



EMPLOYMENT TRIBUNALS

Claimant: Mr Matthew Jowett
Respondent: Health and Safety Executive

AT A FULL HEARING HEARD BY CVP

Heard at: Nottingham **On:** 12-16 July 2021
Reserved to: 20 August 2021 (in chambers)

Before: Employment Judge M Butler

Members: Miss J Hogarth
Mr M Alibha

Representation

Claimant: In person
Respondent: Mr J Feeny, Counsel

Covid-19 statement:

This was a partly remote (hybrid) hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

1. The majority Judgment of the Tribunal is that the Claimant is not disabled for the purposes of Section 6 of the Equality Act 2010 (EQA). Accordingly, the claims under Sections 15 and 21 EQA are dismissed.
2. The unanimous Judgment of the Tribunal is that the claim under Section 13 EQA is well founded and succeeds.
3. The claim of breach of contract is not well founded and is dismissed.
4. A Remedy Hearing will now be listed.

RESERVED REASONS

The Claims

1. By a claim form submitted on 26 April 2019, the Claimant brought claims of unfair dismissal, disability discrimination and breach of contract. Since he was never employed by the Respondent and his case being that an unconditional offer of employment was withdrawn immediately before his start date, the claim of unfair dismissal was dismissed.

2. The Claimant stated that he suffered from hyperacusis and he also made reference in communications with the Respondent to the condition of misophonia. Hyperacusis is sensitivity to certain sounds in certain situations and misophonia includes, inter alia, possible agitation and aggression in those situations. The Claimant also historically suffered from post-traumatic stress disorder in relation to an earlier life event but that condition is not relied upon by him in this case. His specific disability discrimination claims were brought under Section 13 EQA (direct discrimination), discrimination under Section 15 EQA as a result of something arising from his disability and failure under Section 21 to make reasonable adjustments to allow him to carry out the duties of a Health and Safety Inspector.

3. The claim of breach of contract arises from the fact that he was given an unconditional offer of employment as a Trainee Health and Safety Inspector and the Respondent should be liable for a considerable loss of earnings as a consequence.

4. As the claims proceeded through various preliminary hearings, the Claimant produced a medical report indicating that he did not suffer from hyperacusis or misophonia and this full merits hearing had to determine whether he was disabled at the material time. If we find he was, all of his discrimination claims may subsist but if we find that he is not disabled, the only discrimination claim which could proceed would be under Section 13 EQA in that he was discriminated against as a result of the Respondent's perception that he was disabled.

5. In essence, the Respondent disputes all of the claims.

6. The Claimant did on 29 December 2020 submit a further claim of victimisation claiming that the claim now before us was a Protected Act as a result of which he suffered detriments. That case number is 2420723/2020 and was struck out as having no reasonable prospect of success on 18 June 2021.

The Issues

7. The first issue to be determined is whether the Claimant was disabled during the recruitment process. We considered this issue first and, since we found that he was not disabled because of hyperacusis or misophonia, albeit by a majority, the claims under Section 15 and 21 EQA would fall in line with that Judgment and we would need to address whether he was directly discriminated against under Section 13 EQA as a result of the Respondent's view that he was perceived to be disabled.

8. The next issue is to determine whether the Respondent acted in breach of contract in withdrawing the unconditional offer of employment and, if it did, consider the appropriate level of compensation. In this regard, we note that the contract of employment offered to the Claimant provided for no notice of termination by the Respondent for employees who had not completed at least one month's continuous service.

The Law

9. Under Section 4 EQA, disability is a protected characteristic.

10. Section 6 EQA provided:

"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."

11. Section 13 EQA 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".

12. In ***Sarker v South Tees Acute Hospitals NHS Trust [1997] ICR673*** it was held that an unconditional offer of employment which was accepted by the prospective employee and then withdrawn by the employer may give rise to a claim by the proposed employee for damages for breach of contract.

The Evidence

13. We heard oral evidence from the Claimant and for the Respondent from Ms Clare Owen, Principal Inspector, and Ms Kim McClelland, Head of Policy, and who was a Lead Case Worker at the time of the withdrawal of the offer of employment to the Claimant. All witnesses provided witness statements and were cross-examined.

