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EMPLOYMENT TRIBUNALS (SCOTLAND)

**Case No: 4107955/2021 (V)
(By Cloud Video Platform)**

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Held on 6, 7 and 27 January 2022

Employment Judge: L Doherty

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Mr M Murray

**Claimant
Represented by:
Mr R Milvenan
Solicitor**

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Chief Constable Police Service of Scotland

**Respondent
Represented by:
Ms Lyons –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that ;

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1. The claimant was disabled in terms of Section 6 of the Equality Act 2010 during the relevant period;
2. The respondents had knowledge of the claimant's disability in terms of Equality Act 2010 from March 2020.

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REASONS

1. This was a Preliminary Hearing (PH) to consider the following;
 - 1) Does the claimant's hearing loss have a substantial adverse effect on his ability to carry out normal day-to-day activities?
 - 2) If the answer to one is yes, when the claimant's hearing loss begin having such an effect?
 - 3) If the answer to one is yes, was the claimant a disabled person at the time the alleged discriminatory acts occurred?
 - 4) If the answer to one's yes, did the respondent have knowledge of the claimant's disability at the relevant time?

2. It is accepted that the claimant has an impairment, which is hearing loss.
3. The claimant gave evidence on his behalf, and evidence was given on his behalf by his wife, Mrs Murray, and ENT specialist, Dr Newton.
4. Evidence was given for the respondents by Inspector McInnis.
5. The parties lodged a joint bundle of documents.

Findings in fact.

6. The claimant, whose date of birth is 16/07/1972 commenced serving as a Police Officer in November 1997. He became a Firearms Officer in 2005, moving on to become a full time instructor.
7. Officers in this role are required to meet a certain standard of medical fitness. These are assessed on a rolling five year basis, which include an annual hearing test. The standards which an officer has to meet are set by the Police College, and are produced at page 38 of the bundle.
8. The claimant attended the hearing test in August 2019 which was conducted by the respondent's Occupational Health Provider, Optima.
9. The claimant failed this hearing test. Police officers do from time to time fail their hearing test. On some occasions this can be because of temporary

illness such as a cold. It is open to an officer to reset the hearing test, however if they fail on 3 occasions then their licence to act as a Firearms Officer is revoked.

- 5 10. It is standard procedure when an officer fails the test on the first occasion, that their licence is removed on a temporary basis.
11. Inspector McInnis, who in August 2019 was Sgt McInnis, and the claimant's first line manager, authorised the temporary withdrawal of his firearms licence after the claimant failed his first hearing test.
- 10 12. Subsequent to failing this test, the claimant attended for medical treatment, and attended an appointment with an ENT specialist at Cross House hospital with Dr Thachil on 23 December 2019. Dr Thachil produced a letter from his consultation with the claimant noting; *Subjectively the claimant did not struggle with hearing on a day-to-day basis, however occasionally he experienced difficulty in hearing in a noisy room.*
- 15 13. Dr Thachil noted the audiogram results showed bilateral high-frequency hearing loss, with the right ear showing a dip at 4K.
14. Dr Thachil noted that he had a long chat with the claimant regarding his findings and the fact that surgery and medication was unlikely to improve his hearing loss. He suggested hearing aids, however the claimant declined to try this.
- 20 15. The claimant did not consider that he had a hearing loss issue, and was reluctant to accept that there was an issue with his hearing when he first consulted with Dr Thachil.
- 25 16. The claimant did not consider that the audiogram had been carried out in ideal conditions at Cross House hospital in December 2019, and he attended for a subsequent audiogram with Boots in January 2020, which showed effectively the same results (page 60). At this stage the claimant reluctantly accepted that he was suffering from hearing loss.

