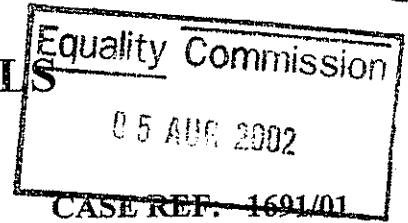


THE INDUSTRIAL TRIBUNALS



APPLICANT: Elizabeth Hand

RESPONDENTS: 1. The Police Authority for Northern Ireland
2. Criminal Records Office

DECISION

The unanimous decision of the tribunal is that the applicant is disabled within the meaning of section 1 of the Disability Discrimination Act 1995.

Appearances:

The applicant was represented by Mr M Potter, Barrister-at-Law, instructed by George Kilpatrick of the Equality Commission for Northern Ireland.

The respondents were represented by Mrs N Murnaghan, Barrister-at-Law, instructed by Ms A Bell, Crown Solicitor's Office.

1. The above application was listed to consider the following preliminary issue, namely:-

“Whether the applicant is disabled within the meaning of Section 1 of the Disability Discrimination Act 1995.”

It was further agreed by the parties at the outset of the proceedings that if the tribunal decided that the applicant was not so disabled it should consider the further preliminary issue namely:- “If not so disabled, whether the applicant had a past disability within the meaning of section 2 of the Disability Discrimination Act 1995.” In light of the tribunal's decision as set out above the tribunal has made no determination in relation to the said second preliminary issue.

2. (a) Oral Evidence was given on behalf of the applicant by Alan G Leonard FRCS, Consultant Plastic Surgeon and Dr Donald Burden, Consultant Orthodontist. Both Consultants also presented in evidence medical reports, which they had prepared on the applicant. The respondents also presented in evidence reports which had been prepared in relation to the applicant by Mr R Millar FRCS Consultant Plastic Surgeon and Mr Derek J Gordon FRCS ed FRCSI (Plast) Consultant Plastic Surgeon. The applicant also gave evidence.
- (b) The tribunal, having considered the said reports and the said oral evidence of Mr Leonard and Dr Burden and the applicant was satisfied that the applicant, who had been born on 23 May 1960 with a complete unilateral cleft of lip and palate, was disfigured. She had had a series of surgical procedures aimed at repairing the cleft palate including a mandibular osteotomy to give a better contour to the face. She also had a corrective rhinoplasty, which consisted of thinning, straightening and shortening the tip of the nose together with revision of the lip scar. An operation was also performed to enlarge the left nostril, which had become stenosed. In addition the applicant had considerable orthodontic treatment to reduce the disfigurement due to mal-alignment of the teeth in the region of the cleft. Dr Burden indicated that the applicant had a Class III malocclusion on a severe skeletal III base – whereby her lower jaw projected beyond the upper jaw. He gave evidence that there were three classifications namely mild, moderate and severe and the applicant, in his subjective judgement, would fall in the latter category. He then confirmed this view by reference to precise measurements as to the degree of over closure, which had been obtained from a radiograph. He referred to the missing dentation common to the condition together with the obvious nasal asymmetry. He also gave evidence of the 10 grade rating scale used by Orthodontists to rate the severity of a patient's aesthetic impairment and concluded that the applicant's aesthetic component rating was grade 10 which represented severe aesthetic impairment. This grading was obtained by measuring, using radiographic techniques, the applicant's facial skeletal dental and soft tissue parameters and comparing same with the normal values for an individual's racial sub group. This rating was such that Dr Burden concluded that the applicant was a person who would be offered corrective surgery, if she wished to have same.

Mr Leonard in his evidence referred to the residual stigmata of the cleft lip and palate deformity, which was clearly observed by the tribunal when the applicant

