



Neutral Citation Number: [2019] EWCA Civ 1061

Case No: A2/2018/0060

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**  
**HH Judge David Richardson**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/06/2019

**Before:**

**LORD JUSTICE UNDERHILL**  
**(Vice-President of the Court of Appeal (Civil Division))**  
**LORD JUSTICE DAVIS**  
and  
**LORD JUSTICE BEAN**

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**Between:**

**THE CHIEF CONSTABLE OF NORFOLK**  
**- and -**  
**LISA COFFEY**

**Appellant**

**Respondent**

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**Mr Paul Strelitz** (instructed by **Norfolk Constabulary Legal Services**) for the **Appellant**  
**Mr Jack Feeny** (instructed by **Pattinson & Brewer Solicitors**) for the **Respondent**

Hearing date: 20<sup>th</sup> February 2019  
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**Approved Judgment**

**Lord Justice Underhill :**

## **INTRODUCTION**

1. The Claimant, who is the Respondent before us, is a police officer in the Wiltshire Constabulary. She suffers from a degree of hearing loss which has never caused her any problems in doing her job and which it is common ground does not constitute a disability within the meaning of the Equality Act 2010. In 2013 she applied for a transfer to the Norfolk Constabulary, but it was refused because on a medical test her hearing fell, as the medical adviser put it, “just outside the standards for recruitment strictly speaking”.
2. The Claimant brought proceedings under the 2010 Act against the Chief Constable of the Norfolk Constabulary, the Appellant, claiming that she had been discriminated against because of a (perceived) disability. Her claim was upheld by an Employment Tribunal sitting at Bury St Edmunds (Employment Judge Postle and members). She was subsequently awarded compensation in the sum of £26,616.05 and the Tribunal made two recommendations under section 124 (2) (c) of the Act.
3. The Appellant appealed to the Employment Appeal Tribunal against the ET’s decision on liability. By a judgment handed down on 19 December 2017 HH Judge David Richardson dismissed his appeal.
4. This is an appeal against that decision. The Appellant has been represented by Mr Paul Strelitz and the Claimant by Mr Jack Feeny. Both counsel appeared in both tribunals below.

## **THE BACKGROUND LAW**

5. The essential structure of the 2010 Act, so far as relevant for our purposes, is that Part 2 begins by identifying various “protected characteristics” and proceeds to define various forms of discrimination by reference to those characteristics. The following Parts provide that discrimination is unlawful in the particular circumstances there defined: discrimination in relation to work is covered by Part 5.
6. “Disability” is a protected characteristic. The primary definition of that term is in section 6 (1), which reads:

“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’s ability to carry out normal day-to-day activities.”

I shall have to return later to the meaning of “normal day-to-day activities”.

7. Schedule 1 of the Act contains a number of provisions supplementing the basic definition of disability. For present purposes I need refer only to paragraph 8, which is headed “Progressive conditions”. This reads (so far as material):

“(1) This paragraph applies to a person (P) if –

- (a) P has a progressive condition,
  - (b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but
  - (c) the effect is not (or was not) a substantial adverse effect.
- (2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.
- (3) ...”

8. As regards the words “likely to result” in paragraph 8 (2), in *Mowat-Brown v University of Surrey* [2001] UKEAT 462/00, [2002] IRLR 235, the EAT (HHJ Reid QC presiding) held that in the equivalent provision of the Disability Discrimination Act 1995 “likely” meant “more likely than not”. However, in para. 55 of his judgment in the present case Judge Richardson said that, “as elsewhere in the Schedule”, it meant “could well happen”. He plainly had in mind the decision of the House of Lords in *SCA Packaging v Boyle* [2009] UKHL 37, [2009] ICR 1056, which gave that interpretation to the same language in paragraph 6 of Schedule 1. In his oral submissions Mr Strelitz accepted that that was right and that *Mowat-Brown* is in this respect no longer good law. I agree.

9. As for the definition of discrimination, there are two kinds of discrimination common to all protected characteristics – direct discrimination, defined in section 13; and indirect discrimination, defined in section 19. We are concerned only with the former. Section 13 (1) reads:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

There is a good deal of law about the effect of the phrase “because of” in the context of direct discrimination (and its equivalent in the prior discrimination legislation, “on the grounds of”). I need not summarise it here save to note that the authorities confirm that it covers cases where the protected characteristic is a significant, even if only subconscious, part of the “mental processes”, or “motivation”, of the putative discriminator in deciding to do the acts complained of.

10. Section 13 is supplemented by section 23, which reads (so far as material):

- “(1) On a comparison of cases for the purposes of section 13, ... there must be no material difference between the circumstances relating to each case.
- (2) The circumstances relating to a case include a person's abilities if—
  - (a) on a comparison for the purposes of section 13, the protected characteristic is disability;
  - (b) ... .”

11. It is common ground before us, as it was before both tribunals below, that an act will be caught by section 13 (1) where A acts because he or she thinks that B has a particular protected characteristic even if they in fact do not: this is generally labelled “perception discrimination”. Judge Richardson gave an example at para. 47 of his judgment, taken from the Explanatory Notes to the 2010 Act:

“If an employer rejects a job application form from a white man whom he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception.”

I should say, because it appears that a case of perception discrimination under the 2010 Act has not previously been before this Court, that I am satisfied that the consensus on this issue below was correct. As a matter of ordinary language the phrase “because of [a protected characteristic]” is wide enough to cover the case where A acts on the basis that B has that characteristic, whether they do or not<sup>1</sup>; and the Explanatory Notes confirm that that was Parliament’s intention.

12. There are two further forms of discrimination peculiar to disability – “discrimination arising from disability”, defined in section 15; and failure to comply with the duty to make reasonable adjustments, defined in section 21 (by reference to section 20). No point arises in this appeal about the latter, but, as will appear, section 15 is relevant to the argument. It reads:

“(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

No-one has come up with an apt label for this kind of discrimination, cognate with “direct” and “indirect” discrimination, and I will have to content myself with “section 15 discrimination”. I return later to the relationship between sections 13 and 15.

13. I should mention that prior to the 2010 Act a substantially similar form of protection to that given by section 15 was afforded by (initially) section 5 (1) and (subsequently) section 3A (1) of the 1995 Act, which proscribed discrimination against a disabled person “for a reason which relates to [their] disability”, subject to a defence of justification – so-called “disability-related discrimination”. The particular drafting of these provisions gave rise to difficulties, as exposed by the decision of the House of Lords in *London Borough of Lewisham v Malcolm* [2008] UKHL 43, [2008] AC 1399,

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<sup>1</sup> This was not – or was certainly not clearly – the position under the 1995 Act, which proscribed discrimination “against a disabled person”.

and at least partly for that reason section 15 of the 2010 Act is differently framed; but the overall objective of the two provisions is the same.

