SUMMARY

2019/42 Discrimination because of a perceived disability is unlawful (UK)

The Court of Appeal (CA) has ruled that it was unlawful to discriminate against an employee because of a mistaken perception that she had a progressive condition which would make her unable to perform the full functions of the role in future.

Background

The UK's law on disability discrimination, contained in the Equality Act 2010 (EqA), normally protects only a person who is actually disabled. The legal test for disability requires there to be an impairment that is long-term (either lasting 12 months or more or a recurring condition), and which has 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' for the purposes of discrimination law.
If someone has a 'progressive condition' – which means that a current, more minor impairment will in future be likely to have a 'substantial' adverse effect – the test for disability is also deemed to be satisfied.
There are various alternative ways in which a claim of disability discrimination can be pursued under the EqA, including:

Direct discrimination. This occurs where, because of disability, an employer treats a worker less favourably than it treats or would treat others. This type of discrimination tackles prejudice against disability and cannot be justified by the employer.
Discrimination arising from disability. This is where an employer treats a disabled person unfavourably because of something arising in consequence of his or her disability, and the employer cannot justify this by showing that the treatment is a proportionate means of achieving a legitimate aim.
Indirect discrimination. This arises if an employer applies a provision, criterion or practice

which puts a disabled worker (and others who have the same disability) at a particular disadvantage, and which the employer cannot show to be a proportionate means of achieving a legitimate aim.
Failure to make reasonable adjustments. Wherever a disabled worker is placed at a substantial disadvantage by a provision, criterion or practice imposed by the employer or by a physical feature of the employer's premises, the employer has a duty to take reasonable steps to avoid that disadvantage.

What is the position where an employer wrongly thinks that a person is disabled and discriminates against him or her on that basis – does that person still have a discrimination claim? Discrimination based on incorrect perceptions is well established for certain other protected characteristics under the EqA and is most relevant for hidden characteristics which are not immediately obvious, such as sexual orientation. So if an employer assumes that someone is gay, and treats him or her unfavourably because of that, it does not matter whether he or she is gay or not. That person has been treated differently because of a perception about sexual orientation, which is unlawful direct discrimination.
In the case reported below, the CA considered whether the same sort of approach to discrimination based on perception could apply in the context of a disability discrimination claim.

Facts

Lisa Coffey was a police constable in Wiltshire who had minor hearing loss. Her hearing was slightly worse than the acceptable standard laid down in the Medical Standards for Police Recruitment. Those standards were not, however, decisive. Accompanying guidance said that candidates should be looked at individually to ascertain whether they had the functional ability to perform the role, and consideration should be given to a practical test to assess this. The Wiltshire Constabulary followed this guidance and arranged a practical functionality test, which Ms Coffey passed. She worked successfully as a police constable for two years, without needing any adjustments, before applying for a transfer to the Norfolk Constabulary for family reasons.
Despite recognising that Ms Coffey was currently performing the role to an acceptable standard, Acting Chief Inspector (ACI) Hooper of the Norfolk Constabulary declined her request to transfer. ACI Hooper made her decision on the basis that Ms Coffey's hearing was below the required medical standard and she (Hooper) did not wish to risk increasing the number of police officers on 'restricted' duties. The Norfolk Constabulary did not give Ms Coffey an 'at work' test of practical functionality.
Ms Coffey brought a claim of direct disability discrimination. Both sides accepted that her hearing loss did not have a substantial adverse effect on her ability to perform the role, so the

question arose whether she was nonetheless 'disabled' and so able to bring a claim for disability discrimination.
Ms Coffey's condition was not a progressive one (see above), but ACI Hooper believed that it might be and that she might, in future, not be able to perform all aspects of the role. ACI Hooper made her decision to reject the transfer request based on this incorrect assumption about Ms Coffey's hearing. The claim succeeded at the Employment Tribunal and the Employment Appeal Tribunal (EAT) dismissed the Norfolk Constabulary's appeal (see EELC 2018/13).
The EAT noted that other types of discrimination claims had been brought successfully based upon the employer's incorrect perception that the individual had the relevant protected characteristic (for example, sexual orientation). It decided that the same could be true of disability discrimination.
According to the EAT, the employer would not need to believe that the individual was disabled as a matter of law – in other words, it would not need to know the legal definition of disability. The employer would, however, need to perceive the individual to have 'an impairment with the features which are set out in the legislation'. The Norfolk Constabulary made a further appeal to the CA.