herself came to give evidence. He emphasised that from the side view the applicant's face showed the typical dish face deformity which is one of the residual stigmata seen in many cleft lip and palate individuals of the applicant's age; from the front there was an impression of a recessive upper lip (which goes with the dish face deformity) and an impression of her having a very long lower jaw and lower face. Mr Leonard referred to the fact that although the root and tip of the nose are both in the mid line there was an obvious deviation of the cartilaginous nose to the right with the result that it is convex on the right side and concave on the left. She had a scar on her left upper lip, which took the form of a "Z" and the upper part of it is noticeably widened. There was a slight step in the vermilion border of the lip and the scar was seen to cross the vermilion to the free border of the lip. Mr Leonard in his evidence emphasised the degree of disfigurement revealed by inspection of the nose from below such as when the applicant would go to speak to someone seated at a desk. Indeed when the applicant came to give her evidence and to allow the tribunal to closely inspect her face it was clear to the tribunal that she was particularly self conscious of this aspect of her disfigurement. The upper end of the lip scar was seen disappearing into the left nostril and there was also a scar across the base of the columella. He concluded that an earlier operation to relieve the stenosis of the left nostril had only been partially successful as it remained significantly smaller than the right and showed an adhesion in the upper part. The end of the nasal septum was seen to be lying in the right nostril. Mr Leonard referred also to the disfigurement of the applicant in the terms of her facial proportions. He emphasised in his evidence that the disfigurement of the applicant was in the central portion of her face, which naturally would be something, which would be immediately noticed by someone looking at the applicant. Indeed this was readily apparent to the tribunal as it observed the applicant both in giving evidence, but also in her seat in the tribunal room before she came to give evidence. Mr Leonard clearly was of the view she had significant disfigurement. In saying so he was attempting to draw attention to those aspects of the disfigurement he considered significant but leaving to the tribunal to judge whether the degree of disfigurement satisfied the definition of disability under the Disability Discrimination Act 1995.

Indeed neither Mr Millar nor Mr Gordon in their reports, in essence, disagreed with the findings of Mr Leonard or Dr Burden as to the nature of the actual disfigurement but emphasised that the degree of disfigurement was a matter of judgement and in this context for the tribunal.

(c) The applicant also gave evidence. The tribunal was satisfied that she was very self conscious of her disfigurement and of what she perceived were people's reaction to same – though the tribunal was also of the view that she has tried over the years “to learn to live with her disfigurement” and it was best summed up when she told Mr Leonard when he asked her how she felt about her appearance “At times I feel it is not too bad but at other times I feel that it is horrendous”.

3. (i) Section 1(1) of the Disability Discrimination Act 1995 ('DDA') states:-

“Subject to the provisions of schedule 1 a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities”.

(ii) The DDA gives a power to make regulations, which provide that in prescribed circumstances a severe disfigurement is not to be treated as having that effect. Regulations have been made which provide that tattoos and body piercing are not to be considered as a disability.

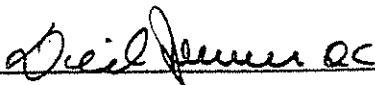
The Guidance on matters to be taken into account in determining questions relating to the definition of disability give examples of disfigurements including scars, birthmarks, limb or postural deformation or diseases of the skin. It says in paragraph A17 “assessing severity will be mainly a matter of the degree of the disfigurement. However, it may be necessary to take account of where the feature in question is (e.g. on the back as opposed to the face)”.

(iii) In this case, where there was no doubt that the applicant was disfigured the issue for the tribunal was whether the said disfigurement was severe or not.

(iv) Unlike elsewhere in the guidance where 'substantial effect' is stated to be one, which is more than 'minor' or “trivial” (Para A.1) there is no similar assistance with regard to the use of the word 'severe'. It is correct that in the case of *Goodwin -v- The Patent Office (1999)* IRLR Mr Justice Morrison, the then President of the Employment Appeal Tribunal stated in relation to the proper interpretation of the DDA – “with social legislation of this kind a purposive approach to construction

should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in questions. With this translation tribunals are given explicit assistance in two forms, which should detract from the need to adopt a loose construction of the language (i.e.) the Guidance and Code of Practice". In these circumstances the tribunal did not consider it necessary to consider the various parliamentary debates on these provisions. The tribunal was also conscious that it was for the tribunal to make an assessment as to whether the disfigurements, which it had been referred to by the medical experts and which it had also observed, satisfied the statutory test – namely whether the disfigurement was severe. It is, in essence, a question of fact for the tribunal to determine in light of the aforesaid evidence. The tribunal in reaching its conclusions in this matter did consider the Judicial Studies Board for Northern Ireland Guidelines for the Assessment of General Damages in Personal Injury cases in Northern Ireland (Second Edition) and in particular with regard to the various categories of facial disfigurement set out therein and the distinctions made therein between males and females. However, the tribunal in doing so was conscious that these guidelines could only be of limited comparative assistance and had been devised for use in personal injury actions.

- (v) The tribunal considered the evidence as set out above and also observed for itself the said disfigurement. It noted the precise nature of the disfigurement and in particular how easily observed it was being a facial disfigurement and in the central portion of the face. In the circumstances the tribunal was satisfied the applicant has a severe disfigurement and is therefore disabled within the meaning of Section 1 of the Disability Discrimination Act 1995.



Date and place of hearing: 22 May 2002, Belfast

Date decision recorded in register and issued to parties:

E 2 AUG 2002.
CB