17. The claimant then began to investigate equipment which would help his hearing, and allow him to continue in his job as a firearms officer. He spoke to his first and second line manager about this, and felt they were supportive, but nothing further came of this.
- 5 18. The claimants attended follow-up appointment with Dr Thachil in February 2020, where audiogram tests were carried out, with the same result as before. Dr Thachil noted that he had a discussion with the claimant about improving his hearing and suggested a hearing aid trial would benefit him.
19. The claimant began at trial with hearing aids supplied by a private provider in
10 early March 2020. The use of hearing aids made a very significant difference to his ability to hear.
20. The claimant could not continue with the privately supplied hearing aids due to the expense, and moved on to NHS hearing aids in around September 2020.
- 15 21. From March the claimant wore his hearing aids when he attended work, and his first line manager was aware that he was wearing hearing aids. That claimant had asked Inspector McInnis if he could wear a hearing aid at work, and was assured that he could.
22. The claimant discussed matters with his line managers , who were aware that
20 he had failed his hearing tests and the problems this caused, although Insp McInnis had not observed any difficulty with the claimant's hearing when he spoke to the claimant. At some point around March 2020, after the first Covid lockdown, when face masks were extensively in use, the claimant explained to Inspector McInnis that this made it more difficult for him to hear what
25 people were saying to him. The claimant also told him that he struggled in the office making phone calls due to the background noise. Inspector McInnis accepted that this was the case, and an accommodation was made by him to allow the claimant to move into his office, which was much quieter.
23. In July 2020 the claimant was referred for an occupational health consultation
30 with Optima. He emailed the letters of December and February he had

received from Dr Thachil to Optima, and he gave consent for Optima to release their report to his employer.

24. Optima's report, dated 16 July 2020, is produced at page 63 to 66 of the bundle. Under the heading current situation report stated;

5 *'Since March 2020, PC Murray has been using hearing aids from Specsavers and confirmed they have been helpful for his high-frequency hearing loss. However, he disclosed that he has no hearing related problems in his normal life.'*

10 25. Optima advised that the claimant was able to carry out his duties as a Police Officer, but not as a Firearms Officer.

26. The claimant attended for a further review with Optima in November 2020. Their report is at page 67 to 72 of the bundle.

27. Under reason for referral the report stated;

15 *'PC Murray advises he failed the standards for Firearms duties in August 2019 , He was referred to Hear Nose and Throat (ENT) specialists who confirmed moderate hearing loss. Repeat assessment was undertaken with similar results and bilateral hearing aids were recommended. He trialled ones privately, and found them to make a big difference to his hearing. He didn't realise how impaired he was with his hearing until the*
20 *aids were used. He has since been provided with NHS ones. He struggles with background noise area and has found this year difficult with faces being covered in masks. '*

25 28. The report stated that it was likely that the Equality Act would apply, and that the claimant struggles to hear normal conversation with background noise, his condition is not likely to improve, and without hearing aids the symptoms of reduced hearing would be worse.

29. Subsequent to the issue of this report the claimant's firearms licence was withdrawn on 14 September 2020.

30. It is not uncommon for people who suffer from hearing loss to be unaware that their hearing is deteriorating.
31. The claimant was examined by an ENT Consultant, Dr Newton, for the purpose of this litigation in October 2021, and he found that the claimant's hearing had effectively remained unchanged from when he first failed his hearing test, when he was examined by Dr Thachil, and had hearing tests done privately. The claimant's audiogram tests have consistently shown the same results throughout the period from initial assessment until Dr Newton's report in October 2021.
32. Dr Newton's opinion is that the claimant's audiogram results demonstrate moderate to severe high-frequency sensory hearing loss, and this will cause him to struggle to hear normal conversational tones. He considers that the claimant's hearing is significantly worse than an equivalently aged man.

Day to Day Activities

33. From August 2019 to date the claimant has experienced difficulty in hearing normal conversations. This has meant that sometimes he does not hear what has been said to him at all, or he has had to ask for what has been said to be repeated. The claimant worries that his inability to hear makes him appear rude to others.
34. The presence of background noise exacerbates this and makes it more difficult for him to hear what is being said. The introduction of face masks from around March 2020, when the claimant could no longer see the person speak, has also made it more difficult for the claimant to hear and understand what is being said to him.
35. The claimant's inability to hear what is being said in normal conversation impacted upon him socially, and he has become withdrawn in social situations. For example the claimant would avoid talking to other people when he was walking his dogs, and would avoid talking to people who he has not seen for some time in social situations, such as weddings or parties.

