Chessington-v-X

Employment Appeal Tribunal ruling, June 1997

Foreword

Following dismissal by her employers following gender reassignment, X took her case to an industrial tribunal, complaining of discrimination on grounds of sex. The tribunal found that X had been subjected to continued harassment because of her trans status. It applied the decision of the European Court of Justice in the case of P *v* S and Cornwall County Council and held that discrimination for reason related to a gender reassignment breaches the Sex Discrimination Act 1975.

The employers appealed, and the principal issue at stake was whether the Sex Discrimination Act 1975 can be construed in accordance with the decision of the European Court so as to apply in a case where the complainant relies upon unfavourable treatment following notice of intention to undergo gender reassignment.

The appeals tribunal ruled that the SDA could be so construed, and dismissed the employer's appeal.

(Please note that the name of the trans woman involved has been removed from this copy of the ruling, to protect her identity. For the full text of the ruling, see [1997] IRLR 556)

NB: the Sex Discrimination (Gender Reassignment) Regulations 1999 have amended the SDA to explicitly protect transsexual people from discrimination in employment.

Claire McNab, June 1999

Tribunal decision

CHESSINGTON WORLD OF ADVENTURE LTD (appellant)

v

X (respondent)

Judge
Peter Clark

Employment Appeal Tribunal

Judge Peter Clarke, Mr D J Hodgkins CB, Mrs P Turner OBE

Appeal dismissed 27 June 1997

Representation

For the Applicant: John Bowers, instructed by Cheyney Goulding
For the Respondent: Dinah Rose, instructed by Tyndalloods

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1. JUDGE PETER CLARKE: This case raises the issue of the application of the Sex Discrimination Act 1975 ('the Act') to transsexuals. It comes before us by way of an appeal by the applicant employer against a decision of the London (south) Industrial Tribunal promulgated with full reasons on 31st July 1996 and a cross appeal by the respondent employee.

The facts

2. On 5 January 1987, the respondent, a biological male, commenced employment with the applicant as a rides technician. On 8 July 1991, the respondent (hereinafter referred to a 'she') announced her change of gender identity from male to female, and on 18 July 1991, by statuary declaration, she changed her forename to N.

3. Following her announcement of change of gender, she was subject to a prolonged and serious harassment and ostracism by a very small minority of her male colleagues amongst the 17 other engineers employed on the site by the appellant. The tribunal found that the principal reason for such treatment was her transsexuality. That treatment included the repeated theft of her tools and coffee mugs (with the consequence of deterring from using the same tea-room as her workmates during tea breaks); refusal by her colleagues to work with her or assist her with heavy lifting; verbal abuse (calling her 'queer'); vandalism including the defacement of her clothing and other property with lipstick; tampons and sanitary towels on her work bench; leaving a replica coffin inscribed with her name and the letters 'RIP' on her workbench; and informing her that a 'book' had been taken out by her colleagues, who

had saved up to £100 to be paid to the person who succeeded in having her seriously injured or dismissed.

4. The tribunal found that this was a concerted course of harassment which continued from 1991 until she went off sick on 2 March 1994, never to return to work before her dismissal on grounds of incapability, which took effect on 31 July 1994.

5. In November 1993, she attempted suicide. The tribunal found that this event was connected in a very substantial way to what was happening at work, although personal difficulties with a girlfriend at the time must have played a part.

6. From about February 1, it became clear that the appellant's management, including the deputy general manager, Mr Robin Dunham, the personnel manager, Mrs Rhonda Ewen, the engineering manager, Mr Timothy O'Callagham, and the deputy engineering manager, Mr Rodney Russell, that the respondent was experiencing serious difficulties with her work colleagues because of her transsexuality.

