenza.

14 October 2013 – 25 October 2013

22. From 14 October 2013 until 25 October 2013 the claimant had 11 days sickness absence. The reason given for sickness on the respondents ESR computer system was S13 cold, cough, flu-influenza.

25 June 2014 – 22 November 2014

23. The claimant had a period of sickness absence from 25 June 2014 until 22 November 2014, a period of 151 days. This absence was recorded on the respondents ESR system as S30 pregnancy related disorders.

First maternity leave

24. The claimant then took maternity leave following the birth of her little girl on 13 December 2014. The birth was a traumatic delivery for the claimant. She sustained a third degree tear and needed surgical repair. She was due to return to work on 23 November 2015.

Sickness absence 23 November 2015 – 31 March 2016

25. The claimant had a period of sickness absence from 23 November 2015 until 31 March 2016, a period of 130 days which was recorded on the respondents ESR system as S 26 genitourinary and gynaecological disorders. That absence arose from the damage sustained during the traumatic delivery. The claimant saw Dr Kumar, Consulant in Occupational Medicine on 9 February 2016. He reported that:

> *"she has been referred to Aintree Hospitals for more specialised treatment. She is also under the care of a neurologist, who is planning to refer her to London hospitals for a second opinion……...with the current symptoms and associated problems related to the trauma she is unfit for work".*

Return to work in April 2016

26. During her sickness absence the claimant talked to then her line manager Mrs Weston (who no longer works for the respondent) and it was agreed that the claimant could reduce hours and work flexibly enabling her to return to work in April 2016.

27. The claimant worked from April 2016 until 29 March 2017 without any sickness absence.

Second pregnancy 2017

28. On 30 March 2017 the claimant had a period of sickness absence until 7 April 2017, a period during which she missed 4 working days. The claimant was newly pregnant and suffering morning sickness. The claimant initially self certified as sick recording the absence as pregnancy related. She obtained a GP fit note dated 30 March 2017 which records dizziness and nausea. The respondent's ESR system (wrongly) records the reason for absence on this occasion as S25 gastrointestinal problems.

29. The claimant suffered ill health during her second pregnancy. Her pregnancy exacerbated her underlying condition following the traumatic delivery of her first daughter.

Sickness absence 9 June 2017 – July 2017

30. The claimant had a period of sickness absence from 9 June 2017 until the start of the second period of maternity leave in July 2017. Her GP fit notes for this period record the reason for absence as back pain - pregnancy related. The respondent's ESR system recorded 3 separate periods of absence for this continuing absence. It recorded:

- 1 June 2017 to 23 June 17, 23 days, S30 pregnancy related disorders;
- 26 June 2017 to 6 July 2017, 11 days, S30 pregnancy related disorders;
- 7 July 2017 to 21 July 2017, 15 days, S11 back problems

Occupational Health report

31. On 26 June 2017 the Trust's Occupational Health expert, Doctor Minaxi Shah, saw the claimant. Dr Shah reported to the claimant's line manager Mrs Weston in writing. He reported that the claimant sustained:

> *"…a third degree tear during labour in December 2014. She has had continued complications and remains under specialist care. She is currently pregnant and her due date is 17 September. She hopes to commence further treatment in October after the baby is born. Currently her symptoms are worse due to her pregnancy.*
>
> *She is also off work with pelvic girdle pain and is having physiotherapy.*
>
> *She is likely to be off work for at least the next 4 weeks, but may be longer.*
>
> *She is having appropriate care and treatment. When she returns to work prior to the birth of her baby she will benefit from continuing to do flexible working as at present, if operationally feasible. These temporary restrictions will be required until her maternity leave as she needs to access to washroom facilities urgently and unpredictably. Additionally, she has to plan activities in advance due to the complications. In my opinion, with regards to the disability legislation, impairment is likely to be considered long-term and which has a substantial adverse effect. Risk assessment should be performed."*

32. Dr Shah requested that the claimant's line manager refer her back to Occupational Health when she was coming towards the end of her maternity leave, if appropriate.

Second maternity leave

33. The claimant's second period of maternity absence began in July 2017. Her second daughter was born in September 2017.

34. On 18 June 2018 whilst on maternity leave the claimant had a keep in touch meeting with Mrs McGugan who had replaced Mrs Weston as the claimant's line manager. Mrs McGugan had inherited the claimant's personnel file from the previous line manager. It was contained in a locked cupboard in her room. Mrs McGugan did not look at the file and had not seen Dr Shah's Occupational Health report 2017 prior to meeting with the claimant.

35. The claimant told Mrs McGugan that she had had a good relationship with her previous line manager Mrs Weston and hope to have a good relationship with Mrs McGugan too. She told Mrs McGugan that everything was fine with her health, that she had had treatment and was fit to return to work. She did not say that she was suffering ongoing health problems or that she was disabled.

36. The claimant told Mrs McGugan that she had an informal agreement in place, previously agreed with Mrs Weston, to return to work on reduced hours and to work flexibly from home. Mrs McGugan was concerned as to what work the claimant could do from home. The claimant said she was able to work on policies and on administration. Mrs McGugan told the claimant that she would need to make a formal application for flexible working under the Trust's Policies.

Return to work August 2018

37. The claimant returned to work on 20 August 2018. Everyone agreed that they had good professional working relationships within the team. The claimant saw Dr Mortimer most days and occasionally more than once per day. The claimant did not discuss the details of her health with Dr Mortimer. The claimant had a good working relationship with Mrs McGugan but did not discuss the detail of her health with her.

38. In October 2018 the claimant, applied for a role as a band 5 practice nurse in a GP practice. This was a part-time and more junior role.

39. The claimant was interviewed for the role on 15 October 2018. One of the interviewers was external to the practice and was a member of the CCG. The claimant was not asked and did not tell the interviewers that she had had sickness absence or the reasons for the absences at interview.

40. Shortly thereafter, the GP practice manager KF, telephoned the claimant to discuss potential salary and to canvass working hours with her. The claimant did not disclose that she had a significant sickness absence record. The claimant was hopeful of being offered the role.

Make up of the workforce in 2018

41. In 2018 there were 4788 females to 1059 males employed in the respondent Trust. 102 men had long term sickness absence in 2018. 636 women had long term sickness absence in 2018. The incidence of long term sickness absence for men was 102 divided by 1059 giving an incidence of 0.09 The incidence of long term sickness absence for women was 636 divided by 4788 giving 0.13. Females had a 30.8% higher incidence of long-term sickness absence than males.

42. The respondent lost a total of 90549 days to sickness absence in 2018. Of that 90549, 77821 days lost were female, 12728 were male. Females had a 25.9% higher rate of days lost to sickness than males.

