



# EMPLOYMENT TRIBUNALS

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**Claimant:** Miss K Marsh  
**Respondents:** (1) Leeds City Council  
(2) Debra Gedge

## AT A HEARING

**Heard at:** Leeds                      **On:** 4<sup>th</sup> and 5<sup>th</sup> April 2023  
**Before:** Employment Judge Lancaster  
**Members:** L Fawcett  
DW Fields

### Representation

**Claimant:** In person  
**Respondent:** Mr F Mortin, counsel

## WRITTEN REASONS

1. Reasons for this decision were given orally at the hearing, immediately upon the conclusion of the case.
2. The Claimant did not at that stage make any request for written reasons.
3. The Judgment dismissing the claim was sent to the parties on 11<sup>th</sup> April 2023
4. On 11<sup>th</sup> April 2023 the Claimant applied for reconsideration of the judgment , which was refused by a further judgment dated 18<sup>th</sup> April 2023, and at the same time did then request written reasons.
5. Although the Employment Judge did give instructions, at the same time as refusing the reconsideration request, that a transcript of the oral decision should be prepared so that written reasons could be finalised, that was, in error, not ever done promptly.
6. The Claimant has quite properly now chased up her unanswered request, but not until 27<sup>th</sup> September 2023, following an exchange of correspondence with the Employment Appeal Tribunal where she was informed that she was required to provide written reasons to accompany her appeal
7. Unfortunately, it is not now possible readily to locate the recording of the oral decision.
8. Summary written reasons are therefore now provided, which necessarily do not reflect the full content of the decision delivered orally.

### **The issues**

9. As identified by Employment Judge Maidment at the preliminary hearing on 30<sup>th</sup> September 2022, this is a claim only of direct post-employment discrimination because of perceived disability: sections 6 (as supplemented by schedule 1), 13 and 108 of the Equality Act 2010.
10. The alleged acts of discrimination are the provision of three references for prospective future employers after the Claimant had voluntarily left employment with the First Respondent on 31<sup>st</sup> March 2021.
11. All three references were provided by the Second Respondent, the Claimant's previous line manager so that both Respondents are potentially able as employee and principal: section 109 Equality Act 2010.
12. The three references were provided as follows:
  1. To Home Group on 29<sup>th</sup> October 2021
  2. To Leeds City College on 19<sup>th</sup> April 2022
  3. To Hovingham Primary School on 18<sup>th</sup> May 2022.
13. The first issue is therefore whether the provision of any or all of these references in fact subjected the Claimant to a detriment: section 39 (2) d) of the Equality Act 2010.
14. It is conceded that the second reference was a detriment; that is that the Claimant reasonably perceived its content as placing her at a disadvantage in circumstances where she was seeking to secure future employment.
15. The second and key issue is whether the Respondents in fact perceived the Claimant to meet the definition within the meaning of the Equality Act 2010, in circumstances where neither side contends that she actually was disabled.
16. The third issue is whether, if she was indeed perceived to be disabled, she was in being subjected to any detriment treated less favourably than a relevant hypothetical comparator who was not disabled or similarly perceived to be disabled would have been treated: sections 13 (1) and 23 of the Equality Act 210. That is, was the protected characteristic of disability the reason why a detrimental reference was given?

### **The Law**

17. Section 13 (1) of the Equality Act 2010 reads:

"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."
18. Section 39 (2) d) of the Equality Act 2010 reads:

"An employer (A) must not discriminate against an employee of A's (B)- .. by subjecting B to any other detriment."
19. The House of Lords' decision in *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. Their Lordships took the view that an unjustified sense of grievance could not amount to a detriment but did emphasise that whether a claimant has been disadvantaged is to be viewed subjectively.

20. The Equality Act 2010 defines actual disability as a physical or mental impairment which at the material time has a substantial (that is “more than trivial”) adverse effect on a person’s ability to carry out day-to-day activities where the effects of the impairment are long-term, that is that they had lasted at least 12 months, or were likely to last at least 12 months, or if not, were likely to recur.
21. The position in respect of how perceived disability is to be determined is set out in the Court of Appeal decision in Chief Constable of Norfolk v Coffey [2020] ICR 145. Lord Justice Underhill summarised the issue as follows:
- “35. The starting-point for the issues raised by these grounds is that it was common ground before us that in a claim of perceived disability discrimination the putative discriminator must believe that all the elements in the statutory definition of disability are present – though it is not necessary that he or she should attach the label “disability” to them. As Judge Richardson put it succinctly, at para. 51 of his judgment: “The answer will not depend on whether the putative discriminator A perceives B to be disabled as a matter of law; in other words, it will not depend on A’s knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation.”
- That distinction between knowing the facts that constitute the disability and knowing that they amount to a disability within the meaning of the Act had already been drawn, albeit in a different context, by Lady Hale in her speech in Malcolm : see para. 86 (p. 1430 F-G). Again, although it was common ground that this was the right approach, I should say that I agree that it is correct. In a case of perception discrimination what is perceived must, as a simple matter of logic, have all the features of the protected characteristic as defined in the statute.”
22. From the relevant authorities, the phrase “because of” in section 13 of the Equality Act 2010 has been held to cover cases where the protected characteristic is a significant, even if only subconscious, part of the “mental processes”, or “motivation”, of the putative discriminator in deciding to do the acts complained of. That phrase “because of [a protected characteristic]” has also been held in Coffey to be wide enough to cover the case where A acts on the basis that B has that characteristic, whether they do or not.
23. Section 136 of the Equality Act 2010 provides that if there are facts from which in the absence of any other explanation the Tribunal could conclude that the Respondents have contravened a provision of the Act it must hold that that contravention occurred unless the Respondent shows that it did not contravene that provision (“the reverse burden of proof”).
24. Section 13 is supplemented by section 23 , which reads (so far as material):
- “(1) On a comparison of cases for the purposes of section 13 , ...there must be no material difference between the circumstances relating to each case.
- (2) The circumstances relating to a case include a person’s abilities if—
- (a) on a comparison for the purposes of section 13 , the protected characteristic is disability;”

### **The Facts**

25. The Claimant was employed by the First Respondent as a family outreach worker from 13<sup>th</sup> September 2005 until terminated by mutual consent as an “early leaver” on 31<sup>st</sup> March 2021. The Claimant received a severance payment of £9,13.26
26. Her place of work changed on 17<sup>th</sup> July 2017 and the Second Respondent then became her line manager. This followed almost immediately from a period of twenty working days absence for stress, which was categorised as a long-term absence, therefore triggering the First Respondent’s attendance management procedure.
27. The Second Respondent when requested to provide the first reference to Home Group Limited drafted a response which included, in a context which suggested without explicitly stating it that these were reasons why she would not re-employ the Claimant, the following observations:

“During the time I managed Kara there were periods of time she needed extra support with her own mental health & Well-being, which were exacerbated during the Covid Pandemic. Kara did not always recognise or acknowledge there were any issues and because of this she was not always ready to engage with support offered. Kara at time found it personally challenging in her role in delivering some of the key messages to children & families relating to Covid, this was challenging to manage. Kara preferred to work in isolation and needed support to work as part of a team.”
28. She also included in a section headed “additional comments relating to the candidate’s suitability for the post”:

“Kara was only managed by myself for 4 years, in this time we saw improved attendance at work, and she was removed from formal attendance management procedures. Kara struggled with time keeping and punctuality was inconsistent. Kara endeavoured to work to the best of her abilities to support families, she was able to draw her own experiences which enabled her to be empathetic with parents’ situations. Kara was finding it more difficult to work for the local authority and when the opportunity arose to leave I feel it was the right decision for her.”
29. This draft was then submitted to HR and was amended on their advice.
30. The reference which was in fact provided to Home Group therefore read as follows in substitution for these original comments:

(now elaborating on an express reply that “it would depend upon the role she applied for” as to whether the Claimant would be re-employed) “Time keeping and punctuality were an issue for Kara, she would often be late for work but was willing to make the time up at the end of her shift. Kara felt she worked better alone; team dynamics could be challenging for her”; and, (regarding suitability for the post) “Kara endeavoured to work to the best of her abilities to support families.”
31. The Claimant was given a job with Home Group but it was not extended beyond her probationary period because she would not agree to be vaccinated against covid.