7. No real investigation was carried out by the management into the difficulties she was experiencing. Apart from an initial talk by Mr Dunham to her colleagues in September 1991, instructing them to be kind to the respondent, no significant steps were taken to protect her, or to prevent the continuation of the harassment or ostracism, in spite of complaints made by the respondent (including a written complaint in her self appraisal dated February 1993, to which no response was made) and her mother, whose evidence the tribunal accepted in its entirety, in a letter to Mrs Ewen dated 9 February 1992 to which no written reply was received. The tribunal found that Mrs Ewen was herself prejudiced against the respondent because of her transsexuality and that in December 1993, following the respondents suicide attempt, Mr O'Callagham wrote to Dr Dunham stating:

"Further to our discussion regarding [the respondent] I wish to go on record that I am not comfortable with having her on my staff."

8. The tribunal found that the reference to not feeling comfortable was very significant and finalised the position of the respondent being isolated. E also note that following her return to work after her suicide attempt she asked for a transfer, but none was forthcoming. She carried on, working on her own, unwilling to ask for assistance from the colleagues and conscious of their hostility towards her. The overall picture was left unaddressed by management.

9. No disciplinary action was taken to identify and discipline those responsible for harassing the respondent. The appellant was completely unprepared for any discrimination problem that may arise.

10. On 1 August 1994, the day following the termination of her employment, the respondent attended at the site to pick up her property. She was subjected to an offensive comment related to her change of gender and found that had yet again been stolen. On the same day she wrote to the appellant alleging sexual harassment.

11. On 4 August 1994, she married her female partner. The marriage certificate recorded her as a man.

12. On 29 October 1994, she presented an originating application to the industrial tribunal, complaining of sex discrimination, unfair dismissal under the wages act 1986. On 2 May 1996 she withdrew the latter two complaints.

13. The hearing of her sex discrimination complaint occupied the tribunal between 3 and 14 June 1996, leading to the decision and reasons promulgated on 31 July 1996.

The industrial tribunal decision

14. The material findings by the tribunal may be summarised as follows:

1. That the appellant's failure to act upon its knowledge of a concerted course of harassment to which the respondent was subjected by her work colleagues between 1991 and March 1994 constituted a continues detriment amounting to direct unlawful sex discrimination on the part of the appellant contrary to ss.1(1)(a) and 6(2)(b) of the Act. The appellant was also directly liable to the respondent under the Act.
2. It made no finding as to whether the appellant was also vicariously liable for the acts of its employee's under s.41(1) of the Act, although it did make a finding that if the appellant was vicariously liable, it had not made out the statutory defence under s.41(3).
3. The continuing act of discrimination terminated when the respondent went off sick on 2 March 1994. Accordingly, the complaint was presented outside the three-month primary period of limitation provided for in s.76(1) of the Act. Specifically, it ruled that the respondent could not rely upon the events of 1 August 1994, which occurred after the employment terminated; nor did the discrimination continue until terminated on 31 July 1994.
4. However, in the exercise of its discretion under s.76(5), it considered that it would be just and equitable to consider the complaint.
5. Accordingly, the complaint succeeded.

The appeal

15. The following issues raised by the parties' fall to be determined in this appeal:

1. Can the Act apply in a case where the complainant relies upon less favourable treatment following notice of intention to undergo gender reassignment?
2. Whether the industrial tribunal erred in law in finding that the appellant was directly liable to the respondent for unlawful sex discrimination.
3. Whether the tribunal ought to have found, additionally or in the alternative, that the appellant was vicariously liable for the relevant acts of its employees.
4. Whether the tribunal was wrong to find that the appellant as guilty of a continuing act of discrimination until March 1994.
5. Whether the tribunal was wrong to find that such continuing act terminated in March 1994.
6. Whether the tribunal was wrong to exclude the events of 1 August 1994 when determining the last act complained of for limitation purposes.
7. Whether the tribunal erred in law and/or reached a perverse conclusion in exercising its discretion in favour of allowing the complaint to proceed under s.76(5) of the Act.

