Appeal No. UKEAT/0260/16/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 July 2017
Judgment handed down on 19 December 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

THE CHIEF CONSTABLE OF NORFOLK — APPELLANT

MRS L COFFEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL STRELITZ (of Counsel) Instructed by: The Chief Constable of Norfolk Jubilee House Falconer's Chase Wymondham Norfolk NR18 0WW
For the Respondent	MR JACK FEENY (of Counsel) Instructed by: Pattinson & Brewer 14th Floor Colston Tower Colston Street Bristol BS1 4XE

SUMMARY

DISABILITY DISCRIMINATION - Direct disability discrimination

Perceived Discrimination

The Employment Tribunal did not err in law in finding that the Respondent (1) perceived the Claimant to be disabled and (2) treated her less favourably because of the protected characteristic of disability.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This appeal is concerned with the concept of perceived direct disability discrimination. Mrs Lisa Coffey ("the Claimant"), a serving police officer, was refused a transfer from Wiltshire to Norfolk when she did not meet the Police National Recruitment Standards relating to hearing. For reasons which I will explain, and which are really not in dispute for the purposes of the appeal, that refusal was manifestly ill-considered and unfair. But did it amount to direct perceived disability discrimination? The Employment Tribunal sitting in Norwich (Employment Judge Postle, Mrs Prettyman and Mr Schooler) held that it did by their Judgment dated 19 January 2016. The Chief Constable of Norfolk Constabulary ("the Respondent") appeals against that decision.

The Background Facts

2. The Claimant was employed by the Norfolk Constabulary from 1993 until 1997 as a police constable. She did not suffer from hearing loss or tinnitus at that time. She then took a career break for family reasons. In 2009 she joined the Wiltshire Constabulary as a staff member. In 2011 she applied to the Wiltshire Constabulary to become a police constable. She underwent a medical. It was discovered that she suffers from bilateral mild sensori-neural hearing loss with tinnitus.

3. The Home Office laid down National Recruitment Standards which included Medical Standards for Police Recruitment. There was a standard for hearing loss - a total of 84dB over the 0.5 to 1.2 KHz range or more than a total of 123dB over the 3, 4 and 6 KHz range. But the standard was not decisive in itself. The accompanying guidance stated that if the hearing loss was only below the standard in one ear, or if it was a borderline test, consideration should be

given to a practical test of hearing to assess functional disability. Even if both ears were below standard the guidance said only that the candidate was "unlikely to be suitable". And a Home Office Circular made it clear that all cases where candidates did not meet the medical standard should be looked at individually; candidates should be assessed in terms of ability based on the role functions and activities of an operational constable.

4. The Wiltshire Constabulary followed this guidance. It arranged a practical functionality test which the Claimant duly passed. She worked as a police constable on front-line duty with no adverse effects from 2011 onwards; indeed she continued to do so at the time of the Employment Tribunal hearing.

5. For important family reasons the Claimant wished to move to the Norfolk area. On 26 September 2013 she made an application to the Norfolk Constabulary for a transfer. She disclosed that she had some upper range hearing loss and enclosed the report from the functionality test. She said that no adjustments had been necessary because of this hearing loss.

6. On 19 November 2013 she was informed that she had been successful at the interview stage, subject to a fitness and pre-employment health assessment. This took place on 6 December. The medical adviser stated that she had significant hearing loss in both ears and was "just outside the standards for recruitment strictly speaking". He noted, however, that she had undertaken an operational policing role with the Wiltshire Constabulary without any undue problems. He made a recommendation for an "at-work test". He said:

> **"This means that I recommend that the Constabulary undertake an assessment of her effectiveness to work in an operational environment with respect to hearing the radio and hearing the environment and being able to operate safely."**

7. This recommendation was not accepted by the Norfolk Constabulary. Instead further clarification was sought from another medical adviser. In an email dated 24 December this adviser explained the standards and said that the 2011 and 2013 audiograms were very similar - just outside the range. So it could be concluded that there had been no deterioration in the Claimant's hearing since 2011 and she would pass a practical test. The Claimant herself saw an ENT specialist who confirmed that her hearing levels were stable and sent a copy of his report to the Norfolk Constabulary.