14. Section 39 (1) (c), which falls under Part 5 of the Act, proscribes discrimination by not offering a person employment. Holding the office of constable is to be regarded as employment: see section 42.
15. Council Directive 2000/78/EC (the so-called “Framework Directive”), which was required to be implemented by member states by 2 December 2003, proscribes discrimination on the ground of (among other things) disability in the field of employment and occupation. Disability discrimination was already unlawful in the UK by reason of the 1995 Act. Some amendments were required to that Act in order to conform to the Directive, but the statutory scheme continued to be in some respects rather differently framed than the Directive, and that remains the case under the 2010 Act: in particular, the Directive does not contain any provision equivalent to section 15.

### **THE FACTS**

16. I gratefully adopt verbatim Judge Richardson’s summary of the background facts.
17. The Claimant was employed by the Norfolk Constabulary from 1993 until 1997 as a police constable. She did not suffer from hearing loss or tinnitus at that time. She then took a career break for family reasons. In 2009 she joined the Wiltshire Constabulary as a staff member. In 2011 she applied to the Wiltshire Constabulary to become a police constable. She underwent a medical. It was discovered that she suffers from bilateral mild sensori-neural hearing loss with tinnitus.
18. The Home Office laid down National Recruitment Standards which included Medical Standards for Police Recruitment. There was a standard for hearing loss - a total of 84dB over the 0.5 to 1.2 KHz range or more than a total of 123dB over the 3, 4 and 6 KHz range. But the standard was not decisive in itself. The accompanying guidance stated that if the hearing loss was only below the standard in one ear, or if it was a borderline test, consideration should be given to a practical test of hearing to assess functional disability. Even if both ears were below standard the guidance said only that the candidate was “unlikely to be suitable”. And a Home Office Circular made it clear that all cases where candidates did not meet the medical standard should be looked at individually; candidates should be assessed in terms of ability based on the role, functions and activities of an operational constable.
19. The Wiltshire Constabulary followed this guidance. It arranged a practical functionality test which the Claimant duly passed. She worked as a police constable on front-line duty with no adverse effects from 2011 onwards; indeed she continued to do so at the time of the Employment Tribunal hearing.
20. For important family reasons the Claimant wished to move to the Norfolk area. On 26 September 2013 she made an application to the Norfolk Constabulary for a transfer. She disclosed that she had some upper range hearing loss and enclosed the report from the functionality test. She said that no adjustments had been necessary because of this hearing loss.

21. On 19 November 2013 she was informed that she had been successful at the interview stage, subject to a fitness and pre-employment health assessment. This took place on 6 December. The medical adviser stated that she had significant hearing loss in both ears and was “just outside the standards for recruitment strictly speaking”. He noted, however, that she had undertaken an operational policing role with the Wiltshire Constabulary without any undue problems. He made a recommendation for an “at-work test”. He said:

“This means that I recommend that the Constabulary undertake an assessment of her effectiveness to work in an operational environment with respect to hearing the radio and hearing the environment and being able to operate safely.”

22. This recommendation was not accepted by the Norfolk Constabulary. Instead further clarification was sought from another medical adviser. In an email dated 24 December this adviser explained the standards and said that the 2011 and 2013 audiograms were very similar – just outside the range. So it could be concluded that there had been no deterioration in the Claimant's hearing since 2011 and she would pass a practical test. The Claimant herself saw an ENT specialist who confirmed that her hearing levels were stable and sent a copy of his report to the Norfolk Constabulary.
23. Still the Norfolk Constabulary did not accept the recommendation. After internal correspondence and discussion the matter was placed before Acting Chief Inspector Hooper for decision. She declined the Claimant's application because her hearing was below the medical standard. In an internal memorandum she wrote:

“The applicant's hearing is below the standard for recruitment. Whilst I acknowledge that she performs the role of frontline officer in Wiltshire the assessment of her hearing at the time she joined them was ‘borderline’. The transfer of ‘risk’ assessment & management of her ability to perform the role of frontline officer would become Norfolk Constabulary's responsibility & would require me to set aside medical opinion that the hearing is below the recruitment standards.

Regrettably the applicant's hearing is below the acceptable & recognised standard & we should decline the application to transfer.”

24. If she had read the standard as a whole, or the accompanying circular, she would have realised the importance of individual assessment. She did not do so. So the Claimant received a letter informing her that her application would not be progressed further because her hearing was below the recognised standard for recruitment.
25. Judge Richardson also quoted two passages from ACI Hooper's witness statement, as follows:

“15. With regard to the suggestion that I declined the Claimant's application because I believed her to be disabled, this is certainly not the case. I have a basic understanding of the Equality Act and the definition of 'disabled' and it is my understanding that there would need to be a substantial adverse impact on an individual's ability to carry out normal day to day activities. On the basis of my reading of the papers,

I had no reason to believe that the Claimant was disabled. On the contrary, the Claimant was an operational front line officer in Wiltshire and I was advised of no other restrictions meaning that she was able to operate to the high physical and mental requirements that are placed upon such front line officers. There is simply no way that I considered that her marginal failure of such tests would have such an impact on her daily life that it would mean she was disabled.

16. I also did not believe she was disabled as this had been mentioned by neither of the occupational health/medical experts in this case who had been specifically asked to examine her. Having looked through the notes now this is perhaps unsurprising since Dr Roberts noted that in respect of her 'deafness' ... that it 'Does not cause any problems' for the Claimant.

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18. The Force, as for all other Forces across the country, is being required to deliver public services with fewer officers than in previous years and this situation will worsen over the coming years. In practical terms this means that every Force will have fewer officers to deliver the same or more frontline services. As a consequence, when making decisions on recruitment I had to be mindful that Norfolk and Suffolk constabulary already retain officers who have become permanently restricted during their tenure and who by virtue of their restrictions are not operationally deployable. This inevitably places pressure on those officers who are deployable. To knowingly risk increasing the pool of restricted officers if the Claimant, or any other applicant did not meet the nationally published criteria, could further reduce the pool of officers who are operationally deployable and increase that pressure which in my view, in light of the financial constraints the Force is required to meet cannot be consistent with service delivery.

19. I am and was aware at the relevant time that the Medical Standards do not prevent me from recruiting restricted officers per se, of course if someone was disabled then we would specifically have to look at how that might be managed. However, having regard to the fact that the Force will increasingly require officers to be omnicompetent and fully deployable, regrettably, the recruitment of a non-disabled permanently restricted officer could only be considered were the officer to have a specific skill that the Force could utilise.