16. It will be convenient to consider each issue in turn.

First Issue

17. The act provides:

'1. *Sex discrimination against a woman*

(1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if-

(a)on the grounds of her sex he treats her less favourably than he treats or would treat a man, …

2. *Sex discrimination against a man*

(1) Section 1, and the provisions of Parts II and III relating to sex discrimination against women, are to be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite

…

5. *Interpretation*

…

(2) In this Act-

"woman" includes a female of any age, and "man" includes any man of any age.

(3) A comparison of the cases of persons of different sex … under s.1(1) or 3(1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other

(6) *Discrimination against applicants and employees*

…

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her-

…

by … subjecting her to any other detriment.'

18. The Equal Treatment Directive (76/207/EEC) ('the Directive') provides by Article 5:

'1. Application of the principle of equal treatment with regards to working conditions, including the conditions governing dismissal, means that men and women shall be granted the same conditions without discrimination on grounds of sex.'

19. It is common ground that since the appellant is not an emanation of the state, the respondent can not rely directly upon the Directive. However it is equally clear that the 1975 Act must be construed consistently with the Directive in order to achieve the purpose of the Directive, if such a construction is possible: Marleasing SA v La Comerial Internacional de Alimentacion SA [1990] ECR 1-4135.

20. Mr Bowers submitted, however, that it is not permissible to distort the meaning of the statute. In this connection he relies first upon the House of Lords' approach in Duke v GEC Reliance Ltd [1988] IRLR 118. There the issue was whether a privet member's policy, whereby the normal retirement age for women was 60 and men 65, constituted unlawful discrimination contrary to the Act against the female appellant who was dismissed shortly after her 60th birthday. The House of Loads dismissed the complaint on the grounds that the employer's retirement' within the meaning of s.6(4) and therefore the dismissal was saved from being unlawful by virtue of s.6(4).

21. During the course of giving the leading speech, Lord Templeman observed (123, 29) that the Act was not intended to give effect to the Directive, and that the words of s.6(4) could not be distorted in order to enforce against an individual a Directive which has no direct effect between individuals, as constructed by the European Court of Justice in Marshall v Southampton and South West Hampshire Area Health Authority [1993] IRLR 445.

22. More recently, in MacMillan v Edinburgh Voluntary Organisations Council [199] IRLR 536, the Employment Appeal Tribunal sitting in Scotland (Mummery J presiding) held that an industrial tribunal had correctly held that the Act, when construed in accordance with the Directive, did not allow an award of compensation for unintentional indirect discrimination. It held that the clear words of s.65(1)(b) and s.66(3) could not be construed to accord with the provisions of the Directive. There was no ambiguity in the language of the statute; it is not permissible, in the guise of interpretation, to distort the language for the purpose of making the provision conform to the Directive.

23. Both Duke and MacMillan were clear cases in which the remedy sought was specifically excluded by the wording of the Act. Can it be said that the case of a transsexual, who experienced different treatment before and after notification of an intention to undergo gender reassignment, is excluded from the protection of the Act.

24. We begin with the position under the Directive. In P v S [1996] IRLR 347, the applicant, employed in an educational establishment by a local authority which was accepted to be an emanation of the state, informed the employer of an intention to undergo gender reassignment. After undergoing preliminary surgical procedures, the applicant was given notice of dismissal and bought a complaint of unlawful sex discrimination before an industrial tribunal. The matter was referred to the European Court of Justice for a preliminary ruling on the question as to whether the dismissal of a transsexual for the reason related to gender reassignment was precluded by Article 5(1) of the Directive. That Question was answered in the affirmative. At paragraph 20 to 21 of its judgement the court said (p.354):

'20. Accordingly, the scope of [Directive 76/207/EEC] cannot be confined simply to discrimination based on the fact that a person is of one sex or the other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or had undergone gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.'

25. The question raised under the first issue in this appeal, therefore, is whether the Act may read consistently with the purpose of the Directive as interpreted in P v S without doing impermissible violence to language.

26. Mr Bowers submits not. He submits that the basis of the Act is a comparison between a person of one sex and an actual or hypothetical member of the opposite sex. Less favourable treatment of a man than a woman has recently been emphasised in the Court of Appeal decision in Smith v Safeway plc [1996] IRLR 456.