14. There was also an agreed bundle of documents comprising 1214 pages and references to page numbers in this Judgment are to page numbers in the bundle.

The Disability Issue

15. It is fair to say there was much confusion in relation to this issue. In his claim form, the Claimant said he had been diagnosed with hyperacusis and also *"identified with some of the things"* in a BBC article on misophonia. However, by the time of the first telephone preliminary hearing before Employment Judge Blackwell on 3 December 2019, the Claimant said that a report by Dr H Aazh, an Audiologist, had concluded he did not meet the diagnostic criteria for hyperacusis or misophonia (page 405). Accordingly, it is necessary for us to consider very carefully the evidence before us in the form of the Claimant's own evidence as to how his sensitivity to

sounds adversely effects his normal day to day activities and the various medical reports and opinions within the bundle.

16. We begin by referring back to the Claimant's claim form where he says, *"my hearing sensitivity is something many people will be able to identify with. Many people will find clicking pens or intrusive text alerts can affect their ability to "zone out" and concentrate on a task. In my case, this sensitivity is more acute, but it is not unmanageable. Certain noises can break my "code of concentration" when I am back in the office trying to write up reports or write letters etc. The more noisy and interactive my environment, the less my condition affects me, a subtly (sic) the Respondent failed to grasp despite information from me and the medical advisors they appointed"*.

17. In his impact statement (page 409), the Claimant refers to issues at University 30 years ago when he could not always concentrate well in his room in halls of residence because of banging doors, a loud telephone on the wall outside his door and waking through the night due to a bathroom door being directly below his room. He says, *"the condition does not affect me in interactive scenarios or over short periods...."*. He goes on to say, *"the condition only significantly impacts me in that it can lead to long-term stress if I'm exposed to triggering sounds daily in quiet environments where I am not interacting with anyone else"*. In relation to his day to day activities, he says his hearing sensitivity, *"affects what accommodation I can live in. It affects enjoying the cinema or theatre if the audience is too noisy, which in Britain I find they often are. It can affect my enjoyment of eating out, especially with piped muzak. I may ask a friend to turn the tv down if we are talking."* When he was writing his impact statement he says, *"As I write this account, I have my window open and there is a builder banging loudly and repeatedly and it has been going on for several days. It has absolutely no impact on my mood, my concentration or ability to think. Just as the mopeds raging through the village just outside have zero impact on me. They are no more distracting then the birds twittering in the trees"*.

18. In a reference to misophonia, the Claimant says, *"my condition does not typically result in me having any outwardly expressed anger and I am not someone who loses my temper in general life anyway. I am a calm and reasoned person"*.

19. The Claimant also makes reference to a holiday he took for three weeks when he became exhausted from lack of sleep because there was a door outside his hotel room that slammed really loudly in the middle of the night every night. On visiting the National Theatre he says his experience was marred by teenagers eating crisps and playing with mobile phones as a result of which he resolved not to be a regular theatre goer. He says this is the reason he does not go to the cinema regularly but admitted in cross-examination that he does still go to the cinema and has attended rock concerts. He also records how in a couple of his lodgings in Nottingham he was disturbed by ongoing slamming doors from a neighbour and from other tenants. He also says he is affected by a friend's washing machine which makes a continual beeping noise when the cycle is complete and that his solution is to go and turn it off at this time. Finally, he refers to one of the local supermarkets in the French village where he lives which one day was playing two difference music channels in the store and he found this *"a bit wearing"* when he was trying to concentrate on his

purchases.

20. During his cross-examination, the Claimant confirmed he does visit pubs and restaurants but the music there can affect him as did the music from an ice cream van which he complained to environmental health about because the driver was playing the music outside permitted hours. He says he has earphones in all the time at home and used them when he was preparing the papers for this hearing.

21. The Claimant did give evidence to say he consulted his GP for tinnitus some years ago but there is no indication he has ever been prescribed medication for any hearing impediment.