20. The Claimant was a patrol officer recently out of probation and seeking a frontline role. I did not feel that the Claimant was offering any specific or key skills to enhance the ability of the Force to perform its public services and balance out the fact that she would not be available for full operational deployment. For this reason, I did not consider it appropriate to step outside the Medical Standards and recruit a non-disabled officer who would by virtue of the Medical Standards be a restricted officer.”

We were told that “restricted officer” has no precisely defined meaning but simply connotes an officer who is not able to perform the full range of frontline duties.

### **THE ET’s REASONS**

26. It was the Claimant’s original case that she was disabled within the meaning of the 2010 Act, and she claimed on the basis not only of section 13 but also of sections 15 and 21. However, by the time of the hearing, following a medical report, she accepted that her condition did not amount to a disability and relied only on direct perception discrimination, i.e. under section 13. It was her case that ACI Hooper decided not to recruit her because she believed that she had a disability within the meaning of the Act.
27. After finding the primary facts at paras. 6-26 of its Reasons, the ET has a short section headed “The Law”. The only statutory provisions referred to are sections 13 (1) and 39 (1) (c): there is no reference to any of the provisions defining disability. The only case-law referred to is the decision of the EAT in *J v DLA Piper UK LLP* [2010] UKEAT 0263/09, [2010] ICR 1052, in which “the concept of direct disability by perception” is said to have been “acknowledged”<sup>2</sup>. The Tribunal then says:

“28. The crux of the matter is clearly did the Respondent, particularly Acting Chief Inspector Hooper, perceive the Claimant to be disabled by reason of her bilateral mild sensorineural hearing loss with tinnitus, and was the rejection of the Claimant’s application to transfer to the Respondent less favourable treatment because of the perceived disability ?

29. Did Acting Chief Inspector Hooper perceive the Claimant as having the characteristics that make up the definition of disability ?”

I have to agree with Judge Richardson that the Tribunal’s reasoning would have benefited from a rather fuller analysis of the relevant provisions, which could then have been applied in its dispositive reasoning. In this difficult field it is always a valuable discipline to go through the elements necessary to liability one-by-one.

28. At paras. 30-38 the Tribunal reviews ACI Hooper’s evidence in detail. One obvious difficulty for her was that she had to acknowledge that in Wiltshire the Claimant was performing without problems her full role as a front-line officer. She apparently suggested in her oral evidence that conditions in Norfolk might be different from those in Wiltshire; but at para. 35 the Tribunal unsurprisingly rejected that. It referred at para. 36 to the reference in her memo (see para. 23 above) to “the transfer of ‘risk’ assessment and management of her ability to perform the role of front-line officer”. It continued:

“37. To the Tribunal’s mind the above comment can only in [*sic*] interpreted as Acting Chief Inspector Hooper perceiving felt [*sic*] that the Claimant had a potential disability, and or actual disability which could lead to the Respondent having to make adjustments to the Claimant’s role as a front-line police officer. There is, to the Tribunal’s mind, no other way of looking at it than for the Tribunal to conclude in

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<sup>2</sup> With respect to the Tribunal, *J v DLA Piper* is no longer directly relevant on this point, because – as pointed out in n. 1 above – the definition of discrimination in the 1995 Act was different.



the absence of any other explanation that the Respondent treated the Claimant less favourably because of her perceived disability. Additionally, given Acting Chief Inspector Hooper's view that the Claimant had a potential disability or a perceived disability<sup>3</sup>, the adjustments that Acting Chief Inspector Hooper believed would have to be made was that the Claimant would become a restricted officer and thus a liability to the Force, as indeed she suggests in paragraph 20 of her statement where she says 'I do not consider it appropriate to step outside the medical standards and recruit a non-disabled officer who would, by virtue of the medical standards, be a restricted officer'. This clearly cannot be the case because if that were correct then Wiltshire would be in breach of the Home Office Guidance by employing her as a front-line officer without any restrictions.

38. Acting Chief Inspector Hooper's memo as to her reasons for rejecting the Claimant takes no account of this guidance and the only justification for not employing the Claimant, we repeat, is that she did not meet the required medical standards for hearing. Again, the only conclusion the Tribunal can draw from that is that Acting Chief Inspector Hooper perceived the Claimant had a disability which could not be accommodated by reasonable adjustments or perceived she would require adjustments in the future notwithstanding her position in the Wiltshire Constabulary."

29. The crucial part of that reasoning is the first sentence of para. 37, though its effect is repeated in the second sentence of para. 38. That finds, in summary, that ACI Hooper perceived that the Claimant had a "potential" disability "and/or" an "actual" disability. But exactly what the Tribunal meant is not very clear and needs some unpacking.
30. I take first the content of the distinction between "actual" and "potential". "Actual" is ambiguous. One meaning is "real", as opposed to perceived; but it can also mean "current", as opposed to future or contingent. In the context of para. 37 as a whole I think it is clear that the Tribunal meant the latter. That is because the first finding ("potential" disability) is that ACI Hooper believed that the Claimant's impairment might at some time in the future have the result that she would be unable to perform the role of a front-line officer: that may not be crystal clear from the word "potential" by itself, but it is confirmed by the phrase "in the future" in para. 38. If that is so, the other finding ("actual" disability) must be that ACI Hooper believed that the Claimant's impairment meant that she was *currently* unable to perform that role.
31. I turn to the relationship between those two findings. In so far as they are genuine alternative findings about what ACI Hooper believed, they mean that *either* she believed that the Claimant's hearing loss already amounted to a disability *or* she believed that it did not do so now but might do so later. (I rather suspect, though it is unnecessary to reach a conclusion about this, that the fact that the Tribunal put "potential" disability first means that it regarded that as the primary finding – i.e., to

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<sup>3</sup> I strongly suspect that the phrase "a potential disability or a perceived disability" is a slip for "a potential disability or *an actual* disability", reflecting the finding in the first sentence. But it is possible that what the Tribunal meant to express was that the "potential disability" was only perceived. But the point is not material to the reasoning.

paraphrase, “ACI Hooper believed that the Claimant’s hearing loss might in due course become a disability, if indeed it had not already done so”.) However the Tribunal apparently did not regard the two findings as mutually exclusive, because it uses the formula “and/or”. A strict logician might object that ACI Hooper cannot have believed both that the Claimant was currently disabled and that she was only potentially disabled. But it may be that what the Tribunal meant was that ACI Hooper’s own thought processes covered both possibilities – i.e. that her thinking was “I am not sure if this applicant is disabled currently, but if she is not there is a real risk that she will be later”.

32. I have spelt this out so elaborately in the interests of clear analysis; but fortunately I do not believe that the outcome of this appeal depends on the precise construction of these findings.