8. Still the Norfolk Constabulary did not accept the recommendation. After internal correspondence and discussion the matter was placed before Acting Chief Inspector Hooper for decision. She declined the Claimant's application because her hearing was below the medical standard. In an internal memorandum she wrote:

> **"The applicant's hearing is below the standard for recruitment. Whilst I acknowledge that she performs the role of frontline officer in Wiltshire the assessment of her hearing at the time she joined them was "borderline". The transfer of "risk" assessment & management of her ability to perform the role of frontline officer would become Norfolk Constabulary's responsibility & would require me to set aside medical opinion that the hearing is below the recruitment standards.**
>
> **Regrettably the applicant's hearing is below the acceptable & recognised standard & we should decline the application to transfer."**

9. If she had read the standard as a whole, or the accompanying circular, she would have realised the importance of individual assessment. She did not do so. So the Claimant received a letter informing her that her application would not be progressed further because her hearing was below the recognised standard for recruitment.

The Issues at the ET Hearing

10. Although the Claimant's claim was originally much wider, by the time of the ET hearing it was put fairly and squarely on the basis of perceived disability. It was not alleged that she actually had a disability; her case was that her hearing loss did not have, and was not

likely to have, a substantial adverse effect on her ability to carry out day-to-day activities, including working activities. The claim was also put fairly and squarely as a direct discrimination claim.

11. The list of issues agreed by the parties had been more detailed in respect of direct discrimination. It had taken into account the issue of comparator and the potentially shifting burden of proof. It read:

> **"2. Was the rejection of the claimant's application to transfer to the respondent, less favourable treatment because of the perceived disability?**
>
> **3. Who, if any, is the hypothetical non-disabled comparator?**
>
> **4. Are there facts from which a court could decide, in the absence of any other explanation, that the respondent treated the claimant less favourably because of her perceived disability?**
>
> **5. If so, can the respondent show that it did not treat the claimant less favourably because of disability?"**

12. The ET heard evidence from the decision-maker, Acting Chief Inspector Hooper. In her statement she said that she declined the Claimant's application to transfer because her hearing did not meet the published medical standards. But she said that she did not regard the Claimant as a disabled person. She said in her statement:

> **"15. With regard to the suggestion that I declined the Claimant's application because I believed her to be disabled, this is certainly not the case. I have a basic understanding of the Equality Act and the definition of 'disabled' and it is my understanding that there would need to be a substantial adverse impact on an individual's ability to carry out normal day to day activities. On the basis of my reading of the papers, I had no reason to believe that the Claimant was disabled. On the contrary, the Claimant was an operational front line officer in Wiltshire and I was advised of no other restrictions meaning that she was able to operate to the high physical and mental requirements that are placed upon such front line officers. There is simply no way that I considered that her marginal failure of such tests would have such an impact on her daily life that it would mean she was disabled.**
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> **16. I also did not believe she was disabled as this had been mentioned by neither of the occupational health/medical experts in this case who had been specifically asked to examine her. Having looked through the notes now this is perhaps unsurprising since Dr. Roberts noted that in respect of her "deafness" on p.104 that it "Does not cause any problems" for the Claimant."**

13. Paragraphs 18 and 19 of her statement, however, made it plain that she regarded the Claimant as, at least potentially, a "non-disabled permanently restricted officer". She said the following:

> **"18. The Force, as for all other Forces across the country, is being required to deliver public services with fewer officers than in previous years and this situation will worsen over the coming years. In practical terms this means that every Force will have fewer officers to deliver the same or more frontline services. As a consequence, when making decisions on recruitment I had to be mindful that Norfolk and Suffolk constabulary already retain officers who have become permanently restricted during their tenure and who by virtue of their restrictions are not operationally deployable. This inevitably places pressure on those officers who are deployable. To knowingly risk increasing the pool of restricted officers if the Claimant, or any other applicant did not meet the nationally published criteria, could further reduce the pool of officers who are operationally deployable and increase that pressure which in my view, in light of the financial constraints the Force is required to meet cannot be consistent with service delivery.**
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> **19. I am and was aware at the relevant time that the Medical Standards do not prevent me from recruiting restricted officers per se, of course if someone was disabled then we would specifically have to look at how that might be managed. However, having regard to the fact that the Force will increasingly require officers to be omnicompetent and fully deployable, regrettably, the recruitment of a non-disabled permanently restricted officer could only be considered were the officer to have a specific skill that the Force could utilise."**

14. Accordingly she said that she "did not consider it appropriate to step outside the Medical Standards and recruit a non-disabled officer who would by virtue of the Medical Standards be a restricted officer" (paragraph 20).