22. The medical evidence in the bundle begins with a letter from Professor Birchall to the Claimant's GP dated 21 June 2017 (page 367). The text of the letter is headed "*hyperacusis*" and notes that the Claimant has sensitivity to electronic alarms, doors closing, radios, tv's etc. Professor Birchall explains that this is something that can be cured but it might be helpful if the Claimant had some cognitive behavioural therapy. When questioned on this, the Claimant said he did not undertake CBT, he had had it in the past but could not remember whether it was useful at the time and he also thought his hearing sensitivity was a biological matter which would not change with any kind of talking therapy.

23. In the Claimant's fitness certificate for a new role dated 7 November 2018, Dr Emslie of Duradiamond Health (Duradiamond), (the Respondent's occupational health advisers) notes (page 369) "*This employee was diagnosed with hyperacusis in his teenage years. This causes him no issues with his day to day living however he does have a sensitivity to electronic alerts*".

24. At page 390 to 391 there is an Occupational Health Report by Dr Richard Cowlard of Duradiamond. It notes that misophonia is also known as selective sound sensitivity and is a strong emotional response to the presence of or anticipation of a sound which response can include anger, disgust and anxiety. It notes the challenge for the Claimant as being "*background sound and intrusive noise in a quiet office environment such as background music, sound alerts on mobile phones and computers, noisy banging of doors, noisy eating....*". He states that hyperacusis and misophonia are long standing, enduring and having a significant impact on day to day life and are likely to be covered by the Equality Act.

25. The Claimant's GP, Dr T Atiomo, produced a letter dated 4 April 2019 (page 402) which refers to the stress and anxiety suffered by the Claimant as a result of his job offer with Respondent being withdrawn. At page 403, is a letter from Mr Joe McGuire, Affiliate Practitioner at Insight Health Care, which also refers to the stress suffered by the Claimant after the withdrawal of the job offer. On 6 August 2019, Dr M Harris, Consultant General Adult and Forensic Psychiatrist at Rampton Hospital, also confirmed he had been consulted regarding the Claimant's stress and anxiety.

26. On 9 October 2019, Dr H Aazh, a specialist in tinnitus and hyperacusis rehabilitation, produced a report after conducting a consultation with the Claimant via Skype and following the completion of a long questionnaire by the Claimant (page

405 to 406). The marks scored by the Claimant are well below the threshold for hyperacusis. Dr Aazh concludes that, *“although Mr Jowett maybe sensitive to certain environmental noises, he does not meet the diagnostic criteria for hyperacusis or misophonia....”*. The report continues *“In my professional opinion, there is no reason to believe that he would have significant difficulty coping with environmental noises in his workplace or any other situations”*. Dr Aazh also notes that individuals with hyperacusis typically recover from the condition or manage the condition well after undertaking six sessions of hyperacusis-focused cognitive behavioural therapy, but his assessment is that the Claimant does not have either condition and no further session with him was needed.

27. The Tribunal discussed the disability issue at some length. As noted in the Judgment above, the conclusion was not unanimous. The majority view was that the Claimant’s evidence as to his hearing sensitivity was rather inconsistent. He did not seem to be able to make up his mind whether he became stressed and anxious in a quiet environment where he was trying to concentrate or in other environments such as the cinema or theatre. He also noted in his evidence that, when he was in an interactive environment, he was not disturbed by such things as texts and email alerts.

28. The majority of the Tribunal also noted that none of the medical evidence produced prior to the report of Dr Aazh seemed to be based on a proper and detailed examination but rather on what the Claimant had said. Further, there is no corroborating evidence from any of the Claimant’s friends or family who may have witnessed his reaction to sounds which annoy him.

29. There is no evidence before us of the Claimant reacting angrily to the sounds which disturb him. He himself gave evidence that he is a calm person who does not lose his temper. He has overcome some of the issues raised by these sounds by the simply expedient, for example, of turning off a washing machine when the cycle has finished. His alleged lack of sleep some 30 years ago when he was student due to banging doors and telephones ringing seems to us to be part and parcel of student life. Whilst he may have been awoken during the night, there is no evidence before us, even from the Claimant himself, that his disturbed sleep led to any stress or anxiety.