### **THE APPEAL**

33. The ultimate question for us is whether the ET made any error of law. That being so, I will not attempt at this stage to summarise Judge Richardson’s judgment in the EAT, though I will refer to it in the course of my reasoning below.
34. There are three pleaded grounds of appeal, but grounds 1 and 2 are closely related and Mr Strelitz took them together. I will do the same.

### **GROUND 1 AND 2: PERCEPTION OF DISABILITY**

35. The starting-point for the issues raised by these grounds is that it was common ground before us that in a claim of perceived disability discrimination the putative discriminator must believe that all the elements in the statutory definition of disability are present – though it is not necessary that he or she should attach the label “disability” to them. As Judge Richardson put it succinctly, at para. 51 of his judgment:

“The answer will not depend on whether the putative discriminator A perceives B to be disabled as a matter of law; in other words, it will not depend on A’s knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation.”

That distinction between knowing the facts that constitute the disability and knowing that they amount to a disability within the meaning of the Act had already been drawn, albeit in a different context, by Lady Hale in her speech in *Malcolm*: see para. 86 (p. 1430 F-G). Again, although it was common ground that this was the right approach, I should say that I agree that it is correct. In a case of perception discrimination what is perceived must, as a simple matter of logic, have all the features of the protected characteristic as defined in the statute.<sup>4</sup>

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<sup>4</sup> We were referred to the fact that at the committee stage in the House of Commons an amendment was moved providing that A could be liable for perception disability even if he or she did not believe that the perceived impairment would have a substantial and long-term adverse effect. The Solicitor-General contended that the amendment was logically faulty, in that “it would be most inequitable for somebody who did not have a disability to have a lighter test to gain protection than somebody who did”. The member who had proposed the amendment acknowledged the force of that point and withdrew the amendment – see PBC Deb 16 June

36. It was Mr Strelitz's essential submission that the ET's primary findings about ACI Hooper's thought processes were incapable of supporting a conclusion that she believed that all the elements of the statutory definition of disability were present in the Claimant's case. There are various aspects to that submission, and it will be necessary to consider separately the ET's alternative findings of perceived "potential" and "actual" disability; but I start with an issue which is common to both.
37. The issue, in short, is whether ACI Hooper's belief that the Claimant 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". Mr Strelitz submitted that the requirements of the role of a front-line police officer were exceptional in character and could not sensibly be treated as falling within that description. He referred us to the Guidance on the meaning of "disability" issued by the Secretary of State under section 6 (5) of the Act, which courts or tribunals are required to take into account so far as it appears relevant (see paragraph 12 of Schedule 1). At paragraphs D8-D10 the Guidance gives examples of "specialised activities" which would fall outside the scope of the definition, such as the delicate manipulations required by a watch-repairer or playing the piano to concert standard.
38. It is not clear that that point was made so explicitly in the ET or the EAT: indeed it is only rather opaquely pleaded in the grounds of appeal, and the Secretary of State's Guidance was not referred to in Mr Strelitz's skeleton argument. The ET appears to have taken it for granted that if the Claimant's hearing loss prevented her from performing a front-line role the statutory definition would be satisfied. In the EAT Judge Richardson did address the issue, but only at a fairly general level. At paras. 52-53 of his judgment he said:

"52. It is established law that in the field of employment and occupation the definition of 'disability' in the 2010 Act must be applied in a way which gives effect to EU law. The definition of disability has been laid down by the ECJ most recently in *Ring v Dansk Almennyttigt Boligselskab* [2013] IRLR 571<sup>5</sup>:

'37. The UN Convention, which was ratified by the European Union by decision of 26 November 2009, in other words after the judgment in *Chacón Navas* had been delivered, acknowledges in recital (e) that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others". Thus the second paragraph of Article 1 of the convention states that persons with disabilities include "those who have long-term physical, mental, intellectual or sensory

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2009, cols 195-7. That is consistent with the consensus before us. I am not in fact satisfied that this episode is admissible on *Pepper v Hart* principles, even had the point been in dispute, but counsel's diligence in unearthing it deserves recognition.

<sup>5</sup> The full name and preferred citation of this case is *HK Danmark v Dansk almennyttigt Boligselskab* (C-335/11), [2013] ICR 851; but *Ring* (the name of the actual claimant) is a convenient shorthand.

impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

38. Having regard to the considerations set out in paragraphs 28-32 above, the concept of “disability” must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.’

53. This impacts in particular on the definition of ‘day-to-day activities’; the phrase must be given an interpretation which encompasses the activities which are relevant to participation in professional life. Thus, in the leading UK case, *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763 it was held that the taking of a professional examination for promotion to a high grade was a day-to-day activity.”

39. Judge Richardson refers in that passage to two authorities to which we were also referred – *Chacón Navas v Eurest Colectividades SA* (C-13/05), [2007] ICR 1, and *Paterson*, for which the full citation is [2007] UKEAT 0635/06, [2007] ICR 1522. In *Paterson* the ET had held that taking part in an exam as part of a promotion process was not a normal day-to-day activity. The EAT (Elias J presiding) was referred to *Chacón Navas* as establishing that the concept of disability comprises situations “in which participation in professional life is hindered over a long period of time” (see para. 62). It rejected the ET’s conclusion. Elias J said, at paras. 66-67:

“66. ... We would have reached that conclusion simply taking domestic law on its own without any reference to the decision in *Chacón*. In our view carrying out an assessment or examination is properly to be described as a normal day to day activity. Moreover, as we have said, in our view the act of reading and comprehension is itself a normal day-to-day activity. In any event, whatever ambiguity there may be about that, in our view the decision of the ECJ in *Chacón Navas* is decisive of this case.

67. We must read [the statutory definition of disability] in a way which gives effect to EU law. We think it can be readily done, simply by giving a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment. Since the effect of the disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life.”

40. Mr Strelitz submitted that Judge Richardson’s reliance on *Paterson* and *Ring* was misplaced. He referred to the decision of Lady Smith in the EAT in *Chief Constable of Lothian and Borders Police v Cumming* [2009] UKEAT 0077/08, [2010] IRLR 109. The claimant was a civilian police employee who was also a special constable. She

suffered from amblyopia in one eye, resulting in mildly impaired vision, but when she had been appointed a special constable she was given a certificate of fitness and found to have excellent binocular vision. She applied to become a police officer and was rejected because her eyesight did not meet the prescribed standard. She brought proceedings for disability discrimination, but she relied on actual rather than perceived disability. The ET found that her impairment had a substantial adverse effect, on two alternative bases – (a) that her rejection as a police constable recruitment itself constituted a substantial adverse effect, relying on what was said to be the reasoning in *Chacón Navas* and *Paterson*; and (b) that in any event the effect of the amblyopia on her vision was substantial. The EAT allowed the Chief Constable’s appeal. Mr Strelitz relied on Lady Smith’s reasoning on the first alternative. In summary, she held that it was not legitimate to shortcut the enquiry into the actual physical/mental adverse effects of an impairment and rely simply on the fact that it had led to a refusal of employment. As she put it at para. 36 of her judgment (p. 113):

“The status of disability for the purposes of the [1995 Act] cannot be dependent on the decision of the employer as to how to react to the employee’s impairment yet that is, in essence, the argument that the claimant seeks to advance.”