New job offer

43. On Friday 26 October the claimant had a telephone call to tell her that a letter was coming in the post to offer her the role, subject to references. In that call the claimant did not disclose her sickness absence record. The letter arrived, it said:

> "*We are delighted to confirm our offer of employment to you as Practice Nurse… Following receipt of satisfactory references"*

Reference requests

44. KF wrote on 9 November 2018 to Mrs McGugan and Dr Mortimer, requesting references. The request letter said:

> *"We have employed Emily Ellis as at Practice Nurse……. And she has given your name as one of her referees, I would be grateful if you could provide a reference commenting particularly on the following areas:*
>
> - *Clinical skills*
> - *interpersonal skills, including communication*
> - *problem solving skills*
> - *timekeeping and sickness*
> - *any additional comments you feel are relevant"*

45. Dr Mortimer rang Mrs Lewis the Human Resource Business Partner to provide information on sickness absence for the claimant. She emailed Mrs Lewis on 9 November 2018 saying:

> *"As discussed over the phone, please would you let me know the extent of sickness leave taken by Emily Ellis……. If it is possible to get the number of days off sick by year that would be useful."*

46. Mrs McGugan also received a reference request in the same terms as that of Dr Mortimer's and she too asked Mrs Lewis for sickness absence data.

HR obtains sickness absence data

47. Mrs Lewis asked a member of her HR team to obtain sickness absence data

for the claimant from ESR. Mrs Lewis saw a sickness absence record that showed the absences and reasons for them as recited above.

48. Mrs Lewis was aware of the respondents' Reference Policy and the General Data Protection Regulations 2018. She had been trained in equality and diversity and in data protection. She was aware that Good Practice Recommendations from the Information Commissioner's Office said:

> *"Managers and human resources staff are not generally qualified to interpret medical details."*

49. Mrs Lewis used the data provided to her and created a table of sickness absence dates that did not show the reasons for the absence. Her table was as follows:

Sickness absence start date	Sickness absence end data
07-July-17	21-July-17
26-Jun-17	6-July-17
01-Jun-17	23-Jun-17
30-Mar-17	07-Apr-17
23-Nov-15	31-Mar-16
25-Jun-14	22-Nov-14
14-Oct-13	25-Oct-13

50. Mrs Lewis did this because it was her belief, in accordance with GDP Regulations, that the reasons for sickness absence were sensitive personal data that was confidential to the claimant and should not be disclosed.

51. Mrs Lewis removed the reason for sickness absence in every case in which she was asked to provide sickness data for references, not just the claimant's case, as a matter of course. She did this about 25 times per year.

52. The Trust had a workforce of around 6000 people in November 2018 and since then has acquired more staff so that the headcount today is around 6500. Mrs Lewis estimates a turnover of around 13% per year. Of the people who leave each year only a proportion require references. Mrs Lewis is not the only person who can provide sickness absence data to referees. She has a team of around another 12 people who might also do that. There are also a team of three in the medical department who would deal with references for doctors.

53. Mrs Lewis and her colleagues in HR, routinely in 2018, removed the reason for sickness absence from the data that they obtained from ESR and sent on to line or clinical managers to be used in the preparation of references.

54. Mrs Lewis and her team were involved in recruitment and routinely received only headline sickness absence data on candidates that they were considering employing from other NHS employers. It was standard practice that headline data only was given but that a prospective employer, if it felt it wanted more information, could seek the candidate's consent to get more data from the employer, could get the data from the candidate herself or could refer the candidate, again with her consent,

to their own Occupation Health provider.

55. A potential employer might expect to get an OH report for a candidate with considerable sickness absence because this might relate to a disability and they would want to be well informed so that they could consider any reasonable adjustments necessary. That is how the respondent had always managed sickness absence data as a recruiting employer.

56. Mrs Lewis and her team did not ask their employees to consent to them providing more than headline absence data. To do so would result in a complicated scenario surrounding reasons for absence in which the Trust would find itself needing to negotiate the reason to be recorded on its system with multiple stakeholders including the employee, the GP and or any specialist treating the employee and their own OH provider and line manager. Getting agreement on the reasons to be recorded would not be straightforward and not be without significant resource implications for the HR team.

57. Mrs Lewis has only once, during her employment in the NHS, seen an employee be asked for consent for more than headline sickness absence data to be provided and that was in relation to the claimant in January 2020 when she applied for another job.

The references

58. In November 2018 Dr Mortimer prepared her reference. As a doctor she was concerned not only to comply with Trust policy but to abide by guidance from The General Medical Council called Good Medical Practice. The respondent's Reference Policy provided:

> *"5.3 It is the responsibility of the HR department to ensure that the policy is adhered to at all times, that robust records are maintained in accordance with NHS best practice standards and General Data Protection Regulations 2018, and any concerns about the application and/or breach of this policy are brought to the attention of the Head of strategic Resourcing.*
>
> *…*
>
> *5.6 It is the responsibility of line managers to provide honest and truthful employment references should they be asked to provide one for their existing staff by another employer. Should a request be received to supply an employment reference for a colleague with whom they are not a line manager reference request should be refused. However, where a manager is not the line manager but is the supervising clinician for a period covered by placement for a student for example, the supervisor can provide a reference."*

59. The policy document had been agreed between staff representatives and management and took effect from 18 July 2018. It was due to be reviewed on 18 July 2021.

60. Dr Mortimer also had regard to guidance given by the General Medical Council. The document in our bundle was undated. It provided:

. *"41. You must be honest and objective when writing references, and when appraising or assessing the performance of colleagues, including locums and students. References must include all information relevant to your colleague's competence, performance and conduct.*

…

43. You must support colleagues who have problems with their performance or health. But you must put patient safety first at all times."

61. Dr Mortimer was seeking to comply with the respondent's policy and guidance from her own professional body. Dr Mortimer had been asked to comment on "sickness absence and timekeeping". When she saw the sickness absence data for the claimant she thought it was extensive. She had been asked to give references including information on sickness absence on numerous occasions. She had never been asked to give a reference for someone with that much sickness absence before.

62. Dr Mortimer did not know the reasons for absence all she saw was the list of absence dates. She was not told if any of the periods of sickness absence were pregnancy or disability related. She did not know that the claimant was disabled. She was aware that the claimant had had some periods of absence that may have been pregnancy related but did not feel it was her role to enquire as to reasons for absence or disclose reasons for absence. If she had been asked to give a reference for a man (with gender specific sickness absence) or a person who did not have the same disability as the claimant with the same amount of sickness absence as the claimant she would have included the sickness absence data without providing reasons in exactly the same way as she did for the claimant.

63. The relevant extract from Dr Mortimer's reference, dated 14 November 2018, said:

> *"There have been no issues with time management in relation to Emily's clinical duties. She has however had extensive episodes of sickness absence during her employment here, the details of which are below."*

64. Dr Mortimer then reproduced the table that had been sent to her by Mrs Lewis showing headline sickness absence data only. She concluded her reference saying:

> "I wish Emily all the best of her future employment. Please let me know if you have any queries."

65. Mrs McGugan prepared her reference. It was dated 16 November 2018. She did not comment on sickness absence but provided the same data on sickness absence as Dr Mortimer had provided. Mrs McGugan also gave evidence that she was concerned to ensure the reference she gave was truthful and accurate. If she had been asked to give a reference for a man (with gender specific sickness absence) or a person who did not have the same disability as the claimant with the same amount of sickness absence as the claimant she would have included the sickness absence data without providing reasons in exactly the same way as she did for the claimant.

