

# Employment Bulletin

## July 2019

### Refusal of employment because of a perceived disability was unlawful discrimination

**Summary:** The Court of Appeal confirmed that a police officer, who was turned down for a transfer because her hearing was marginally outside the standard for recruitment, had suffered direct perception discrimination. The Constabulary refused the transfer because it was concerned that the officer would end up on restricted duties. This indicated that it perceived her to have disability, in the form of a progressive condition (*Chief Constable of Norfolk v Coffey*).

**Key practice point:** This is the first Court of Appeal case on perception discrimination

under the Equality Act 2010. It confirms that it can be direct discrimination to treat a person less favourably because it is thought that they have a disability, even if they do not in fact meet the legal definition of disability. Unlike with indirect disability discrimination, an employer cannot attempt to justify direct discrimination. Employers must be cautious about the factors they take into account when assessing performance standards on recruitment or during employment.

**Background:** Paragraph 8 of Schedule 1 to the Equality Act 2010 (EA 2010) states that where a person has a progressive condition that results in an impairment having an effect on the ability to carry out normal day-to-day activities, but the effect is not a substantial adverse effect, it will still be treated as having a substantial adverse effect if it is likely that the condition will result in that effect in future.

**Facts:** C suffered from mild hearing loss. In 2011 she had successfully applied to the Wiltshire Constabulary to become a police constable. In 2013, she applied to transfer to the Norfolk Constabulary. She attended a pre-employment health assessment, where it was noted that her hearing was just outside the standards for recruitment but that she had undertaken an operational policing role with Wiltshire without any undue problems. However, the Assistant Chief Inspector (ACI) declined C's request to transfer, 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.

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C's condition did not amount to a disability but she made a claim for direct perception discrimination - she had been treated less favourably because she was perceived to have a disability, in the form of a progressive condition. The Employment Tribunal upheld her claim and the Employment Appeal Tribunal dismissed the employer's appeal.

**Decision:** The Court of Appeal confirmed the Tribunal and EAT decisions.

The ACI had argued that she had not considered C to be disabled under EA 2010. The Court of Appeal confirmed that this did not matter. The question of whether A perceives B to be disabled does not depend on whether A perceives B to be disabled as a matter of law, but on whether A perceives B to have an impairment with the features set out in the legislation (in this case, paragraph 8). The ACI's belief that C already was, or might become, incapable of performing front-line duties was a belief about her ability to carry out normal day-to-day activities. The effect would be substantial and adverse, at least if (as the ACI had assumed) it would lead to her being taken off front-line duties.

The Court of Appeal also confirmed that this was direct discrimination, because the ACI was influenced in her decision by a stereotypical assumption about the effects of what she perceived to be C's (actual or future) hearing loss.

**Analysis/commentary:** The Court of Appeal's decision confirms that it can be discriminatory to treat a person less favourably because it is thought that they have a disability, even if they do not in fact meet the legal definition of disability. However, it was significant that the discriminatory treatment in this case was in the stereotypical assumptions made by the employer as to the employee's ability to do the job. A direct discrimination claim will not be available in most cases where an employee suffers a detriment because of something they cannot do as a result of their disability. This is because the claimant has to show that a comparator, who was not disabled but whose abilities were not materially different, would have been treated more favourably. In most cases, the comparator would also not have been able to perform the role or duties in question, and would therefore have been treated in the same way by the employer. A claimant in those circumstances would usually have to rely on section 15 EA 2010 (discrimination arising from a disability), which allows the employer to seek to justify the treatment.

The Court pointed out that its decision "*reflected the wider merits*". C had performed entirely satisfactorily in a front line role in the Wiltshire Constabulary; and, in reaching her decision, the ACI had failed to take into account Home Office guidance on medical standards for police recruitment that emphasised the importance of individual assessment - something which Wiltshire (unlike Norfolk) had arranged.

## Court of Appeal confirms holiday pay should include voluntary overtime payments

**Summary:** The Court of Appeal confirmed that, based on employees' contractual terms and conditions and on the right to paid annual leave under the European Working Time Directive (WTD), the holiday pay of employees should include voluntary overtime in the calculation (*East of England Ambulance Service NHS Trust v Flowers*).

**Key practice point:** This decision confirms that voluntary overtime payments need to be taken into account in the calculation of holiday pay, at least for the standard four weeks' annual leave under Regulation 13 of the Working Time Regulations (WTR), provided the payments are regular and/or recurring and over a sufficient period of time to be regarded as part of normal pay.

