

Ashton-v-West Mercia Police (Employment Appeal Tribunal)

Employment Appeal Tribunal judgment

July 2000

Foreword

The Employment Appeal Tribunal dismissed Ms Ashton's appeal against the employment tribunals's decision to reject her claims of Sex Discrimination and Disability Discrimination.

[Claire McNab](#), October 2000

Tribunal Decision

EMPLOYMENT APPEAL TRIBUNAL

Judgments

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

Appeal No: EAT/1381/99

At the Tribunal On:29th June 2000

Before:

HIS HONOUR JUDGE PETER CLARK

MR P DAWSON OBE

MR A E R MANNERS

MS C ASHTON

v

THE CHIEF CONSTABLE OF WEST MERCIA CONSTABULARY

APPEARANCES

For the Appellant

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Judgment delivered on 27 July 2000

JUDGE PETER CLARK:

This is an appeal by the applicant before the Shrewsbury Employment Tribunal, Ms Claire Ashton, against that tribunal's reserved decision promulgated with extended reasons on 27th September 1999, dismissing her complaints of both sex and disability discrimination brought against her employer, the Chief Constable, West Mercia Constabulary.

The Facts

1. The appellant was born a male child on 26th March 1951. Prior to summer 1996, when she was diagnosed as suffering from gender identity dysphoria (GID) she was working as a police officer in the West Mercia Constabulary.
2. Following that diagnosis she decided that she could no longer live as a man and informed the Assistant Chief Constable of that diagnosis and that she intended to follow a course of medical treatment which would allow her eventually to live as a woman. In other words, she intended to undergo gender reassignment (GRA). On 19th August 1996 she wrote an open letter to her colleagues in the police setting out her position in some detail.
3. Initially she intended to remain a serving police officer, but following a report from the respondent's Occupational Health Physician, Dr Laidlaw dated 28th September 1996 she was relieved of normal patrol duties, following a period of compassionate leave and was assigned to clerical duties.

Medical treatment

4. She began a course of hormone treatment in June 1996. Between February and July 1997 she was prescribed *Androcur* tablets, but that treatment caused her to suffer from depression and was therefore discontinued by Dr Gould, her general practitioner. Dr Gould formally diagnosed depression on 4th August 1997 and prescribed *Lofepramine*. That treatment ceased temporarily on 11th November 1997 but was restarted on 29th November. *Zoladex* was also prescribed in August 1997 and continued until March 1998 when all treatment ceased in anticipation of the appellant's forthcoming surgery. At that stage Dr Reed, her consultant psychiatrist found no evidence of depression.

The employment position

5. Following a meeting with the appellant on 23rd January 1997 the respondent's Head of Personnel, Mr Spence, wrote to her on 7th February setting out proposed terms for her future employment. In summary, it was proposed that she resign her office as a police constable with effect from 31st March 1997; that she would receive an immediate pension based on her previous service; that she would not be required to work during March 1997 and that from 1st April 1997 she would be appointed a Communications Operator at the maximum point on the relevant pay scale on a six month, rather than the usual 12 month probationary period. The period of six months was a compromise reached between the appellant and Mr Spence; she wanting no probationary period, he seeking the usual 12 months.

6. The appellant accepted those terms by letter dated 9th February 1997. The tribunal found that at that time the respondent was seeking to secure the best possible terms for her continued employment and remuneration.

7. On 24th February 1997 Dr Laidlaw certified that due to GID the appellant was disabled from performing the ordinary duties of a member of the police force.

8. On 7th April 1997 the appellant took up her duties as a Communications Operator under the management of Mrs Bennett, tutored by Kathy Griffiths and supervised by Sergeant Lyons.

9. In short, the appellant did not perform satisfactorily in her new role. That assessment was genuinely reached by Sgt. Lyons in an assessment carried out on 7th July 1997. She was found, among other things, to be forgetful and showed poor concentration.

10. The tribunal, in accepting that Sgt. Lyons assessment was fair, attributed the shortcomings found in her performance to a combination of factors, namely the side effects of the drug therapy she was then receiving, that is depression, the stressful environment of the Communications Operations Room, the further stress of the appellant having to prove herself and yet further stress caused by her undergoing a major life change. At that stage the appellant herself did not attribute her unsatisfactory performance to her treatment regime and its effects.

11. As a result of that assessment Mrs Bennett saw the appellant on 11th July and told her that her probation period would be extended by a further six months to 1st April 1998 in order to address the areas of concern about her performance.

12. On 26th September she was transferred to a different squad with Sophie Warren as her tutor, supervised by Sgt. Dewerson. The thinking was to give her a fresh start with new colleagues.

13. On 13th November Mrs Bennett reviewed the appellant's progress. Complaints about her performance had been received on 11th November. As a result of that review Mrs Bennett recommended termination of her employment.

14. A further complaint about her speed and accuracy was received on 27th November. She then went off sick never to return to work with the respondent.

15. On the following day Mr Spence wrote to the appellant informing her that her Divisional Managers had concluded that her employment should be terminated. He identified five specific areas of concern about performance.

16. By then the side effects of her medication were known to the respondent. Mr Spence wished to take medical advice and he asked her to complete a medical consent form.

17. Having discussed the matter with Dr Laidlaw Mr Spence gave the appellant notice that her employment would be terminated at the end of her second probationary period, 31st March 1998, on grounds of capability (erroneously referred to, innocently, as "compatibility" in the dismissal letter).