66. The claimant did not see the references at the time.

67. KF at the doctors practice received the reference from Dr Mortimer and forwarded it to one of the GPs, PM, with the following email:

> *"hi, reference for Emily attached. It's good on the whole but quite extensive sickness record (although none in past 16 months)."*

The 19 November 2018 telephone call: concerns about sickness absence

68. The claimant spoke to KF on Monday, 19 November 2018. The claimant was told that the GPs were concerned about the claimant's level of sickness absence and that they were thinking about withdrawing the offer of employment.

69. There was discussion about the claimant's sickness absence record which put the claimant in a position of having to reveal intimate detail of the health problems she had suffered after delivery of her first daughter and how they had been exacerbated by her second pregnancy.

70. The claimant also told KF that following her return to work she had been able to undertake full duties and had not had a period of sickness absence. The claimant described her attendance as exemplary. The claimant said that she was willing to see someone at Occupational Health and to ask her consultant to provide a letter to reassure the GPs that she was not likely to have significant sickness absence going forward. The claimant also felt it necessary to disclose that she was not planning to have any more children.

71. KF did not raise any concerns during that telephone conversation about the claimant's performance.

Offer withdrawn

72. On 23 November 2018 KF emailed the claimant to say that there was a letter in the post and that the offer of employment was being withdrawn with immediate effect because the claimant's references were not satisfactory.

73. The claimant telephoned to try and speak to the GPs or KF but the calls were not returned. She sent an email on 27 November asking for further details of the reason why the offer was withdrawn. The GPs replied in a letter dated 6 December 2018 but which the claimant received on the 10 December 2018 which for the first time raised concerns about the claimant's interpersonal skills and problem solving skills. It said:

> *"We write further in the offer of Practice Nurse. The offer was subject to satisfactory references from two of your most recent employers.*
>
> *You furnished us with details of those referees who have now provided a response.*
>
> *Unfortunately, the references were not satisfactory we are therefore left with no alternative but to withdraw our offer of employment with immediate effect."*

74. The claimant went to see Dr Mortimer. Dr Mortimer showed the claimant the

reference on her computer screen and later the respondent provided the claimant with a copy.

75. On 22 January 2019 the claimant went to see Mrs McGugan and broke down in tears when telling Mrs McGugan how upset she was to have had the job offer withdrawn. Mrs McGugan showed the claimant the reference she had sent to the GPs. Mrs McGugan said it was a good reference.

76. Mrs McGugan offered to ring the GP's to tell them about the claimant's full attendance since her return from maternity leave. Mrs McGugan rang the GP's but her calls were not returned.

Grievance

77. The claimant lodged a grievance on 6 February 2019. In her grievance she complained that:

> *"Care was not taken in providing information that would likely and has resulted in discrimination against me as an individual. The references provided resulted in the withdrawal of a job offer. I raised this matter informally but haven't been satisfied with the outcome. I have discussed my concerns with both (Mrs McGugan) and Dr Mortimer. We have been unable to resolve the issues:*
>
> - *Loss of an offer of employment*
> - *Damage to reputation*
> - *Loss of access to CPD*
> - *Negative impact on personal circumstances (commute, child care options etc)*
> - *Damage to professional relationships in current workplace, difficult and stressful impact on the work situation*

She concluded that she was seeking:

1. *A formal apology and compensation*

2. *Clarification of what absence information (and for what period) will be provided to any future prospective employers*

3. *An assurance that if details of any absence is provided in any future references the fact that they are pregnancy related or disability related will be clearly stated."*

[The Tribunal has abridged the content of the grievance letter so as remain focused on the List of Issues in this case]

78. In March 2019 the claimant brought her claim in the Employment Tribunal.

79. The grievance was heard by Matron, MB on 5 July 2019. The claimant attended with her RCN Regional Officer. On 30 July 2019 MB wrote to the claimant telling her that her grievance was dismissed. The claimant was offered mediation with Mrs McGugan and Dr Mortimer. MB said that the request for compensation was being

handled by the legal team, that the Reference Policy:

> "*is currently being revised to include standardized provision of sickness absence information. Should you wish to provide further details regarding your absences and or the reasons to a prospective employer, then you are free to do so."*

Claimant applies for another job

80. In January 2020 the claimant applied for another job. The respondent's Head of HR wrote to the claimant:

> *"Dear Emily, I am writing in relation to the Trust receiving a reference request Rachel University, following your recent appointment to lecturer in Nurse Education. One of the questions on the reference request form is in relation to your sickness absence, specifically 'please detail the applicant's absences from the last 2 years'. In line with the Trust Reference Policy Section 5.5, references 'will include information regarding the instances, but not causes of sickness absence within a defined period'. I would therefore like to see your consent as to what information regarding your sickness absence you wish for us to release to edge Hill University. (Please tick appropriate box)*
>
> *1. Include information regarding instances but not causes of sickness absence;*
> *2. include instances and sickness absence.*
>
> *For clarification, if you wish for us to release the causes of sickness absence to Edge Hill University, the reason for the sickness absence stated on your GP fit note at the relevant time will be the reason provided in the reference.*
>
> *Oonagh McGugan will be responding to the reference request as your direct line manager."*

Edge Hill University only required two years' worth of attendance data. The claimant was successful in achieving a new role.

The Law

Burden of Proof

81. The Equality Act 2010 provides for a shifting burden of proof. Section 136 says:

> "(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

82. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes

those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

83. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

84. If in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Definition of disability

85. Section 6 defines a disability as follows:

> **"A person (P) has a disability if**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to to carry out normal day-to-day activities."**

The section goes on to provide that any reference to a disabled person is reference to a person who has a disability.

86. The word "substantial" is defined in section 212(1) as meaning "more than minor or trivial".

Discrimination arising from disability

87. Section 15 of the Equality Act 2010 reads as follows:-

> **"(1) 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.**
>
> **(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability".**

88. A Section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

89. Scott v Kenton Schools Academy Trust [2019] UKEAT 0031 considered the test, under Section 15, of something arising in consequence of the disability. HHJ Auerbach said at paragraph 41 of the judgment:

> *"The test has been examined in prior authorities now on a number of occasions, as well as other aspects of Section 15. The most useful guidance to be found in one place, I think, is that in the decision of the President of the EAT, as she then was, Simler J, in Pnaiser v NHS England & Another [2016] IRLR 170 where she drew the threads together of the previous authorities, as follows:*
>
> *31. ……the proper approach to determining section 15 claims …. can be summarised as follows:*
>
> *(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
>
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. ..*
>
> *(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, for the "in consequence test" to be satisfied, the connection can be a relatively loose"

90. The Court of Appeal in Robinson v Department for Work and Pensions [2020] EWCA Civ 859 considered causation in a section 15 complaint. Bean LJ at paragraphs 55 and 56 of the judgment rejected a "but for" test in establishing whether the treatment (unfavourable treatment for a section 15 complaint and less favourable treatment for a section 13 complaint) was *because of* the claimant's disability or something arising in consequence of it. Bean LJ affirmed Underhill LJ in Dunn v Secretary of State for Justice [2018] EWCA Civ 1998 who stated that a prima facie case under section 15 is not established solely by the claimant showing that she would not be in the situation…if she were not disabled. The Tribunal must look at the thought processes of the decision maker concerned to ascertain "the reason why they treated the claimant as they did. Was it wholly partly because of something that arose in consequence of the claimant's disability ?"