30. Finally, we have the report of Dr Aazh who quite categorically reports that the Claimant does not have either hyperacusis or misophonia and notes no further issues arising from his sensitivity to certain sounds.

31. The majority view of the Tribunal, in the light of this evidence, is that the Claimant is not disabled. We did not consider his sensitivity to certain sounds constituted a long-term impairment which had a substantial adverse effect on his ability to carry out normal day to day activities.

32. The minority view of Ms Hogarth is that the Claimant was disabled at the material time. She considered the impairment to be long term and accepted the Claimant’s evidence as to the effect certain sounds had on him. Ms Hogarth did not consider the fact that Dr Aazh had found the Claimant to be below the threshold for

hyperacusis and misophonia had a significant bearing on the disability issue as she accepted the Claimant's evidence that those matters to which he referred did amount to a substantial adverse effect on his ability to carry out normal day to day activities.

33. The majority view of the Tribunal is that the Claimant was not at the material time disabled for the purposes of Section 6 EQA.

Direct Disability Discrimination by Perception

34. The principal authority in relation to direct discrimination by perception is the Judgment of the Court of Appeal in ***Chief Constable of Norfolk Constabulary v Coffey [2019] EWCA Civ 1061***. Mr Feeny, who here represents the Respondent, successfully acted for the Claimant in that case and had the conduct of it in the Employment Tribunal, Employment Appeal Tribunal and Court of Appeal. The law seems to be quite settled as a result of that Judgment. It is worth at this stage summarising the Judgment of the Court of Appeal as follows:

- (i) Perception discrimination occurred under Section 13 (1) of the EQA where a person treated another less favourably because he or she thought that the person had a particular protected characteristic, when in fact they did not. To establish such a claim in relation to disability, the putative discriminator had to have believed that all elements in the statutory definition of disability in Section 6 EQA were present.
- (ii) The first issue was whether the decision maker's belief that the Claimant was or might become incapable of performing his or her duties (as a front line Police Officer) was a belief about her ability to carry out "*normal day to day activities*". It was held that the Claimant's disability which then or in the future rendered her unable to perform her duties was a perception that it would have an effect on her ability to carry out normal day to day activities and that any such effect would be substantial and adverse.
- (iii) Was the refusal of employment because of such a perception of a risk of future inability to work as a front line Officer one which fell within the terms of the EQA in circumstances where the decision maker believed at the time of the decision that the Claimant was suffering from a condition falling within the terms of the EQA thus entitling the Claimant to be treated as already having an impairment with a substantial adverse effect on her ability to carrying out normal day to day activities?
- (iv) An employer's concern about the ability of a disabled Claimant to do the job might constitute direct discrimination if it was significantly influenced by a stereotypical assumption about the effects of the disability.

35. In considering the Claimant's evidence on direct discrimination by perception, we could not help but think that he had, to a significant extent, unwittingly been the author of his own misfortune. He declared to the Respondent that he suffered from hyperacusis which did not seem to raise any significant concerns in that the Respondent seems to have adopted the view that his hearing sensitivity could be

overcome by his colleagues acting considerately in the office environment. What really set the legal cat amongst the pigeons was the Claimant's email of 29 January 2019 (page 228) to Miss Owen in which he refers her to a BBC News website which records information about misophonia. In his email he says, "*from the reading I've done I can identify with both misophonia and hyperacusis*". Essentially, this led to further medical information being sought which highlighted symptoms arising from misophonia which included anger and aggression. There was then a concern on the part of the Respondent that the Claimant might become angry and aggressive when visiting duty holders, who can be particularly argumentative, outside the office environment. The Respondent concluded it could not make any adjustments which would enable the Claimant to avoid the potential consequences of him becoming angry and/or aggressive in these environments.

36. We note at this stage that in response to the Claimant's original claim, disability on the grounds of hyperacusis was conceded by the Respondent. That position changed in the light of Dr Aazh's report but it is quite clear that the Respondent's view throughout the recruitment process, and in the light of its OH reports, was that the Claimant was disabled for the purposes of Section 6 EQA.