15. Both parties were represented as they are today - the Claimant by Mr Jack Feeny, the Respondent by Mr Paul Strelitz.

The ET's Reasons

16. In its Reasons the ET identified two issues for decision. Did the Respondent perceive the Claimant to be disabled by reason of her bilateral mild sensori-neural hearing loss with tinnitus? Was the rejection of the Claimant's application to transfer to the Respondent from the Wiltshire Constabulary less favourable treatment because of the perceived disability? This, it will be noted, is a truncation of the issues agreed by counsel. The list is not inaccurate; but it omits consideration of a hypothetical comparator or the burden of proof.

17. The ET set out findings of fact on which I have already drawn. In its summary of the law it referred to section 13(1) and section 39(1) of the **Equality Act 2010**, and said that the EAT had acknowledged "the concept of direct disability discrimination by perception" in **J v DLA Piper UK LLP** [2010] IRLR 936. It slightly restated the first question which it had identified by asking - did Acting Chief Inspector Hooper perceive the Claimant as "having the characteristics that make up the definition of disability"? It did not set out any statutory provision or legal authority relating to the definition of disability.

18. The key part of the ET's reasoning is to be found in paragraphs 36 to 38. In paragraph 36 the ET quoted from Acting Chief Inspector Hooper's memorandum, which I have set out earlier in this Judgment. It went on to say:

> **"37. To the Tribunal's mind the above comment can only [be] interpreted as Acting Chief Inspector Hooper perceiving felt [sic] that the Claimant had a potential disability, and or actual disability which could lead to the Respondent having to make adjustments to the Claimant's role as a front-line police officer. There is, to the Tribunal's mind, no other way of looking at it than for the Tribunal to conclude in the absence of any other explanation that the Respondent treated the Claimant less favourably because of her perceived disability. Additionally, given Acting Chief Inspector Hooper's view that the Claimant had a potential disability or a perceived disability, the adjustments that Acting Chief Constable Hooper believed would have to be made was that the Claimant would become a restricted officer and thus a liability to the Force, as indeed she suggests in paragraph 20 of her statement where she says "I do not consider it appropriate to step outside the medical standards and recruit a non-disabled officer who would, by virtue of the medical standards, be a restricted officer." This clearly cannot be the case because if that were correct then Wiltshire would be in breach of the Home Office Guidance by employing her as a front-line officer without any restrictions.**
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> **38. Acting Chief Inspector Hooper's memo as to her reasons for rejecting the Claimant takes no account of this guidance and the only justification for not employing the Claimant, we repeat, is that she did not meet the required medical standards for hearing. Again, the only conclusion the Tribunal can draw from this is that Acting Chief Inspector Hooper perceived the Claimant had a disability which could not be accommodated by reasonable adjustments or perceived she would require adjustments in the future notwithstanding her position in the Wiltshire Constabulary."**

19. The Employment Tribunal therefore upheld the Claimant's direct discrimination claim and recommended that her rejection be expunged from the Respondent's record.

Statutory Provisions

The UK Framework

20. Disability is defined by section 6 of the **Equality Act 2010** supplemented by Schedule 1 to the Act. The basic definition of disability is set out in section 6(1):

> **"(1) A person (P) has a disability if -**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."**

21. Schedule 1 contains a supplementary provision relating to disability. Paragraph 8 makes provision for progressive conditions:

> **"(1) This paragraph applies to a person (P) if -**
>
> **(a) P has a progressive condition,**
>
> **(b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but**
>
> **(c) the effect is not (or was not) a substantial adverse effect.**
>
> **(2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment."**

22. It is unlawful for an employer to discriminate against a person by not offering them employment: section 39(1)(c). Holding the office of constable is to be regarded as employment: see section 42.

23. Direct discrimination is defined in section 13. Section 13(1) provides:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

24. Section 13 does not require that B has the protected characteristic - only that A treats B less favourably because of the characteristic. It is therefore sufficiently wide to cover a case where A treats B less favourably because of a perception that B has the characteristic.

25. In the light of the arguments in this appeal it is important to summarise certain further characteristics of the **2010 Act** which relate to disability.

26. (1) There is specific provision relating to the comparison to be made between A and B. The general principle is set out in section 23(1) of the **Act**; but there is a specific provision relating to disability in section 23(2).

