EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105545/2017

Held in Glasgow on 25 to 27 March & 16 December 2019

Employment Judge F Eccles
Members Kenneth Thomson
Andrew McFarlane

Mr L Trueman	**Claimant** **In Person**
Civil Nuclear Police Authority	**Respondent** **Represented by:** **Mr D Hay - Advocate** **Ms A Rathbone -** **Instructing Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant was not discriminated against by the respondent because of perceived disability under Section 13 of the Equality Act 2020 and the claim should be dismissed.

REASONS

BACKGROUND

1. The claim was presented on 6 November 2017. The claimant complained of disability discrimination. The claim was resisted. In their response accepted on 18 December 2017, the respondent did not concede that the claimant is a disabled person for the purposes of proceedings under the Equality Act 2010 ("EA2). The respondent denied having discriminated against the claimant.

2. At a preliminary hearing held on 29 June 2018, the type of disability discrimination alleged by the claimant was identified as direct discrimination under section 13 of the Equality Act 2010, based on perceived disability. Any other claim of disability discrimination brought by the claimant was withdrawn.

3. An application by the respondent to sist the proceedings pending the outcome of the case of **Chief Constable of Norfolk Constabulary v Coffey 2018 IRLR 193** before the Court of Appeal was refused. It was considered appropriate to list the case for a final hearing to hear the parties' evidence. During an adjournment of the final hearing an Order was granted on 14 August 2019 requiring the respondent to provide the claimant with additional information including the HSE category of hearing for existing employees and the outcome of their Risk Assessment Panel for applicants and existing employees.

4. At the final hearing, the parties provided the Tribunal with witness statements to stand as their evidence in chief. The parties provided the Tribunal with a Joint Bundle to which documents were added (P17 to 22) during the course of the hearing including information provided to the claimant in response to the Order for Additional Information dated 14 August 2019. The Tribunal heard evidence from the claimant. The respondent called Ms Clare Lewis, HR Business Partner; Chief Inspector Jamie Thorne, Chief Firearms Instructor; Dr Thomas Policarp, Medical Officer and Brian Rowles, Health, Safety & Environmental Manager to give evidence on their behalf. The claimant represented himself at the hearing. The respondent was represented by Mr D Hay, Advocate and Ms A Rathbone, Instructing Solicitor.

FINDINGS IN FACT

5. The Tribunal found the following material facts to be admitted or proved: the respondent was established under Section 51 of the Energy Act 2004 for the purpose of securing and maintaining the effective functioning of the Civil Nuclear Constabulary ("CNC"). The CNC is an armed police force incorporated under Section 52 of the Energy Act 2004 with the primary

function of protecting civil nuclear sites and safeguarding nuclear material in Great Britain and elsewhere.

6. The respondent employs Force Armourers to inspect and maintain CNC weapons and ammunition. Force Armourers are employed across the various nuclear sites protected by the CNC. Force Armourer is a civilian role. Most of a Force Armourer's time is spent in the facility workshop inspecting and repairing firearms as required. The workshop can be a noisy environment when the Armourer is operating machinery such as compressors and grinders. The role also involves regular testing of CNC firearms – known as "zeroing". "Zeroing" involves discharging firearms using live ammunition on firing ranges in the facility. An Armourer is required to attend the firing range around once a month for up to six hours at a time to "zero" weapons. "Zeroing" weapons is a noisy operation. While "zeroing", Armourers are required to wear personal protective equipment consisting of internal ear plugs and external muffs – known as "double plugging". "Double plugging" is insisted upon by the respondent in part to maintain protection should one layer of protection become dislodged during operations.

7. The claimant is a former police officer and Authorised Firearms Officer ("AFO"). He has received training as a Divisional Armourer, Range Officer and Firearms Licensing Officer. The claimant has academic qualifications in firearms and forensic ballistics. He is a member of the Chartered Society of Forensic Sciences and is an accredited expert in firearms**.** The claimant was diagnosed with noise induced hearing loss in April 1998. Since then he has used "double plugging" when discharging firearms. The claimant's diagnosis of hearing loss did not prevent him from undertaking AFO training in July 1998 and qualifying as a commercial helicopter pilot in August 2002.

8. On or about 26 February 2017 the claimant applied for the post of Force Armourer (P9/80 -89) at the Sellafield nuclear site. The claimant passed a paper sift on 20 March 2017 (P9/92) and attended an interview on 22 March 2017. He performed well at interview and on 24 April 2017 received a written offer of employment subject to vetting and a medical assessment.

9. At the Sellafield facility, “zeroing” involves all firearms stored on site being tested over the course of a day. This normally involves all of the Armourers employed at Sellafield (around 6) being present and discharging firearms using live ammunition. The exposure of each Armourer during a day of ”zeroing” can be up to 2,750 discharges (based on 110 weapons firing up to 25 rounds). Discharging a firearm with live ammunition creates a substantial noise “event” – of around 160 decibels. The personal protection equipment provided to Armourers does not reduce the level of noise during “zeroing” to below 80 decibels.

10. In addition to police officers, staff employed by the respondent in safety critical roles are required to attend a medical examination as a condition of appointment. The role of Force Armourer is classified by the respondent as safety critical. The respondent uses medical criteria based on College of Policing standards for the recruitment of police officers as AFOs (P10/145). The respondent considers an applicant unlikely to be suitable for recruitment as an AFO where there is; “*On recruitment*: *more than an average of 20 dB loss over a range of 500 to 6000 Hz when audiogram is taken in a sound proof booth. Unilateral hearing loss of a similar magnitude or an indication that an applicant has suffered significant hearing loss in one or both ears which is likely to affect their ability to meet the standards in the near future*.

Use of hearing aids (including implanted devices) to achieve this standard would not be compatible with firearms use”.

11. For the post of Armourer, the respondent’s medical criteria (P10/151) provides; “*Hearing/Ear – Consider AFO standards, RAP incidences where these are not met on a case by case basis. Hearing conservation programme required to monitor changes in hearing including baseline assessment*”.

12. The claimant attended a medical assessment on 7 June 2017. At time of the medical assessment the claimant was aged 47**.** He was examined by the respondent’s Medical Officer, Dr Thomas Policarp. Audiometry tests were part of the medical assessment. They showed the claimant’s left ear sum of hearing on 3Khz, 4Khz and 6Khz frequency as 126dB. The respondent’s

standard was set at 123dB. The claimant's average hearing loss in his left ear across the spectrum from 0.5 to 6Khz was found to be 25.5db. The respondent's standard was 20db. The average hearing loss across the spectrum from 0.5 to 6khz in the claimant's right ear was 21.5dB. The respondent's standard was set at 20db. The average hearing loss across the spectrum from 0.5 to 4Khz in the claimant's left ear was found to be 21.6db. The respondent's standard was 20db.