37. The Tribunal had some concerns with Ms Owen's evidence. She was at times hesitant in answering questions and her evidence was punctuated by heavy sighs which we considered illustrated her frustration in attempting to answer the questions put to her.

38. It was put to her by the Claimant that the Respondent should have sought specialist advice before withdrawing his job offer. Ms Owen's response was that she tried to give Duradiamond a picture of what the Claimant's duties would be and, whilst she thought her referral was adequate, their response was inadequate, so she challenged it. Duradiamond were considered specialists in Occupational Health and she did not consider it necessary to go to an audiology specialist. It was her responsibility to decide what reasonable adjustments could be made and she thought that, if the Claimant was in a factory, he would need to concentrate on reading documents, and he might struggle. She understood that the Claimant's condition could result in emotional distress and anger. The Tribunal noted she was very hesitant in giving this evidence. At paragraph 45(d) of her statement she had said she thought the Claimant would "*be exposed to trigger sounds in environments where he would not be in a position to focus on his own wellbeing and manage his own response.... based on my knowledge of the job, I felt this would be a frequent occurrence. As a trainee starting out, the Claimant would not have experience of the job to fall back on and help him through difficulties*". She also said she "*bore in mind the significant potential for reputational damage to the Respondent if the Claimant behaved inappropriately while at work*". In paragraph 49 she said, "*I was also concerned that (dealing with stress) may lead to an uncontrolled outburst directed at a colleague in a training situation or to a duty holder*". Clarifying that last statement, she said she was expecting an emotional outburst at some point from the Claimant. She had not thought to ask either the Claimant or a specialist whether such an uncontrolled outburst was likely.

39. Ms Owen sighed very heavily when asked about her own notes at page 242

referring to Autism/Aspergers and said this was just “*a hypothetical*”. In response to a question from the Employment Judge regarding her note at page 226 that the Claimant “*cannot conform to the behaviours we accept*”, Ms Owen was unable to state what behaviours she had in mind when writing that note. In responding to a further question from the Employment Judge she said did not know why the Respondent did not get a specialist report (which contradicted her previous evidence) and merely stated that she followed the policy.

40. Ms Owen said that she felt the Respondent could have made reasonable adjustments for the Claimant to combat his hearing sensitivity in the office but did not know how that could be done in a factory environment. She confirmed this in her email to Ms McClelland dated 27 February 2019 (page 257 to 258) but the penultimate sentence of that email states “*if Matthew loses control of his emotions, HSE runs the risk of reputational damage resulting from violence and aggression, complaints and incidents*”. Ms Owen was unable to say why she did not think to ask the Claimant if he had ever been violent.

41. In response to questions from the Tribunal, Ms Owen was unable to explain what she meant in her report at page 382 by the words “*an essential element of becoming an effective Inspector is the ability to build rapport with another human being*”. She confirms that Dr Emslie of Duradiamond told her it would be acceptable for her to ask the Claimant how he displays his anger, but she admitted she did not ask him.

42. Ms Owen became very flustered when Mr Feeny, in re-examination, asked her about the Occupational Report of 8 November 2018, her discussion with Dr Emslie and Dr Cowlard’s report.

43. For the reasons identified above, we did not form a favourable view of Ms Owen’s evidence.

44. Ms McClelland was more forthright in her evidence. She was referred to Dr Cowlard’s Occupational Health Report at page 390 which confirmed that the Claimant could undertake his duties in an office environment with an adjustment such as discussing his problems with his Manager and colleagues and reducing the noise in the office which had an impact on him. Dr Cowlard said that “*it would appear to be the office environment that is a problem rather than industrial settings*”. He then said, “*I recommend Matthew is fit for work in the role as described and the associated training without restriction or adjustment other than attention to intrusive sounds in the office as described*”. Ms McClelland confirmed that that is what Dr Cowlard said but said that his decision was not overturned. Strangely, she said in cross-examination, “*We felt the office environment could be similar to being in a duty holders office with the same triggers. It is for the employer to look at what reasonable adjustments were necessary in every environment in which an employee would work*”.

