SUMMARY

2018/13 Discrimination based on perceived disability found unlawful (UK)

<p>The Employment Appeal Tribunal (‘EAT’) has confirmed that, even if an employee is not actually disabled for the purpose of the relevant statutory test, it is unlawful for an employer to discriminate against that employee because of a perceived disability.</p>

Legal background

The Employment Equality Framework Directive (Council Directive 2000/78/EC) was implemented in the UK in the form of the Equality Act 2010 ('EqA'), which also consolidated the various earlier pieces of domestic legislation concerning discrimination.

As disability is one of the '*protected characteristics*' under section 4 of the EqA, an employer commits an act of direct discrimination if it treats an employee less favourably than it would treat others "*because of*" the employee's disability.

Section 6(1) of the EqA provides the statutory definition of disability: "*A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.*"

The impairment in question must be both long-term (that is, lasting 12 months or more or be a recurring condition) and have a substantial effect on the person's ability to carry out normal day-to-day activities. This means that people with short-term or less serious conditions are not regarded as 'disabled' under the EqA. The legislation does, however, protect individuals with "*progressive conditions*". These are conditions that have (or had) some effect on the individual's day-to-day activities and are likely to result in "*an impairment which has a*

substantial adverse effect" (Paragraph 8 to Schedule 1 of the EqA).

Discrimination based on incorrect perceptions is well-established for other protected characteristics. It is most relevant for hidden characteristics that are not immediately apparent, such as sexual orientation. If an employer assumes that an employee is homosexual and treats him badly because of this, it is irrelevant whether the individual is homosexual or not. Another example, used in the explanatory notes to the EqA, is that of an employer who rejects a job application by a white man, wrongly believing him to be black on the basis of an African-sounding name. Treating someone less favourably because of their perceived sexual orientation or race is unlawful direct discrimination.

The question in this case was whether or not the same approach applies to direct disability discrimination, as this had not yet been determined by case law.

Facts

Mrs Coffey was a serving police officer. When she joined the Wiltshire Constabulary in 2011, her hearing was marginally below the Police National Recruitment Standards. However, in line with regular practice, she undertook a practical functionality test and passed. She was allowed to join the force and worked as a frontline officer without any hearing issues.

In 2013 she applied to transfer to Norfolk Constabulary. She attended a health assessment, which found that her hearing was just outside the usual standards for recruitment. The medical advisor noted that she had been able to undertake an operational policing role in Wiltshire, so recommended an "at work", practical hearing test.

Norfolk Constabulary declined her request to transfer – despite the fact that Mrs Coffey provided them with a report from a medical specialist confirming her hearing levels were stable. The Acting Chief Inspector reasoned that Mrs Coffey's hearing was "*below the standard for recruitment*", so accepting her transfer request "*could further reduce the pool of officers who are operationally deployable*".

Mrs Coffey did not allege she was disabled, as her hearing did not have a substantial adverse effect on her ability to carry out normal day-to-day activities. Instead, she brought a direct disability discrimination claim on the basis that she had been perceived to have a disability in the form of a progressive condition.

The Employment Tribunal ('ET') found in Mrs Coffey's favour on the basis that Norfolk Constabulary believed she "*had a potential disability or perceived disability*" and "*would become a restricted officer and thus a liability to the Force*".

Judgment

Norfolk Constabulary's appeal was unsuccessful. The EAT agreed with the ET that a perception of disability was sufficient for a direct discrimination claim.

Whilst the Acting Chief Inspector who refused the transfer did not believe Mrs Coffey was disabled at the time, she was concerned that Mrs Coffey might be moved onto restricted duties at a later date. This showed a perception that Mrs Coffey had a progressive condition which was likely to worsen, even though medical advice suggested otherwise.

His Honour Judge Richardson found that this was direct discrimination. In accordance with section 23(1) of the EqA, Mrs Coffey's treatment was compared against a hypothetical individual with the same hearing abilities who was not perceived as having a progressive condition. The EAT concluded that the comparator would not have been treated in the same way. It was Norfolk Constabulary's belief that Mrs Coffey's hearing would deteriorate which led them to reject her transfer request. Mrs Coffey had been treated less favourably because of the perception that she was disabled.

Commentary

Given the approach in cases of perceived discrimination based on other protected characteristics, this decision is unsurprising. The case confirms that disability discrimination is treated in the same way.