36. The claimant struggled to make telephone calls do this if there was background noise, which interfered with his ability to hear what was being said.

37. Without the use of his hearing aids, the claimant required the television to be turned up loudly and to use subtitles.

38. The claimant's use of hearing aids has improved his ability to hear, but his hearing is still impacted to some degree even when he is using hearing aids. He feels that wearing hearing aids makes it easier to explain that he has difficulty hearing what is being said.

10 **Note on Evidence**

39. The Tribunal found all of the witnesses to be credible, and reasonably reliable, although in some instances their recall of when particular events happened was not particularly clear. The Tribunal did not draw any adverse inference from this, but considered rather that it was commensurate with the passage of time.

40. Ms Lyon on behalf of the respondents made fairly extensive criticisms of claimant's credibility, and the credibility of Mrs Murray. Having regard to the evidence, and even taking into account the inconsistencies relied on by Ms Lyon, the Tribunal did not find these criticisms to be well founded. It was not persuaded that the claimant was misleading the Tribunal as to the extent of his impairment in order to advance his claim.

41. The Tribunal accepted the claimant's evidence as to the effect of his impairment on his ability to hear, and on his day-to-day activities. In reaching this conclusion the Tribunal takes into account Ms Lyon's submission regarding that there was material before it, particularly Dr Thachil's report from December 2019 and the first Optima report, which it was submitted was inconsistent with this suggestion that there was any significant or substantial impact on the claimant's ability to hear at that stage.

42. Dealing firstly with Dr Thachil's report, the Tribunal notes that he states';
*Subjectively (the claimant) does not struggle with hearing on a day-to-day
basis....*

5 43. Dr Thachil therefore recorded what he was been told by the claimant, and the
Tribunal was satisfied that this was explained by the claimant's reluctance to
accept that he had any difficulty with his hearing. Dr Newton gave very
persuasive evidence about the fact that individuals who suffer from hearing
loss are often unaware of the fact that they are losing their hearing, and the
Tribunal was satisfied that this was the case with the claimant. This was also
10 supported by the evidence given by Mrs Murray who spoke about the
claimant's resistance to the notion that he had any difficulty with his hearing.

44. It was, as explained by Dr Newton, unlikely that the claimant's hearing
deteriorated overnight as of August 2019. That was just the date upon which
it was identified that he was suffering from hearing loss because the first test
15 was carried out on that date.

45. The fact that the claimant was suffering from hearing loss in August 2019 is
also supported by the fact that his audiogram results have been consistent
throughout. The evidence about the consistent audiogram results was given
by Dr Newton, was unchallenged by the respondents. The claimant's hearing
20 loss was therefore the same, or approximately the same in September 2020
when he was assessed as Optima as being a candidate to whom it was likely
that the Equality Act would apply, as it was in July 2020, and indeed August
2019 when he failed the first hearing test.

46. In relation to that statement in Optima's report to the effect that the claimant
25 recorded no difficulty in hearing, the claimant explained that that was because
he was wearing hearing aids. Albeit the claimant did not challenge the content
of the report at the time, the Tribunal was satisfied that that was likely to be
correct, taking into account the extent of the claimant's hearing impairment.

47. The Tribunal did not reject as untenable the claimant evidence that he did not
30 appreciate the extent of his hearing loss until he started to wear hearing aids.

Rather the Tribunal considered this to be consistent with Dr Newton's evidence about gradual hearing loss, which can go unnoticed even although there is a loss of function.

