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*Practice Group(s):*  
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## Case Alert: Negative Oral Reference Found to be Discrimination Arising from Disability

*By Paul Callegari and Deirdre Treacy*

In *Pnaiser v NHS England and Coventry City Council*, the Employment Appeal Tribunal (the "EAT") ruled that to make a successful claim of disability discrimination, the employee need show only that the disability was part of the reason for the discriminatory treatment.

Ms Pnaiser was disabled within the meaning of the Equality Act 2010, and as a result had periods of long absences during employment with Coventry City Council (the "Council"). When Ms Pnaiser was made redundant she signed a settlement agreement which included an agreed reference. She was subsequently offered another job by NHS England, subject to satisfactory references. The Council provided the agreed reference to NHS England along with an offer to discuss the matter further in a covering email. When NHS England rang Ms Pnaiser's previous manager as invited, she indicated that Ms Pnaiser might not be suited to the role and might struggle to cope with the pressure, mentioning significant sickness absences during her employment with the Council. Following this discussion, NHS England withdrew the job offer.

Ms Pnaiser claimed disability discrimination against the Council and NHS England. Although the claim was initially dismissed, Ms Pnaiser appealed claiming that the Tribunal erred in its application of the required burden of proof. The EAT ruled that the Tribunal should have asked why the negative reference was given and if it could be inferred that Ms Pnaiser's disability related absence was part of the reason. The EAT found that this inference could have been made. The burden of proof should have then shifted to the Council and NHS England to explain their actions.

### What does this mean?

Whether or not there is intention to discriminate is irrelevant. Claimants need only establish evidence that links the disability and negative assessment in order for the burden of proof to then fall on the employer to show that the disability played no part in the assessment.

### What should we do?

When providing a reference, employers should ensure that any written reference is fair and not misleading or, if a reference has been agreed as part of the termination arrangements, stick to the agreed reference. Employers should then ensure that this reference is not contradicted by any subsequent conversation which the new employer may have with the old.

If the new employer receives a negative reference, the employer should be careful that the job offer is not withdrawn if it could be inferred that the reason for the withdrawal is linked to the candidate's disability.

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### Authors:

#### Paul Callegari

paul.callegari@klgates.com  
+44.(0).20.7360.8194

#### Deirdre Treacy

deirdre.treacy@klgates.com  
+44.(0).20.7360.8234

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