Judgment

The CA confirmed that the EAT had taken the correct approach, stating that "*what is perceived must … have all the features of the protected characteristic as defined in the statute*".
The Norfolk Constabulary attempted to argue that ACI Hooper did not have any perception about Ms Coffey's ability to perform 'normal day-to-day activities', but rather her perceptions were around Ms Coffey's potential future ability to perform the specialised and exceptional role of a front-line police officer.
The CA accepted that some roles would require exceptional skills that were not 'normal day-to-day activities', but decided that the job of a police constable did not fall into this category. While acknowledging that the role of a front-line police officer was in many respects unique and could be challenging and dangerous, the CA considered that the activities it involved – at least those for which good hearing was relevant – were nevertheless 'normal day-to-day activities' for the purposes of the EqA.

Commentary

The EqA's provisions on disability discrimination are technical and often difficult to apply, and the CA's judgment adds a further layer of complexity. The first and most straightforward point is that the CA agrees it is unlawful to discriminate against someone because of a mistaken belief that they are disabled. The CA has also confirmed that the test is not whether

the employer believes the impairment meets the legal definition of disability, but whether it believes the impairment has the necessary features – for example, that it is substantial and long-term.

Beyond this point, the case throws up some troublesome issues. One implication appears to be that if an individual has a progressive condition which currently has no adverse impact, and the employer appreciates this, the individual is not protected by disability discrimination law while the condition is still asymptomatic. But if the employer incorrectly thinks the individual's condition does have a current, minor impact, then protection against discrimination would apply.

Moreover, if an individual's condition will not result in a current or future substantial impairment but the employer mistakenly believes it would, the individual would also be protected on the basis of perceived disability. This seems to be so even though it could result in the individual having greater protection than someone whose condition is actually going to worsen.

In practical terms, the problem in this case arose because the employer did not properly explore the facts before hastily reaching the conclusion that Ms Coffey's transfer application should be rejected. It should have carried out an 'at-work' hearing test and obtained further medical evidence about whether her hearing was going to deteriorate.

It may, of course, be lawful for employers to apply performance standards and reject job applicants who cannot meet them. However, if a candidate fails the performance standard because of a disability, this might fall within the category of 'discrimination arising from disability' described above – that is, unfavourable treatment because of something arising *in consequence* of the person's disability. This type of discrimination can potentially be justified.

There was some debate in this case about whether it was more properly a claim for discrimination arising from disability, because it was really about whether Ms Coffey could do the job. The CA decided this should be regarded as a direct discrimination claim because, on the facts, ACI Hooper was not simply acting on the basis of the actual things that (as she believed) Ms Coffey could not do. There was an additional element, in that ACI Hooper was significantly influenced by stereotypical assumptions about the effects of hearing loss. Such stereotypical assumptions could found a claim for direct discrimination.

In any event, Ms Coffey may well have been unable to succeed with a claim of discrimination arising from disability, because the wording of the EqA does not seem to permit a claim for discrimination *arising from* a *perceived* disability. While observing this potential omission in protection from discrimination, the CA was not obliged to reach a decision on the point and declined to do so. We await a further judgment to resolve the question of whether that type of claim could ultimately succeed.

Comments from other jurisdictions

Austria (Hans Georg Laimer and Lukas Wieser, zeiler.partners Rechtsanwälte GmbH): As far as can be seen no Austrian Supreme Court case law dealing with the question, whether a disability actually has to be shown to be covered by the Austrian anti-discrimination law, exists. Austrian legal scholars, however, take the position that in case of a perceived disability by the employer the employee, although not being disabled, enjoys protection against discrimination (Gerhartl, RdW 2007, 416; K. Mayr in Neumayr/Reissner, *ZellKomm³* § 7b BEinstG Mn 2;). As pointed out in the comments to the case, this may have the effect that an employee with no or only little conditions of disability may enjoy protection whereas an employee, whose condition is actually going to worsen, does not enjoy any protection at all.