13. Dr Policarp expressed concern to the claimant about his loss of hearing. When questioned by the claimant as to how this would prevent him from undertaking the post, Dr Policarp referred to the noisy environment in which he would have to work and that this could lead to further damage to his hearing. The claimant explained that he was aware of the risks involved and of methods used to mitigate them. He explained that he had been using personal protective equipment effectively since 1998. Dr Policarp questioned the claimant about his ability to understand what people were saying during a conversation. The claimant sought to reassure Dr Policarp that he had no difficulty in conducting a conversation. He referred to his aviation qualification. Dr Policarp emphasised the importance of being able to understand instructions when on a firing range and wearing hearing protection. The claimant informed Dr Policarp that he regularly conducted firearms training and testing wearing double hearing protection without experiencing any difficulty.

14. Dr Policarp had regard to the Health & Safety (HSE) categorisation scheme for management of noise induced hearing loss. The HSE scheme provides categories of hearing loss and, where appropriate, recommended action. Dr Policarp concluded that the claimant had HSE category 2 hearing loss - described as mild hearing impairment. As someone with noise induced hearing loss, he considered the claimant to have an increased sensitivity to noise. He was concerned that even with "double plugging" the claimant would be exposed to high levels of noise when discharging firearms and an unacceptable level of risk of accelerated hearing loss. Dr Policarp was of the opinion that the claimant was unlikely to be **"***covered by the equality act***".**

15. The claimant was offered the opportunity to attend another audiometry test which he declined. From the test results available to him, Dr Policarp was not satisfied that the claimant's overall level of hearing met the respondent's medical standards for the post of Force Armourer. He reported to the respondent on 8 June 2017 (P11) that he considered the claimant to be "*temporary UNFIT for the role of Armourer*".

16. Dr Policarp considered it appropriate to refer the claimant's case to the respondent's pre-employment Risk Assessment Panel ("RAP") to decide whether the claimant's recruitment should proceed. The issues he wanted the RAP to consider included the possibility of making any adjustments to accommodate the claimant's hearing; the risk of hearing loss accelerating from the age of 40 and the safety implication of employing someone with a hearing impairment to handle weapons. A RAP met to consider the claimant's case on 22 June 2017. The RAP consisted of Philip Bishop, Chair & Chief Superintendent; Dr Thomas Policarp, Medical Officer; Mike Durose, Firearms Training Unit; Brian Rowles, Health, Safety & Environmental Manager and Gill Lay and Caroline Ashfield from HR.

17. Dr Policarp provided the RAP with advice on his medical assessment of the claimant. He informed the RAP that the claimant had been identified as having significant noise induced hearing loss – the 4Khz range being the most concerning. He explained that in terms of HSE categorisation, the claimant's loss of hearing would be stage 2. He explained that HSE category 2 required heightened awareness and verbal advice given to the individual, with good practice to provide a written warning of noise exposure. Brian Rowles expressed concern that in his right ear, the claimant had quite a significant dip at 4kHz and problems at other frequencies. Dr Policarp confirmed that it was the 4kHz that was of most concern.

18. Brian Rowles provided the RAP with health & safety advice. He is a qualified health and safety practitioner and is a College of Policing Range Safety Inspector. In or around 2008 he was involved in commissioning a report on the noise levels in the firing range at Sellafield. He is currently involved in the introduction of a functional hearing test for employees working with firearms.

Based on his knowledge of the Sellafield site and the noise levels in the firing range, Brian Rowles expressed concern at the RAP meeting that the role of Force Armourer involves "*zeroing"* weapons.

19. Dr Policarp informed the RAP that while the claimant's hearing was currently a category 2 under HSE categorisation, he was very close to category 3 – described as poor hearing – which requires a specialist referral. Philip Bishop questioned whether the level of risk in the claimant's case was unacceptable taking into consideration that an Armourer is involved in "zeroing" weapons. Brian Rowles stated that hearing deteriorates over time however with the claimant's existing noise induced hearing loss, he would reach category 3 quite quickly. It was noted that the role of Armourer involves exposure to a noisy environment and that general ageing can also affect hearing. Dr Policarp explained that at HSE Category 3, referral to an audiology specialist is required and potentially there could be practical implications, involving trying to reduce noise exposure. Dr Policarp stated that despite controls put in place, the Armourer would be firing a weapon and placed in a noisy environment. Dr Policarp questioned how compatible control measures would be with the role. He described the risk in the claimant's case as "*high and close at hand*". Gill Lay asked whether adjustments could be made and about the existence of a written policy. Dr Policarp referred to the respondent's medical standards as their policy on hearing. Brian Rowles added that the claimant already has hearing damage and there would be a "bleed through" of sound in the environment. He stated that the controls would need to be significant.

20. Mike Durose was asked to provide an overview of a Force Armourer's exposure to noise/gunfire. He stated that most of the Armourer's work takes place in the workshop although once a month, the Armourer was involved in "zeroing" which involved firing weapons on the range. He explained that the "baseline" was therefore that once a month the Armourer would be exposed to the full range of weaponry. Brian Rowles queried how close the range is to the workshop. It was noted that in the current facility, the environment is extremely noisy. The view was expressed that the firing range in the new

facility was a reasonable distance from the workshop although this was not certain and the level of "bleed through" of noise had not yet been defined.

21. Concern was expressed that the claimant had not agreed to attend a repeat audiometry test. Members of the RAP agreed that the risk to the claimant was too high and could lead to further noise induced hearing loss. It was noted that there was the potential requirement for significant restrictions to the role. Dr Policarp stated that the concern for him was the HSE categorisation and that while the claimant was at present a category 2, he was likely to progress to category 3 which required a specialist referral, the outcome of which may be to recommend removal from a noisy working environment**.** Dr Policarp reviewed the claimant's employment history and stated that it was consistent with the current audiogram result.

22. Based on the information available to them at their meeting the RAP agreed that the claimant was not fit to continue in the recruitment process. The RAP issued a written summary (P13) of their meeting and action taken. The RAP's written summary (P13) incorrectly recorded the claimant's year of birth as 1960. The reason for the claimant's rejection for the post of Force Armourer was recorded by the respondent as "high risk" (P22/246).

23. The respondent's HR department notified the claimant by letter dated 23 June 2017 (P12) that his case had been referred to a RAP to discuss a concern that was highlighted during his medical appointment and that;

"*Unfortunately after careful consideration, the Risk Assessment Panel concluded that, based on the information available to them, they could not assure themselves that they would not be placing you in a position of unacceptable risk should you become an Armourer as such, the CNC are not in a position to progress your application further. There is no appeal route to this decision*."

24. The claimant did not accept the outcome of the RAP. He applied to the respondent for a record of their reasons for withdrawing his offer of employment. The claimant was informed that it would be necessary to make

a Freedom of Information request. The claimant was subsequently provided with records of his medical assessment.