45. Ms McClelland went on to say she was satisfied with Dr Cowlard’s report and felt the information from Ms Owen (page 257) was comprehensive and she considered it along with Dr Cowlard’s report. She chose not to escalate the matter to

a specialist because Duradiamond did not feel it was necessary. She emphasised that the Health and Safety Inspector role was stressful and demanding which could be made worse in certain environments. Whilst she said she did not think the Respondent ever referred to violence, anger could incite violence, possibly. This flew in the face of Ms Owen's email to Ms McClelland dated 27 February 2019 which at page 258 says, "*HSE runs the risk of reputational damage resulting from violence and aggression, complaints and incidents*".

46. Ms McClelland accepted that there were no verification checks to ascertain whether the Claimant had ever been violent. She did not think it was a mistake to withdraw the employment offer and would do the same again. In the Claimant's case, the Respondent needed to act quickly. The Claimant referred her to the Respondent's Policy for the Health and Safety for Disabled People and their Employers which begins at page 903 but she said she did not know this was on the Respondent's website.

47. She said it was her recommendation to the Head of HR that the offer of employment be withdrawn.

48. In response to questions from the Tribunal, Ms McClelland said the Respondent tested different competencies for job applicants and these included emotional responses to situations. She accepted that Dr Cowlard (page 390) recommended a discussion with the Claimant but Ms McClelland said this was "*not something I would recommend*". When it was put to her that she did not even raise the subject with the Claimant her answer was "*I think Clare (Owen) may have done but I did not*".

49. Considering Ms McClelland's evidence in the round, we found it illustrative of the Respondent's failure to properly investigate the Claimant's condition and make their own assumptions of his reactions to certain sounds notwithstanding the contrary opinion given by its own Occupational Health Advisors.

Findings of Fact

50. The findings of fact in relation to the issues are relatively brief.

51. The Claimant applied for the position of Trainee Health and Safety Inspector with the Respondent. He was successful at interview after a process which tested various competencies including a candidate's emotional responses to various situations. He was sent a letter of appointment and contract of employment and references were taken up.

52. He confirmed during the application process that he suffered from hyperacusis and discussed this at length with Ms Owen. During one such conversation, he made reference to a BBC article on misophonia and said that he identified with some of the symptoms set out in that article. He did not say he suffered from misophonia.

53. The Respondent referred the Claimant to Duradiamond and the various reports in the bundle all conclude that he was fit for the role. Dr Cowlard in particular

said that the only issue for the Claimant was in a quiet office environment where sounds such as email or text alerts or noisy eating could irritate him. A reasonable adjustment would be to discuss this with his colleagues so that such alerts and eating were on silent or very quiet. None of the Occupational Health Advisors considered the Claimant would have any difficulty in factories, people's homes or other industrial environments.

54. In a conversation with Dr Emslie, Ms Owen was given a description of the symptoms of misophonia. Dr Cowlard also made reference to this prompting "*feelings of fight or flight*", due to the production of adrenalin.

55. Miss Owen, who had taken the lead in relation to the Duradiamond referrals, reported to Ms McClelland that she was concerned about potential anger and violence by the Claimant. Neither Ms Owen nor Ms McClelland made any further enquiry of the Claimant as to whether his condition had provoked violence in him.

56. Although Ms McClelland placed some emphasis on the Respondent's reliance on its Occupational Health Advisors, both she and Ms Owen, neither of whom have any medical qualifications, made the assumption that the Claimant was unsuitable for the role because of a potential predisposition towards violence.

57. Ms McClelland, in conjunction with the Respondent's HR Advisors, withdrew the Claimant's offer of employment literally a couple of days before he was due to start.

Submissions

58. Although the submissions made on behalf of the parties are briefly summarised below, we confirmed that we considered all submissions very carefully in reaching our conclusions.