She said that the claimant’s approach “proceeds on a misunderstanding of *Paterson* and *Chacón Navas*”.

41. Mr Strelitz submitted that Lady Smith’s reasoning in *Cumming* was authority for the proposition that *Chacón Navas* and *Ring* are only concerned with “ordinary work activities” and that that excluded the duties of a front-line police officer, which he described as “unique”. I do not accept that submission. As appears from the previous paragraph, the issue which she was addressing in the passage on which he relies had nothing to do with what constitute “normal day-to-day activities” in a work context, or, more particularly, in the context of front-line police work: indeed the submission that she was addressing, and rejecting (as it seems to me, rightly), would have meant that that question did not even arise.
42. I return, therefore, to Judge Richardson’s approach. The proposition that he was concerned to establish – see para. 53 of his judgment – was simply that

“[the phrase ‘normal day-to-day activities’] should be given an interpretation which encompasses the activities which are relevant to participation in professional life”.

That seems to me wholly unexceptionable, save that “working life” might be more appropriate than “professional life” (which I think he used only because it appeared in *Paterson*). However, it does not directly address Mr Strelitz’s submission before us (which, as I say, may not have been so explicitly advanced below) that the particular activities required of a front-line police officer are not “normal” and are more akin to the highly specialised capabilities required of the watchmaker or concert pianist mentioned in the Guidance.

43. As to that, the impairment with which we are here concerned relates to hearing. There was no evidence before the ET, and it seems unlikely, that front-line officers need to have peculiarly acute hearing: they are not piano-tuners or audio engineers. I accept,

of course, that there will be occasions in the course of their duties when it is important that they be able to listen carefully or hear particular sounds (even if not a fly's foot-fall), but that is characteristic of many situations both at work and outside it. Although I fully accept that the work of a front-line police officer is in many respects unique and that it is often challenging and sometimes dangerous, the multifarious activities that it involves – or at least those for which good hearing is relevant – are nevertheless for the purpose of the Act “normal day-to-day activities”.

44. It follows that ACI Hooper's belief, as found by the ET, that the Claimant's hearing loss would, currently or in the future, render her unable to perform the duties of a front-line police officer was a perception that it would have an effect on her ability to carry out normal day-to-day activities. It also in my view follows that any such effect would be substantial and adverse, at least if (as ACI Hooper seems to have assumed) it would lead to her being taken off front-line duties.
45. That, however, is only the first of Mr Strelitz's challenges to the ET's conclusion. For the remainder, I need to consider separately the ET's alternative findings of perceived “actual” and “potential” disability.
46. As to actual disability, Mr Strelitz submitted that it was not open to the Tribunal to find that ACI Hooper believed that the Claimant was as at the date of her application unable to operate as a front-line officer, and thus that her impaired hearing had (at that date) a substantial adverse impact on her ability to carry out day-to-day activities. As ACI Hooper herself pointed out in paras. 15 and 16 of her witness statement, the information before her showed that the Claimant was working in Wiltshire in a front-line role, and the medical advice was that her hearing loss did not cause any problem. It would be extraordinary if in those circumstances she had believed that the Claimant's hearing impairment had any substantial impact on her work.
47. Mr Feeny resisted that submission. He drew attention to para. 13 of ACI Hooper's witness statement, where she said that she was not prepared to recruit an officer whose hearing did not meet the minimum standard; he said that that justified a finding by the ET that ACI Hooper believed that the Claimant was currently disabled. I cannot accept that. I agree with Mr Strelitz that the evidence relied on by the ET about ACI Hooper's thought processes could not support any such finding. In my view the focus of ACI Hooper's evidence was squarely on what might happen in the future. (I suspect that it is for that reason that the Tribunal, as already noted, appears to have treated “potential” disability as its primary finding.)
48. I turn, therefore, to the finding that ACI Hooper perceived the Claimant as having a potential disability. I have already explained (see para. 30 above) that that must be read as a finding that she believed that the Claimant's impairment might at some time in the future have the result that she would be unable to perform the role of a front-line officer; and also (see paras. 37-44) that that finding would constitute a finding of a substantial adverse impact on her ability to carry out day-to-day activities and thus of (future) disability.
49. The first question is whether there was an evidential basis for that finding. I did not understand Mr Strelitz to contend otherwise, but in any event I am sure that there was. It seems that ACI Hooper's oral evidence was somewhat equivocal, but para. 18 of her witness statement can only be read as referring to a belief that the Claimant might not

be able to carry on as a front-line officer: see in particular the statement that it would be undesirable to “knowingly risk increasing the pool of restricted officers”. The first paragraph of her contemporary memo is to essentially the same effect, though slightly less explicit: ACI Hooper acknowledges that the Claimant currently fulfils the role of a front-line officer, but her reference to the need for “‘risk’ assessment and management of her ability to perform the role of front-line officer” if transferred necessarily implies that she believed that there was a risk that the Claimant would at some point in the future become unable to do so.

50. The remaining question is whether to refuse employment because of such a perception of a risk of future inability to work as a front-line officer falls within the terms of the Act. At paras. 56-60 of his judgment Judge Richardson held that it did, because the effect of the ET’s findings was that ACI Hooper believed that at the time of her decision the Claimant was suffering from a progressive condition falling within the terms of paragraph 8 (1) of Schedule 1 (see para. 7 above) and thus, by virtue of paragraph 8 (2), was to be treated as (already) having an impairment with a substantial adverse effect on her ability to carry out normal day-to-day activities. He acknowledged that the ET did not justify its decision by reference to paragraph 8: indeed it did not refer to it at all. But what mattered was the effect in law of its factual findings.
51. It is necessary to consider each of the elements in paragraphs 8 (1) and (2) of Schedule 1. I take them in turn.
52. There is no difficulty about sub-paragraph (1) (a), namely that “P has a progressive condition”. The ET found (on the relevant alternative) that ACI Hooper believed that the Claimant had a condition (hearing loss) which did not at present prevent her from performing front-line duties but might do so in the future. That can only mean that she believed that the condition might get worse; and that is, in substance, a belief that she had a progressive condition, irrespective of whether ACI Hooper consciously articulated it to herself as such.
53. I take sub-paragraphs (1) (b) and (c) together. The effect of these is, to paraphrase, that as a result of her progressive condition P currently has an impairment which has an impact, but not a *substantial adverse* impact, on his or her ability to carry out normal day-to-day activities. Mr Strelitz submitted that the Tribunal had not found that ACI Hooper believed, on this alternative, that the Claimant’s hearing loss currently had *any* impact on her ability to carry out normal day-to-day activities: the finding was only that she believed that it might do so in future.
54. That submission has given me pause. There is certainly no express finding of any impact on day-to-day activities; and, as already noted, the medical evidence before ACI Hooper was to the effect that the Claimant had no difficulties in performing the role of a front-line officer. However, I have come to the conclusion, not without hesitation, that the ET should be understood to have found that ACI Hooper believed that the Claimant’s impairment had *some* adverse impact on her current ability to carry out normal day-to-day activities. The starting-point is that it correctly directed itself that the issue was whether she perceived the Claimant “as having the characteristics that make up the definition of disability” (see para. 29 of the Reasons, quoted at para. 27 above). It is clear from the fact that the ET made findings about “potential” disability that it was aware that progressive conditions could fall within the definition of disability; and I believe that it would be wrong to assume that it was unfamiliar with