Indirect discrimination

91. Section 19 provides that:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's;

(2) for the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:

(a) A applies, or would apply, it to persons with whom B does not share the characteristic;

(b) it puts, or would put, persons with whom B shows the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

(c) it puts, or would put, B at that disadvantage; and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

92. Four conditions in section 19(2) must be met. The first condition is that there must be a PCP which the employer applies to employees who do not share the protected characteristic of the claimant. The second condition is that the PCP must put people who share the claimant's protected characteristic at a particular disadvantage when compared with those who do not share that characteristic. Thirdly the claimant must experience that particular disadvantage herself and the fourth condition, the defence of objective justification, is that the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

93. Mr Justice Langstaff when President of the Employment Appeal Tribunal in Dziedziak v Future Electronics Limited EAT 0271/11, established that the burden of proof lies with the claimant to establish the first, second and third conditions within section 19(2). Only when the claimant has established those does the burden shift to the respondent to establish its objective justification. This approach was affirmed by the Supreme Court in Essop and others v Home Office (UK Border Agency) 2017 ICR 640 SC.

94. The Equality and Human Rights Commission (EHRC) Code confirms that a PCP can arise from a one off or discretionary decision. In Ishola v Transport for London [2020] EWCA Civ 112 the Court of Appeal confirmed that an act that has occurred or is likely to occur more than once will usually be regarded as a PCP.

95. Section 19(2) Equality Act 2010 requires that the employer applies *or would apply* the PCP equally to people who do not share the protected characteristic of the claimant. The Equality Act allows for a hypothetical comparator group British Airways plc v Starmer 2005 IRLR 862 and for adverse disparate impact to be measured by reference to that group.

96. Essop clarified previously conflicting Court of Appeal authorities by confirming that it is not necessary for the claimant to show *why* the PCP puts people sharing a protected characteristic at a disadvantage. Baroness Hale said:

> ***"Sometimes, perhaps usually, the reason why the PCP results in the disadvantage will be obvious: women are shorter than men so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: ….Indirect discrimination assumes equality of treatment -that the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a protected characteristic not subjected to requirements which many of them cannot meet which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification it is dealing with barriers which are not easy to anticipate or to spot."***

97. The purpose of indirect discrimination legislation is to challenge practices which appear neutral, in that they apply to everyone, but have a disadvantageous effect on the protected group when compared to other people who do not share the protected characteristic.

98. Section 19(2) requires a comparative exercise to be undertaken. The EHRC Employment Code endorses the method of constructing a pool for comparison as one way of undertaking the comparative exercise.

99. The first step in constructing the pool for comparison is to identify those affected by the PCP including those who are disadvantaged by it and those who are advantaged by it. Constructing the pool is "a matter neither of discretion nor fact-finding but of logic. Logic may on occasion be capable of producing more than one outcome" according to Lord Justice Sedley in Allonby v Accrington and Rossendale College and others 2001 ICR 1189 CA. Lord Justice Sedley in Grundy v British Airways plc 2008 IRLR 74 observed:

> ***"The correct principle in my judgment is that the pool must be one which suitably tests the particular discrimination complained of: but this is not the same thing as the proposition that there is a single suitable pool in every case."***

100. Where there is more than one potential pool it is a matter for the Employment Tribunal to decide which of the pools to consider.

101. In Ministry of Defence v DeBique 2010 IRLR 471 the EAT stated that the tribunal should have regard to the circumstances of the case and the underlying purpose of the legislation when constructing the pool, or choosing which of a range of possible pools to consider. It should choose the pool which it considers will realistically and effectively test the particular allegation before it.

102. Section 23(1) Equality Act 2010 provides that for the purposes of Section 19 there must be no material difference in circumstances. In Spicer v Government of Spain 2005 ICR 213 CA the Court of Appeal found that as a matter of logic once the tribunal had established that in order to receive a higher pay package the individual had to be a Spanish civil servant recruited in post from Spain, the only possible pool for comparison in order to assess disparate impact consisted of all teachers in the school. Any other pool, either all Spanish teachers or all British teachers would be illogical and could not give effect to the purposes of the legislation as on that basis a claim of indirect discrimination would never succeed.

103. A PCP applied to all employees across an existing workforce can also give rise to difficulty in constructing the pool. In such cases the pool should be drawn from all persons employed who are affected or potentially affected by the PCP in question. When the pool is drawn the Tribunal must then undertake the comparative exercise.

104. In disability cases, the PCP must put those who have the same disability as the claimant (section 6(3)(b) Equality Act 2010) at a particular disadvantage when compared with those who do not.

105. The concept of disadvantage is similar to that of detriment in other sections of the Equality Act 2010. The EHRC Code defines disadvantage as something that a reasonable person would complain about. It does not have to be a financial loss and does not have to be quantifiable. The Code derives from the House of Lords decision in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337 HL when it says that an "unjustified sense of grievance" does not qualify as a disadvantage. In Shamoon the disadvantage was that a Chief Inspector's standing amongst her colleagues would be diminished once they knew that her responsibility for conducting appraisals had been taken away from her. In Williams v Trustees of Swansea University Pension & Assurance Scheme [2018] UKSC 65 the Supreme Court accepted that there was no need for a fine distinction between the concept of unfavourable treatment and the concept of detriment.

106. A claimant must show group disadvantage and a disadvantage to the claimant. There are different methods of establishing disparate impact. It can be done by adopting a statistical approach. The EHRC Code (at paragraph 4.21-4.22) states that tribunal may compare the proportion of workers with and without the protected characteristic who are disadvantaged in order to ascertain whether the group with the protected characteristic experiences a particular disadvantage in comparison with others. What has to be considered is the total number of people from each group present in the pool so that the number of those affected by the PCP can be expressed as a proportion or percentage of the total. Two percentages may help to demonstrate

disadvantage. The first is the number of women adversely affected by the PCP, as a proportion of the total number of women in the pool. Second is the number of men adversely affected by the PCP, as a proportion of the total number of men in the pool. The difference in the two proportions may be small, but may nonetheless demonstrate a particular disadvantage if they represent large differences in the actual numbers of men and women adversely affected by the PCP.

107. If a claimant has met its burden of proof in establishing the first three parts of section 19 then the burden will shift to the respondent to establish its objective justification defence.

108. There is no statutory definition of a legitimate aim but the EHRC Code provides that must be legal and not discriminatory. It should represent a real objective consideration.