5 48. The Tribunal did not consider anything significant in relation to the claimant's credibility turned on what Ms Lyon's submitted was an inconsistency in the claimant's evidence that he did not feel unsafe walking down the street without hearing aids, and his impact statement to the effect that he is conscious of his personal safety in public areas, and that he looked round as he may not pick up noise. It did not appear to the Tribunal that these two statements are necessarily inconsistent; even if they were, it did not appear to the Tribunal that a great deal turned on it. Neither did the Tribunal consider anything turned on what she said was the inconsistency in the claimant's evidence about wearing hearing aids when he was running. Ms Lyon relied on evidence to the effect that the claimant's evidence that he did not wear hearing aids when running, which she submitted was contradicted by him later, and by the contents of Dr Newton's report to the effect that he did not wear hearing aids running because they fell out when exercising. It did not appear to the Tribunal that this evidence was inconsistent, and even if it was nothing significant could be taken from it.

20 49. The Tribunal accepted as credible the claimant's evidence as to the degree to which he struggled in day to day conversations, and the impact that had on him in social situations. In reaching this conclusion the Tribunal take into account the evidence of Inspector McInnis to the effect that he had not noticed the claimant experiencing any difficulty in day-to-day conversation while at work. Inspector McInnis also however candidly accepted that this could have been explained by the fact that he was the claimant's line manager and therefore the claimant was likely to listen with a degree of attention to what he said. Inspector McInnis also gave evidence to the effect he recalled some time shortly after the first Covid lockdown the claimant explaining he had 25 difficulties particularly because of mask wearing. He also made arrangements for the claimant to move to his office, because he struggled on 30

the telephone in the office environment where there were around six or seven people.

50. Inspector McInnis's evidenced in this regard supported the fact that the claimant was experiencing difficulties with his hearing, and also that Inspector
5 McInnis was aware of this.

51. The claimant's difficulties in hearing were also spoken to by Mrs Murray, who gave very persuasive evidence firstly, as to when she first noticed the effect, which was in January 2002, she recalled going to pub and noticing the claimant could not hear anything that was being said by the company which
10 they were in. She also gave persuasive evidence as to the claimant's inability to hear normal conversation at home, which resulted in frustration for other family members. That inability to hear manifested itself either in the claimant not hearing at all what was being said, or asking for things to be repeated. She also confirmed the claimant had become withdrawn in social situations
15 as a result of this hearing loss, which was a change in his behaviour.

52. Ms Lyon submitted that Mrs Murray was an incredible witness on the basis she had avoided answering questions put to her. The first question she submitted had not been answered related to how the claimant's removal from his role as a Firearms Officer came about. It did not appear to the Tribunal
20 that this was a question which was relevant to Mrs Murray , who clearly was not involved in the claimant's removal from that role, and nothing rested on the fact that her answer addressed the effect of the withdrawal of the firearms licence on her family, as this was a matter she was able to speak to. The second matter which Ms Lyon relied upon was Mrs Murray's answers to
25 questions about Dr Thachil's report. She submitted Mrs Murray avoided answering a question about whether she accepted the terms of the report. The claimant had agreed with the terms of this report and nothing turned on this.

53. Nor did the fact that Mrs Murray's answer about when she noticed the claimants hearing started to deteriorate differed to the claimant's own
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evidence on when he began to notice, impact her credibility , but rather was explained in the tribunal's view by what she genuinely observed.

Submissions

54. Both parties very helpfully provided written submissions, which were added
5 to by Mr Milvenan orally. In the interests of brevity these are not reproduced,
but are dealt with below in the Tribunal's consideration.

Decision

55. The Tribunal began by considering the relevant legislation.

56. Section 6 of the Equality Act 2010 provides:

10 (1) *A person (P) is disabled 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.*

1. Schedule 1 provides:

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PART 1

DETERMINATION OF DISABILITY

...

2. *Long-term effects*

(1) *The effect of an impairment is long-term if –*

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- (a) *it has lasted at least 12 months*
- (b) *it is likely to last for at least 12 months, or*
- (c) *it is likely to last for the rest of the life of the person affected*

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(2) *If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if it is likely to recur.*

...