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32. When the Second Respondent was asked, some six months later, for the second reference for Leeds City College she incorrectly cut and pasted part of the saved draft of her original first reference, and not the amended version as recommended by HR.
33. Nonetheless, we find that this assessment of the Claimant's performance and abilities was honestly given at that time.
34. The second reference was not further submitted to HR before being sent.
35. However in contemporaneous communication with the Claimant in April 2022, when she was challenged about the content of this second reference, the Second Respondent clearly does appear to be of the mistaken view that the saved version of the first reference which she had used as the template was in fact that for which she had also obtained HR approval. The second reference was submitted electronically directly to the College and the Second Respondent did not keep a saved copy.
36. In the second reference it was stated explicitly in response to a question that the Second Respondent would not re-employ the Claimant.
37. The given reasons for not doing so were:

"Kara struggled with punctuality, she was often late for the start of her shift but she would offer to make the time up at the end of the day.  
Kara found working for LCC challenging at times as I feel she was unable to share her own views & opinions.  
Kara found being a member of a team difficult at times although she adjusted well to our team for the 4 years she was with us.  
Kara has some good transferable skills, in the right role I believe she will flourish."
38. In rating the Claimant's job performance under specified headings, she was marked as good in four categories, satisfactory in five, and poor in only one, punctuality. The Second Respondent also confirmed that she was completely satisfied that the Claimant was suitable to work with children and vulnerable adults.
39. In the section headed "further information" the following deleted sections from the original draft of the first reference was reproduced verbatim:

"During the time I managed Kara there were periods of time she needed extra support with her own mental health & Well-being, which were exacerbated during the Covid Pandemic. Kara did not always recognise or acknowledge there were any issues and because of this she was not always ready to engage with support offered."  
"Kara was finding it more difficult to work for the local authority and when the opportunity arose to leave I feel it was the right decision for her."  
"Kara was only managed by myself for 4 years, in this time we saw improved attendance at work, and she was removed from formal attendance management procedures."
40. It also included the comment:

"Kara found some of the LCC policies and procedures did not align with her own personal views & opinions and this at times was difficult to manage."
41. The Claimant was not offered a job with Leeds City College.