59. For the Respondent, Mr Feeny raised the question as to why the Respondent perceived the Claimant to be disabled. He said there was a clear contrast with the Judgment in Coffey as in that case a perception was invented by the Respondent that the condition of the Claimant was worsening. In this case the Respondent thought the Claimant was disabled because Duradiamond said he was, and this was a correct perception based on the medical evidence. There was a further distinguishing feature between Coffey and this case in relation to whether a hypothetical comparator would have been treated differently. In this case there was a genuine mistake and not a stereotypical view by the Respondent. He suggested a hypothetical comparator would have been treated in the same way as the Claimant.

60. There was also an issue in relation to balancing the risk of employing the Claimant. As noted by the Duradiamond, there was a legal risk in employing the Claimant but balanced against that was allowing the Claimant to start work without reasonable adjustments being made in the field. There was a risk the Claimant might have developed psychological injury as a result of going out in the field.

61. Mr Feeny said that references to a potential anger response by the Claimant

was not the only issue that Ms Owen or the Respondent had since stress, emotional anguish and a number of other symptoms might be prevalent.

62. In relation to misophonia, Mr Feeny submitted that the Claimant clearly represented that he suffered from that condition. A reasonable reading of Dr Cowlard's report is that the Claimant suffered from misophonia in an office environment. His report said anger was a likely symptom, but he accepted that violence and aggression were "*more of a stretch*" although Dr Cowlard's report does make reference to "*fight*" in using the term fight or flight. He accepted that there was no clear indication of what adjustments could or should have been made in the field.

63. The Claimant submitted that he thought that if there were any lurking concerns about his condition, they would have been put to him. If Ms Owen did not understand anything in the BBC article on misophonia the Claimant sent to her, she only needed to ask him.

64. In relation to the reference to fight or flight, this did not have to translate into violence with everyone. The Respondent had made unreasonable assumptions. Whilst he can experience emotions, he did not let them translate into socially unacceptable behaviour.

65. The Claimant reiterated that Dr Cowlard's advice was that he was fit for the role. If the Respondent was not satisfied with that report, they should have got another one. The Respondent's final Occupational Health Report recommended him as fit for the role with adjustments.

Conclusions

66. In many respects, the conclusions in this case must rest on an interpretation of the Coffey Judgment as it relates to this Claimant. The waters were certainly muddied by the fact that, after submitting his claim, the Claimant revealed at a preliminary hearing that Dr Aazh had said he did not suffer from hyperacusis or misophonia. Up until then the Respondent had accepted the Claimant was disabled by virtue of those conditions but then swiftly changed its mind. The Claimant himself now seems to accept that he does not suffer from those conditions and we respect that view based on the thoroughness of Dr Aazh's investigation compared to those previously undertaken and the consultations with the Duradiamond. We note that throughout the recruitment process, those Advisors acknowledge the Claimant was disabled. We further note and bear in mind that the Claimant did not suggest he suffered from misophonia, only that he identified with some of its symptoms. Mr Feeny suggests the Claimant clearly represents he has misophonia in his email to Ms Owen (page 228) but then, after saying that he identifies with misophonia, he describes specific sounds which can affect him in the office environment. He does not say he becomes aggressive or violent as a consequence.

67. Mr Feeny also suggested that Dr Cowlard's report (page 390) diagnoses misophonia and that a reasonable reading of the report is that the Claimant has these symptoms in an office environment. Frankly, we could not disagree more with this interpretation. Dr Cowlard's report refers to the "*conditions of hyperacusis with*

misophonia” but he does not make a diagnosis but merely accepts what was the Claimant’s belief at the time that he had hyperacusis and identified with some of the symptoms of misophonia. We further note that there is nothing in any of the Occupational Health Reports or any other medical reports which suggests the Claimant could be violent in response to the triggers of hyperacusis or misophonia.