109. ECJ authorities established that the PCP must correspond to a real need on the part of the respondent, be appropriate with a view to achieving the objective in question and be necessary to that end. A balance must be struck when considering proportionality between the discriminatory effect of the PCP and the reasonable needs of the party who applies it. Section 19(2)(d) requires the tribunal to carry out an objective balancing exercise between effect of and reasons for the PCP taking into account all relevant facts (EHRC Code para 4.30).

110. Costs can be a factor. In Heskett v Secretary of State for Justice [2020] EWCA Civ 1487 Underhill LJ reviewed the authorities on legitimate aim where that aim is to save costs

> **"83. It follows that the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate."**

111. The EHRC code at paragraph 4.30 provides an employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts'.

112. Lord Justice Sedley in *Allonby v Accrington and Rossendale College and ors* explained: '**In this situation it is not enough that the tribunal should have posed, as they did, the statutory question "whether the decision taken by the [employer] was justifiable irrespective of the sex of the person or persons to whom it applied"… [T]here has to be some evidence that the tribunal understood the process by which a now formidable body of authority requires the task of answering the question to be carried out, and some evidence that it has in fact carried it out. Once a finding of a [PCP] having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the [employer]'s reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the PCP on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.'**

Discussion and Conclusions

Disability

113. It was conceded by the respondent that the claimant's sickness absence from November 2015 until March 2016 was disability related. The list of issues invited us to consider whether each of the periods of sickness absence cited in the references provided by Dr Mortimer and Mrs McGugan related to disability and/or were pregnancy related. The issue before us in considering claims for discrimination arising out of disability and indirect disability discrimination was whether the claimant was disabled as at the time of the absences for the section 15 complaint and as at the date of the acts of discrimination complained of, that is to say when the references were sent on 14 and 16 November 2018 for the section 19 complaints

114. We had evidence from the claimant contained in her Disability Impact Statement. We accept her evidence that she continued throughout the period from the delivery of her first daughter to the date of this hearing to suffer from double incontinence. She must avoid lifting and running and has to be careful about heavier household tasks like hoovering and even lifting her younger daughter in and out of the car. She has to make provision to cope with accidents at any time, including always having a change of clothes with her. The claimant has learned to manage her diet and timing of food and drink to minimize risk of accidents. Her condition worsened during her second pregnancy. More recently it has improved following PTNS treatment but needs ongoing monitoring and top up treatment. The claimant continues to take medication, has ongoing issues and long term double incontinence.

115. The claimant's sickness absence from 14 October 2013 until 25 October 2013 was unrelated to pregnancy. The claimant's sickness absence from 25 June 2014 until 22 November 2014 was pregnancy related. On her own evidence, and corroborated in part by the evidence of Dr Shah, who in the OH report dated 26 June 2017 said "*In my opinion, with regards to the disability legislation, impairment is likely to be considered long-term and which has a substantial adverse effect"* we find that the claimant was disabled for the purposes of Section 6 Equality Act 2010 from the birth of her first daughter on 13 December 2014 and remained disabled to the date of the acts of discrimination complained of on 14 and 16 November 2018 and beyond.

116. Using the table prepared by the respondent we find that the reasons for absence for the periods in question and for the reasons set out above were as follows:

Sickness absence start date	**Sickness absence end data**	**Our finding on reason for absence**
07-July-17	21-July-17	Disability and pregnancy related
26-Jun-17	6-July-17	Disability and pregnancy related
01-Jun-17	23-Jun-17	Disability and pregnancy related
30-Mar-17	07-Apr-17	Disability and pregnancy related
The claimant returned to work and had no sickness absence at all from March 2016 until March 2017 when she became pregnant again and experienced exacerbation		

of her disability for pregnancy related reasons		
23-Nov-15	31-Mar-16	Conceded disability related Pregnancy related
The claimant's first daughter was born on 13 December 2014		
25-Jun-14	22-Nov-14	Pregnancy related Claimant not disabled at this time
14-Oct-13	25-Oct-13	Unrelated to pregnancy Claimant not disabled at this time

The Section 15 Complaint

Did the respondent treat the claimant unfavourably by commenting in the reference dated 14 November 2018 that the claimant had "extensive episodes of sickness absence"?

117. Unfavourable treatment is not defined by the Equality Act but EHRC Code of Practice says that it means that a person must have been put at a disadvantage. It can also be construed widely to mean suffered a detriment. The respondent did not treat the claimant unfavourably by commenting on the sickness absence. It was not unfavourable treatment because:

a. Dr Mortimer commented in the context of a reference which invited comment. The comment related to the quantity of absence.

b. The respondent's use of the word "extensive" was not a critical or negative comment ; it didn't say for example that this was difficult to cover, or caused problems for the respondent. It wasn't negative or positive. It was a neutral comment on quantity only.

c. It was an accurate description of the quantity of absence. It was not the comment that caused the harm to the claimant. We were satisfied that even without the comment the GP practice would have withdrawn the offer. In that regard we felt the comment was innocuous.

118. If the comment had been unfavourable treatment, then Section 15 would require us to go further. We would have had to ask ourselves what was the reason for the unfavourable treatment. Why did Dr Mortimer comment and why did she use the word extensive?

Was the comment that the claimant had "extensive episodes of sickness absence" because of something arising in consequence of the claimant's disability of bladder and bowel dysfunction, namely the claimant's disability related sickness absences? Alternatively, was it due to a reference request from the Penny Lane Surgery (originally the second respondent) which asked for comments on 'timekeeping and sickness'?

119. Dr Mortimer accepted in evidence that she had an issue with the quantity of absence. Dr Mortimer was motivated by the level of absence, and the level of absence arose in consequence of disability. This part of section 15 would have been made out.

Did Dr Mortimer know (or could she reasonably be expected to know) that the claimant was disabled?

120. Dr Mortimer did not know that the claimant was disabled for the period in relation to which she made the comment. Dr Mortimer, in choosing to comment on sickness absence could reasonably be expected to know, within section 15(2) that the claimant was disabled. The respondent had a report dated 26 June 2017 from the Occupational Health expert, Doctor Minaxi Shah. It used the language of the Equality Act when it said:

> *"In my opinion, with regards to the disability legislation, impairment is likely to be considered long-term and which has a substantial adverse effect. Risk assessment should be performed."*

121. Anyone writing a reference for the claimant that included sickness absence data and who chose to comment on that data could reasonably be expected to know the reasons for those absences before commenting on them.

122. If the claimant had established unfavourable treatment, which she did not, then Dr Mortimer's state of knowledge would not have been an impediment in this case as she could reasonably have been expected to know that which was in the OH report in the line manager's file when she chose to comment on absence in a reference.

123. It has not been necessary to deal with the objective justification defence for the section 15 complaint as it fails for want of unfavourable treatment.

Section 19 EA 2010

PCP1 – Indirect Sex Discrimination

Did the Respondent have a PCP of listing absences within references without providing any detail of the reasons for the absence?

124. Yes, the respondent had a PCP of listing absence without providing detail of the reasons for the absence. It provided headline data only. Mrs Lewis removed the reasons before sending the data to Dr Mortimer and Mrs McGugan. We accept the evidence of Dr Mortimer and Mrs Lewis that this is how it is always done not just in their Trust but in the NHS generally.