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42. The third reference was provided at a time when the Respondents were aware that the Claimant had raised a complaint about the content of the earlier ones.
43. In this reference the Claimant was rated as acceptable in all designated categories except timekeeping, and there was no reply to the question as to whether the Claimant would be re-deployed. None of the contentious phraseology was re-used.
44. The Claimant withdrew from the application process at Hovingham school before the reference was in fact provided.
45. Following the raising of a complaint by the Claimant the First Respondent has agreed an acceptable form of words for any future reference.
46. We accept that the Respondents' statement of "background facts" during employment at paragraphs 7 to 37 of Mr Morten's written closing submissions is a balanced and accurate account, supported by the documentary evidence. In summary:-
47. The Claimant had had a number of sickness absences which were recorded variously as stress, anxiety or depression but with no evidence of any underlying cause. Only one such absence, three days in January 2018, occurred however during the period when she was managed by the Second Respondent. Several of those episodes, or of periods of heightened emotional upset even if not resulting in a period of absence, are clearly relatable to discrete trigger factors in the Claimant's personal family circumstances, particularly bereavement, or interpersonal issues at work such as those which led to her seeking to move teams in 2017. Whilst she has been offered access to support during what have presented as stressful times for her, the Claimant has constant asserted, particularly to the Second Respondent, that there is nothing wrong with her mental health.
48. The Claimant has had clearly documented issues with poor timekeeping and team working identified throughout the course of her employment.
49. The Claimant has questioned the existence of covid, strongly objected to the measures being taken to combat the spread of the virus, especially the vaccination programme, and has therefore come in conflict with the prevailing view within the Council leading to admittedly emotional outbursts on her part. This culminated in an altercation with the Second Respondent on 11th June 2020 where the Claimant should not have spoken as she did, shouting and swearing, and where her behaviour was clearly unacceptable.
50. Following this the Claimant was temporarily removed from front-line duties and agreed to be referred to Occupational Health.
51. The OH report dated 22<sup>nd</sup> June 2020 and received by the Respondents on 29<sup>th</sup> June 2020, recommended that the Claimant undertake bereavement counselling but recorded no medical issues that would prevent her returning fully to work, nor any adjustments that were required to be made. It did not give any indication that the Claimant may meet the definition of disability.
52. The Claimant did then return to frontline duties and apart from three days absence for a cold and for dental problems, worked continuously until the date of termination, nine months later.

## Conclusions

53. Neither the first nor the third reference can, in these circumstances properly be construed as subjecting the Claimant to any detriment. The first reference was sufficiently satisfactory to enable her to secure employment and the third, which is unobjectionable in form, was not material because she withdrew her job application. An incorrect prior assumption that the third reference may have gone on to reproduce the wording of the second is not a detriment.
54. The Second Respondent did not believe that all of the elements of the definition of disability were met. She did perceive the Claimant as having on occasions had issues with her mental health and personal well-being. She did not, however believe that to be as the result of any underlying mental impairment, none having ever been diagnosed and in fact having been expressly disavowed by the OH doctor in June 2020. Nor did the Second Respondent believe any such issues to be having a substantial adverse long-term effect, as the Claimant had only ever been absent with stress for three days in 2018 during the period of her line management and any effects witnessed during the time of the later emotional altercation in June 2020 had ceased. By the time that the second reference was written more than twenty-one months had elapsed since that most recent episode. The Second Respondent at the material time, April 2021, believed neither that the Claimant was as the result of some mental impairment experiencing a continuing substantial adverse effect upon her ability to carry out normal day-to-day activities, nor that she had experienced such effects previously for more than twelve months, a “past disability” (section 6 (4) of the Equality Act 2010). Nor given that time frame did the Second Respondent have any reason to, and did not believe that there was likely to be any reoccurrence of what had happened in January 2018 (or earlier) or in June 2020: the Claimant was presenting herself at this time as fully as fit to work and therefore applying for jobs.
55. The Claimant was not therefore subjected to the admitted detriment that was the unsatisfactory second reference because of perceived disability.
56. In any event nearly all of the comments in the second reference would have been made in respect someone who was not perceived to be disabled but who had had the same levels of performance at work and the same capacities as the Claimant in respect of their ability to be punctual, to work in a team or to deal with the conflict arising out of their views about covid. To this extent there could have been no less favourable treatment.
57. The only part of that reference which might conceivably relate only to a person with a perceived mental impairment is therefore: “During the time I managed Kara there were periods of time she needed extra support with her own mental health & Well-being, which were exacerbated during the Covid Pandemic. Kara did not always recognise or acknowledge there were any issues and because of this she was not always ready to engage with support offered.”
58. This too is, however expressly within the context of the Claimant’s views about covid. We would therefore have been satisfied that the reason for the reference being phrased in this way was in no sense whatsoever because of the perception of the

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Claimant's mental health itself but because it was an honest account of her behaviours towards her line manager and the effect this had in the workplace, particularly the outburst on 11<sup>th</sup> June 2020.

EMPLOYMENT JUDGE LANCASTER

DATE 4<sup>th</sup> October 2023

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