> **"(1) On a comparison of cases for the purposes of section 13 … or 19 there must be no material difference between the circumstances relating to each case.**
>
> **(2) The circumstances relating to a case include a person's abilities if -**
>
> > **(a) on a comparison for the purposes of section 13, the protected characteristic is disability;**
> >
> > **…"**

27. (2) The **2010 Act** does not allow for direct discrimination because of disability to be justified on the basis that it is a proportionate means of meeting a legitimate aim. In respect of direct discrimination, justification in this way is permitted only in respect of age: see section 13(2).

28. (3) There are provisions applicable only to the protected characteristic of disability the practical effect of which is to require allowances to be made for disabled persons and affirmative action to be taken to overcome disadvantage for disabled persons. These are section 15, concerned with discrimination arising from disability, and sections 20 to 22, concerned with the making of reasonable adjustments. These provisions may have the result that a disabled person will receive more favourable treatment than a non-disabled person. This is recognised by section 13(3), which provides that:

> **"(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."**

29. (4) The concept of indirect discrimination applies to the protected characteristic of disability: see section 19. This provision, which applies broadly across the range of protected characteristics, is also aimed at counteracting disadvantage experienced by persons who have a protected characteristic.

30. (5) Unlike section 13, sections 15, 19 and 20 to 22 are framed in such a way that they apparently apply only where B has the protected characteristic. Thus section 15 applies where A treats B unfavourably "because of something arising in consequence of B's disability" (section 15(1)). Section 19 applies where A applies a provision, criterion or practice which puts or would put persons "with whom B shares the characteristic" at a particular disadvantage (section 19(2)); and A "discriminates against a disabled person" if he fails to comply with a duty to make adjustments in relation to that person (section 21(2)). I say "apparently" because I heard no direct argument on the meaning of these provisions; the appeal was concerned only with the law relating to direct discrimination.

The EU Framework

31. **Council Directive 2000/78/EC** ("the Equality Directive") provides a "framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment" (Article 1). The **Directive** is directly applicable in the UK. Its ambit is not as wide as the **Equality Act 2010**, since it applies only as regards employment and occupation.

32. The principle of equal treatment is defined in Article 2(1) as meaning that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

Article 5 provides that compliance with the principle of equal treatment also requires reasonable accommodation to be provided in relation to persons with disabilities.

33. In Article 2(2)(a) direct discrimination is defined as occurring where "one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1". The **Directive** contains no provision akin to section 23(2) of the **Equality Act 2010**.

34. The **Directive** contains no provision akin to section 15 of the **Equality Act 2010** (discrimination arising from disability); but it does contain a provision akin to sections 20 to 22 (duty to make reasonable adjustments): see Article 5.

Submissions

35. On behalf of the Respondent Mr Strelitz emphasised that the Claimant's case was put on the basis of perceived disability; it was not put on the basis of actual disability due to an existing or progressive condition. He emphasised also that the case was put on the basis of direct discrimination; he reserved his position as to whether it could have been put as a case of indirect discrimination. Against this background I can summarise his submissions in the following way.

36. Firstly, he submitted that the ET failed to identify or use the correct test in determining whether or not ACI Hooper considered that the Claimant met the definition of disability. The correct test was to be found in section 6 of the **Equality Act 2010**. It would be wholly unjust if a less stringent test was applied in the context of perceived discrimination. If the ET had applied that test it would inevitably have found that ACI Hooper did not perceive the

Claimant's hearing loss to have a substantial and long-term adverse effect on her normal day-to-day activities. European law in this respect did not significantly add to the picture: if necessary he would submit that the Claimant's disability fell within the category where any impact was in such a specialist area that it did not impact on day-to-day activities. It is not enough that the putative discriminator may have perceived that the Claimant could become disabled at some date in the future: references by the ET in paragraph 37 to potential disability indicate that the ET may have fallen into this error. In any event the ET gave no adequate reasons for its conclusion on this point.

37. Secondly, he submitted that the ET erred in considering this to be a direct discrimination case at all. For the purposes of disability the circumstances of the case include a person's abilities: see section 23(2). So if A treats B the same way as he would treat a non-disabled person with the same abilities he is not guilty of direct discrimination. The same must be true if A treats B, whom he perceives to be disabled, the same way as he would treat a non-disabled person with the same abilities.

38. Thirdly, he submitted that the ET erred in finding that the refusal of the application was because of perceived disability. The reason why her application to transfer was not accepted was that she did not meet the prescribed standards. This is not the same as saying that her transfer was not accepted because she was disabled or perceived to be disabled. If she had been disabled the refusal of the application would no doubt be because of something arising from her disability: section 15 would be applicable. But treatment under section 15 can be justified.