The complication here is that disability is different from other protected characteristics, as there is a specific statutory definition for 'disability' (set out above). In this particular case, the Acting Chief Inspector who made the decision thought Mrs Coffey had a progressive condition and so, mistakenly, believed that she met the statutory definition. It is unclear what would happen if a decisionmaker wrongly perceived that someone had a health condition which did not meet the statutory definition and treated them less favourably. It is also unclear what would happen if a decisionmaker wrongly thought that a short-term condition – such as a broken leg – met the definition of disability and treated someone badly because of it. These situations would be difficult to assess, as they technically would not satisfy the relevant statutory requirements.

According to the EAT the question is whether the decisionmaker perceived the individual "*to have an impairment with the features set out in the legislation*". In other words, this was straightforward in Mrs Coffey's case, as she was perceived to have a progressive condition. In different cases, it may be more difficult to show whether the decisionmaker perceived something which was long-term or serious enough to meet this legal test. Cases involving so-

called "hidden disabilities", such as mental health conditions, are likely to cause particular difficulties. If an employer perceives that someone is suffering from depression or anxiety, they may need to examine the circumstances in detail.

As this case has illuminated, employers should avoid jumping to conclusions about the health conditions of their employees.

Comments from other jurisdictions

Germany (Paul Schreiner, Luther Rechtsanwaltsgesellschaft mbH): Section 7(1) of the German transposition of Council Directive 2000/78/EC, the Allgemeines Gleichbehandlungsgesetz (AGG), has the following wording:

"Prohibition of Discrimination

(1) Employees shall not be permitted to suffer discrimination on any of the grounds referred to under Section 1; this shall also apply where the person committing the act of discrimination merely assumes the existence of any of the grounds referred to under Section 1."

Section 1 contains the prohibition against discrimination on the grounds laid out in the Directive.

Therefore, this case would probably have been handled the same way in Germany. The author raises the question in the commentary as to how a case in which an employer mistakenly believed someone to be disabled although she was only impaired for a short period of time would be treated. The majority in German legal literature – and I share their opinion – believe that such a case would not be subject to the discrimination prohibition in the AGG. The employer in such a case would simply have misunderstood the legal requirements for the application of the law. For example, let´s assume the employer believes a certain football fans' association qualifies as a religion and discriminates against any employees who are members. In such situation, the employer would be distinguishing between employees on grounds that are not forbidden – albeit that they are a little strange. It is not the purpose of the anti-discrimination law to exclude actions of the employer of this kind (though other laws do deal with that kind of behaviour).

Greece (Harry Karampelis, KG Law Firm): This case is interesting in the sense that it deals with a perceived disability, though there is actually no disability in law. The EAT further agreed with the ET that a perception of disability was sufficient for a direct discrimination claim. The EAT also said in this case that there was little doubt that the UK Equality Act was broad enough to include someone perceived to have a protected characteristic and that the Act made

no distinction in this respect between disability and other protected characteristics.

The burden of proof in such cases would be on the claimant, who has to show on a balance of probabilities that the perpetrator of the discrimination perceived the claimant as having a physical or mental impairment with a substantial and long-term adverse effect on the claimant's ability to carry out regular day-to-day activities. Under Greek law, the perpetrator could only try to prove that the perception was justified. The Greek courts might also assess the argument raised by the Norfolk Constabulary that accepting the claimant's transfer request "*could further reduce the pool of officers who are operationally deployable*".

It seems therefore that similar cases would have to be judged based on the individual facts. Claimants may face certain difficulties when raising such claims however, especially if they are based on physical or mental conditions that are not easily identifiable, for example, perceived depression. In such cases the claimant would have to prove that the employer perceived them as having a disability – although proving that a perceived disability of that kind does not have a substantial effect on normal day-to-day activities or the execution of duties should be easier, given that the perception was wrong.

Italy (Caterina Rucci, Fieldfisher): At first sight, this is a quite simple case: an employee is thought to be disabled and therefore does not get the transfer she asked for. If she were disabled, under Italian law, the disability would impair her ability to work, she would undergo a medical examination and if she was indeed found to be disabled, she would be placed in the category of disabled employees, a number of whom is mandatory to hire.

But the situation is more complex in this case: the employee is not in fact disabled, but only perceived to be. In my view, under Italian law, the behaviour of the person who refused to accept her in the new work location would be considered discriminatory: meaning that an employee can suffer not only because of an actual impairment, but also because of a perceived characteristic.

Subject: Disability discrimination, other forms of discrimination

Parties: The Chief Constable of Norfolk – v – Mrs Lisa Coffey

Court: Employment Appeal Tribunal

Date: 19 December 2017

Case number: UKEAT/0260/16