25. On 25 July 2017, Brian Rowles measured noise levels in the armoury workshop at Sellafield. He used an "app" on his mobile telephone as opposed to specialist equipment provided by the respondent. He recorded the results in his work diary (P20). The results were indicative only and not used by the respondent for any formal risk assessment purposes. At the time of the claimant's application for the post of Force Armourer the respondent did not have a functional hearing test for employees working with firearms. The respondent intends to introduce such a test at some point this year. The respondent currently employs AFOs in the HSE category 3 hearing class (P22/249). It is anticipated that AFOs who are on restricted duties will be offered a functional hearing test once it is introduced.

26. The claimant is employed as a Sheltered Housing Officer with a local authority from which he earns around £10,000 per annum. Had he been appointed by the respondent his annual salary would have been around £30,000. The claimant operates a firearms consultancy from which he derives an income for providing opinion work and attending court as an expert witness. The claimant is upset and feels aggrieved about the withdrawal of his offer of employment by the respondent.

NOTES ON EVIDENCE

27. The claimant gave his evidence in a clear and forthright manner. His expertise in firearms was not in dispute. His credibility and reliability on matters of fact were not challenged to any great extent during cross examination and he was willing to concede certain matters such as the detail of his discussion with Dr Policarp about whether he would validate him for aviation purposes and his earnings from consultancy work. The claimant did not lead any expert evidence on medical or health & safety issues. In his witness statement he states that he is experienced in carrying out detailed risk assessments that take into account all identifiable risks including the mitigation of acoustic risk. The Tribunal agreed with the respondent's submission regarding the weight

to be attached to the expert evidence of a party to the proceedings given their lack of impartiality. The Tribunal was not persuaded in any event that had the claimant established that the opinions of the respondent's witnesses regarding his hearing level and the risk to his hearing were wrong that he should succeed in his claim. To establish discrimination, the claimant would have had to persuade the Tribunal that the opinions of the respondent's witnesses were not only wrong but so wrong as to lead the Tribunal to draw an adverse inference requiring the respondent to explain the reason for the less favourable treatment. When cross examining the respondent's witnesses, the claimant sought to challenge the evidence of Dr Policarp and Brian Rowles in particular by advancing his own opinion on not only acoustic risk but also medical and health & safety matters generally. He sought to challenge the respondent's witnesses from a number of different angles, some of which he introduced during the hearing. For example he sought to challenge Dr Policarp's medical assessment of his fitness for appointment by applying a functional hearing test which Dr Policarp readily accepted had not been part of his medical assessment. He questioned Dr Policarp at length about the methodology used to assess his level of hearing loss. Similarly, he sought to challenge the opinion of Brian Rowles in relation to his knowledge of and method for measuring the level of noise in the armoury and firing range. The Tribunal was not persuaded that the evidence of either witness was significantly undermined by the claimant's detailed cross examination or that the opinion of either witness was materially flawed.

28. The evidence of Clare Lewis related to the respondent's HR procedures generally. She did not have any direct involvement in the medical assessment of the claimant or the decision to find that he was not fit for employment as a Force Armourer. To that extent her evidence was not challenged by the claimant. Jamie Thorne's evidence was persuasive in relation to the level of risk to which an Armourer is exposed on the occasions when they are required to "zero" weapons. He explained in clear, if quite technical terms, the role of Force Armourer and did not attempt to answer questions outside his field of

knowledge or experience. The claimant did not challenge the evidence of either witness to any material extent.

29. Dr Policarp is the respondent's Medical Officer. He gave persuasive evidence that in his opinion the claimant's loss of hearing disqualified him for recruitment because of a number of factors which included his existing noise induced hearing loss at HSE category 2; sensitivity to noise; risk of accelerated hearing loss from exposure to a noisy environment and age-related hearing loss generally. His opinion did not change when challenged by the claimant and subjected to detailed scrutiny. He did not dispute that he had reached his opinion that the claimant would progress to category 3 based on his own assessment of the available clinical information and his experience of how noisy working environments and age adversely affect hearing. His primary concern however was that the working environment of a Force Armourer would expose the claimant to high levels of noise when discharging firearms and an unacceptable level of risk to accelerated hearing loss. The risk to the claimant was, as he described it to the RAP, "*high and close at hand*".

30. The claimant challenged Dr Policarp's assessment of his hearing in a number of respects. He did not accept that the respondent had mandatory medical standards for the post of Force Armourer. The Tribunal did not find that Dr Policarp had sought to show that there were mandatory medical standards or that he had applied any mandatory standards when testing the claimant's hearing. It was not in dispute that Dr Policarp had concluded that the claimant's hearing did not meet the requirements of the AFO medical standards but rather than exclude the claimant from employment, this led to his case being referred to the RAP to make a decision as to whether the level of risk in allowing his recruitment to proceed was acceptable to the respondent. The RAP considered the claimant's case and there was no persuasive evidence that they decided to revoke his offer of employment solely because he did not meet medical standards.

31. Dr Policarp's evidence was clear that in his assessment the probability of the claimant's hearing loss increasing to HSE category 3 was extremely high if he was exposed to the working environment of a Force Armourer, in particular if required to "zero" weapons. He explained clearly that his assessment was based on the claimant already having noise induced hearing loss and as a result being sensitive to noise.

32. The Tribunal did not find that Dr Policarp considered the claimant to be disabled due to hearing loss at the time of his application for employment with the respondent. In his statement at paragraph 12 he states; "*I requested the panel to explore reasonable adjustments despite my opinion that Mr Trueman was unlikely to be covered by the equality act*". When questioned by the claimant about the above statement, Dr Policarp explained that it was considered good practice to look at the possibility of reasonable adjustments for all applicants, regardless of disability. The Tribunal was not persuaded that reference by Dr Policarp to considering the possibility of reasonable adjustments was evidence from which an inference should be drawn that the respondent perceived the claimant to be disabled. It was not in dispute that the activity which caused Dr Policarp concern in relation to the claimant was "zeroing". The Tribunal concluded from his evidence that it was the risk to the claimant's hearing of exposure to "zeroing" and not being disabled or likely to become disabled that had led Dr Policarp to question the claimant's suitability for recruitment to the post of Force Armourer. The Tribunal was also not persuaded that it should draw an adverse inference from the fact that at the RAP meeting, Dr Policarp described the claimant as "*having significant noise induced hearing*" and being "*very close to category 3*" while in his statement he described the claimant's hearing loss as falling into "*moderate severe category*". The Tribunal was satisfied that Dr Policarp's advice to the RAP was based on his genuine belief that there was too great a risk involved in exposing the claimant to the working environment of a Force Armourer.

