

Employer discriminated against employee because of perceived disability

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An employer was found to have directly discriminated against an employee on the basis of a hearing disability it perceived that employee to have.

The Employment Appeal Tribunal stated that the evidence clearly showed that the Acting Chief Constable was concerned that Mrs Coffey had a hearing condition which could progress

to the extent that she would have to be placed on restricted duties. Therefore, the perception was that Mrs Coffey had a progressive disability.

Mrs Coffey was a police constable in the Wiltshire area. She suffered with some hearing loss which, whilst it did not amount to a disability, put her just outside of the national standards for hearing loss for the police. When Mrs Coffey joined the Wiltshire Constabulary, her hearing loss had been flagged during an initial test, but she passed a practical functionality test showing that she was able to work as a constable without the need for any adjustments.

She later applied to transfer to the Norfolk Constabulary. As before, her hearing was tested and the same level of hearing loss was identified. The Acting Chief Inspector of Norfolk rejected Mrs Coffey's application on the basis of that hearing test, and did not arrange a practical functionality test.

Mrs Coffey brought a claim for direct disability discrimination on the basis that her application was rejected because of a perception that she had a hearing-based disability.

The Acting Chief Constable denied discrimination; instead, she said her decision to reject Mrs Coffey was influenced by the significant resourcing and cost pressures her Constabulary was facing, in that she could not justify appointing someone who may not be fully operational.

Chief Constable of Norfolk v Coffey UKEAT/0260/16

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Injury to feelings awards available in breach of working time cases

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The Employment Appeal Tribunal has decided that compensation for injury to feelings can in principle be awarded in respect of working time detriment claims.

This type of compensation is available in trade union and whistleblowing detriment cases. The EAT held that working time detriment cases are akin to claims of victimisation under the Equality Act 2010, so injury to feelings payments should be available in those cases too.

Mr Mansell and his colleagues were firefighters employed by the South Yorkshire Fire & Rescue Service. The Fire Service intended to change the duty system from a 2-2-4 system (two day shifts and two night shifts of around 12 hours each, followed by four days off) to a scheme called "Close Proximity Crewing". Under that scheme, firefighters would work consecutive 24-hour shifts comprised of a 12-hour day shift and 12 hours on-call each night, followed by four days off. On call time had to be spent in or near the fire station.

The firefighters disputed the decision to implement the Close Proximity Crewing system. As a result, they were compulsorily transferred to other fire stations in South Yorkshire. The firefighters brought claims alleging that they had been subjected to detriments because they had refused to comply with a measure imposed by their employer which contravened the Working Time Regulations 1998.

Those claims were successful, and the remaining question was how much those claims were worth.

The firefighters argued that they ought to be entitled to compensation for injury to feelings caused by the detriments to which they were subjected (including interference with care arrangements, loss of free time, leisure time and family time, and disruption to their working patterns and family relationships). The Fire Service resisted on grounds that injury to feelings payments ought not to be available in working time claims.

It is now clear that injury to feelings can be awarded in working time cases in principle. However, the reality is that

demonstrating sufficient injury to feelings to justify compensation will likely be quite difficult in cases concerning working time violations.

South Yorkshire Fire & Rescue Service v Mansell and others
UKEAT/0151/17

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Employment Tribunal awards increased from April 2018

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The level of certain awards which can be awarded by Employment Tribunals will increase from 6 April 2018.

Each April, compensation limits for Employment Tribunal cases increase in line with the Retail Price Index.

The maximum limit on a week's pay (which is important for the calculation of redundancy pay, unfair dismissal basic awards, and holiday pay, among other things) will increase from **£489 to £508**.

The maximum basic award for unfair dismissals will rise from **£14,670 to £15,240**, whilst the statutory cap on the unfair dismissal compensatory award will increase from **£80,541 to £83,682**.

Employment Rights (Increase of Limits) Order 2018 (SI 2018/194)

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How does an employer know whether an employee is disabled?

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The Court of Appeal has decided that the test was not whether the employer did all it could to determine whether an employee was disabled and exhaust every option open to them; rather, it was whether the employer could be reasonably expected to know

the employee was disabled.

The facts of this case are not unusual.

Ms Donelien was a court officer employed by Liberata for almost 11 years. Her employment featured numerous of short-term sickness absences for which various explanations were given (including, on one occasion, no explanation) and often no advance notice of her absence was given. Liberata referred Ms Donelien to Occupational Health in May 2009, posing a number of questions as it did so.

In July 2009, OH reported that Ms Donelien was not disabled; however, the report failed to engage with a number of the questions posed. Liberata followed up by requesting a second OH report. Whilst the second report was more detailed (and again stated that Ms Donelien was not disabled), it still failed to answer some questions.. Liberata did not go back to OH a third time, but instead held 'return-to-work' interviews with Ms Donelien and reviewed correspondence from her GP.

Liberata dismissed Ms Donelien in October 2009 on the basis of unsatisfactory attendance, a failure to comply with absence notification procedures and a failure to work contractual hours. In response, Ms Donelien brought a number of claims in the Employment Tribunal including a failure to make reasonable adjustments.

The Employment Tribunal found that Ms Donelien was disabled from August 2009. The question was whether Liberata had constructive knowledge of that disability.

This case confirms that employers are allowed to place weight on the reports provided by OH, so long as they exercise their own independent judgment and avoid blindly relying on them.

Donelien v Liberata UK Ltd [2018] EWCA Civ 129

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Stand by for new rules on shift pay

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The ECJ has once again shaken up rules on working time in a recent employment case on stand by shifts.

Previously, on call or stand by shifts would count as working time only if the employee was required to stay in a location specified by the employer. However, the new ECJ case says that the key factor should be the quality of time that the employee is able to spend while on stand by.

If a worker's freedom to enjoy non-work activities is severely impacted by the constraints involved in being on stand-by, then that will be working time and must be paid.

The facts of the case give a good illustration of the difference in the old and new tests. Mr Matzak was a firefighter working for the Ville de Nivelles in Belgium. He was required to be on stand-by for one week in every four during evenings and weekends. During time spent on stand-by, Mr Matzak was required to remain contactable and, if requested, report to the fire station within no more than 8 minutes. While there was no specific geographical constraint, in practice, the rules meant that Mr Matzak's activities on stand by were significantly restricted. In particular, it meant that he had to live very close to the fire station and his actions at home whilst on stand-by were limited. The ECJ confirmed that in the degree of restriction meant that the time qualified as working time and must be paid,

This case did not set out a general test as to when a worker's time will be "significantly restricted" by requirements placed on them during periods on stand-by. The broad point of principle established will open the door for arguments on other circumstances that qualify, just as it has done for other aspects of working time, like holiday pay. Employers who impose restrictions that are comparable in their impact will

need to consider whether to pre-emptively change their payment policy for on call time or to take a wait and see approach until domestic case law develops and gives a clearer picture of the boundaries. They may get lucky as the UK government's long term opposition to aspects of the European working time law framework could mean that this area will be changed after Brexit. In any event, employers with on call time will want to monitor the position closely.

Ville de Nivelles v Matzak (C-518/15)

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