

Perceived disability discrimination and future disabilities

By [Mark Green](#)

3PB Barristers

The Chief Constable of Norfolk v Lisa Coffey [2019] EWCA Civ 1061

(Underhill VP, Davis LJ and Bean LJ – 21 June 2019)

The Facts

- Ms Coffey was a police officer.
- She had mild hearing loss which was picked up originally by Wiltshire constabulary when she applied to be a PC. Although she was just below the threshold for hearing loss, the guidelines suggested that in such cases, a practical test should be undertaken to assess 'functional disability'. She passed this and was given the job.
- The hearing problems did not affect her ability to do her job in any way.
- She applied for a transfer to Norfolk constabulary and had a hearing test as part of the process. She again fell slightly short of the threshold. The medical officer recommended another practical test.
- Norfolk did not give Ms Coffey a practical test and simply relied on the results from the hearing test.
- The application was turned down by the (Acting) Chief Inspector, expressly due to Ms Coffey's hearing loss. In essence, Norfolk only turned down her application for transfer because the Chief Constable was concerned that, at some point, Ms Coffey's hearing loss would impact on her ability to do the job for which she was applying and therefore she would have to be put on 'restricted' duties.
- Ms Coffey succeeded both at the ET and the EAT. Norfolk appealed.

The Questions for the Courts

It was agreed between the parties that Ms Coffey was *not* disabled by reason of her hearing loss at the time of the decision. The questions were therefore:

- (1) whether Ms Coffey could bring a claim that the refusal of her application for transfer was discrimination because the Respondent *perceived* her to be disabled; and
- (2) whether a future (perceived) disability can be said to render an individual disabled at the time of an earlier decision.

The Law as considered by the Court of Appeal

Unlike for a case of indirect discrimination or reasonable adjustments, a Claimant does not have to be disabled to bring a claim of direct discrimination. The requirement under s13 Equality Act 2010 is simply that there is less favourable treatment 'because of' a protected characteristic.

This allows, for example, for successful claims following homophobic taunts of someone who is not actually gay but who is perceived to be.

Perceived Disability

In Ms Coffey's case, the question was whether the Chief Inspector perceived her to have a condition which had a substantial adverse effect on day-to-day activities. The Chief Inspector gave evidence that she did not believe that Ms Coffey was 'disabled'. However, the Court of Appeal confirmed (at para 35) that a perception of the *label* of disability is not relevant. Rather, the question is whether or not the discriminator believes that all the elements in the statutory definition are present (i.e. a long term, substantial adverse effect on day-to-day activities).

The Court of Appeal agreed with the EAT's finding that Ms Coffey's hearing loss led to a perception that she already or might at some point be unable to perform the role she was applying for, i.e. front-line police duties. The next question was therefore whether this finding constituted a perception that there would be a substantial adverse effect on her day-to-day activities.

The Court confirmed that participation in 'working life' is part of 'normal day-to-day activities'. This principle comes from European case law to which (at least at the present time!) effect should be given in domestic law: *Chacon Navas v Eurest Collectividades SA* [2006] IRLR 706). This was also confirmed by Elias J in *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763.

As the Chief Inspector had clearly found that the hearing loss might lead to Ms Coffey being taken away from front-line activity and being put on restricted duties, it was clear that hearing loss was perceived to have an effect on participation in working life for a Police Constable.

Norfolk tried to argue that the particular activities of a front-line police officer are akin to the highly specialised skills required of watchmakers and concert pianists. These two examples are the examples used (at paras D8-D10) in the Government's *Guidance on matters to be taken into account in determining questions relating to the definition of disability*. Those skills are so particular that they do not fall within the remit of 'normal day-to-day activities'. The Court of Appeal disagreed and stated that for a Police Constable, hearing did not fall into this specialised/unique category, and rejected Norfolk's argument.

The Court therefore found that Ms Coffey's hearing loss did indeed lead to a perception that her hearing loss would have a substantial adverse effect, i.e. Norfolk perceived that she may become disabled in the future.

Future/Potential Disability

However, this was not the end of the matter. The Court also considered whether a perception of future disability or 'potential' disability was enough to satisfy the test if she was not considered to be disabled at the time of the decision.

Paragraph 8 of Schedule 1 to the Equality Act 2010 refers specifically to 'progressive conditions'. If an individual has a condition which does not have a *substantial* adverse effect on day-to-day activities but is 'likely to' develop a substantial adverse effect in the future, the condition is treated as if it does have a substantial adverse effect.

This means that at the time of the decision, there needs to be *an* effect, even though it is not *substantial*. The effect could be minor or trivial as long as it exists. Norfolk argued that there was no effect at all at the time of the decision and therefore Ms Coffey could not fall under these 'progressive condition' provisions. Underhill VP commented that the threshold for the

present effect was low and that it was clear in this case that the hearing impairment had *some* impact at the time.

The Court agreed that the Chief Inspector did consider that Ms Coffey had a progressive condition, as she considered that Ms Coffey's condition might get worse and that it was likely to impede her full execution of the role of a Police Constable. Therefore, the Chief Inspector had perceived that Ms Coffey was disabled by virtue of her progressive condition.

For all the above reasons, Norfolk's appeal was dismissed.

It should be noted that usually, an argument that an employee has suffered detriment because of an inability to perform a job arising from her disability will come under s15 EqA 2010 – discrimination arising from disability. However both the EAT and the Court of Appeal agreed that Ms Coffey's case came under the ambit of direct discrimination, because she was subject to 'a stereotypical assumption' that her deafness would render her unable to perform front-line duties, following *Aylott v Stockton-on-Tees Borough Council* [2010] ICR 1278. The Court of Appeal noted this, and noted that s15 may well not be open to a Claimant who is advancing a case of perceived discrimination.

Lessons

- One does not need to be disabled to bring a case of direct disability discrimination, unlike other forms of disability discrimination.
- If it appears that an individual has been treated badly because the employer or service-provider believes (even mistakenly) that she is disabled, then this should be pleaded as perceived discrimination. It can even be pleaded in the alternative if it is not clear whether an individual is disabled.
- An inability to do one's role may well constitute a substantial adverse effect on day-to-day activities.
- Some careful formulation may be needed if an individual is claiming that she has suffered detriment due to an assumption that her perceived disability will prevent her from executing her role. There will need to be some level of stereotyping for it to fall into the ambit of direct discrimination, rather than the natural fit as a s15 EqA claim. Of course, s15 can be pleaded in the alternative but at present, it is unlikely that such a claim will succeed when the question is of a perceived disability.

- A future disability may render an individual disabled for the purposes of the EqA if it is part of a progressive condition. However, there needs to be some effect, even if minor, at the time of the decision. In the footnotes to the Judgment, Underhill VP expressed dissatisfaction that this may preclude claims from individuals who are asymptomatic but who are predicted to have disabling symptoms in the future and are dismissed as a result. Such a result would seem arbitrary and unfair. This will likely have to be tested in the Appellate Courts before we have a definitive answer!



Mark Green

Barrister

3PB Barrister

020 7583 8055

Mark.green@3pb.co.uk