PART 2

The Guidance

Impairment

5 *An impairment can be physical or mental (A.3)*

It is to be determined by reference to the effect that an impairment has on that person's abilities to carry out normal day-to-day activities (A.4, with original emphasis)

Substantial Adverse effect

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- *More than minor or trivial (B.1)*
 - *Includes the time taken for, and way in which, an activity is carried out (B.2 & B.3)*
 - *Account should be taken of how far a person can reasonably be expected to modify his behaviour – such as coping or avoiding strategies (B.7, with original emphasis)*
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3. *It is important to consider the things a person cannot do, or only with difficulty*

4. *Long term*

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- *Last or likely to last 12 months having regard to the cumulative effect (See C.2)*
 - *A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period (See C.7)*
 - *A person even if recovered to no longer be adversely affected may qualify as having been a disabled person for a relevant period of time if the effects lasted 12 months or more after the first occurrence, or if a recurrence happened or continued until*
- 25
- more than 12 months after the first occurrence (A.16 and C.12)*

57. The relevant time at which the claimant's disability is to be assessed is at the time when the discrimination is said to have occurred. That period is agreed as being between August 2019 and October 2020. That is the period in respect of which the Tribunal has considered in assessing whether the claimant meets the criteria in Section 6 of the EQA.
58. It is not in dispute in this case that the claimant has an impairment, which is a hearing loss. Nor is it in dispute that the effect of that impairment is long-term. The issue was whether that impairment had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities.
59. The questions which the Tribunal was asked to determine at this Preliminary Hearing are set out at the beginning of these Reasons.
60. The first question is whether the claimant's hearing loss had a substantial adverse effect on his ability to carry out normal day-to-day activities. For the reasons given above the Tribunal was satisfied that the claimant's hearing loss interfered with his ability to engage in normal day-to-day conversations. He was sometimes unable to hear at all what was said to him, and he had to ask for things to be repeated on a regular basis. Background noise made matters more difficult, as it rendered it more difficult for him to hear what was being said. He struggled to conduct conversations on the telephone if there was background noise. His ability to communicate was further diminished with the widespread wearing of face masks which came with Covid 19.
61. The claimant's ability to hear was improved with his use of hearing aids, however in assessing the effect of the impairment the Tribunal must disregard this, and consider the effect without the use of hearing aids.
62. The Tribunal therefore concluded that there was an effect on the claimant's ability to carry out day to day activities and went on to consider if that was a substantial adverse effect .
63. Substantial means more than minor or trivial. As submitted by Mr Lyons, the Equality Act '*Guidance on matters to be taken into account in determining questions relating to the definition of disability*' (the Guidance) provides that

the requirement that an adverse effect on day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal difference in ability which may exist among people.

5 64. In support of her submission that there was no substantial adverse effect Ms Lyon submitted that the effects spoken about by the claimant were only minor it trivial, and things such as turning up the television volume, or putting on subtitles, or leaving the room in order to make a telephone or in a busy environment, or not understanding people with masks on, were things that people do on a daily basis who are not disabled.

10 65. The Tribunal however was satisfied that the claimant's inability to hear what was being said in normal day-to-day conversation, to the extent that he sometimes did not hear at all, and often had to ask for things to be repeated, which difficulties were exacerbated further by background noise, and that he struggled to make telephone calls if there was background noise, was more
15 than minor or trivial. This, the Tribunal concluded went beyond the normal differences in ability between people, and out with the category of things which people who do not have the claimant's impairment, regularly experience. The Tribunal was satisfied that the adverse effect on the claimant's ability to carry out the activity of engaging in everyday conversation
20 and making telephone calls was more than minor or trivial.

66. This conclusion is supported not just by the claimant's evidence, but also the evidence of his wife, who spoke to the impact of the claimant's inability to hear on family life, and who explained that the claimant's hearing loss was such that it would interfere with his ability to hear what was being said in normal
25 day-to-day conversations.