39. Mr Strelitz emphasised the potential consequences for other cases if direct discrimination under section 13 is committed because a person does not meet, or is perceived

not to meet, a required standard. Direct discrimination cannot be justified; so there would be no room for the setting of required standards, which are an essential part of recruitment in the police force and in many other areas of life.

40. Mr Feeny accepted that the Claimant's case before the ET was put on the basis of perceived discrimination: by the time of the hearing, following the receipt of medical evidence, an initial contention that she had a progressive condition was withdrawn. He also accepted that the case was put as a case of direct discrimination. He answered the submissions of Mr Strelitz in the following way.

41. Firstly, while accepting that the ET's reasoning was succinct, he submitted that its primary finding was plain enough: ACI Hooper perceived the Claimant to be disabled either by virtue of her current abilities or by virtue of a progressive condition. This is what the ET meant when it said that ACI Hooper perceived the Claimant to have a "potential disability and or actual disability". It was sufficient that the ACI Hooper perceived the Claimant to have a progressive condition which may well lead to a substantial adverse effect on her work. This approach accorded both with the **Equality Act 2010** and with the principles contained in the **Framework Directive**. Such a condition, if it existed, would be a sufficient hindrance on professional life to meet the European definition of disability: see **Banaszczyk v Booker Ltd** [2016] IRLR 273. There was ample evidence on which the ET could reach the conclusion it did.

42. Secondly, he submitted that the ET had the correct comparison in mind. The comparison had to take account of the Claimant's abilities. Here she had, and would continue to have, the required abilities: the fact that she was a borderline failure on the recruitment

standard did not mean that she lacked any ability to do the job. The comparison should not build in ACI Hooper's false assessment of her abilities. Alternatively, he submitted that no comparator was required where, as here, the reason for rejecting the applicant was to avoid the statutory duty to make reasonable adjustments.

43. Thirdly he submitted that the ET committed no error of law in concluding that the refusal of the application was because of the perceived disability. The decision was made because, as the ET found, ACI Hooper believed she would become a liability to the force, and held this belief because of false and prejudicial assumptions about her ability without proper individual assessment of the candidate as recommended in the Guidelines. If she had actually been a disabled person, in the circumstances of this case, the ET might properly have found direct disability discrimination: he relied particularly on **Aylott v Stockton-on-Tees Borough Council** [2010] EWCA Civ 910.

44. Mr Feeny did not accept that the ET's decision in this case would render it difficult or impossible for organisations to apply a required standard. If the person concerned in fact lacked an ability which was a requirement of the job, and if this was the reason for the treatment, then section 13 would not be engaged; section 15 would be applicable and the organisation would be entitled to show that the unfavourable treatment in question was a proportionate means of pursuing a legitimate aim.

Discussion and Conclusions

45. The Employment Appeal Tribunal is empowered by the **Employment Tribunals Act 1996** to hear appeals only on questions of law. If the ET applied the law correctly, gave sufficient reasons for its decision and made findings of fact which were open to it on the

A evidence, its decision must be upheld. Moreover it is well established that the EAT should read the reasoning of the ET in the round, avoiding an overly technical or pernickety approach. The EAT must, in determining an appeal, avoid any factual assessment of its own. If there is an error of law in the decision of the ET, the EAT must remit the matter to the ET for reconsideration unless the EAT can say, on the factual findings of the ET, that any error of law cannot have affected the result.

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Perceived Discrimination

46. I start from the proposition, not seriously in issue before me, that the definition of direct discrimination contained within section 13 of the **Equality Act 2010** is sufficiently broad to encompass a case where the putative discriminator A treats B less favourably because A perceives that B has a protected characteristic.

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47. The Explanatory Notes to the **Act** give a simple example which will fall within the provision:

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> **"If an employer rejects a job application form from a white man whom he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception."**

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48. Prior to the enactment of the **2010 Act** the definition of direct discrimination applicable to disability (then found in section 3A(5) of the **Disability Discrimination Act 1995**) appeared to require that B should actually have the characteristic. This is the background against which Underhill P considered, in **J v DLA Piper**, that a reference to the European Court of Justice would be required to establish whether perceived disability would come within the legislation: see paragraphs 60 to 64, in which he gave reasons for declining to allow the point to be argued in that appeal.