Did the respondent apply that PCP to the claimant?

125. The PCP was applied to the claimant on 14 November 2018 when Dr Mortimer sent her reference to the GP practice and on 16 November 2018 when Mrs McGugan sent her reference and each of them included headline sickness absence data only.

Did the PCP put female employees at a particular disadvantage of "giving an incorrect

impression of generally poor sickness record or poor health and make it less likely that a prospective employer would exclude pregnancy related absences from consideration" when compared with male employees?

126. The inclusion of headline data without reasons put female employees at a particular disadvantage. Here are our reasons:

127. We started by observing that the PCP would adversely affect some employees. It would tend to give an impression of a generally poor sickness record or poor health. That impression can put off prospective employers.

128. Next, we set about constructing a pool for comparison, so we could test whether or not this adverse effect would be experienced particularly by women in comparison with men. In our view the pool should comprise those people affected by the PCP.

129. We considered the pool that had been constructed by the claimant and respondent, that is to say, a pool comprising all employees in the respondent Trust. We rejected that pool . It is too wide. The disadvantage flowing from the PCP of listing absences without reasons would not bite on all employees in the Trust. Prospective employers would not be put off employing candidates with no sickness absence or a low or average level of sickness absence (whether caused by infrequent long periods of absence or persistent intermittent absence). The reason for absence would be unlikely to make any difference to those candidate's employability in the eyes of the recruiting employer. The PCP would only affect those who had levels of absence which, if unexplained, might cause a prospective employer not to employ the candidate. We thought that the kind of absence most likely to come into that category was long term sickness absence.

130. We recognised that a pool defined by long-term sickness absence would not perfectly match the adversely affected group. For some employees with long-term absence, the bad impression caused by the list of absences would not be cured by stating the reason for absence: the prospective employer would still not want to employ the candidate once they knew the reason. But, for a significant subset of long-term absent employees, the reason would or could improve the candidate's prospect of being taken on by the new employer. It might be that the reason for absence (such as a single traumatic injury with full recovery) might reassure the new employer that the absence would not recur during the new employment. It might also be that, if the prospective employer knew that the absence was due to pregnancy or disability, they would think twice about withdrawing their conditional offer of employment. A well-intentioned recruiter would make further enquiries with the candidate or seek occupational health advice. Even a cynical prospective employer would fear that withdrawing an offer at that stage would expose them to potential liability for discrimination. The PCP made it less likely that a prospective employer would employ candidates in this subset than if the reason were included.

131. We did not have direct evidence of who did or did not fall into this particular subset. We were, however, able to infer that the size of this group would broadly correlate to the size of the larger group – people with long-term sickness absence – of which the subset formed a part. Crucially, we had no reason to think that the proportion of men within the subset would be likely to be any higher than the proportion of men within the long-term absence pool as a whole. We therefore concluded that

the long-term sickness absence group would enable us to test disadvantage. If there were significantly more women than men who had long-term sickness absence, it is likely that there would also be significantly more women than men who fell into the subset that was adversely affected by the PCP.

132. The Trust defined long term sickness absence as more than four weeks' sickness absence in any one absence year. Defining the pool in this way allowed us to measure the impact of the potential harm in the provision of a reference with headline sickness data only and its potential to result in an offer of employment not being made or being withdrawn despite the fact that some or all of the sickness absence may be absence related to a protected characteristic which ought to be discounted by the prospective employer.

133. We considered further refining the pool to include only employees who had sickness absence some of which related to a protected characteristic. We decided that defining the pool in that way would be too narrow – the PCP does not only affect people who are absent due to a protected characteristic.

134. We had data in the bundle showing the total number of sickness absence days and episodes for pregnancy related absence at the relevant time but did not have data for male specific sickness absence.

135. Having constructed the pool of employees with long-term sickness absence we then conducted a statistical analysis following the approach at paragraphs 4.21 and 4.22 of EHRC Employment Code. It provides for an approach that involves comparing the proportion of workers with and without the protected characteristic who are disadvantaged in order to ascertain whether the group with the protected characteristic experiences a particular disadvantage.

136. We looked at the ratio of female to male employees in the respondent Trust. In 2018 there were 4788 females to 1059 males.

137. We looked at the number of staff who have had long term sickness absence in the Trust in 2018. 102 men had long term sickness absence in 2018. 636 women had long term sickness absence in 2018. We asked what incidence of long term sickness absence was male 102 divided by 1059 gave an incidence of 0.09 We asked what incidence of long terms sickness absence was female 636 divided by 4788 gave 0.13.

138. We saw that females had a 30.8% higher incidence of long-term sickness absence than males.

139. This meant that the PCP of listing absences within references without providing any detail of the reasons for the absence put females at a disadvantage when compared with males. Females had higher incidence of long-term sickness than males and therefore more of them were likely to lose offers of employment as a result of the provision of headline data only than men.

<u>Did the PCP put the Claimant at that particular disadvantage?</u>

140. The claimant was put to that particular disadvantage. Headline sickness data only was provided to a prospective employer for her. No reasons were given.

Therefore, absence which ought to have been discounted because it related to a protected characteristic was not discounted. The prospective employer was given the general impression of an applicant with a generally poor sickness record and/or poor health.

Was it incumbent upon the Respondent to specify if any of the Claimant's absences were pregnancy related?

141. We do not go so far as to say it was incumbent upon the respondent to specify if any of the claimant's absences were pregnancy related. Nor do we need to do so. The question of whether or not the PCP was indirectly discriminatory does not depend on whether or not it was "incumbent" on the respondent to take any particular step. We nevertheless considered that this question might help us determine whether or not the PCP was justified. The respondent might have included a note to the provision of headline data only to the effect that the prospective employer should enquire of the applicant or its own Occupational Health provider with the applicant's consent as to whether or not any of the absence ought to be discounted. We consider this point further under the proportionality consideration in the objective justification defence below.

Can male employees also suffer from gender specific conditions which cause sickness absence? Would those sickness absences also have been listed by the respondent within references without providing any detail of the reasons for the absence?

142. Male employees can also suffer from gender specific conditions which cause sickness absence. The respondent would also have included absences related to those conditions in a reference without providing reasons. We did not have data before us to compare male gender specific long-term sickness absence with female gender specific long-term sickness absence.

143. On disparate impact we say that because of the significantly higher proportion of women with long-term sickness absence, more females will be disadvantaged by headline data provision only, than males.

144. Although we considered the case based on the pool as we defined it above, if we had accepted the pool proposed by the parties then the outcome would still have been a statistically significant difference.

a. In 2018 there were 4788 females to 1059 males.
b. The respondent lost a total of 90549 days to sickness absence in 2018. We asked what proportion of days lost to sickness absence were female. Of that 90549, 77821 days lost were female. We asked what proportion of days lost to sickness absence were male. 12728 were male.
c. We then looked at the male and female days lost to sickness absence pro rata to the headcount of males and females. We divided 77821 by 4788 and got 16.2 days lost to sickness absence per female. We divided 12728 by 1059 and got 12.01 days lost to sickness absence per male.
d. We saw that females had a 25.9% higher rate of long-term sickness absence than males.