**Background:** The calculation of holiday pay under the WTR is based on a “week’s pay”, under the Employment Rights Act 1996 (ERA). This means it often excludes elements additional to basic salary, such as overtime pay, commission, and bonuses. A series of European Court decisions established that the statutory method of calculating holiday pay is not fully compliant with the WTD - all elements of a worker’s normal remuneration have to be taken into account.

On voluntary overtime, the EAT in *Bear Scotland Ltd v Fulton* held that payments for non-guaranteed overtime had to be taken into account. In *Dudley MBC v Willetts*, the EAT decided that purely voluntary overtime should also be included in holiday pay, in so far as paid with sufficient regularity to count as “normal remuneration” (see our [Bulletin dated 18 August 2017](#)).

**Facts:** The claimants were employed by the Trust in a range of roles concerned with the provision of ambulance services. They received shift-overrun payments (non-guaranteed overtime) whereby they were entitled to payment for time spent completing a task which was outstanding at the end of a shift. They also received voluntary overtime. They were not required or expected to volunteer for this and it was not something that they normally did.

The claimants’ terms and conditions included clause 13.9 which provided that: *“Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area supplements. Pay is calculated on the basis of what the individual would have received had he/she been at work. This will be based on the previous three months at work or any other reference period that may be locally agreed.”*

The claimants argued that, based on their contractual entitlement and the WTD, their holiday pay should have included both non-guaranteed overtime and voluntary overtime. The EAT upheld the claims; the Trust appealed.

**Decision:** The Court of Appeal rejected the appeal. The claimants had a contractual entitlement to have overtime taken into account for the purposes of calculating holiday pay and there was no basis for distinguishing between voluntary and non-guaranteed overtime pay for this purpose.

Lord Justice Bean did not accept the Trust’s argument that the omission from clause 13.9 of an express reference to overtime was a deliberate decision by the parties and that it should therefore be excluded from the calculation of holiday pay. The clause had to be read as a whole and the natural interpretation was that overtime was part of pay.

The Court of Appeal’s decision on contractual entitlement meant that it was unnecessary for it to decide the position under the WTD, but the Court did consider the Trust’s argument that the decision of the EAT in *Willetts* - that holiday pay must include voluntary overtime if made with sufficient regularity to constitute “normal remuneration” - was wrong.

The Court of Appeal reviewed the case law, finding that it established clearly that the question in each case is whether the patterns were sufficiently regular and settled for payments to amount to normal remuneration, and that there is no separate requirement that the hours of work were compulsory under the contract. The Court of Appeal agreed with the EAT in *Willetts* that an intrinsic link between payment and the performance of tasks is not a necessary criterion.

**Analysis/commentary:** The position on holiday pay and overtime is now that:

- For the four weeks' annual leave under the WTD/Regulation 13 of the WTR, European and domestic case law has established that words should be read into the WTR to override the calculation of "a week's pay" under the ERA. Workers must be paid "normal remuneration". This includes all forms of regular overtime, including purely voluntary overtime, and overtime payments must therefore be taken into account in calculating holiday pay.
- For the 1.6 weeks' "additional leave" under Regulation 13A of the WTR, the ERA definition continues to apply unmodified, so there is no requirement to include overtime payments in the calculation. However, employers may prefer to do so, not least because it may not be clear which four weeks of leave is the Regulation 13 leave (and therefore governed by the "normal remuneration" rule).

Lord Justice Bean commented that, if voluntary overtime was not included in holiday pay, employers might be encouraged to set artificially low levels of basic contractual hours and to categorise the remaining working time as overtime. He said that the current trend towards zero hours contracts showed that this was "*a very real objection*" to the Trust's argument.

## Women and Equalities Select Committee calls for changes to non-disclosure agreements

There have been well-publicised concerns that non-disclosure agreements (NDAs) are being used to cover up allegations of unlawful discrimination and harassment in the workplace, sometimes without any investigation into the allegations. The House of Commons Women and Equalities Select Committee conducted an inquiry into the use of NDAs in discrimination cases, publishing its report on 11 June 2019.