18. An appeal against the dismissal decision by the appellant, with the assistance of her trade union, was dismissed by letter dated 29th April 1998.

19. The 12 month probationary period coincided with the "real life test" during which she lived and worked in the female role before undergoing irreversible surgery.

Employment Tribunal decision

20. Having heard evidence over a number of days and considered the submissions of experienced Counsel for the parties the tribunal set out their findings of fact in considerable detail. We have summarised the basic story for the purpose of this appeal. Their conclusions on the two heads of complaint were as follows:

Sex Discrimination

(1) They rejected the respondent's submission that the **Sex Discrimination Act 1975** had no application to allege discrimination against a transsexual. **P v S & Cornwall County Council [1996] IRLR 347; Chessington World of Adventures Ltd v Reed [1998] ICR 97**. Further, they found that EC Directive 76/207 applied directly to the respondent as an emanation of the State. In so holding they did not accept the submission that the **Sex Discrimination (Gender Reassignment) Regulations 1999**, amending the 1975 Act by adding s.2A, and a definition of GRA in s.82, which came into force after this appellant's dismissal, would not have been necessary if the 1975 Act and the Directive as originally drafted covered discrimination against transsexuals. That legal conclusion is not challenged by the respondent in this appeal.

(2) On the facts, the appellant was consistently performing below the standard to be expected of successful probationer in the post of Communications Operator.

(3) In answer to the question, but for her declared intention to undergo GRA would the appellant have received the same treatment (i.e. dismissal) from the respondent, the tribunal gave an unequivocal reply in the affirmative (reasons paragraph 24).

(4) In these circumstances they rejected the complaint of sex discrimination under the 1975 Act and the Directive.

Disability Discrimination

The tribunal found that the appellant suffered from two distinct mental impairments for the purposes of S.1(1) of the **Disability Discrimination Act 1995** ['DDA'], GID and depression. In this appeal we are concerned only with the tribunal's findings in respect of GID. The finding, adverse to the appellant that she was not disabled within the meaning of s.1(1) in relation to her depression is not challenged on appeal.

Their findings in relation to GID were that, although long-term, that impairment did not have a substantial effect on her ability to carry out normal day-to-day activities.

Accordingly, the disability discrimination complaint was dismissed on the grounds that she was not suffering from a disability.

The Appeal

21. It is convenient to deal separately, first with the appeal against the finding of no unlawful sex discrimination and then the tribunal's decision to dismiss the complaint of disability discrimination.

Sex Discrimination

(1) Did the tribunal ask themselves the wrong question in law at paragraph 24 of their reasons?

Mr O'Dempsey submits that the question, following **James v Eastleigh Borough Council [1990] ICR 554**, was not whether the respondent's treatment of the appellant was by reason of her sex (GRA), which involved looking at the respondent's motives for the treatment, but whether it was on grounds of her sex.

We are not satisfied that the tribunal did fall into error in this way. Although the word "reason" is used in the tribunal's decision, we accept Mr Kurein's submission that at paragraph 24 they asked themselves and permissibly answered the correct question.

(2) Did the tribunal impermissibly narrow their focus to the appellant's intention to undergo GRA as opposed to considering whether the treatment of the appellant was a direct result of the effects of her treatment in undergoing GRA and therefore on the grounds of her sex?

Mr O'Dempsey took us at great length through the case of **P v S**. That was a case immediately concerned with less favourable treatment directly attributable to the applicant's stated intention to undergo GRA.

He has sought to draw a parallel with the case of a pregnant woman, incapable of work through pregnancy-related illness. We do not accept that comparison. Special provisions have been made for pregnant workers that do not yet arise in the case of transsexuals.

It is a bridge too far to submit that where the cause of this appellant's poor work performance is, on the tribunal's findings, linked to the side effects (depression) of medical treatment prescribed to her whilst undergoing GRA, that the necessary causative link is established between the treatment complained of, dismissal and her sex.

In this case, unlike pregnancy-related illness which is gender specific, the medical conditions from which the appellant suffered are not. The true comparison is between the appellant and a probationer who performed unsatisfactorily during his or her probation period. Both would, on the tribunal's findings, have been dismissed.

In these circumstances we can find no grounds in law in interfering with the tribunal's conclusion on sex discrimination.

Disability Discrimination

First, Mr O'Dempsey submits that the tribunal's findings at paragraph 14 of their reasons, that the appellant's GID did not have a substantial adverse effect on her day-to-day activities in that her mobility was not affected by her decision not to socialise outside work taken in

June 1996, was an impermissible finding. He argues that an adverse effect may be an indirect effect, here of the treatment undergone with a view to GRA.

We accept Mr Kurein's submission that the tribunal was entitled to find, on the evidence, that her decision not to socialise was her choice; she preferred to keep herself to herself. In these circumstances the tribunal was entitled to conclude that her GID condition did not have a substantial adverse effect on her mobility. We reach that conclusion having considered, in particular, paragraphs C6 and C14 of the Guidance issued under s.3 DDA.

Secondly, and for similar reasons, we reject Mr O'Dempsey's further submission that the tribunal was wrong to discount the appellant's conscious decision to alter the way in which she spoke. They found that there was no evidence that her ability to speak was in any way affected. That is a finding of fact with which we shall not interfere.

Accordingly we uphold the tribunal's decision that the appellant was not disabled within s.1 DDA.

Conclusion

22. We are quite satisfied that this tribunal's reasons bear the closest scrutiny. No error of law in their approach is made out. Consequently, this appeal is dismissed.

» by [Claire McNab](#)