67. The extent to which the claimant's ability to hear was impaired was also spoken to by Dr Newton who gave persuasive evidence to the effect that the claimant's hearing loss was such that it interfered with his ability to hear normal everyday conversations tones. The Tribunal notes the respondent's
30 submission as to the role of the expert witness. Ms Lyon's correctly submits that it is not a matter for the expert witness to express an opinion what is a

day-to-day activity. That however is not what the Tribunal relied upon. Dr Newton's evidence was that the claimant's impairment would affect his ability to hear normal conversational tones. That is not evidence about what is normal day-to-day activity, or evidence that there is a substantial adverse effect, but rather an explanation of what effect the claimant's impairment has on his ability to hear.

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68. The Tribunal did not rely on Dr Newton's opinion to reach this conclusion as to what is normal day-to-day activity or whether the effect of the claimant's impairment is substantial.

10 69. The fact that the claimant noticed such an improvement in his hearing with the use of hearing aids also supports the conclusion that the effect of his impairment was substantial. Ms Lyon's submits that the fact that the claimant had no awareness he was suffering from any hearing loss until his first hearing test, meant that it was untenable to suggest that his impairment had a
15 substantial adverse effect. As indicated above however the Tribunal found Dr Newton's evidence about the effect or impact of gradual hearing loss to be persuasive, and it was satisfied that it was this which explained the fact that the claimant had no awareness of his impairment and the extent of it, rather than the fact that he was not suffering from a substantial adverse effect. Again
20 this is supported by the fact that objectively the claimants hearing has not changed during the relevant period as measured by the audiograms, but as of the date of Optima's last report, when his hearing was again measured by audiogram and there was found to be no change, he was considered by them to be likely to fall within the definition of the EQA.

25 70. The Tribunal concluded that engaging in everyday conversation, or conversations on the telephone are normal day-to-day activities, and that the claimant's hearing loss had a substantial adverse effect to carry out normal day-to-day activities.

30 71. The Tribunal is then asked when the claimant's hearing loss began to have that effect.

72. The Tribunal is unable to determine the question exactly, but on the basis of Dr Newton's evidence which was to the effect that it was likely that the claimant's hearing loss was present prior to August 2019, but that was the date on which it was first assessed, it was satisfied he could safely conclude
5 that the claimant's hearing loss had that effect as of August 2019. For the reasons given above, and taking into account that the objective measurement of the claimants hearing did not demonstrate any change in the period from August 2019 to October 2020, the Tribunal rejected Ms Lyon's submission to the effect that there could be no impairment until after October 2020.

10 73. The effect of that conclusion is that the claimant was disabled in terms of section 6 of the EQA as of August 2019.

74. It is not suggested that the claimant's condition has improved or is likely to improve, and no issue was taken to the effect that the claimant's condition was not long-term. The Tribunal concluded that the claimant was disabled in
15 terms of the EQA for the period during which it is alleged he was subjected to discriminatory acts (of August 2019 2 October 2020).

Knowledge of Disability

75. The Tribunal is then asked to consider whether the respondents had knowledge of the claimant's disability at the relevant time. The claims are
20 brought under Section 15 and Section 20m of the EQA.

76. The relevant legislation is to be found in sections 15 and Schedule 8 of the EQA.

Section 15-Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

25 *(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.*

Schedule 8 Part 2

5 20(1)A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) *in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;*

10 (b) *in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

15 (3) *An applicant is, in relation to the description of A specified in the first column of the table, a person of a description specified in the second column (and the reference to a potential applicant is to be construed accordingly).*

77. The question is whether the respondents had actual or constructive knowledge of the claimant's disability at the relevant time. That involved the Tribunal considering whether the respondent should have reasonably known or could reasonably be expected to have known about the claimant's disability.

78. Constructive knowledge captures those things that an employer can be fixed as knowing about had they been reasonably diligent.

79. The first piece of information which the respondents possessed was the fact that the claimant had failed his first and second hearing tests.

25 80. The Tribunal accepts Ms Lyon's submission to the effect that this should not be relied upon as giving rise to knowledge of disability, to extent that failure to pass the first hearing was not be a basis upon which it could reasonably be concluded that the claimant had a disability. The Tribunal accepted

Inspector McInnis's evidence that officers did from time to time fail their hearing test, and that this could arise for a number of reasons, such as temporary illness.

