



## What's new

### **Discrimination due to a "perceived" disability can be unlawful**

The recent decision of *Chief Constable of Norfolk v Coffey* has established that discrimination due to a perceived disability is unlawful.

Mrs Coffey, who suffered from slight hearing loss and tinnitus, applied to work as a police constable for Wiltshire Constabulary (WC). A medical investigation took place which found that Mrs Coffey did not meet the Home Office's National Recruitment Standard. WC applied the guidance and Mrs Coffey undertook, and successfully passed, a practical functionality test. Mrs Coffey commenced work as a constable without requiring any workplace adjustments.

Subsequently, Mrs Coffey applied for a transfer to Norfolk Constabulary (NC). She disclosed her hearing loss and a copy of the functionality report showing she could perform her existing role without any adjustments. However, NC sought further medical opinion and, despite confirmation that Mrs Coffey's hearing levels were stable, NC rejected Mrs Coffey's transfer application on the basis that she was "just outside the standards for recruitment" in respect of her hearing and so they thought it would impact on her ability to do the role in the future. Mrs Coffey issued proceedings for direct disability discrimination.

The Employment Tribunal (ET) found that NC had directly discriminated against Mrs Coffey by perceiving her to have an actual or a potential disability which could result in NC having to make reasonable adjustments to her role, whether now or in the future. NC appealed to the Employment Appeal Tribunal (EAT), who dismissed the appeal and agreed with the ET that NC should not have rejected Mrs Coffey's application on the basis she would not be able to undertake her role in the future.

NC appealed to the Court of Appeal (CA) who upheld the earlier ET and EAT decisions. The CA held that in claims of perceived disability discrimination the discriminator must believe all the elements in the statutory definition of disability (i.e. that the individual has a physical or mental impairment that has a substantial and long-term adverse effect on the individual's ability to do normal daily activities) are present, even if they do not attach the label of disability to them. NC was held to have believed that Mrs Coffey's hearing loss would, currently or in the future, render her unable to

perform the duties of a front-line officer and perceived that it would have an effect on her ability to carry out normal day to day activities. It followed that any such effect would be substantial and adverse and would lead to Mrs Coffey being taken off front line duties. The CA held that that was unlawful discrimination.

### **Is an employer liable for discriminatory actions taken by an employee on their private, social media account?**

The EAT in *Forbes v LHR Airport Ltd* has held that an employer was not vicariously liable for harassment caused by an employee's racially offensive post on Facebook, which was shared with her friends (including her work colleagues) as it was not done "in the course of employment".

Mr Forbes worked as a security officer for London Heathrow Airport (LHA). Another employee (DS) shared an image of a golliwog on her Facebook page, accompanied by the tag, "let's see how far he can travel before Facebook takes him off". The image was shared with DS's friends, including a work colleague BW. BW later showed the image to Mr Forbes who complained to his line manager. Mr Forbes then issued a formal grievance and DS was subject to a disciplinary investigation. DS offered an apology and received a final written warning. Mr Forbes was later posted to work alongside DS. Mr Forbes complained and was subsequently moved to another location without explanation. Mr Forbes believed that he had been victimised for raising a grievance, was signed off sick and 4 months later, shortly before his return to work, brought a claim of harassment against LHA.

The ET dismissed Mr Forbes' claims on the basis that DS's action in sharing the images on Facebook were not done "in the course of employment", which is an essential element for the employer to be found vicariously liable. DS did not post the image at work nor did she mention any colleagues in the image or state she was an employee of LHA. The ET accepted that the image was offensive and caused Mr Forbes offence, however this was not DS's purpose which is evident in her willingness to apologise. Mr Forbes appealed to the EAT.

The EAT dismissed the appeal. Whilst acknowledging that facts involving social media communication can blur the lines, the EAT reiterated that DS's actions were not done "in the course of the employment". The average individual would not consider that the sharing of an image on a private Facebook page unconnected with work, with a list of friends that largely did not include work colleagues, was done in the course of employment. The fact that the image was later showed to Mr Forbes at work was irrelevant to the question whether DS's act of sharing it on Facebook was done "in the course of employment".

### **Secret recordings of an HR meeting – gross misconduct?**

The case of *Phoenix House v Stockman* held that an employee's compensation could not be reduced on account of the employee's covert recording of a meeting with HR.

Ms Stockman was employed as a financial accountant for a charity, Phoenix House. She reported to the Head of Finance, who reported to the Finance Director. Following a restructure, Ms Stockman's post was removed, and she successfully obtained a new, but more junior, role. Ms Stockman complained of unfair treatment to the Head of Finance that the Finance Director was biased against her and that her concerns were supported by another colleague. A meeting occurred between the Finance Director, the Head of Finance and the other colleague to discuss the matter. Ms Stockman interrupted the meeting, demanding to know what was being discussed and refused to leave when asked.

Ms Stockman was later invited to a meeting with HR which she secretly recorded. Ms Stockman was informed that she would be disciplined for her earlier conduct. Ms Stockman raised a grievance citing unlawful harassment by the Finance Director. However, her grievance was dismissed. Ms

Stockman was later summarily dismissed for her distrust of senior management and she filed a claim for unfair dismissal.

The ET upheld the claim but, during the ET hearing, it transpired that Ms Stockman had recorded the meeting with HR without informing them that she was doing so. On appeal to the EAT Phoenix House argued that any compensation awarded to Ms Stockman should be reduced as a result of the covert recording. The EAT upheld the ET's decision, finding that covert recording was not referred to within the charity's disciplinary policy as an example of misconduct. As such, the EAT held Ms Stockman was not using the covert recording to deceive her employer but due to concerns regarding her own position.

## WHAT TO LOOK OUT FOR

### Post-Brexit migration salary review

The Home Secretary, Sajid Javid, has announced plans to review the minimum salary threshold for highly-skilled workers coming into force in 2021. Discussions are being held on the amount of increase to be made to the current salary threshold of £30,000. The Home Secretary has proposed several questions to the government's Migration Advisory Committee (MAC), which includes whether salary thresholds should be regional. MAC will present their findings in January 2020.

### National Retraining Scheme

The government has announced that the National Retraining Scheme, a national scheme designed to reduce job displacement by retraining workers whose jobs may be lost due to automation, will be trialled in Liverpool. The scheme will aim to tackle the consequences of up to 20 million manufacturing jobs being lost due to automation internationally by 2030.

The scheme aims to support workers, by assisting them in their search for a new career and providing them with opportunities to gain more skills in the event of their jobs changing.

For more information about any of the topics covered in this update please contact Nicholas Hall by clicking [here](#).



This Employment Update is produced by Hewitsons for existing clients of the firm to provide them with a useful summary of recent cases, journal reports and dates to be aware of. It is not a definitive statement of the law in any area. Advice should be sought from a solicitor in the Employment Team at Hewitsons in respect of any information contained in this update that affects any individual matter with which you may be concerned.

Hewitsons LLP is authorised and regulated by the Solicitors Regulation Authority. While the articles and opinions expressed in this publication are summations of current general legal matters the firm can take no responsibility for their application to specific situations in which specialist advice is required.

Hewitsons LLP is a limited liability partnership. Hewitsons LLP Reg Office: Shakespeare House, 42 Newmarket Rd, Cambridge, CB5 8EP. Reg No: OC334689