The Netherlands (Peter Vas Nunes): Continental lawyers can surely learn from UK legislation and case law when it comes to disability discrimination. The Equality Act 2010 is far more elaborate on this subject than Directive 2000/78 and the Dutch Disability Discrimination Act, and judges in the UK have addressed some disability discrimination issues in greater depth than their Dutch counterparts.
One difference between the Equality Act 2010 and Dutch law (and, I suspect, the laws of most other EU Member States) is that the former contains detailed provisions on the concept of disability. Section 6(1) provides that a person has a disability if (a) that person has a physical or mental impairment and (b) the impairment has a *substantial* and long-term adverse effect on the person's ability to carry out *normal day-to-day activities* (emphasis added). Although this provision is more detailed than its Dutch equivalent, which makes no attempt to define disability, it is hardly spectacular. Schedule 1 to the Equality Act 2010 is more innovative. One reason is that it introduces the concept of 'progressive condition'. An employer discriminates if it treats an employee detrimentally because of a progressive condition, i.e. a minor impairment that is likely to have a substantial adverse effect in future. Implicit in this definition is that there must be some impairment, however minor, at the time of the alleged discrimination. This leads the author of this case report to point out an anomaly: if the employer, rightly or wrongly, believes that the employee has a current minor impairment, and it believes, rightly or wrongly, that the impairment is likely to get worse later on, the employee is protected under the Equality Act 2010. On the other hand, if the employer rightly believes that there is no impairment now, not even a minor one, but it knows that the employee suffers from a condition that will create a substantial adverse effect later on, even a serious condition (Alzheimer, say), the employee has no such protection. This seems odd. It is interesting to read what the leading judge in the case reported above, Lord Justice Underhill, had to say on this point (footnote 6 to his opinion):

"For myself, I am not sure why Parliament thought it necessary to specify that the condition must have some current 'impact', albeit not 'substantial'. Take a case where – say as the result

of routine testing – P has a definitive diagnosis of a progressive condition which is currently wholly asymptomatic but where symptoms having a minor impact on her abilities will develop in about a year, and disabling symptoms will appear after two years, and where her employer, who learns of the results and is frightened by the spectre of problems in future, dismisses her. It seems arbitrary and contrary to the policy of the Act that the employer should not be liable (....) provided he acts in year 1 and will only be liable if he acts after the first symptoms have emerged in year 2; it would also raise what might be very nice factual issues as to the precise point at which the 'some impact' threshold was crossed."

I do not know whether Dutch law is to be interpreted as meaning that the employee must have some (actual or perceived) impairment at the time of the alleged discriminatory act or omission in order to be protected. To my knowledge there is no legal precedent on this question. I suspect that a court will find discrimination in the situation where an employee, who has not the slightest impairment at this time, is – for example – dismissed, or their temporary contract is not renewed, on account of a mistaken belief by the employer that they will develop an adverse medical condition at a later time.
Another important distinction between the Equality Act 2010 on the one hand and the Framework Directive, the Dutch Disability Discrimination Act and, I suspect, the equivalent laws in most other Member States on the other hand, relates to the concept of discrimination 'arising from' disability or, as Underhill LJ calls it, 'Section 15 discrimination'. Although Ms Coffey did not (ultimately) base her claim on Section 15, it is worth noting that this concept is unknown in EU and Dutch law. A fine example of Section 15 discrimination is the *City of York Council – v – Grosset* case reported in EELC 2018/3 nr 24. The employer in that case failed to adjust the work schedule of a disabled employee. As a result, the employee came under severe stress. He committed a serious error, for which he was dismissed. He was dismissed, not 'because of' his disability, so there was no direct discrimination. However, it was established that the employee would most likely not have committed the error had he not been under severe stress, and he would not have been under severe stress if the employer had complied with its obligation to make reasonable adjustments. Ergo: the employee was dismissed 'because of something arising as a consequence of' his disability. A Dutch court would have faced a dilemma: either the dismissal discriminated directly because of the disability, in which case it would have been invalid, or there was no discrimination at all. The Equality Act 2010 gives judges more flexibility, by allowing them to hold that, although there is no direct discrimination, there is 'Section 15 discrimination', which can be justified.
The doctrine that it is unlawful to discriminate against someone because of a mistaken belief that they are disabled is well established in Dutch case law even though, to my knowledge, the ECJ has not yet ruled on this point.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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Verdict at:
Case number: