



EMPLOYMENT TRIBUNALS

Claimant: Mr R Huskisson

Respondent: (1) Chief Constable of Cambridgeshire Constabulary.
(2) Chief Superintendent Simon Hawkins, Hertfordshire Constabulary.

HEARD AT: Cambridge Employment Tribunal **ON:** 9th June 2017

BEFORE: Employment Judge King

For the Claimant: Mr D Stephenson, Counsel.

For the Respondent: Mr P Bowness, Solicitor.

RESERVED JUDGMENT

The Claimant is disabled within the meaning of Section 6 of the Equality Act 2010.

REASONS

1. The only witness evidence I heard was from the Claimant. The Claimant having served a witness statement in advance and the parties having prepared an agreed bundle of documents which ran from page 1 to page 174.

The issues

2. The hearing was to deal solely with whether the Claimant had a disability within the meaning of s6 of the Equality Act 2010. At the outset of the hearing the issues were identified as follows:
 - a It is not in dispute that the Claimant has a physical impairment namely a partial high frequency hearing loss or that it is in effect long term. What is in dispute is whether the impairment had a substantial adverse

effect on the Claimant's ability to carry out normal day to day activities?

- b Are any measures being taken to treat or correct the impairment, and if so I must consider but for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities.

The Law

3. Section 6 of the Equality Act 2010 states:-

- (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) ability to carry out normal day to day activities.*
- (2) *A reference to a disabled person is a reference to a person who has a disability.*
- (3) *In relation to the protected characteristic of disability:-*
 - (a) *A reference to person who has a particular protected characteristic is a reference to a person who has a particular disability;*
 - (b) *A reference to persons who share a protected characteristic is a reference to persons who have the same disability.*
- (4) *This Act (except part 12 in Section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has a disability; according (except in that part and that section):-*
 - (a) *A reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*
 - (b) *A reference (however expressed) to a person who does not have a disability includes a reference to person who has not had the disability.*
- (5) *A minister of the crown may issue guidance about matters to be taken into account in deciding any question for the purposes of sub-section 1.*
- (6) *Schedule 1 (disability; supplementary provision) has effect.*

4. Further Schedule 1 of the Equality Act 2010 - Disability Supplementary Provision – Part 1 determination of disability states:

1. *Impairment ...*
2. *Long term effects ...*
4. *Substantial adverse effects*

Regulations make provision for an effect of a prescribe description on the ability of a person to carry out normal day to day activities to be treated as being, or not as being, substantial adverse effect.

5. *The effect of medical treatment*

- (1) *An impairment is to be treated as having a substantial adverse effect on the ability of a person concerned to carry out normal day to day activities if:-*
 - (a) *Measures are being taken to treat or correct it, and*
 - (b) *But for that, it would likely to have that effect.*
- (2) *Measures “includes”, in particular, medical treatment and use of prosthesis or other aid.*
- (3) *Sub paragraph 1 does not apply:-*
 - (a) *In relation to the impairment of a person sight to the extent that the impairment is both, is in the persons case correctable by spectacles or contact lenses or in such other ways as may be prescribed;*
 - (b) *In relation to other impairments as may be prescribed in such circumstances as are prescribed.*

5. Section 212(1) of the Equality Act 2010 states:-

Substantial “means more than minor or trivial”.

6. I have also been referred to a number of authorities on behalf of both the Respondent and the Claimant, and both parties drew my attention to provisions contained within the Equality Act 2010 “Guidance on matters to be taken into account in determining questions relating to the definition of disability”.
7. The Claimant’s representative referred me to a number of authorities in his outline submissions, namely:-

Goodwin v Patent Office [1999] IRLR 4, EAT.

Chacon Navas v Eurest Colectividades SA [2006] IRLR 706.

Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763 (copy provided).

HK Danmark acting on behalf of Ring v Dansk Almennyttigt Boligselskab C-355/11 [2013] IRLR 571 (copy provided).

Fag Og Arbejde acting on behalf of Kalsoft v Kommunernes Landsforening acting on behalf of the Municipality of Billund (Kalsoft) [2015] IRLR 146.

Sobhi v Commissioner of Police of the Metropolis [2013] EQLR 285.

8. On behalf of the Respondent who made oral submissions to me, two copies of cases were provided namely:-

Chief Constable of Lothian and the Borders Police v Ms K A Cummings UKEATS/0077/08BI.

Ms B Anwar v Tower Hamlets College UKEATS/0091/10RN.

Findings of Fact

9. The Claimant had a hearing test in 2007 when he joined the special branch of the force. He was required to take a hearing test by the Constabulary Occupational Medical Personnel. As result of this hearing test the Claimant booked an appointment with his GP to have another test done which confirmed the results of the police hearing test.
10. The Claimant had hearing issues as a child and the medical report (set out below) summarises a number of ear issues the Claimant had as a child including an ear infection and a ruptured ear drum but before this point (2007) had been unaware of any hearing loss as an adult. He had had grommets fitted as a child.
11. Although the Claimant was left handed he had naturally developed a tendency to put the telephone to right ear and he had not attributed this to anything. It was only when it was highlighted to him that he had an explanation as to why it was hard to do these things.
12. The Claimant accepted in cross examination that his hearing condition had not materially changed since 2007. His evidence on this issue was that he had taken this steps to cope so until someone pointed out why he was doing it he had not associated it with a hearing loss issue.
13. His impairment is in his left ear. He understands this to be hearing loss at a frequency above that of human speech.
14. When the Claimant wanted to become a constable, his hearing became an issue. He underwent a further assessment of his medical suitability to join the force. He underwent a functional hearing test which he passed. He gave evidence as to what this entailed at paragraph 9 of his statement. He referred to using what had at that time become a standard Police issue

earpiece in his left ear to relay information. As a result of the ear piece he passed this test.

15. When the Claimant joined the police force the standard issue for officers was a different earpiece. The Claimant felt this impacted on his ability to perform his role so he purchased his own in ear speaker. He described to the Tribunal that this projected the radio into the inner ear and reduced ambient noise so that this did not interfere with his hearing. He referred to this as an acoustic tube. Purely coincidentally as a result of matters unrelated to this Claimant, this type of earpiece has become standard issue in the force since approximately 2011. The Claimant cannot be precise as to when, he only discovered this when his own earpiece broke and he came to replace it finding that these were now standard issue.
16. It is this reason that the Claimant gave as an explanation as to why his hearing loss did not adversely effect him in his day to day role at work. As a Police Officer he wears his inner ear radio which cuts out background noise and directs the sound straight into his ear. This ear piece was a special ear piece he purchased until this became standard issue as set out above.
17. The impairment adversely effects the Claimant when he is in a noisy pub/club, he has more difficulty than others in that situation in hearing people taking to him. He turns his right ear towards others to alleviate the issues to some extent.
18. The Claimant's friends had noticed he has more problems than others in hearing things in noisy environments and they had noticed his turning of the head and that they had to repeat themselves. These friends did not give evidence before this Tribunal but this comes from the Claimant's evidence. The Claimant has also noticed that he seems to have more issue hearing people than others do in these types of social situations.
19. The Claimant also uses lip reading to some extent to help him understand what is being said. These are all mechanisms he has developed to help him cope with the hearing loss.
20. The Claimant gave evidence that the difficulty in hearing occurred even in less noisy social situations. He positions himself to the left of others where possible so that his right ear faces them. He also uses lip reading in these situations.
21. When driving he is unable to listen to moderately loud music on the radio and have a conversation with someone in the passenger seat. He must either listen to the music or turn it off to have a conversation.
22. The Claimant has one particular friend whose first language is not English but Polish and he cannot understand her in a noisy environment more so than other friends.

23. With the TV on fairly loudly he finds it difficult to have a conversation in the living room adjoining the kitchen with an open door, so he must be in the same room as that person.
24. On questioning he also gave evidence that if someone was sat behind him in the car for example giving directions then this intensifies if the radio is on a talk show or similar as he is unable to distinguish the voices which I accept.
25. A document was produced in around 2010/2011 at page 103 of the bundle, whereby the author was surprised that the Claimant's impairment as he/she did not perceive him to have any problems. The author of this report was unclear and even the Claimant could not shed much light on the author indicating that it could be his mother, the European Human Rights Commission or the Conciliator in that mediation.
26. Certainly, as he presented to this Tribunal the impairment is not obvious in the same way as some physical impairments but even in the course of proceedings we made adjustments to ensure his right ear was closest to the Tribunal when giving evidence and changed his position during the course of proceedings so that he could sit next to his representative accordingly. I am however conscious that just because one cannot see a disability does not mean an impairment does not exist, I therefore attach little weight to this document as it is not clear who created it or for what purpose. It is an unspecified person's observations.
27. The parties had instructed a joint medical expert whose medical report is at pages 50-59 of the bundle. The report is by Mr Parker who examined the Claimant on the 17th February 2017. This report contains extracts from medical records not reproduced for the bundle, save as to say it is not a dispute that there is a history of ear problems for the Claimant as a child.
28. The Claimant presented to this expert with his difficulties concerning his hearing loss when in a noisy environment and singled out examples of when a friend meets him in a loud public house. He also advised the expert that he had to selectively position himself when in background noise sometimes to hear the conversation. The Claimant is described as having significant asymmetric high frequency hearing loss on the left. The medical expert concurs with the parties that the Claimant has an impairment. Mr Parker says that in respect of the issues before this Tribunal that:-

