



Blog: Perceived disability and unlawful treatment – be careful

David Hoey looks at a case reminding us of the Equality Act's ambit.



David Hoey

In terms of the Equality Act 2010, it is unlawful direct discrimination where, because of a protected characteristic, a person (A) treats another person (B) less favourably than A treats or would treat others. By definition B does not need to have the protected characteristic since it is unlawful where A treats B less favourably "because of" the characteristic. It is therefore sufficiently wide to cover a case where A treats B less favourably because of a perception that B has the characteristic. A recent case considered how this applies to a Claimant whose employer may perceive to be disabled (even if she was not).

In *Chief Constable of Norfolk v Coffey* the Claimant applied to become a police constable. She attended a medical, at which it was discovered that she suffers from bilateral mild sensori-neural hearing loss with tinnitus. Her hearing loss was marginally outside the range set down by the Home Office for police recruitment. Despite this, the Claimant required to undergo a practical functionality test. She passed this and carried out front line duties. The Claimant then applied for a transfer. A pre-employment health assessment disclosed that the Claimant's hearing was 'just outside the standards for recruitment strictly speaking'. But the adviser noted that the Claimant had undertaken an operational policing role without any issue. The adviser recommended the Claimant undergo an 'at work' test. This was ignored and the Claimant's application rejected on the basis that her hearing was below the "acceptable and recognised standard", and that it would not be appropriate to step outside that standard given the risk of increasing the pool of officers on restricted duties.

The Claimant argued that she had been unlawfully directly discriminated. It was not alleged she had a disability. It was argued that the Claimant had been treated less favourably because she was perceived to have a disability. This was due to the progressive hearing condition she had.

The Employment Tribunal decided that the officer who decided to decline the Claimant's application decided to do so because she perceived the Claimant's potential disability could lead to the Respondent having to make adjustments to the Claimant's role as a front line police officer. Since this perception was the reason for refusing her transfer application, the claim was upheld.

The Respondent's appeal to the Employment Appeal Tribunal was refused and the decision of the Employment Tribunal was upheld. The reason for the treatment was because of the Claimant's condition which was covered in terms of the complex definition of a disability (and progressive conditions). The Tribunal's assessment of the decision maker's reasoning was also correct. The Employment Tribunal was entitled to find that a person with the same abilities as the Claimant, whose condition the Respondent did not perceive to be likely to deteriorate so that he or she would require restricted duties, would not have been treated as the Claimant was: such an application would have been approved.

This case is a useful reminder on how wide the protections within the Equality Act can extend. Employers must ensure they consider carefully the impact of their decisions on those who are disabled or have another protected characteristic (or who are perceived as disabled or to have one of the other protected characteristics). Sometimes this might not be clear and often chatting the issues through with one of your friendly BTO employment lawyers can help you identify and manage any risk. Happy New Year!



- *David Hoey is a partner at **BTO LLP***