the applicable provisions (i.e. paragraph 8 of Schedule 1) merely because it did not refer to them – though it would have been much better if it had done so.

55. I would only be prepared to hold that the ET had failed to find that sub-paragraphs (1) (b) and (c) were satisfied if such a finding was contrary to the weight of the evidence. That is not so. The required threshold is low. That appears from the language itself: the adverse impact in question is, *ex hypothesi*, not “substantial”. But it is also what I would expect. Given that Parliament intended to give persons with progressive conditions protection against discrimination, the focus must be on what impact the condition may have in the future: what stage the condition has reached at the moment of the act complained of can only be of secondary significance.<sup>6</sup> The impairment in the present case was to the Claimant’s hearing and was described in the medical evidence as “significant”, even though mild. One would expect such an impairment to have at least *some* impact, however minor, on the ability to carry out normal day-to-day activities, given the range of such activities in which hearing is used.
56. I turn to paragraph 8 (2). This is fairly straightforward. The Tribunal’s finding is that ACI Hooper believed that the result of the deterioration in the Claimant’s hearing, if it occurred, would be that she would be unable to go on working as a front-line officer. In the context of the case-law discussed above that is a finding that her hearing loss would have a serious adverse impact on her ability to perform normal day-to-day activities. Although the ET does not find in terms that ACI Hooper believed that such deterioration was “likely to” (in the sense of “could well”) occur, that is the necessary implication of its finding at paras. 36 and 37: if she did not believe that the risks which she perceived could well eventuate, they would not have affected her decision.
57. Mr Strelitz advanced two arguments with which I have not so far dealt, which I take in turn.
58. First, he pointed out that the Claimant had originally in her ET1 pleaded as her primary case that “hearing loss is a progressive condition which worsens with age” but that she had subsequently abandoned that case and relied only on discrimination by perception. He submitted that that meant that it was not open to the ET, or the EAT, to rely on paragraph 8 of Schedule 1 in deciding the case in her favour. I do not accept this. What the Claimant had abandoned was a case that she was *in fact* suffering from a progressive condition; that did not preclude a finding in her favour based on the fact that ACI Hooper thought that she was.

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<sup>6</sup> For myself, I am not sure why Parliament thought it necessary to specify that the condition must have *some* current “impact”, albeit not “substantial”. Take a case where – say as the result of routine testing – P has a definitive diagnosis of a progressive condition which is currently wholly asymptomatic but where symptoms having a minor impact on her abilities will develop in about a year, and disabling symptoms will appear after two years, and where her employer, who learns of the results and is frightened by the spectre of problems in future, dismisses her. It seems arbitrary and contrary to the policy of the Act that the employer should not be liable (at least so far as the 2010 Act is concerned) provided he acts in year 1 and will only be liable if he acts after the first symptoms have emerged in year 2; it would also raise what might be very nice factual issues as to the precise point at which the “*some* impact” threshold was crossed. It is not necessary in this case to decide whether this is, nevertheless, what paragraph 8 (1) (b) means, and since we were not addressed on it I prefer not to express a definitive view.



59. Second, he said that it was wrong to extend the ambit of the legislation to cover not only those (wrongly) perceived to be currently disabled but “those who are perceived to meet the definition of disability at some point in the future”: neither the 2010 Act nor the Framework Directive covered such a case. But that, with respect, overlooks the way that paragraph 8 is framed. Sub-paragraph (2) provides that where the condition is likely to result in P having an impairment falling within the terms of section 6 – that is, necessarily, in the future – he or she “is to be taken to have” such an impairment – that is, now. So if P is perceived to have a progressive condition he or she is to be treated as disabled within the meaning of the Act. Once it is accepted that perception discrimination falls within the terms of section 13 there is no rational basis for holding that it applies to some forms of discrimination and not others. It is unnecessary to consider whether the Directive covers such a case: we are concerned here with primary legislation that does not require EU underpinning.
60. I would accordingly dismiss the appeal on grounds 1 and 2.

GROUND 3: IS THIS A SECTION 13 CASE ?

61. This ground is pleaded as falling into two “sub-grounds” – “the ‘because of’ error” and “the comparator error”. I take them in turn.

“The ‘because of’ error”

62. In order to explain this (sub-)ground, I need to start by identifying the relationship between sections 13 and 15 of the 2010 Act. In essence the distinction is between, on the one hand, cases where the act complained of is done because of the disability itself and, on the other, a wider class of cases where it is done because of “something arising in consequence of” that disability: in the latter case a defence of justification is available but in the former it is not. The distinction recognises that people with a disability may be subjected to some detriments which cannot reasonably be said to be because of the disability itself but against which they should nevertheless have a degree of protection.
63. An example of the distinction between direct discrimination and section 15 discrimination (or its predecessor, disability-related discrimination) which is commonly given is of the blind person with a guide dog who is refused admission to a restaurant because it does not allow dogs: the refusal cannot be said to be “because of” her blindness – she would be admitted if she had no dog – but the fact that she has a dog is something arising in consequence of the fact that she is blind, and refusal on that basis is accordingly unlawful unless it can be justified. An example in the employment context which is given by the Equality and Human Rights Commission in its Guidance is where an employee whose disability leads to them having a higher level of sickness absence is penalised on that account: although the employer is genuinely acting because of the absences rather than the disability itself, the absences arise in consequence of the disability. Another example was given by Judge Richardson in the present case: see para. 69 below.
64. There has been some recent case-law about section 15. In *Sheikholeslami v University of Edinburgh* [2018] UKEAT 0014/17 Simler P, referring to the decision of this Court in *City of York Council v Grosset* [2018] EWCA Civ 1105, [2018] ICR 1492, summarised the exercise which it requires as follows:

“... [T]his provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B’s disability? The first issue involves an examination of the putative discriminator’s state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the ‘something’ was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.”

