

## How deaf is too deaf? - Chief Constable of Norfolk v Coffey



Article By

[Labor and Employment Practice Group Squire Patton Boggs](#)  
[Squire Patton Boggs \(US\) LLP](#)  
[Employment Law Worldview](#)

- [Litigation / Trial Practice](#)
- [Global](#)
- [Labor & Employment](#)
- [United Kingdom](#)

Thursday, February 15, 2018

Ruled upon by the EAT at the end of last year, **Coffey** marks a significant but ultimately unsurprising precedent in terms of perceived disability cases in the UK. The case is the first directly to address the issue of perceived disability discrimination under the Equality Act 2010 and confirms that an employer cannot treat an individual less favourably than others based on a disability it perceives that individual to have, even if he doesn't.

Mrs Coffey, a serving police officer, wished to move from the Wiltshire to the Norfolk Constabulary for family reasons. She disclosed to the Norfolk Police that she had some upper-range hearing loss but also enclosed the report from a hearing functionality test which she had passed in Wiltshire and evidence from a specialist who confirmed her hearing levels were stable despite her falling slightly short of the Police National Recruitment Standards. She had had no hearing-related issues in her work for the Wiltshire Police and was not viewed as having a disability at that time.

Despite this information, Norfolk rejected Coffey's application as on the basis that she did not meet the Recruitment Standards for hearing. No new hearing functionality test was carried out. The decision was made on the basis that Coffey's hearing would deteriorate in the future, meaning her usefulness to Norfolk would become increasingly restricted. In other words, though not disabled at that stage, Norfolk believed that she would soon become so and hence would fail the

Recruitment Standards much more definitively.

Coffey subsequently issued proceedings in the ET alleging that the rejection of her application was based on the perception that a disability may arise in the future and that this rejection amounted to direct disability discrimination. The claims were upheld but were then appealed by the Norfolk Constabulary to the EAT.

Coffey's claims were upheld by the EAT. The EAT found that Norfolk thought that Coffey's condition would progress to the extent that she would need to be placed on impossibly restricted duties and therefore that she had a disability in the sense of a progressive condition and had been rejected on that basis.

Discrimination based on perceptions is well established for other protected characteristics under the EqA 2010 such as sexual orientation. The EAT's decision in the present case confirms that disability discrimination works in the same way. A disabled person is defined in S6 as someone who has, rather than who is thought to have, a disability. However, discrimination takes place under S13 where less favourable treatment occurs "because of a protected characteristic", not because of that individual's protected characteristic. Less favourable treatment due to a belief that someone has or will have a disability is therefore "because of a protected characteristic" even if the victim doesn't actually have it. Employers need to be mindful that even if an employee (or potential employee) does not have a protected characteristic, a finding of direct discrimination is possible if they think he does. [As a brief diversion, this is not true of the duty to make reasonable adjustments under S20 Equality Act. In **Copal Castings - v - Hinton** in 2004, both Hinton and his employer thought that he had Type 1 diabetes. He asked for adjustments to his hours to accommodate this and when he was refused, sued for Copal's failure to make them. Part way through the case it was found that it was in fact Type 2 diabetes, not requiring the same adjustment at all. Undeterred, Hinton battled on, claiming that the duty on Copal depended on what it believed at the time, not the reality. In other words, he said, he should get compensation for Copal's failure to make adjustments, he didn't need to accommodate a condition he didn't have. It was a corker. Happily the EAT kicked it out - S20 required the employee actually to be disadvantaged, not merely believe that he was.]

## **Lessons for employers**

Four things went wrong for the Norfolk Police here:

- It made its own assessment, without medical evidence, that Coffey's hearing would deteriorate to the point where her duties would have to be unacceptably limited;
- In so doing it demonstrated a stereotyped approach to her complaint and did not consider the situation on its own merits; and
- Though it relied on the Recruitment Standards failure, it seems not to have read the accompanying Home Office Circular which reads (in terms applicable to pretty much all employers, not just police forces):

*"It will be unlawful to exclude candidates automatically on the basis of a medical*

*condition or disability. Each case should be looked at individually and assessed on its merits. The standards also reflect fitness to serve at the time of appointment and for a reasonable time. This differs from the previous standards which reflected fitness at the time of assessment and a prediction that the individual was likely to remain fit for the full duties of a Police Constable for the foreseeable future and was unlikely to have a condition or medical history which could lead to premature retirement on health grounds”.*

- Therefore, the possibility or even the likelihood of some incapacitating disability at a later stage will not be good grounds for rejection or dismissal if the employer can get good service out of the individual for a reasonable period of time before then. What counts as “reasonable” will obviously depend upon the nature of the role and the costs of any adjustments expected to be made. Put crudely, the more difficult and/or expensive it would be to accommodate the disabled employee, the longer the period of time for which you would reasonably have to be confident that he/she would be fit enough to do the job before the disability intervened to prevent it.

© Copyright 2019 Squire Patton Boggs (US) LLP

**Source URL:** <https://www.natlawreview.com/article/how-deaf-too-deaf-chief-constable-norfolk-v-coffey>