68. Thus, following the lead in the Coffey Judgment, we must consider “*the because of error*” and “*the comparator error*” in order to determine whether this is properly a Section 13 EQA case. In this case, in order for this complaint to fall within Section 13 EQA, we must find that the withdrawal of the offer of employment arose because of the Claimant’s disability itself. Following the reasoning in ***Stockton on Tees Borough Council v Aylott [2010] ICR1278***, it seems clear to us that what Ms Owen and Ms McClelland did was to take a stereotypical view of misophonia and assume that there was a serious risk that the Claimant would become aggressive or violent towards duty holders. Paragraph 67 of the Coffey Judgment refers to the comments of Mummery LJ who said in ***Stockton on Tees*** “*direct discrimination can occur, for example, when assumptions are made that a Claimant, as an individual, has characteristics associated with the group to which the Claimant belongs, irrespective of whether the Claimant or most members of the group have those characteristics*”. More tellingly, he said, “*the Council’s decision to dismiss the Claimant was based in part at least on assumptions that it made about his particular mental illness rather than on the basis of up to date medical evidence about the effect of his illness on his ability to continue in the employment of the Council*”. The reference in Mummery LJ’s comments about the failure to obtain up to date medical evidence is specifically relevant in this case because neither Ms Owen, Ms McClelland or the Respondent’s HR Advisors countenanced obtaining further medical evidence; nor, in fact, did they even make further enquiry of the Claimant himself. We must conclude, therefore, that the withdrawal of the offer of employment was because of the Claimant’s perceived disability.

69. In relation to “the comparator error”, we refer to paragraph 77 of the Coffey Judgment. In applying that paragraph to this case, we have to ask whether, in making the decision to withdraw the offer, Ms McClelland was motivated by a stereotypical and incorrect assumption that the Claimant’s conditions of hyperacusis and misophonia would prevent him from carrying out the role of a Health and Safety Inspector and the correct comparison is with how a person about whom no such assumption was made would have been treated. Again, we have no hesitation, given our findings of fact, in concluding that the Claimant was treated less favourably than this hypothetical comparator would have been. The Respondent was clearly influenced in its decision by a stereotypical assumption about the effects of what was perceived to be the Claimant’s mental impairment.

70. Returning to the four points of The Court of Appeal’s Judgment referred to above we find as follows:

71. The Claimant was treated less favourably because the Respondent thought he had a particular protected characteristic, when in fact he did not, and believed that all the elements in the statutory definition of disability in Section 6 EQA were present.

72. The Respondent believed that the Claimant was incapable of performing the duties of a Health and Safety Inspector because of potential aggression and violence translated into a perception that this would have an effect on his ability to carry out normal day to day activities which would be substantial and adverse, if, as the Respondent assumed, he would be incapable of carrying out that role.

73. We have found that the Respondent believed the Claimant suffered from a mental impairment falling within the EQA. This is abundantly clear from the Occupational Health Report upon which it relied which specifically mentioned that the Claimant fell within the EQA. The reference to the symptoms of misophonia can clearly be expected to have some impact on the Claimant's ability to carry out normal day to day activities.

74. The Respondent, through Ms McClelland, was, in our view, clearly motivated by a stereotypical assumption that the Claimant's mental impairment prevented him from carrying out the role of Health and Safety Inspector. This is further evidenced by the Respondent's failure to make further enquiries in relation to the symptoms and consequences of misophonia. Both Ms Owen and Ms McClelland assumed the reference by Dr Cowlard to "*fight or flight*" indicated that the Claimant could be aggressive or violent and this would prevent him from carrying out his duties.

75. Accordingly, pursuant to Section 13 EQA, we find that the Claimant was treated less favourably because of his perceived conditions of hyperacusis and misophonia.

76. In relation to the breach of contract claim, we must look to the terms of the Claimant's contract of employment. Had it have provided that the Claimant was entitled to notice pay immediately on commencing his employment, we would have been disposed to award a sum equivalent to the notice pay he would have been entitled to. However, the contract of employment does not include that provision but provides an entitlement to notice only after one month's continuous employment. Accordingly, the breach of contract claim must fail.

77. The Claimant is entitled to compensation and a Remedy Hearing will be listed to consider remedy. A notice of hearing will follow in due course and orders have been made in preparation for the Remedy Hearing.

Employment Judge M Butler

Date: 14 October 2021

JUDGMENT SENT TO THE PARTIES ON

3 December 2021

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FOR THE TRIBUNAL OFFICE

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