The report includes a wide range of recommendations for the Government, including some radical proposals for changes in the law:

- The Government should legislate to ensure that NDAs cannot be used to prevent legitimate discussion of allegations of unlawful discrimination or harassment, or to prevent someone from giving evidence, or sharing information, in a potential discrimination/harassment complaint or claim by another employee.
- Any clause in a settlement agreement that has the effect of controlling what information an individual can share with others should be clear and specific about what information cannot be shared and should contain agreements about acceptable forms of wording that can be used, for example in job interviews or to respond to queries by colleagues, family and friends.
- Employees should have a legal right to a basic reference, confirming (as a minimum) dates of employment.
- The remedies available in discrimination cases should be improved. Employment Tribunals should be able to award punitive damages and there should be a presumption that they will normally require employers to pay employees' costs if they lose a discrimination case in which sexual harassment has been alleged. Compensation for injury to feelings should also be increased significantly. There should also be guidance about the circumstances in which a refusal to settle a claim may be considered "unreasonable" and lead to a costs order against litigants, in particular making clear that refusal to agree an NDA should never, in itself, be deemed unreasonable behaviour.

- Employers should be required to pay for the worker’s legal advice on a settlement agreement, including advice on the content and effect of any confidentiality, non-derogatory or similar clauses. Where the worker wishes to negotiate the terms of those clauses, further contributions should also be payable, regardless of whether the agreement is entered into.
- NDAs should be drafted in standard, plain English, with standard clauses on the damages that can be reclaimed if confidentiality clauses are breached.
- Employers should be required to appoint a named senior manager at board level (not from an HR/support function) to oversee anti-discrimination policies and procedures and the use of NDAs in discrimination and harassment cases.
- All companies should have to nominate a director to oversee the use of NDAs and anti-discrimination and harassment policies, procedure and training, and to review and monitor settlement sums.

Other recommendations, which the Committee suggests should be considered by the Government, include:

- A review of the extent to which the whistleblowing legislation provides protection and how best to clarify and simplify the existing legislation, including the “public interest” requirement.
- Requiring employers to report annually on discrimination and harassment complaints and their outcome, and the number of settlement agreements containing confidentiality clauses.
- Requiring employers to investigate all discrimination and harassment complaints, regardless of whether a settlement is reached.

**Analysis/commentary:** The Government has already set out its plans on some of these issues, in its response to the Committee’s 2018 report on workplace sexual harassment (see our [Bulletin dated January 2019](#)). It confirmed that it would ask the Equality and Human Rights Commission to develop a statutory code of practice. There are no plans to introduce a duty to protect workers from sexual harassment (as previously recommended by the Committee), although the Government will consult on this. Their consultation will also cover the possibility of extending employment tribunal time limits for bringing workplace discrimination/harassment cases from three to six months; as well as whether further legal protections are needed for interns/volunteers, as they may not be employees/workers.

## **Court of Appeal finds no unlawful inducement in offer made during collective bargaining**

**Summary:** The Court of Appeal found that an employer had not acted unlawfully by seeking to negotiate directly with individual employees over a package of changes to terms and conditions, in circumstances where there was a collective bargaining agreement in place (*Kostal UK Ltd v Dunkley*).

**Key practice point:** Where an employer makes a one-off pay offer direct to employees following the breakdown of negotiations, but does not intend to stop collective bargaining in future, this should not be found to be an unlawful inducement.

**Background:** Section 145B of the Trade Union & Labour Relations (Consolidation) Act 1992 prohibits any offer being made to a worker and union member, which, if accepted, would mean that all or any of their

terms of employment would not be, or would no longer be, determined by collective agreement, and the employer's sole or main purpose in making the offer is to achieve that result.

**Facts:** D was one of a group of shop floor/manual employees of K, who were all also members of the recognised union, Unite. The recognition agreement provided for any proposed changes to terms and conditions to be negotiated between K and Unite. In late 2015, pay negotiations for 2016 began, and K made an offer of a 2% increase to basic pay plus a 2% Christmas bonus (payable in December). The offer was conditional on acceptance of a number of other changes to terms, including reduced sick pay and overtime rates and changes to rest breaks. Unite balloted its members, resulting in rejection of the offer.

K decided to make the pay offer to each employee individually, ostensibly because it would otherwise run out of time to pay the Christmas bonus in December. It therefore wrote to all its employees on 10 December setting out the offer, and stating that if it was not accepted no Christmas bonus would be payable.

On 29 January 2016, K wrote to the remaining employees who had not yet accepted the pay proposal. It offered a 4% pay increase in consideration for the changes to terms, but also threatened that if no agreement was reached the employees' contracts might be terminated. This second offer led to a ballot for industrial action and an overtime ban. A collective agreement in respect of pay for 2016 was eventually reached in November 2016, endorsing the terms of the first offer.