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49. I consider that the position is now clear. Section 13 is wide enough to encompass perceived discrimination; and it makes no distinction in this respect between the protected characteristic of disability and other protected characteristics. I would add that I see no reason to doubt that the European Court of Justice would recognise direct discrimination on the grounds of perceived disability. The ECJ has now consistently said that the **Equality Directive**, along with the linked **Racial Discrimination Directive 2000/43/EC**, is not to be interpreted restrictively and is to apply to persons who suffer less favourable treatment or particular disadvantage by virtue of a prohibited characteristic even if those persons do not themselves have the protected characteristic: see the associative discrimination case of **Coleman v Attridge Law** [2008] IRLR 722 applied more recently in an indirect discrimination case, **Chez Razpredelenie Bulgaria AD v Komisia Za Zashtita Ot Diskriminatsia** [2015] IRLR 746 (see paragraphs 42 and 56).

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50. While I consider the position to be clear in principle, this does not mean that it will necessarily be straightforward for an ET to decide whether a putative discriminator perceived a person to be disabled. Underhill P set out some potential difficulties in **J v DLA Piper**:

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> **"62. … What the putative discriminator perceives will not always be clearly identifiable as 'disability'. If the perceived disability is, say, blindness, there may be no problem: a blind person is necessarily disabled. But many physical or mental conditions which may attract adverse treatment do not necessarily amount to disabilities, either because they are not necessarily sufficiently serious or because they are not necessarily long term. If a manager discriminates against an employee because he believes her to have a broken leg, or because he believes her to be 'depressed', the question whether the effects of the perceived injury, or of the perceived depression, are likely to last more or less than 12 months may never enter his thinking, consciously or unconsciously (nor indeed, in the case of perceived 'depression', may it be clear what he understands by the term). In such a case, on what basis can he be said to be discriminating 'on the ground of' the employee's - perceived - disability? …"**

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51. Now that perceived discrimination is encompassed within section 13 of the **Equality Act 2010** this question must be tackled as part of UK domestic law as well as part of EU directly applicable law. As Underhill P said, the answer will be clear enough in some cases, but may be very difficult in others. The answer will not depend on whether the putative

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A discriminator A perceives B to be disabled as a matter of law; in other words, it will not depend on A's knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation.

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52. It is established law that in the field of employment and occupation the definition of "disability" in the **2010 Act** must be applied in a way which gives effect to EU law. The definition of disability has been laid down by the ECJ most recently in **Ring v Dansk Almennyttigt Boligselskab** [2013] IRLR 571:

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> **"37. The UN Convention, which was ratified by the European Union by decision of 26 November 2009, in other words after the judgment in *Chacón Navas* had been delivered, acknowledges in recital (e) that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'. Thus the second paragraph of Article 1 of the convention states that persons with disabilities include 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.**
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> **38. Having regard to the considerations set out in paragraphs 28-32 above, the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers."**

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53. This impacts in particular on the definition of "day-to-day activities"; the phrase must be given an interpretation which encompasses the activities which are relevant to participation in professional life. Thus, in the leading UK case, **Paterson v Commissioner of Police of the Metropolis** [2007] IRLR 763 it was held that the taking of a professional examination for promotion to a high grade was a day-to-day activity.

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54. I now turn to a question on which Mr Strelitz and Mr Feeny took opposite positions. What if the putative discriminator A knows that B has an impairment and does not consider it presently has a substantial adverse effect, but wrongly perceives that the impairment may well in the future have a substantial adverse effect?

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55. I prefer the submissions of Mr Feeny on this point. I see no reason in principle to exclude a perception of this kind from the ambit of disability law. (1) This approach is consistent with paragraph 8 of Schedule 1 relating to progressive conditions. In my judgment the word "likely" in this paragraph, as elsewhere in the Schedule, means "could well happen"; an employee will be disabled if the impairment, though not presently giving rise to a substantial adverse effect, could well do so. (2) This approach is also consistent with the definition of disability in **Ring**; the definition envisages not only cases where the limitation does hinder full and effective participation in professional life but also cases where it may do so. (3) There would be a gap in the protection offered by equality law if an employer, wrongly perceiving that an employee's impairment might well progress to the point where it affected his work substantially, could dismiss him in advance to avoid any duty to make allowances or adjustments.