33. Brian Rowles is the respondent's Health, Safety & Environmental Manager. His evidence, like that of Dr Policarp was challenged at length by the claimant

in cross examination. The claimant did not agree with Brian Rowles' assessment of the risk to which he would have been exposed had he been employed as a Force Armourer with the respondent. The Tribunal accepted the evidence of Brian Rowles that he had genuine concerns about the level of risk to which working in the post of Force Armourer would have placed the claimant and the respondent's health & safety obligations in relation to noise management. Brian Rowles was consistent throughout his evidence that his primary concern was the level of harm to the claimant's hearing if he was exposed to working with firearms in particular by having to "zero" weapons and work in the vicinity of the firing range – referred to as "*bleed through*". He was of the opinion that the workshop was "*extremely noisy*". This was based in part on his involvement in commissioning a report on the firing range at Sellafield in relation to noise levels His evidence was also credible that he had genuine concerns about the claimant's ability to hear range safety commands given what he understood to be the claimant's significant hearing loss. Brian Rowles explained the balance to be struck between the level of protection provided and the ability to hear instructions. He emphasised that his primary consideration however was the level of risk that might be caused to the claimant from exposure to weapons, in particular when working on a firing range.

34. In response to cross examination Brian Rowles identified the issue for him was knowing that "*harm is being done and the risk of allowing (the claimant) to be in a situation where (the respondent) was at risk of causing further damage*". He went on to state in re-examination that the RAP was "*not prepared to give (the claimant) further hearing damage. This assessment was based on the information we had at the time and not about the future. We would be asking him to do a role and expose him to level of noise that will cause him damage and we were not prepared to allow that to happen*". Brian Rowles confirmed that this was his view and what he understood to be the view of the RAP. The Tribunal accepted his evidence. There was no persuasive evidence to suggest that he had voiced his concerns based upon a perception that the claimant was disabled. His concern was the damage

that he believed would be caused to the claimant's hearing should he be exposed to the working environment of a Force Armourer.

35. The claimant questioned Brian Rowles in detail about assessments undertaken by the respondent and on their behalf. In particular, Brian Rowles was referred to a report undertaken on behalf of the respondent in 2008 (P15). The claimant questioned how comprehensive the report was in relation to weapons used by the respondent and the regularity with which such reports are obtained by the respondent. The Tribunal accepted the evidence of Brian Rowles that the report (P15) was of limited, if any relevance to the considerations before the RAP.

36. Brian Rowles was also questioned at length by the claimant about his knowledge of the role of Force Armourer. He readily accepted that he was uncertain about specifics including the amount of time an Armourer would spend on the firing range and the level of noise generated by specific equipment operated by an Armourer in the workshop such as a grinder or compressor. He had not measured noise levels in the workshop before the RAP meeting. This led to lengthy questioning and the recall of Brian Rowles to give evidence about a test that he had undertaken following the RAP meeting. The Tribunal accepted his evidence that he had undertaken a test using an "app" on his mobile telephone during a visit to the Sellafield site after the RAP decision to withdraw the claimant's offer of employment. He produced an entry from his diary (P20) and transcript (P21). The Tribunal did not accept the claimant's submission that Brain Rowles sought to show that he had carried out something more detailed than an indicative test or that it should draw an adverse inference from the timing or manner of the test including the equipment used to measure sound levels.

37. The Tribunal did not agree with the claimant's submission that Dr Policarp and Brian Rowles both stated on multiple occasions during their oral evidence that any employee, civilian staff or otherwise with HSE category 2 hearing loss would absolutely not, in any circumstances be permitted by the respondent to

use firearms. This was an incorrect recollection of their evidence. In his evidence, Dr Policarp stated that, from his experience as the respondent's Medical Officer, a breach of medical standards would preclude an officer from using firearms. He did not however state that HSE category 2 hearing loss would "absolutely" preclude the use of firearms or that the reason for this was the risk of further hearing loss. When questioned on the above matter by the claimant, Brian Rowles explained his understanding that it was HSE category 3 hearing that would preclude use of firearms in terms of College of Policing standards and that he was advised that the claimant's hearing was HSE category 2, albeit close to category 3. This was not the evidence as suggested by the claimant in his submissions.

38. It was not in dispute that the claimant's date of birth was wrong on the record of the RAP meeting (P13). Both Dr Policarp and Brian Rowles were questioned about this and it was suggested that the RAP was misled into believing that he would each HSE category 3 hearing at an earlier stage because of his age. From the evidence before it the Tribunal did not find this to be the case. Dr Policarp identified 40 as the age at which loss of hearing starts to accelerate. Brian Rowles was clear in his evidence that the claimant's age was not a factor to which he attached much, if any weight, when deciding whether the claimant's application for recruitment should proceed.

THE ISSUES

39. The issues before the Tribunal were as follows:

(i) Did the respondent perceive the claimant to be disabled? &

(ii) If so, did they treat him less favourably because of the protected characteristic of disability by revoking his offer of employment?

SUBMISSIONS

CLAIMANT'S SUBMISSION

40. The claimant provided the Tribunal with written submissions on 31 January 2020. What follows is a summary of the above; the claimant submitted that the post for which he applied – Force Armourer – is a civilian as opposed to a police position. The claimant submitted that as a civilian post there are no mandated standards relating to the hearing levels for the role and no stipulations in respect of HSE hearing category that a candidate must have to qualify for appointment. Similarly, submitted the claimant, neither the national recruitment medical standards nor College of Policing guidelines are mandatory for the civilian post of Force Armourer. The claimant submitted that his hearing level at the time of applying for the post of Force Armourer was just outside national recruitment medical standards, what he described as borderline. Despite applying a police medical standard to the civilian role of Force Armourer, submitted the claimant, the respondent did not offer him a practical hearing test in accordance with police recruitment medical standards; they do not have such a test.

41. Referring to the case of **The Chief Constable of Norfolk v Lisa Coffey 2019 EWCA Civ 1061** (**Coffey)**, the claimant submitted that there was no requirement for a Force Armourer to have peculiarly acute hearing. The job offer, submitted the claimant, was withdrawn not because he failed a medical standard; there simply was no such medical standard for the role. From the evidence before the Tribunal, submitted the claimant, it is apparent that the actual reason for withdrawal of the job offer was as a result of him being perceived as a "high risk" candidate.

42. The job offer, submitted the claimant, was withdrawn following what he described as a fundamentally flawed Risk Assessment Panel. The RAP, submitted the claimant, falsely perceived that he was "*high risk*" based on their collective unevidenced belief that at some undetermined point in the future his hearing category would develop to HSE category 3 making him

unable to carry out the role of Force Armourer. The claimant submitted that if his hearing loss did progress this could mean that he would become a disabled person and unable to participate fully in the professional working environment.

