

# Negative reference can be discriminatory regardless of referee's motive

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# Negative reference can be discriminatory regardless of referee's motive

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The EAT has found that it is not necessary to show a referee's motive when bringing a disability discrimination claim

following a negative reference, which is based partly on an individual's frequent absences.

Ms Pnaiser was employed by Coventry City Council. She had a disability which resulted in some significant absences from work. In July 2013, she was offered a job with NHS England subject to satisfactory references. In responding to the reference request, Ms Pnaiser's former manager, Ms Tennant, sent a written reference which had been agreed in a settlement agreement, but she invited the recruiting manager to discuss the reference further by telephone. During the conversation, Ms Tennant stated that Ms Pnaiser's frequent absences had impacted her performance at work. As a result of this discussion, the offer of employment was withdrawn, and Ms Pnaiser brought a claim against NHS England and Coventry City Council alleging disability discrimination.

The EAT found that the correct approach is to consider whether mentioning Ms Pnaiser's absences as part of a wider discussion about performance could be discriminatory regardless of Ms Tennant's motives. The EAT found that there was sufficient evidence to show that the absences had been at least part of the reason for the negative reference, and it was for NHS England to show that the absences and performance assessment played no part in the withdrawal of the job offer.

This decision puts employers in a tricky situation in relation to references. Certainly if there has been an agreed reference it would be wiser not to volunteer further information. It also reminds employers who are recruiting that claims can arise as a consequence of acting on a reference which is potentially discriminatory.

*Pnaiser v NHS England and Coventry City Council UKEAT/0137/12*

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