145. On either pool, the data strongly suggests that the PCP had a disparate impact

on females and males. The claimant's claim on the first PCP is made out and the burden shifts to the respondent to establish an objective justification. We deal with objective justification below.

PCP2 – Indirect Sex Discrimination

Did the respondent have a PCP of commenting negatively on substantial sickness absence records without specifying the reasons for the absence?

146. We accept Mrs Lewis' evidence that the general practice was to make no comment. Mrs Lewis told us that it is the policy that managers should not comment on sickness absence, and that they should only provide headline data. The managers are not usually given the reasons for the sickness absence. Neither Dr Mortimer nor Mrs McGugan were given the reasons for absence in the claimant's case.

147. Dr Mortimer told us that this was the only case when she had ever commented on sickness absence. Dr Mortimer accepted under cross-examination that she had an issue with the sickness absence in the claimant's case. She felt that it was out of the ordinary to see a sickness absence record with such a lot of absence and for that reason she described it as extensive.

148. The claimant submitted that something that is done just once, as here with Dr Mortimer commenting on the headline sickness data, can amount to a PCP. We accept that submission in principle. The Trust did have a PCP of commenting, in that, applying Ishola Dr Mortimer did comment on the quantity of sickness absence and would have done so again in a case with equivalent quantity of absence, but in this case the PCP was drafted *commenting negatively* and on that PCP the complaint fails.

149. We found that the use of the word extensive was not a negative comment on the data provided. It was an accurate interpretation of that data. There was no PCP of commenting *negatively* applied to the claimant.

Did the respondent apply that PCP to the claimant?

150. No such PCP existed and no such PCP was applied to the claimant. The section 19 claim on the protected characteristic of sex on the second PCP fails. It was not necessary for us to go further in dealing with the list of issues on this point as the claimant has not established a PCP that was applied to her.

PCP3 – Indirect Disability Discrimination

Did the respondent have a PCP of commenting negatively on employee's substantial sickness records?

151. For the same reasons as above, we found that the Trust did not have a practice of commenting *negatively* on employees' substantial sickness records. The respondent therefore did not apply that PCP to the claimant. The Trust did have a PCP of commenting, in that, applying Ishola Dr Mortimer did comment on the quantity of sickness absence and would have done so again in a case with equivalent quantity of absence. That is not enough to show that the alleged PCP existed. In this case the alleged PCP was drafted as "*commenting negatively".* The word, 'negatively' is an

important part of the PCP. Without it, it is hard to see what disadvantage the PCP would cause. On that PCP the complaint fails.

152. We did not have data on the incidence of disability within the sickness absence data for the respondent. The claimant could not make out that the PCP put disabled people (with the claimant's disability) at a particular disadvantage of having negative comments included in their references as compared to non disabled people nor people who were disabled but who did not share the claimant's disability. Even if the claimant had been able to make out disparate impact the claimant was not put at any such disadvantage in this case because we found above that on the way the PCP was drafted in this case no *negative* comment was made.

Was it incumbent upon the respondent to reply truthfully and accurately to a reference request from a prospective employer?

153. Again, this question, if it has to be answered at all, must be seen in its proper context. It is not determinative of whether or not the PCP was indirectly discriminatory. It does, however, have some relevance to the question of justification. The claimant worked as an Aseptic Non-Touch Technique Clinical Nurse Specialist at the respondent for just under six years. The claimant was a band 7 nurse. She had applied for a band 5 job in October 2018. As at the date at which the references were provided on 14 and 16 November 2018 the claimant had spent 344 days, (the respondent's data said 363 days) absent from work. In addition to the sickness absence the claimant had maternity absences. The periods absent from work on maternity leave were not included in the reference.

154. A prospective employer expects to be able to form a view as to the level of experience and ability or competence of an applicant gained from being at work. It concerned us that irrespective of the reasons for absence, to have discounted periods of absence (other than the maternity leave which was not included) might have given an inaccurate impression of the experience and ability of the claimant. It might have suggested to the prospective employer that the claimant had more experience, gained through more time in work, than (through no fault of her own) she actually had.

155. The respondent's reference was truthful and accurate in terms of the provision of headline sickness absence data and in terms of the comment made by Dr Mortimer.

Objective Justification

156. The test of objective justification was set out by the ECJ in Bilka-Kaufhaus GmbH v Weber von Hartz 1987 ICR 110 The employer is required to show that the policy alleged to be discriminatory corresponds to a real need on the part of the employer; that the policy is appropriate with a view to achieving the employer's objective; that the policy is 'necessary' for this purpose.

Did the respondent have a legitimate aim of a desire to provide true and accurate reference information to prospective employers?

157. Yes. We accept the evidence of Dr Mortimer and Mrs McGugan and Mrs Lewis. We find that PCP1 was a means of achieving the aim of providing true and accurate reference information to prospective employers and that that aim was legitimate.

Was the comment regarding the claimant having had "extensive sickness absence" true and accurate?

158. The comment was true and accurate. The claimant had suffered a traumatic delivery and birth of her first daughter and suffered ongoing health problems that were then exacerbated by a second pregnancy. She was dealing with difficult health issues that left her unfit for work for a long time. Her sickness absence was extensive. Put another way, the application of the PCP to the claimant was a means of achieving the legitimate aim.

Was the approach taken by the respondent proportionate?

159. Applying the law on proportionality, we had to ask ourselves did the respondent have a real need in relation to each of the PCP's. Was the PCP appropriate to achieving that aim and was it reasonably necessary ?

160. PCP1 was of listing absences within references without providing any detail of the reasons for the absences. Did the respondent need to do this in order to provide true and accurate references ? Was listing headline data only appropriate so as to achieve its aim and was it reasonably necessary ?

161. PCP 2 was commenting negatively on substantial sickness absence records without specifying the reasons for the absence? Did the respondent need to do this in order to provide true and accurate references ? Was commenting negatively without specifying reasons appropriate so as to achieve its aim and was it reasonably necessary ?

162. PCP 3 was commenting negatively on employee's substantial sickness records? Did the respondent need to do this in order to provide true and accurate references ? Was commenting negatively appropriate so as to achieve its aim and was it reasonably necessary ?

163. In relation to PCP2 and PCP3 we found that there was no negative comment. It was not necessary for us to go on to consider the objective justification defence for those PCP's. If there had been a need for us to consider it then we would have concluded that there would have been no real need to make a negative comment in order to achieve the legitimate aim of a true and accurate reference. Commenting may have been appropriate in a context in which a referee was asked to comment on timekeeping and attendance but it would not have been reasonably necessary for that comment to be negative. The comment, as in this case, could draw attention to the quantity of absence without being negative. **The objective justification defence, if PCP's 2 and 3 had been made out, would have failed on the real need and the reasonably necessary aspects of the test for proportionality.** A reference response for a candidate with extensive sickness absence whether reasons for absence were provided or not, could be true and accurate, meeting the legitimate aim without being negative. If the claim had been made out the objective justification defence would have failed on PCP's 2 and 3.