56. Against this background I turn to the ET's reasoning in this case. The ET did not express its findings about ACI Hooper's perception by reference to any specific provision of the **2010 Act** concerning disability or by reference to the **Ring** definition of disability. Its reasoning would have been improved if it had done so. Nevertheless, given its findings of fact, and ACI Hooper's own statement, I consider that there was no error of law in its reasoning; indeed, I think its finding was inevitable.

57. ACI Hooper's evidence included a denial she considered the Claimant to be disabled at the time in question: see paragraph 19 of her witness statement, which I have already quoted. This paragraph, however, was based on a partial understanding of the law. ACI Hooper considered that a substantial adverse effect on day-to-day activities was required; whereas paragraph 8 of Schedule 1 does not require such an effect if the Claimant has a progressive

condition which could well result in an impairment with such an effect in the future. The correct focus is not upon ACI Hooper's understanding of the law, which was incomplete in an important respect, but on whether she perceived the Claimant to have an impairment with the features set out in the legislation.

58. In my judgment the ET was not only entitled to find but plainly correct to find that she did. Paragraph 18 of her witness statement, which I have quoted, is explicable only on the basis that she thought the Claimant's condition could well progress to the extent that she would have to be placed on restricted duties; this risk was at the very least part of the reason why she did not accept her application for a transfer. If the Claimant's condition were to progress to the extent that it required her to be placed on restricted duties, there would be a substantial adverse effect on her day-to-day activities, having regard to the definition of disability in **Ring**. Hence ACI Hooper, despite her protestation to the contrary, did perceive the Claimant to be disabled.

59. Paragraph 19 of ACI Hooper's statement leads to the same conclusion. She perceived that the recruitment of the Claimant might well result in the employment of a permanently restricted officer. She appears to have thought that such an officer might not necessarily be disabled; having regard to the definition in **Ring**, that is a misunderstanding of the law.

60. While therefore the reasoning of the ET would have been greatly improved if it had been linked to the provisions of the **2010 Act** and to the definition of disability in **Ring**, I have no doubt that, on ACI Hooper's own evidence, the ET was correct to find that she perceived the Claimant to have a disability.

Direct Discrimination

61. I turn then to the question whether this case was rightly categorised by the ET as a direct discrimination case.

62. Section 23(2)(a) makes special provision for the comparison which is to be made in a direct discrimination case relating to disability. The circumstances which are to be taken into account include a person's abilities. A genuine difference in abilities may be a material difference. An example is given in the **Employment Code (2011)** published by the Equal Opportunities Commission:

> **"A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate. …"**

63. If the disabled man really lacks the ability in question and is really rejected for that reason, the employer's action will not be direct discrimination. The man would still be able to bring a claim - for example, under section 15, which applies where there is "unfavourable treatment"; here the employer may defend the claim on the basis that the application of the typing speed was a proportionate means of achieving a legitimate aim.

64. However, if the disabled man really has the required ability, and is nevertheless rejected because he has a disability, section 23(2)(a) will not assist the employer. Suppose for example a woman who is blind, and is rejected because the employer wrongly believes that because of her blindness she will not be able to type at a required speed. Section 23(2)(a) requires her actual abilities to be taken into account; it does not provide any warrant for the employer's flawed belief in her lack of ability to be taken into account as a material difference. A

A stereotypical and incorrect assumption that a claimant has characteristics associated with a disability may found a claim for direct discrimination: see **Aylott** at paragraph 46.

B 65. I confess that for a while I was troubled by the argument of Mr Strelitz that if direct discrimination were in play in a case of perceived direct discrimination it would be difficult or impossible for an employer to apply a performance standard, because it could not be justified. On reflection, however, there is no force in this point. The **2010 Act** contains proper provision C for removing from the ambit of direct discrimination those cases which are really concerned with the application of a performance standard to a disabled person who lacks a relevant ability. But that provision does not protect an employer who wrongly perceives a person to lack an D ability which that person actually has.

66. In this case the hypothetical comparator would be a person who was not perceived to be E disabled - that is, whose condition was not perceived as likely to deteriorate so that they would require restricted duties - and who had the abilities which the Claimant had. The ET was fully entitled to conclude that such a person would not have been treated as the Claimant was treated. The Claimant was able to perform the active policing role; she was performing it in Wiltshire; F she had been accepted at the interview stage; her rejection followed when ACI Hooper ignored advice to rely on a practical assessment of the Claimant because, as the ET put it, she believed the Claimant would become a liability to the force. The ET did not err in law in concluding that G she had been subjected to direct discrimination.

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