43. The claimant identified the risk to be assessed by the RAP as noise, principally from the discharge of firearms but also from workshop equipment. In his case, submitted the claimant, the respondent failed to assess the acoustic risks prior to the RAP. The assessment undertaken after the RAP, submitted the claimant involved unsuitable equipment and did not cover all work areas. At the RAP, submitted the claimant, Brian Rowles stated that he did not even know how close the firing range was to the workshop and was unaware of the "*bleed through of noise*" stating that it had not yet "*been defined*". Despite this, submitted the claimant, Brian Rowles was able to describe the workshop as "*extremely noisy*". The RAP, submitted the claimant, could not assess his personal level of risk as they did not know the environmental risk against which to measure it. Referring to the evidence of Brian Rowles, the claimant submitted that the respondent claims to have undertaken a full workplace noise assessment of the armoury area and completed a report relating to noise levels and general risk. The word "indicative" submitted the claimant appears to have been a later addition to the original diary entry and contradicts the evidence of Brian Rowles that he carried out a full noise risk assessment. The claimant also questioned the level of professionalism of the respondent as an organisation that "lost" the report that Brian Rowles claims to have completed.

44. The claimant challenged the suitability of an "app" on a mobile telephone to carry out a formal noise assessment in a working firearms or industry environment. The claimant submitted that Brian Rowles's use of such equipment as opposed to the respondent's specialist equipment should cast doubt on his level of professionalism in addition to his understanding of acoustic risks and the correct methodology for measuring risk. The claimant submitted that the Tribunal should reject as "ludicrous" Brian Rowles's

evidence that it was too difficult for him to take the correct equipment on site. He described Brian Rowles's evidence on this matter as "laughable" and submitted that it casts clear doubt on his credibility as a witness. It has been established beyond doubt, submitted the claimant, that those present at the RAP had no clue whatsoever as to the actual level of risk in either the firing range or armoury environment. The claimant submitted that this was contrary to mandatory HSE and College of Policing guidelines which he submitted stipulate that acoustic risks must be assessed. To date, submitted the claimant, assessment by the respondent of acoustic risks remains outstanding.

45. The claimant submitted that the error made by the RAP in relation to his date of birth – recording it as 9 December 1960 as opposed to 9 December 1969 – was material. This error, submitted the claimant, led the RAP to incorrectly assume that he was approaching his 60's and therefore more likely to suffer from age related hearing loss. In addition, submitted the claimant, the RAP was informed by Dr Policarp that he was "*very close to category 3*" which would require a specialist referral, something which the claimant described as absolutely incorrect. Classification is a matter of fact, submitted the claimant, based on a simple mathematical calculation. The respondent, submitted the claimant, incorrectly presents classification as matter of opinion on the part of Dr Policarp. The claimant calculated that he was very close to category 1 as opposed to category 3 and that Dr Policarp's advice to the RAP was therefore demonstrably incorrect. He referred to his medical examination form in which his HSE category of hearing is listed as 2L. The respondent, submitted the claimant, continues in their established pattern of providing misleading and factually incorrect information. The respondent, submitted the claimant, is unable to state who made the erroneous calculation in relation to his category of hearing loss or accept that an error has been made. The assessment of his hearing was not an "opinion" of Dr Policarp, submitted the claimant, but a matter of fact based on numerical values.

46. The claimant submitted that both Brian Rowles and Dr Policarp were wrong to state that employees with an HSE category 2 hearing loss would not under any circumstances be permitted to use firearms. He referred to both witnesses stating on multiple occasions during their evidence that an employee, civilian staff or otherwise, with HSE category 2 hearing loss or greater would absolutely not, in any circumstances be permitted to use firearms. The respondent's intention to introduce a practical/operational hearing test this year contradicts their position, submitted the claimant. He referred to his own employment record and that of colleagues who are employed as authorised firearms officers while having an HSE category 2 hearing level. The claimant referred to evidence before the Tribunal of the number of authorised firearms officers with HSE category 2, 3 and 4 hearing levels – 24 , 4 and 12 respectively. The claimant submitted that the above information supports his position that the respondent currently employs AFOs with similar or higher categories of hearing loss than him. Had he not obtained the above information, submitted the claimant, the Tribunal could have incorrectly concluded that the respondent was entitled to withdraw his offer of employment based on an established bar to employees using firearms with an HSE category 2 or higher hearing loss. There would be no requirement for a RAP submitted the claimant if, as suggested by Brain Rowles and Dr Polycarp, there is an absolute bar to employment in a firearms role for those who do not meet national recruitment medical standards. HSE category 2 hearing loss is in no way a bar to his employment with the respondent as a Force Armourer, submitted the claimant.

47. The claimant submitted that the RAP was also provided with incorrect and non expert information from Dr Policarp and Brian Rowles regarding the speed with which his hearing would progress to HSE category 3. The claimant submitted that having HSE category 2 hearing loss would have no effect on his ability to carry out the duties of a Force Armourer. He submitted that existing PPE in the form of internal ear plugs and external muffs would mitigate all acoustic risks to an acceptable level. It was fanciful of Brian Rowles to suggest that the external muffs could "fall off", submitted the

claimant; this was something that had never occurred in his 35 years of shooting. The claimant submitted that there had been no evidence provided to show that using firearms with mandatory PPE is in any way a risk to him or other employees. Similarly, submitted the claimant, there was no evidence to support Dr Policarp's contention that he is "sensitive" to noise.

48. The RAP summary does not state, submitted the claimant, that he is currently unable to carry out the role. All scenarios, submitted the claimant, relate to the perception that at an undefined point in the future, but "quite quickly", he would reach HSE category 3 hearing loss at which time he may have to be removed from the role. The claimant submitted that his job offer was therefore withdrawn not on the basis of what his present abilities, hearing level and HSE category are now but what they may be in the future. The job offer, submitted the claimant, was withdrawn on a false perception that was not evidenced by facts and was tainted by false information in relation to his age and level of hearing loss. The claimant submitted that despite the risks being fully mitigated by the use of PPE and despite him being subjected to the same risks as other employees, the respondent proceeded on the basis that at some undefined point in the future, his hearing loss would reach a level at which he would require a professional medical assessment and therefore possibly leave him unable to carry out his duties. The job offer was withdrawn, submitted the claimant, not because he is currently unable to carry out the role of Force Armourer but because of a false perception that he would only be able to carry out the role for a short time and it was not therefore cost effective to appoint him to the role. The decision to withdraw his job offer, submitted the claimant, was clearly discriminatory and therefore unlawful as he was treated less favourably because of the protected characteristic of disability.