"An individual with these hearing losses in my opinion would be able to carry out day to day activities and certainly those in domestic life. In civilian employment, I would not expect him to be disadvantaged, in the open labour market even with the asymmetric left sided loss since disability is weighted in the manner described above (the DHSS formula) in favour of the better hearing ear. I can appreciate however that a high frequency loss in the left ear seen here could give some concern to an employer in respect to specific duties where various criteria are laid down, but for example with using earpiece for radio in

*his left ear then it could be turned up slightly with no impairment, in my opinion to the Claimant's functionality. An asymmetric hearing loss of this nature would be described as at **most minor but not trivial and not substantial**. It would only however be noticed in an individual of average tolerance of hearing loss in small number of situations at some times."* [Bold – my emphasis]

Conclusions

Does the impairment had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?

29. I am invited by the Respondent to find that there is no substantial adverse effect on day to day activities suggesting that these are not normal day to day activities. The Respondent relies on the guidance at page 56 that "inability to converse orally in a language with is not the speaker's native spoken language" and "inability to hold a conversation in a very noisy place such as a factory floor, a pop concert, sporting event or alongside a busy main road" are all illustrative of non exhaustive list of factors which although experienced by a person it would not be reasonable to regard as having substantial adverse affect on normal day to day activities.
30. I am invited by the Claimant to find that these are day to day activities as per D3 at page 34 of the same guidance, which sets out a list of activities which are normal day to day activities "having a conversation or using the telephone, watching television ... and taking part in social activities" and by considering the activities listed at page 54 as being illustrative and non exhaustive list of factors of which if they are experienced by a person, it would be reasonable to have regard as having a substantial adverse effect on normal day to day activities "difficulty hearing and understanding another person speaking clearly over the voice telephone (where the telephone is not affected by bad reception)".
31. Whilst I can understand the Respondent's position, it is a matter of degree, it is clear that the Claimant has difficulty using the telephone, during a variety of social activities and holding a conversation with other noise in the background and that this does not need to be loud or outside the range of normal levels for the hearing loss to cause an issue. It is the ability to hear rather than the ability to converse that he experiences difficulty with. These are in my view normal day to day activities. These are all activities and things that people do on a regular or daily basis, use the telephone and hold a conversation.
32. I am content from the evidence that the Claimant's hearing loss has an effect on his normal day to day activities but the issue which has taken me more time to determine is the second element of this issue and that is whether that effect is substantial.
33. Turning now to this point, the medical report is not particularly helpful given the terminology used it does little to assist the tribunal in answering the legal

test of substantial. The unhelpful analysis which neither side had sought to clarify was:

*“An asymmetric hearing loss of this nature would be described as at **most minor but not trivial and not substantial**. It would only however be noticed in an individual of average tolerance of hearing loss in small number of situations at some times.”*