65. Judge Richardson summarised this part of Mr Strelitz’s case as follows (see para. 38 of his judgment):

“The reason why [the Claimant’s] application to transfer was not accepted was that she did not meet the prescribed standards. This is not the same as saying that her transfer was not accepted because she was disabled or perceived to be disabled. If she had been disabled the refusal of the application would no doubt be because of something arising from her disability: section 15 would be applicable. But treatment under section 15 can be justified.”

The distinction was crucial because the Claimant had expressly abandoned any claim under section 15 and nailed her colours to the mast of section 13: see para. 26 above.

66. Mr Feeny’s submissions in response are summarised at paras. 43-44 of the judgment:

“43. ... [H]e submitted that the ET committed no error of law in concluding that the refusal of the application was because of the perceived disability. The decision was made because, as the ET found, ACI Hooper believed she would become a liability to the force, and held this belief because of false and prejudicial assumptions about her ability without proper individual assessment of the candidate as recommended in the Guidelines. If she had actually been a disabled person, in the circumstances of this case, the ET might properly have found direct disability discrimination: he relied particularly on *Aylott v Stockton-on-Tees Borough Council* [2010] EWCA Civ 910 [[2010] ICR 1278].

44. Mr Feeny did not accept that the ET's decision in this case would render it difficult or impossible for organisations to apply a required standard. If the person concerned in fact lacked an ability which was a requirement of the job, and if this was the reason for the treatment, then section 13 would not be engaged; section 15 would be applicable and the organisation would be entitled to show that the unfavourable treatment in question was a proportionate means of pursuing a legitimate aim.”

67. *Aylott*, which is mentioned in that passage (para. 43), was a case where the claimant employee was diagnosed with a bipolar condition and the employer “panicked” as a result of what the ET described as “a stereotypical view of mental illness” and

dismissed him. This Court upheld its finding of direct discrimination. Mummery LJ said, at para. 48 (p. 1291 E-F):

“Direct discrimination can occur, for example, when assumptions are made that a claimant, as an individual, has characteristics associated with a group to which the claimant belongs, irrespective of whether the claimant or most members of the group have those characteristics.”

At para. 50 (p. 1292 A-B) he said:

“The council’s decision to dismiss the claimant was based in part at least on assumptions that it made about his particular mental illness rather than on the basis of up-to-date medical evidence about the effect of his illness on his ability to continue in the employment of the council.”

*Aylott* was concerned with the 1995 Act, but the definition of direct discrimination (at section 3A (5)) is substantially identical.

68. Judge Richardson’s reasons for rejecting Mr Strelitz’s submissions appear at paras. 62-66, as follows:

“62. Section 23(2)(a) makes special provision for the comparison which is to be made in a direct discrimination case relating to disability. The circumstances which are to be taken into account include a person's abilities. A genuine difference in abilities may be a material difference. An example is given in the *Employment Code* (2011) published by the Equal Opportunities Commission:

‘A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate. ...’

63. If the disabled man really lacks the ability in question and is really rejected for that reason, the employer's action will not be direct discrimination. The man would still be able to bring a claim - for example, under section 15, which applies where there is ‘unfavourable treatment’; here the employer may defend the claim on the basis that the application of the typing speed was a proportionate means of achieving a legitimate aim.

64. However, if the disabled man really has the required ability, and is nevertheless rejected because he has a disability, section 23(2)(a) will not assist the employer. Suppose for example a woman who is blind, and is rejected because the employer wrongly believes that because of her blindness she will not be able to type at a required speed. Section 23(2)(a) requires her actual abilities to be taken into account; it does not provide any warrant for the employer's flawed belief in her lack of

ability to be taken into account as a material difference. A stereotypical and incorrect assumption that a claimant has characteristics associated with a disability may found a claim for direct discrimination: see *Aylott* at paragraph 46.

65. I confess that for a while I was troubled by the argument of Mr Strelitz that if direct discrimination were in play in a case of perceived direct discrimination it would be difficult or impossible for an employer to apply a performance standard, because it could not be justified. On reflection, however, there is no force in this point. The 2010 Act contains proper provision for removing from the ambit of direct discrimination those cases which are really concerned with the application of a performance standard to a disabled person who lacks a relevant ability. But that provision does not protect an employer who wrongly perceives a person to lack an ability which that person actually has.

66. In this case the hypothetical comparator would be a person who was not perceived to be disabled - that is, whose condition was not perceived as likely to deteriorate so that they would require restricted duties - and who had the abilities which the Claimant had. The ET was fully entitled to conclude that such a person would not have been treated as the Claimant was treated. The Claimant was able to perform the active policing role; she was performing it in Wiltshire; she had been accepted at the interview stage; her rejection followed when ACI Hooper ignored advice to rely on a practical assessment of the Claimant because, as the ET put it, she believed the Claimant would become a liability to the force. The ET did not err in law in concluding that she had been subjected to direct discrimination.”

There was some discussion before us about what Judge Richardson was referring to when he says at para. 65 that the 2010 Act provides for cases where an employer applies a performance standard to be excluded from the ambit of direct discrimination. But I think it is clear that he was referring back to his discussion of section 23 (1) (a), which does indeed confirm that an employer is not liable under section 13 if he treats an employee, or potential employee, less favourably because of the things that they are unable, or less able, to do: he may still, as Judge Richardson says, be liable, but only under section 15, which allows him the opportunity to justify the treatment in question.

69. As I understand it, Judge Richardson was in that passage accepting Mr Feeny’s submission as previously summarised, and specifically at para. 43 (see para. 64 above). That is, he accepted that the reason for ACI Hooper’s decision, as found by the ET, amounted to “a stereotypical assumption” on her part that the Claimant’s (perceived) disability (actual or contingent) would render her unable to perform front-line duties and that on the authority of *Aylott* such a case fell within section 13.
70. Before us, Mr Strelitz advanced essentially the same argument as he did in the EAT. He contended that what the ET found, and in any event all that it could have found on the evidence, was that ACI Hooper refused the Claimant’s transfer not because of her disability itself – that is, the fact that her hearing was (or would become) seriously

impaired – but because of something arising in consequence of that impairment. At para. 41 of his skeleton argument he identified the “something” as “[the Claimant’s] result in a hearing test which ACI Hooper was not prepared to explore further by reason of<sup>7</sup> specialist workplace testing”; he later describes it as “a failure to meet a medical standard”. I am not sure, with respect, that that is the best way to formulate the argument: it might be said that the test result was no more than the evidence which led ACI Hooper to believe (wrongly) that the Claimant was disabled, in which case we are still in section 13 territory. But it is arguable that the real “something” which, according to her evidence, led ACI Hooper to reject the Claimant was not the test result as such but her perception, based on it, that she would be unable to perform a front-line role: in other words, what motivated her decision was not the fact of the Claimant’s (perceived) disability but the actual things that (so she believed) the Claimant could not do in consequence of it, which is a paradigm section 15 case.