- 5 81. Ms Lyons also relies on the fact that the respondents had the first Optima report, which contained a statement to the effect that the claimant had no hearing related problems in his normal life. She submits that the respondents were entitled to rely upon this, and to give plain meaning to the words of the report. Although the Tribunal accepted the claimant's evidence about what he told Optima, it equally accepted that Inspector McInnis would not have
10 been aware of this when he read the report.
82. The respondents are entitled to rely on the report from the OH provider (*Donelien v Liberata UK Ltd (2018 EWCA Civ 129)* referred to by Ms Lyon.
83. What was said in that case by LJ Underhill at paragraph 32;
- 15 84. *It seems that there was some concern following the decision in Gallop that it raised a serious question about whether employers in a case of this kind were entitled to attach weight to advice from Occupational Health consultants about whether an employee was suffering from a disability within the meaning of the 1995 Act. It was explicitly for that reason that Judge Richardson, when permitting the appeal in the EAT to proceed, directed that it be heard by a
20 Tribunal that included lay members. In my view it is plain that Rimer LJ did not intend generally to discount the value of such advice. The basis on which the employee's appeal was allowed was that the ET had found that the employer was entitled to rely, and rely exclusively, on the opinion of the Occupational Health advisers in circumstances where that opinion was
25 worthless because it was unreasoned. That is perhaps most clear from para. 42 of Rimer LJ's judgment (******) relying simply on its unquestioning adoption of OH's unreasoned opinion) but equally from paras. 40 and 43 (***** he cannot simply rubber-stamp the adviser's opinion). That is very far from saying that an employer may not attach great weight to the informed and
30 reasoned opinion of an Occupational Health Consultant. That was the view of the EAT, and in particular of the lay members, in the present case. Having*

expressed at para. 30 of his judgment essentially the same view as me about the ratio of Gallop, Langstaff J went on to say, at para. 31, that while an ET will look for evidence that the employer has taken its own decision the lay members sitting with me in this case would wish to emphasise that in general great respect must be shown to the views of an Occupational Health doctor, though such views should not be followed uncritically.

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85. In this case the OH report was not the only information available to the respondents. The claimant attended work wearing hearing aids in March 2020. He asked his line manager about whether he was allowed to wear them. Inspector McInnis gave evidence to the effect that he saw the claimant wear hearing aids to work, and that he had discussed this with him. Inspector McInnis accepted that the claimant had spoken to him about the difficulties he had in conducting telephone conversations in a busy office environment. Because of this difficulty he allowed the claimant to move into his office, a matter which he told the Tribunal he gave careful consideration to because of confidentiality considerations. The claimant also told his line manager about the difficulties he experienced in understanding what was being said to him because people were wearing face masks with the onset of the Covid pandemic, which also dates around March 2020. It was also accepted that the claimant spoke to his managers about investigations he had made about obtaining different applicant amplification devices to help them return to work.

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86. Constructive knowledge of disability captures those things which an employer might be expected to know, had he been reasonably diligent. The respondents are entitled to attach significant weight to the OH report, but not to follow it uncritically. In circumstances where they were able to directly observe the impact of the claimants hearing impairment on him. Notwithstanding the statement in Optima report of July 2016, had the respondents been reasonably diligent in their investigations, when the claimant was wearing hearing aids at work, had asked for an adjustment in order to make telephone calls because of background noise in the office, told his line manager that he was having difficulty understanding people because they were wearing face masks, they would have been reasonably expected

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to know from March 2020 that the claimant had a disability which caused his hearing to be impaired.

87. The Tribunal was satisfied that it is to question 4, that from March 2020 the respondents could reasonably have been expected to know that the claimant
5 had a disability which caused his hearing to be impaired.

Employment Judge: Laura Doherty
Date of Judgment: 31 January 2022
Entered in register: 04 February 2022
10 and copied to parties

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