34. Taking into account the definition of substantial contained within s212(1) of the Equality Act 2010 this means more than minor or trivial. The medical expert says that at most this impairment is minor which would not mean substantial under s212(1) but he then goes on to say it is not trivial which would mean substantial under s212(1). He uses the word substantial which confused things more as it is clear he is not considering the definition within s212(1). He has not used trivial and minor to mean the same level of impact but different things. I have interpreted this as that he believes it not to be trivial but not substantial something in between. This would meet the test of substantial in s212(1) but for the use of the word minor at the start of this interpretation.
35. It is clear that me that the Claimant has developed coping strategies to enable him to minimise the impact on his day to day activities such as the matters he outlined in evidence, changing positions, lip reading and using a different ear. These signify to me that the impact is not minor or trivial as if it was he would not need to make the changes at all. That said I also have to consider the Claimant's own evidence that until 2007 he was unaware of the hearing loss as an adult and his acceptance that nothing had materially changed from that date. His evidence on this was that he had taken this steps to cope so until someone pointed out why he was doing it he had not associated it with a hearing loss issue. I accept that.
36. I have considered the Guidance and specifically section B as to the meaning of substantial and the time taken by a person to carry out an activity and the way in which the activity is carried out and the effects of behavior or treatment. I have heard no evidence to suggest that it takes longer to carry out any of the activities in question but I have heard evidence on the effects on behavior. I need to consider how far a person can reasonably be expected to modify his behaviour to prevent or reduce the effects of an impairment on normal day to day activities. I have borne in mind that in some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances there is still an adverse effect on the carrying out of normal day-to-day activities.
37. Turning now to consider the key points raised in the key authorities relied upon by both sides:
 - a) *Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763* is authority for the proposition that there is a requirement for me to consider a comparison between the way in which the

Claimant carries out the activity in question and how he would carry it out if he were not impaired. If that difference is more than the kind of difference one would expect taking a cross-section of the population then the effects are substantial.

With all the day to day activities identified we have looked at the Claimant must modify his behavior and that difference is something the public at large does not have to do which would lean towards it being substantial.

- b) *Ms B Anwar v Tower Hamlets College UKEATS/0091/10RN* is authority for the proposition that a Tribunal could concur that the effect of an impairment was more than trivial and yet still minor rather than substantial. This is in effect akin to the medical expert which labelled the disability as at most minor but not trivial and not substantial.
 - c) *Chief Constable of Lothian and the Borders Police v Ms K A Cummings UKEATS/0077/08BI* – the key passage in this case is that at paragraph 39 which deals with the coping mechanisms that Claimant utilised “(looking up, looking further over her shoulder and taking 5 minute breaks when carrying out close reading work) were all straightforward matters which are not, on the findings difficult to employ and can properly be taken into account in reaching the conclusion that the claimant is not disabled.”
 - d) I have considered in particular the guidance on the Equality Act 2010 and sections B and D as they are relevant to the case.
38. Taking into account all of the findings of fact and the authorities I consider that the Claimant’s hearing has a substantial adverse effect on his day to day activities. He has to deploy coping mechanisms to manage his disability but they are more than he can reasonably be expected to undertake and in my view do not alter the effects of the impairment to the extent that it is no longer substantial.
39. If the effects were only minor then he would not need to modify his behavior at all. The expert says that they are more than trivial and I accept the Claimant’s evidence that they are more than minor. It is regrettable that the expert was not asked for clarity on this point but ultimately it is the decision of this Tribunal having heard the evidence and considered the documents and the authorities to make.
40. I distinguish this case to that of *Chief Constable of Lothian and the Borders Police v Ms K A Cummings UKEATS/0077/08BI* as in that case the claimant was able to utilise straightforward coping mechanisms like looking over her shoulder and taking five minutes breaks. Here the Claimant must change his positioning which in social situations or work situations may not be straightforward as it may necessitate an explanation as to why he must be so positioned and involve third parties. The claimant in the Cummings case

could deploy those coping strategies without involving third parties and they are minor matters. Further, the Claimant in the case before this Tribunal used lip reading to assist with him “hearing” what was being said to him. This again suggests that the hearing loss is more than minor and more than trivial so as to make it substantial.

41. I therefore find that the effects are substantial. Turning now to the second issue:

Are any measures being taken to treat or correct the impairment, and if so I must consider but for those measures would the impairment be likely to have a substantial adverse effect on the Claimant’s ability to carry out normal day to day activities?

42. The Claimant does not wear a hearing aid. He used a non-standard ear piece for his officer duties when he was first appointed to the work force. I am satisfied that there are no measures being taken to treat the impairment which need to be excluded.
43. The matter is listed for **Preliminary Hearing by telephone** on the **4th August 2017 at 10am** for further directions as appropriate to be made in this case. The parties should have had the listing through for this preliminary hearing under separate cover.

Employment Judge King, Cambridge.

Date: 26th July 2017

Sent to the parties on:

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For the Tribunal Office