71. The problem with that submission, even if re-formulated as I have proposed, is that it does not address the actual basis on which Judge Richardson decided the point. As I understand his reasoning, if he had regarded this as a case where ACI Hooper had simply made an error about what the test results meant in terms of the Claimant’s ability to do the job he would have held that it fell outside the scope of section 13. Certainly Mr Feeny in his oral submissions before us was happy to accept that that was so. He acknowledged that in the typical case where a person is refused a job – or indeed is dismissed or suffers any other detriment – because they are unable to meet a performance standard in consequence of a disability, they will have no claim of direct discrimination and will have to claim under section 15; and in answer to a question from Davis LJ he acknowledged also that that would be the case if they were not in fact disabled but were perceived to be as a result of a “genuine mistake”. But he submitted that in some cases there will be the additional element which he said was evidently present in this case, where the misperception was not simply a mistake but flowed (in significant part) from a stereotypical assumption about the effects of disability.
72. The proposition that an employer’s concern about the ability of a disabled claimant to do the job may constitute direct discrimination if it is significantly influenced by a stereotypical assumption about the effects of the disability seems to me right in principle, and Mr Strelitz did not seek to controvert it. The question then is whether the ET can fairly be regarded as having made a finding that such an assumption was part of ACI Hooper’s mental processes, and, if so, whether there was a proper basis for it. As to that, Mr Feeny pointed out that she had disregarded not only Home Office guidance about the importance of individualised assessment but also the recommendation by her own Force’s adviser that the Claimant undergo an at-work test (see paras. 21-24 above); and that the Tribunal at para. 35 of its Reasons explicitly rejected the only reason that she advanced in evidence for thinking that someone who was capable of front-line work in Wiltshire would not be capable of it in Norfolk (see para. 28). That being so, he submitted that ACI Hooper had acted irrationally, and that it was accordingly a natural inference that she was motivated, at least in part and perhaps only subconsciously, by a stereotypical assumption that officers with hearing loss could not be up to the job: otherwise why not let the Claimant do the at-work test and see? He reminded us that under section 136 of the 2010 Act if there were facts from which a finding of discriminatory motivation could be made the burden was on

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<sup>7</sup> I think this must be a slip for “by means of”.

the respondent to disprove them. The Tribunal had plainly rejected ACI Hooper's explanation of her motivation.

73. As with the issue about whether the ET found a progressive condition, it takes a benevolent reading of the ET's Reasons to be satisfied that it made the finding which Mr Feeny attributes to it; and I have, again, not found this part of the case entirely easy. But I have come to the conclusion that on a fair reading it is indeed implicit in the Tribunal's findings, and in the criticisms of ACI Hooper's evidence which it makes, that it believed her to have acted on the basis of a stereotypical assumption that the Claimant's hearing loss would render her incapable of performing front-line duties; and such a finding was plainly open to it, for the reasons which Mr Feeny gives.
74. I accordingly do not accept this element of ground 3. In my view the case falls within section 13 (1) because on the particular facts of the case as found ACI Hooper was influenced in her decision by a stereotypical assumption about the effects of what she perceived to be the Claimant's (actual or future) hearing loss. I would emphasise that it does not follow that a claim of direct discrimination can be brought in the generality of cases where an employee suffers a detriment because they are (or are perceived to be) unable to do the work required by the employer, or do it to a sufficient standard, as a result of disability: on the contrary, such cases will typically have to be brought under section 15 (if available)<sup>8</sup>, and the employer will have the opportunity to seek to justify the treatment complained of.

#### "The comparator error"

75. Mr Strelitz's essential submission under this head was that the ET never conducted the comparison exercise which he said was required by section 13 (1), read with section 23 – that is, it never considered whether ACI Hooper would have treated another would-be transferor, with the same abilities, in the same way.
76. The first point to make about that submission is that it is now very well established that the comparison exercise under section 13 (1) (the so-called "less favourable treatment" question) does essentially the same job as asking whether the treatment complained of was "because of" the protected characteristic (the so-called "reason why" question), and that if the latter question is answered the answer to the former will normally follow. That point was first and most authoritatively made by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337, (see in particular *per* Lord Nicholls at paras. 11-12 (p. 342 B-D)); and in fact Mr Feeny told us that in his submissions to the ET he reminded it of *Shamoon*. Provided that the ET made no error of law in its decision on the reason why question, as I have held above, there can be no error of law in it not having explicitly addressed the less

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<sup>8</sup> If the disability is perceived rather than actual, section 15 may not be available, because, unlike section 13, it applies to discrimination "against a disabled person". The natural meaning of that phrase is that the person should in fact be disabled, and it is not apt to cover the case where they are only perceived to be. As pointed out in n. 1 above, the definition of discrimination in the 1995 Act was formulated in the same way, and in *J v DLA Piper* it was submitted that the statutory language should be given a strained construction in order to accord with what was said to be the effect of EU law; but the EAT concluded that that submission could not be accepted without a reference to the CJEU. Since the Claimant (now) relies exclusively on section 13, it has not been necessary for us to explore these issues.

favourable treatment question. As I understood it, in answer to a question from Bean LJ Mr Strelitz in fact accepted that this was the case.

77. In any event, however, Judge Richardson addressed the question of the correct comparator in para. 64 of his judgment, which I quote at para. 66 above, and I agree with what he says there. If ACI Hooper was indeed motivated by a stereotypical and incorrect assumption that the Claimant's hearing loss prevented her from carrying out the role of a front-line officer, section 23 cannot help her: the correct comparison is with how a person about whom no such assumption was made would have been treated.
78. Accordingly this element of ground 3 also fails.

### **CONCLUSION**

79. For the reasons given above I would dismiss this appeal.

#### **Lord Justice Davis:**

80. I agree with the judgment of Underhill LJ.
81. Such a conclusion in employment law terms, on the facts and circumstances of this particular case, also seems to me to reflect the wider merits. The claimant had performed entirely satisfactorily in a front line role in the Wiltshire Constabulary. The (unparticularised) suggestion raised in evidence that front line duties in Norfolk were somehow different from those in Wiltshire was half-baked and properly rejected by the Employment Tribunal; furthermore, and in particular, in reaching her decision of 1 April 2014 ACI Hooper had failed to take into account the highly material Home Office standard and accompanying circular and guidance.

#### **Lord Justice Bean:**

82. I agree with both judgments.