164. For PCP1, where we found there to be a legitimate aim we went on to consider proportionality. Did the respondent need to provide headline data only in order to

provide true and accurate references, was it appropriate to do so and was it reasonably necessary ?

165. We undertook a critical evaluation of the evidence before us as to whether the respondent's approach met a real need, was appropriate and reasonably necessary. We looked at all the relevant facts as per the EHRC Code. We find that the respondent's approach met the real need of providing true and accurate references, that providing headline data only was appropriate and reasonably necessary for the reasons set out below. The proportionality test is met and **the defence of objective justification is made out in relation to PCP1 and the indirect sex discrimination claim** for the following reasons:

166. We accept the evidence of Mrs Lewis that the existing status quo within the NHS is that employers provide headline sickness absence data only and the burden rests on the prospective employer to make further enquiry of the applicant herself, with her consent her GP, or with her consent the employer should it wish to obtain further information. Or it might, with her consent, refer her to its own Occupational Health provider. It is for the prospective employer to consider whether or not any of the sickness absence ought to be discounted because it relates to a characteristic protected under the Equality Act 2010. A prospective employer would want to make those checks in any event in case there might be reasonable adjustments to be made for an incoming employee. The respondent had a real need to provide true and accurate references and to do so in the context of the existing status quo for reference provision within the NHS.

167. It is not for the employer to disclose confidential, sensitive personal information belonging to the employee. It would not be appropriate to require the employer to disclose that information because to do so would require it to obtain the employees consent which may or may not be forthcoming, it would require an interpretation of the data on ESR system which is put up there from a variety of sources including GP fit notes and information provided direct by the employee. Mrs Lewis gave evidence that neither HR nor line managers are qualified to interpret medical information. This might mean that medical expert opinion would be needed before classifying absence and coding it in such a way that it could flag whether or not the absence might relate to a characteristic protected under the Equality Act 2010. Even if medical opinion was obtained there could be conflict in medical opinion. The process of coding reasons for absence could become a negotiated process. This would cause considerable delay and cost to this respondent and to any NHS employer. It would need an increase in HR resource to be able to manage the process. Compliance with data protection laws plus the potential for a move to a negotiated agreed coding of sickness absence, and the concomitant direct and indirect costs thereof, made it appropriate and reasonably necessary for the respondent to disclose headline sickness absence data only. In providing headline data only the respondent was not seeking solely to save the costs of alternate methods of providing true and accurate references. It was seeking to operate within what might be termed a "costs plus" framework of its internal policy context and the external status quo as to the interrogation of sickness absence data.

168. Further, in balancing discriminatory effect and the respondent's reasonable needs it struck us that the discriminatory effect on the claimant (making it look like she had a generally poor sickness record or poor health and make it less likely that a prospective employer would exclude pregnancy related absences from consideration

and making it less likely that she would get a job offer or more likely that an offer would be withdrawn) could have been mitigated if not eradicated had the claimant herself disclosed at interview the reasons for her sickness absence and explained the traumatic and discrete circumstances that led to her extensive sickness absence. It was her case that of the 344 days sickness absence only 14 were not related to the traumatic delivery of her daughter and her subsequent disability and pregnancy related absences. She could have pointed out the periods of attendance with no absence whatsoever (for example from her return to work in 2016 until she fell pregnant in 2017 and began to suffer an exacerbation of symptoms from the first delivery) and contextualised her disability and or pregnancy related sickness absence and stated that it should be discounted, for the prospective employer.

169. Further, on discriminatory effect we consider that the provision of headline sickness absence data only may have *given an impression* of someone with poor sickness record or poor health but the actual effect is the decision not to interrogate that data, not to discount some of the data, the decision to withdraw the offer. The effect on the claimant is not because of the data provided but because of the failings by the GP practice in their response to the data. We had not reason to think that the GP practice would have behaved differently even had a Rider been put in place to the reference as suggested at paragraph 141 above and 171 below. The effect caused by the respondent's PCP *as opposed to the actions of the recipient of the information* was minimal.

170. The respondent had a reasonable need to provide true and accurate reference information in a way that was manageable within their internal and external context. Internally, they have a limited resource for managing reference requests and a system that codes reasons for absence based on data provided by the employee or their GP or sometimes OH. They have a reasonable need to comply with the GDPR and to not release sensitive personal data without consent. They have a limited resource for obtaining that consent and reaching agreement as to the reason for absence. Externally, they have a reasonable need to operate in a way that is consistent with practice in their sector. We accept the respondent's Mrs Lewis's evidence and the respondent's submission that the current status quo in the NHS is that it is for the prospective employer to make enquiry as to reasons for sickness absence and to consider discounting periods of absence.

171. Further, on proportionality Baroness Hale (as she then was) in Essop above spoke about blanket policy decisions and their potential to be indirectly discriminatory. In this case the objective justification defence is made out in relation to the only complaint (PCP1 indirect sex discrimination) where the claimant fully discharged her burden of proof. Whilst the claimant's claims all fail we note that the blanket policy decision of providing headline sickness absence data only, did have a disparate impact and the potential to create barriers for women. The claimant talked about feeling trapped by her own sickness record. We heard evidence from Mrs Lewis that the respondent was revising its Reference Policy and that its policies are regularly reviewed. It may be that the Trust will consider a revision so that, should it continue to provide headline sickness absence data only, a rider is included on references to the effect that some or all of the sickness absence data provided might be absence for reasons related to a protected characteristic under the Equality Act 2010 that ought to be discounted and that enquiry should be made by a prospective employer of a candidate and / or a prospective employer's own Occupational Health expert before

reaching decisions based on the headline data alone. Whilst no criticism is made of the respondent whose objective justification defence is made out, such a revision in practice may better meet the aim of achieving the equality of results to which Baroness Hale alluded.

172. A revised reference would have been a fairly easy step to take and was just as effective a means of achieving the legitimate aim as the reference that was actually sent out. A rider, as suggested above, could have lessened the disadvantage which would particularly affect women. However, this was not the claimant's case. Her formulation of the PCP meant that all the respondent had to justify was withholding the actual reason for absence. If the thing that caused the disadvantage to women was the absence of a warning to prospective employers about legally-protected reasons for absence, the PCP would have had to have been formulated differently. We accepted the respondent's submission citing Chandok v Tirkey [2015] ICR 527 that we must address the case as put and the PCP's as formulated by the claimant, and that is what we did.

173. We accept the respondent's submission, balancing the discriminatory effect of the PCP and the reasonable needs of the respondent that the respondent's approach was proportionate.

174. We therefore find that in providing headline data only about the claimant sickness absence, the respondent put the claimant at a particular disadvantage in relation to PCP1 for the protected characteristic of sex, but that this was objectively justified.

175. For the reasons set out above the claimant's claims all fail.

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Employment Judge Aspinall

Date: 19 November 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

20 November 2020

FOR EMPLOYMENT TRIBUNALS