49. The claimant referred the Tribunal to the case of **Coffey** in support of his claim that the perception of disability is sufficient to establish direct discrimination. The claimant disputed that the respondent had led expert evidence in relation to acoustic risk or hearing. He did not accept that either Dr Policarp, Brian

Rowles or for that matter any other member of the RAP are experts in the above fields. Dr Policarp, submitted the claimant, is not an audiology or ENT specialist and made fundamental errors in his calculation of his HSE category of hearing loss and the evidence he provided to the RAP. When assessing the quality of his evidence, submitted the claimant, Dr Policarp's errors cannot be ignored by categorising them as matters of "opinion".

50. The claimant submitted that unlike the respondent in the case of **Goldscheider**, the respondent in this case has apparently constructed a purpose-built range facility to ensure that Armourers and other employees are protected from noise.

51. The claimant submitted that he has made numerous attempts to resolve his claim with the respondent. He referred the Tribunal to his revised schedule of loss which reflects his offer to withdraw the future loss of earnings claimed in an earlier schedule.

RESPONDENT'S SUBMISSIONS

52. The respondent provided the Tribunal with written submissions on 23 December 2019 and 7 January 2020. What follows is a summary of the above; Mr Hay for the respondent submitted that a key feature of the proceedings was the extent to which the claimant sought to challenge opinion evidence of the respondent's witnesses. Mr Hay submitted that the respondent's witnesses were credible and reliable. Their evidence was consistent that the respondent's key concern was to avoid exposing the claimant to noise that would cause harm to his hearing. Mr Hay submitted that the Tribunal should have some reservations as to the credibility and reliability of the claimant. He referred the Tribunal to the claimant's withdrawal during cross examination of his claim for future loss of earnings. He referred to the claimant's position that he was able to give impartial evidence in these proceedings. He submitted that when questioning Brian Rowles, the claimant had misrepresented the facts in the case of **Coffey** regarding functional hearing assessments and the evidence of Dr Policarp on whether his own hearing assessment was

borderline in order to advance his case. Dr Policarp did not accede to the suggestion from the claimant that he was a "borderline fail" given the logarithmic nature of the decibel scale, submitted Mr Hay.

53. On establishing discrimination, Mr Hay referred the claimant to the leading authority of **Shamoon v CC Royal Ulster Constabulary 2003 ICR 337**. From the above case, submitted Mr Hay, it is possible to collapse the matter into one question : did the claimant on the proscribed ground, receive less favourable treatment than others? When answering this question, it is necessary, submitted Mr Hay, for the Tribunal to determine the mental motivation of the alleged discriminator, which motive might be conscious or subconscious (**Nagarjan v London Regional Transport 1999 ICR 887**). Mr Hay also referred the Tribunal to the burden of proof provisions at Section 136 of the Equality Act 2010 and the requirement of the claimant to establish a prima facie case from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred (**Madarassy v Nomura International plc 2007 ICR 867**). Mr Hay submitted that there is a well-recognised distinction between what are matters of fact and what are matters of opinion. The latter, submitted Mr Hay, are generally recognised to be the domain of expert witnesses. Referring to the case of **Kennedy v Cordia LLP 2016 SC(UKSC) 59**, Mr Hay submitted that to be of any weight, expert evidence must be independent, objective and the unbiased opinion of the witness in relation to matters within their expertise.

54. As regards reliance by the claimant on the case of **Coffey**, Mr Hay submitted that the Court of Appeal had emphasised the unusual and fact- specific nature of the case. In the present case, submitted Mr Hay, the respondent simply did not have a perception of future disability on the part of the claimant. It was not part of the respondent's mental process when determining to withdraw the conditional offer of employment. Its "*reason why*", submitted Mr Hay was not that it could see a time when the claimant would become a disabled person and wished to shirk having a disabled person on its books as an employee but rather its current assessment of risk to the claimant of injury as a result of

the unavoidable exposure to noise that would result from him engaging as a Force Armourer. There was an assessment of current risk to the claimant, submitted Mr Hay, with a desire to avoid the consequences of injuring him further and causing him harm. This amounts to a substantial factual difference, submitted Mr Hay from the **Coffey** case. This is not a reason connected with any perceived disability of the claimant, submitted Mr Hay. The above submission was advanced by the respondent, submitted Mr Hay, while accepting that the refusal/withdrawal of a conditional offer of employment could readily amount to a detriment or less favourable treatment.

55. The above reasoning, submitted Mr Hay, was amply demonstrated in the evidence of Dr Policarp and Brian Rowles. The claimant sought to challenge their evidence, submitted Mr Hay, by subjecting to minute scrutiny their understanding of HSE and other standards and the conduct and reporting of risk assessments. The purpose of the claimant's line of cross examination, submitted Mr Hay was to impugn the witnesses' reasoning and to demonstrate that that on no view could their opinions as to his risk of exposure have been reasonably and genuinely held. This would require the Tribunal to conclude, submitted Mr Hay, that the assessment of risk to the claimant made by Dr Policarp and Brian Rowles was correct, as opposed to being simply genuinely held by them. A non- discriminatory reason for an action, even if mistakenly held by the alleged discriminator, will defeat a claim of direct discrimination under Section 13 of the Equality Act 2010 submitted Mr Hay. For the claimant's line of argument to succeed, submitted Mr Hay, he would also have to lead supportive expert evidence. The claimant's own assertions made in cross examination are not sufficient, submitted Mr Hay and his evidence on health and safety and risk on exposure to noise from firearms falls foul of the guidance in **Kennedy v Cordia LLP** on apparently expert evidence being proffered by a party to litigation himself.

56. The respondent, submitted Mr Hay, does not seek to establish that the views held by Dr Policarp and Brian Rowles are correctly held. The Tribunal, submitted Mr Hay, is being asked to find that their views were genuinely held

and the reason for the refusal of the offer of employment. The Tribunal, submitted Mr Hay, should have little hesitation in reaching the above conclusion and in so holding conclude that the case is distinct on its particular factual matrix from the case of **Coffey.** This is despite the similarities that strike one at first blush. There is no evidence before the Tribunal to reverse the burden of proof in this case, submitted Mr Hay. Even if there is evidence from which the Tribunal could draw an inference, submitted Mr Hay, there was no evidence to rebut the evidence as to the reason provided by Dr Policarp and Brian Rowles. On what basis, submitted Mr Hay, should they not be believed? There is no good reason, submitted Mr Hay, for their reasoning as to assessment of risk to the claimant not to be accepted and found as fact. There is no evidence, submitted Mr Hay, of the reason advanced by the respondent being so wrong as to amount to a sham reason.

57. Mr Hay identified further factual distinctions between the present case and that of **Coffey**. These included Ms Coffey already being employed as a police constable at the time of her request to transfer to the respondent constabulary; there being no question of Ms Coffey handling firearms as part of her role; Ms Coffey having passed a functional hearing test for ordinary police constables and having worked for her predecessor police force for two years without issue; the medical recommendation that Ms Coffey undertake a further "at work" functionality test not being accepted by the respondent constabulary and that the recruiting officer who refused Ms Coffey's application for transfer being found to have thought that she was suffering from a progressive condition and to have held stereotypical assumptions. In the present case, submitted Mr Hay, the respondent has no similar aversion to keeping officers retained; it has been shown that they have kept AFOs and at least one Armourer in employment pending the development of a functional test.