D lodged claims that both the first and second offers amounted to unlawful inducements under section 145B. The Employment Tribunal upheld D's claim and awarded the mandatory fixed award (then £3,830; it is now £4,193) to each employee in respect of each of the unlawful offers. The EAT upheld the decision.

**Decision:** The Court of Appeal overturned the EAT and dismissed the claim. Section 145B did not cover the facts of this case. The employer had made an offer whose sole or main purpose was to achieve the result that one or more of the workers' terms of employment would not, on that one occasion, be determined by the collective agreement.

The Court said that there are only two possible "prohibited results" under section 145B. These are where the employer makes an offer with the sole or main purpose of achieving the result that:

1. (where the trade union is seeking recognition) - the workers' terms will not be determined by collective agreement; or
2. (where a trade union is already recognised and the workers' terms are determined by collective agreement) - the workers' terms, or one or more of them, will no longer be determined by collective agreement on a permanent basis.

Given the penal nature of section 145B, the construction argued for by D would give a recognised trade union an effective veto over any direct offer to any employee concerning any term of the contract, major or minor, on any occasion. It was extremely unlikely that Parliament had intended that result. The EAT's response to this - that an employer who acted "reasonably and rationally" would not be liable - was not satisfactory. Section 145B says nothing about reasonableness and it is established law that courts and tribunals should not try to decide which side in a trade dispute is behaving reasonably and rationally. The Tribunal's answer - dismissal and re-engagement - was equally unsatisfactory; it could not have been the intention behind section 145B.

As to the objection that the Court of Appeal’s interpretation would mean that a union could not oppose a change to terms, Lord Justice Bean pointed out that the union could ballot their members for industrial action.

The members of the union were not being asked to relinquish, even temporarily, their right to be represented by their union in the collective bargaining process. All that had happened was that the employer had gone directly to the workforce and asked them whether they would agree a particular term on that occasion. The words “*would no longer be determined by collective agreement*” in section 145B clearly indicates a change taking the term(s) concerned outside the scope of collective bargaining on a permanent basis.

It was also significant that K was not motivated by hostility to trade unions; that the offers were made to the whole workforce; and that each individual continued to be represented by Unite under the collective agreement.

**Analysis/commentary:** The Court of Appeal’s interpretation of section 145B limits its impact to two scenarios - where the employer’s purpose is to prevent the trade union being recognised, or to stop collective bargaining on a permanent basis. The comment that, in the context of an impasse in negotiations, there is no test requiring an assessment of which party to a dispute is behaving reasonably is also helpful for employers.

However, the Court of Appeal’s reference to a change not being covered by collective agreement “*on this one occasion*” suggests that a tactic of repeatedly making offers directly to employees to accept changed rates of pay or varied terms, whilst at the same time maintaining union recognition and an expressed intention to bargain with the union in the next bargaining round, would fall foul of section 145B.

Unite has said it is asking for permission to appeal to the Supreme Court.

## Horizon scanning

What key developments in employment should be on your radar?

31 October 2019	European Union (Withdrawal) Act 2018 expected to take full effect
9 December 2019	Extension of the SMCR to FCA solo-regulated firms
April 2020	Annual updates to employment rates and limits
6 April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6 April 2020	Written statement of terms to be provided to employees and workers from day one of

	employment and to contain extra details
6 April 2020	Threshold for valid employee request for information and consultation will be lowered from 10% to 2% of employees
6 April 2020	Abolition of the opt-out of the equal pay protections of the Agency Workers Regulations (the “Swedish derogation”)
6 April 2020	Change in reference period for calculating holiday pay for workers with variable remuneration, from 12 to 52 weeks
6 April 2020	Extension of off-payroll working rules to private sector - client rather than intermediary will be responsible for determining whether IR35 applies

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers)
- **Data protection:** *Wm Morrison Supermarkets Plc v Various Claimants* (Supreme Court: whether employer was vicariously liable for deliberate disclosure of co-workers’ personal data by rogue employee); *López Ribalda v Spain* (ECtHR: covert workplace surveillance)
- **Discrimination / equal pay:** *Gray v Mulberry Company (Design) Ltd* (Court of Appeal: philosophical belief); *X v Y* (Court of Appeal: iniquity exception to legal advice privilege)
- **Whistleblowing:** *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure); *Ibrahim v HCA International* (Court of Appeal: public interest)
- **Trade unions:** *Jet2.com v Denby* (Court of Appeal: refusal of employment)
- **Agency workers:** *Kocur v Angard Staffing Solutions* (Court of Appeal: parity of terms)
- **Unfair dismissal:** *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits).





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