58. In the case of **Coffey**, submitted Mr Hay, the imputation of motive as to a stereotypical assumption of disability came from the evidence of the respondent's recruiting officer in which there was reference to a "*transfer of*

risk" and to the logistical difficulties posed by having disabled officers "*on the books*". The implication was obvious, submitted Mr Hay, and pointed towards a mindset of casting ahead to a point where Ms Coffey would not be able to perform the duties of a police constable, considered by the Court of Appeal to be reflective of ordinary day to day activities. There was also the inherent improbability, submitted Mr Hay, of a genuine belief that Ms Coffey could not objectively perform, or would be likely not to objectively perform in the future, the role of a police constable given that she had been performing such duties perfectly well for the past two years. There was, submitted Mr Hay, a "*smoking gun*" in the evidence of the respondent's witness in **Coffey**, throwing light on a perception that Ms Coffey was either disabled now, or would be disabled at some point in the future.

59. Mr Hay did not dispute that the claimant's case had certain factual similarities to that of **Coffey**, for example the same form of hearing assessment. Ms Coffey's case however did not have the feature of the very job for which recruitment was sought presenting a further risk of injury – nowhere was it found that the ordinary duties of a police constable would expose her to dangerous levels of noise. There is a risk of further injury, submitted Mr Hay, to those with noise induced hearing loss from working with firearms. This is distinct, submitted Mr Hay, from a perception of a candidate for employment becoming disabled in the future

60. It is well known, submitted Mr Hay, that employers who expose employees to noisy environments are under certain legal duties to protect those employees from injury. Mr Hay referred the Tribunal to the case of **Goldscheider v Royal Opera House Convent Garden Foundation 2018 EWHC 687QB** on the potential liability of an employer requiring an employee to work in a noisy environment – in the above case, an orchestra pit. Is it being contended, submitted Mr Hay, that an employer who is recruiting for a specialist and dangerous role must employ an employee who it is reasonably certain will be further injured by dint of the role in question and then redeploy them to another role without the risk to avoid a finding of direct discrimination which

they will have no opportunity to objectively justify? This was a matter that clearly weighed on both the EAT and Court of Appeal in **Coffey**, submitted Mr Hay. The EAT and Court of Appeal, submitted Mr Hay, were able to respect the outcome of the Employment Tribunal by reference to the particular factual matrix of the case.

61. Mr Hay invited the Tribunal to find as fact that the reason for withdrawal of the offer of employment was on account of an assessment that there was an unacceptable risk to the claimant in being deployed to the role of Force Armourer in the form of further and accelerated damage to his hearing. This is not a case, submitted Mr Hay, of some irrational and stereotypical perception that he was disabled and thus unable to fulfil the duties of the role. The RAP, submitted Mr Hay, was convened because the claimant failed to achieve the national police standards for hearing. The view of the RAP, submitted Mr Hay, was that the results of the claimant's failure to meet the national police standards in the medical assessment disclosed a level of noise induced hearing loss which placed the claimant at a risk of further injury greater than someone without his degree of hearing loss.

62. In response to the claimant's submission regarding the error made over his date of birth, Mr Hay submitted that this matter, if considered relevant, takes the claimant no further. Firstly, age is not a disability and the claim is not one of age discrimination and secondly the evidence, if anything, supports the conclusion that the motivation for withdrawing the offer was an assessment of risk to the claimant. If made under the misapprehension of the claimant being older than he was, submitted Mr Hay, a non-discriminatory motive, even if based on a mistake, remains non-discriminatory.

63. As regards remedy in the event of the claimant succeeding in his claim, Mr Hay submitted that as a claim involving an adverse decision during recruitment, any award for injury to feelings should be within the lower band of **Vento**. Mr Hay observed that the claimant was less than clear and forthcoming about his loss of earnings and efforts to find alternative work once

his offer of employment was withdrawn and this should be reflected in any award for past loss.

DISCUSSION & DELIBERATIONS

64. Section 13 of the Equality Act 2010 provides that "*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*". Section 39(1)(a) of the Equality Act 2010 provides that "*an employer (A) must not discriminate against a person (B) (a) in the arrangements A makes for deciding to whom to offer employment*" and at Section 39(1)(c) "*by not offering B employment*".

65. Disability is a protected characteristic. It is defined at Section 6 of the Equality Act 2010 as a person who has "*a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day- to- day activities*". Paragraph 8 of Schedule 1 of the Equality Act 2010 also provides that if a person has a progressive condition, as a result of that condition the person has an impairment which has (or had) an effect on the person's ability to carry out normal day- to- day activities but the effect is not (or was not) a substantial adverse effect, the person should be taken to have an impairment which has the substantial adverse effect if the condition is likely to result in the claimant having such an impairment.

66. Section 13 of the Equality Act 2010 does not require the person to have the protected characteristic, only that they are treated less favourably because of it. Treating a person less favourably because of the perception that they have a protected characteristic can amount to direct discrimination.

67. Section 23 of the Equality Act 2010 provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case. Circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13 the protected characteristic is disability.

68. As regards proving discrimination, Section 136 of the Equality Act 2010 provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the Equality Act, the Tribunal must hold that the contravention occurred. This is referred to as the shifting burden of proof. It required the claimant to prove facts from which inferences could be drawn by the Tribunal that the respondent treated him less favourably because of a protected characteristic - in the claimant's case the protected characteristic being disability.

69. The claimant did not seek to show that he is a disabled person or is likely to become a disabled person within the meaning of the Equality Act 2010. It was the claimant's case that because the respondent perceived that he was likely to become disabled within a short period of time – "*quite quickly*" - they treated him less favourably by withdrawing his offer of employment.

70. Central to this case and relied on heavily by the claimant was the case of **The Chief Constable of Norfolk v Lisa Coffey 2019 EWCA Civ 1061** (**Coffey**). In summary the facts in Coffey were as follows; Ms Coffey applied to become a police constable with the Wiltshire Constabulary in 2011. At that time she did not meet the medical standard for hearing laid down by the national medical recruitment standards. The standards were not decisive and accompanying guidance allowed for a practical test to assess functional disability for candidates who were only below the standard in one ear or it was a borderline test. Ms Coffey was assessed in terms of her ability based on the role, functions and activities of an operational constable and was found to be a suitable candidate for the post of police constable. She worked as a police constable on front-line duty with no adverse effects from 2011 onwards. In 2013, Ms Coffey applied to the Norfolk Constabulary for a transfer. She disclosed that she had some upper range hearing loss and enclosed the report from her functionality test. She said that no adjustments had been necessary because of her hearing loss. Ms Coffey was successful at interview, subject to a fitness and pre-employment health assessment. The medical adviser stated that she had significant hearing loss in both ears and was "*just outside the standards for recruitment strictly speaking*". He

recommended an "*at-work test*". Norfolk Constabulary did not accept the above recommendation. Ms Coffey was referred to another medical adviser who advised that the audiograms from 2011 and 2013 were very similar – just outside the range. Norfolk Constabulary still did not accept the recommendation and their recruiting officer declined Ms Coffey's application because her hearing was below the medical standard for recruitment. The recruiting officer identified Ms Coffey as a non-disabled officer who by virtue of the medical standards would be a restricted officer. The decision to refuse Ms Coffey's application was found to be influenced by stereotypical views of disability. Ms Coffey brought a successful claim of perceived direct disability discrimination.

71. The Court of Appeal considered the case of **Coffey** to be fact specific. It is necessary therefore to consider carefully the facts in both cases and to identify any material differences. The claimant sought to show that the facts of his case were similar, if not the same, as that of Ms Coffey. On occasions, this led him to misrepresent the evidence in his case. For example, he suggested, incorrectly, to Brian Rowles that Dr Policarp had agreed that his hearing test was "borderline". (Ms Coffey's hearing test was "borderline"). This was incorrect. In the present case, the claimant, unlike Ms Coffey, was also applying for a civilian as opposed to a police role. She had passed a functionality test. There is no such test available at present for the post of Force Armourer. Unlike Ms Coffey the claimant was applying for the post as opposed to requesting a transfer to the same post at a different site. The claimant's offer of employment was not withdrawn because the respondent considered that there would be an inevitable deterioration in his hearing that would lead to him becoming disabled and placed on restricted duties. The offer of employment was withdrawn because of the respondent's concerns that the role of Force Armourer and in particular the requirement to "zero" weapons would cause an unacceptable level of harm to his hearing.

72. Before the Court of Appeal in **Coffey** it was common ground that in a claim of perceived disability discrimination the putative discriminator must believe that all of the elements in the statutory definition of disability are present. It is not

necessary that they should attached the label of "disability" to the them. The Court of Appeal was satisfied that there was evidence before the Employment Tribunal that the respondent believed that Ms Coffey's hearing loss would at some time in the future result in her being unable to perform the role of a front-line police officer. Of significance to the present case, the Court of Appeal in **Coffey** was satisfied that the activities of a front-line police officer for which good hearing is relevant are "*normal day to day activities*" within the meaning of Section 6 of the Equality Act 2010. In the present case, the claimant did not apply for the post of front-line police officer. The role of Force Armourer involved "zeroing" weapons and there was no suggestion that this was a normal day to day activity. It was the part of the role that caused the respondent particular concern in relation to the claimant and which they believed would harm his hearing if he was appointed to the role of Force Armourer. There was no persuasive evidence before the Tribunal that the respondent considered the claimant unable to carry out normal day to day activities either at the time of his application or at some point in the future.

73. It was Dr Policarp who provided the respondent's RAP with medical information on which to base their decision about the claimant's recruitment. The Tribunal did not find that Dr Policarp considered the claimant to be disabled due to his hearing loss. As referred to above, the Tribunal was not persuaded that his request that the RAP "*explore reasonable adjustments*" was evidence of a belief that the claimant was or would become disabled or something from which the Tribunal should draw an inference of such a belief. The statement was also qualified by Dr Policarp to the extent that the request was made "*despite (his) opinion that Mr Trueman was unlikely to be covered by the equality act*".

74. It was exposure to "zeroing" weapons that led the respondent to consider the claimant's hearing would probably deteriorate to HSE category 3 within a relatively short period of time as opposed to the progressive nature of his condition. While it might be possible to assume that a person with HSE category 3 hearing may struggle with normal day to day activities, the Tribunal did not find that this was part of the respondent's thought process either

consciously or subconsciously when deciding whether to proceed with the claimant's appointment. The main concern of the respondent was to avoid exposing the claimant to an unacceptable level of risk as a person who already had noise induced hearing loss as opposed to someone who was perceived to be disabled either at the time of his application or who would inevitably become disabled with the passage of time. The Tribunal was satisfied that the respondent's concerns about the risk to the claimant's hearing of exposing him to "zeroing" were genuine and not unreasonable unlike the situation in **Coffey** in which the recruiting officer was found to have held stereotypical assumptions about the abilities of a person with hearing loss. In all the circumstances, the Tribunal was not persuaded that the respondent perceived the claimant to be disabled.

75. If the Tribunal is wrong and the respondent did proceed on the basis that with the passage of time the claimant would become disabled within the meaning of the Equality Act 2010, it was not persuaded that disability was the reason why the respondent withdrew the claimant's offer of employment. In their letter to the clamant notifying him of their decision not to progress his application, the respondent states that the RAP "*could not assure themselves that they would be placing you in a position of unacceptable risk should you become an Armourer*". The respondent's records gave the reason for his rejection as "*high risk*". This is consistent with the reason advanced by the respondent before the Tribunal that they had genuine and reasonable concerns about the extent to which "zeroing" would adversely affect and accelerate the deterioration of the claimant's hearing.

76. The Tribunal was satisfied that the reason for the respondent's decision not to appoint the claimant arose as a consequence of the claimant's existing hearing loss, not because of it. The respondent felt obliged to avoid causing further deterioration to the claimant's already damaged hearing. The decision to withdraw the claimant's offer of employment was not to do with his abilities. It was to do with the high level of risk to him of exposure to "zeroing". The Tribunal identified this to be the reason why the claimant's offer of employment was withdrawn and not because of perceived disability.

77. While the respondent may have had concerns that exposure to "zeroing" would result in the claimant's hearing becoming prematurely HSE category 3, the Tribunal was not persuaded that this amounted to less favourable treatment because of a perceived disability. The reason that the offer of employment was withdrawn was because of the respondent's belief that as a consequence of his hearing loss there was an unacceptable risk to the claimant from exposure to "zeroing" that was likely to accelerate the deterioration in his hearing. This reason was separate from and not because of any perceived disability.

CONCLUSION

78. In all the circumstances the Tribunal was not persuaded that the respondent perceived the claimant to be disabled. The Tribunal found that the reason for the claimant's job offer being withdrawn was because of the respondent's belief that as a consequence of his hearing loss the claimant would be exposed to an unacceptable level of noise likely to accelerate the deterioration in his hearing. The reason why the claimant's offer of employment was withdrawn was not because of perceived disability. The Tribunal therefore concluded that the claim should be dismissed.

Employment Judge: F Eccles
Date of Judgement: 23 April 2020

Entered in Register,
Copied to Parties: 30 April 2020