27. He contends that the tribunal simply applied the reasoning in P v S to the Act, without considering the difference in language between the statute and the Directive. In particular, he submits that the structure of s.1(1)(a) and the reference to a comparison of the cases of different sex in s.5(3) make clear that there must be a comparison between persons of different biological sexes.

28. Conversely, the Directive lays down no requirements for a comparison between one case and another; it contains no definition of man and woman; the only question is one of causation, not comparison.

29. Further, the respondent has remained a biological male throughout. He relies upon the family case of Corbett v Corbett [1970] 2 WLR 1306, in which a marriage between a person born a biological male, who subsequently underwent a sex change operation, and a male was declared void. In reaching that conclusion Ormrod J stated at p.132F:

'Marriage is a relationship which depends on sex and not gender.'

30. Further, we have taken note of the ruling of the European Court of Human Rights in X, Y & Z v United Kingdom (The Times, 23 April 1997), to the effect that the United Kingdom's refusal to register a post-operative transsexual of the farther of a child born to a female partner by artificial insemination by a donor was not a denial of the respect of the applicant's family and privet life as guaranteed by Article 8 of the European Convention of Human Rights.

31. Ms Rose first submits that there is no clear language in the Act to exclude the case of transsexuals: cf Duke and MacMillan. We accept that submission.

32. She distinguishes the test for establishing a person's 'legal sex' in the context of marriage. Again, we accept that the distinction. A biological test is necessary in relation to marriage where heterosexual intercourse plays an essential part. That necessity dose not arises in relation to the Act.

33. We are also reminded of the course of events in Webb v EMO. When that case finally came before the House of Lords, following a reference to the European Courts of Justice, the house held that ss.(1)(a) and 5(3) of the Act were to be interpreted consistently with the

ruling of the European Court that it was discrimination on the grounds of sex contrary to the Directive for an employer to dismiss a female employee who was pregnant in circumstances where no direct comparison could be made with a male employee: [1995] IRLR 645.

34. Applying the same reasoning, where, as in this case, the reason for the unfavourable treatment is sex based, that is a declared intention to undergo gender reassignment, there is no requirement for a male /female comparison to be made. In these circumstances we interpret the 1975 Act consistently with the ruling of the European Court in P v S, and uphold the tribunals on the first issue.

Second Issue

35. In Burton v De Vere Hotels Ltd [1996] IRLR 596, this appeal tribunal held, in the context of a race discrimination claim, that an employer subjected an employee to the detriment of racial harassment if he causes or permitted the harassment to occur in circumstances in which he could control whether it happened or not. That case has since been cited without disapproval by the Court of Appeal in Jones v Tower Boot Co Ltd [1997] IRLR 168 per Waite LJ, paragraph 38.

36. In our judgement, similar principles apply in this case of sex discrimination, all the more so where

those responsible for the harassment are employee's and not a third party.

37. It is abundantly clear, on the tribunal's findings of fact, that here the appellant was aware of the campaign of harassment directed towards the respondent, but took no adequate steps to prevent it, although it was plainly something over which it could exercise control.

38. In these circumstances we can find no grounds for interfering with the tribunal's conclusion that direct liability for the sex discrimination suffered by the respondent lay with the appellant.

Third Issue

39. The tribunal found it unnecessary to rule on the question of the appellant's vicarious liability for the acts of its employees. It is strictly unnecessary for us to do so in light of our upholding the tribunal's decision on direct liability; however, in view of the subsequent Court of Appeal decision in Tower Boot, overruling the earlier majority decision of the Employment Appeal Tribunal in that case [1995] IRLR 529, we think it right to indicate our view that if the tribunal was wrong in its finding as to direct liability, we would affirm the results on the ground that the appellant was vicariously liable for the acts of harassment of its employees under s.41(1) of the Act, the tribunal having also found, permissibly, that on the facts the appellant had failed to make out the statutory defence under s.41(3).

Fourth to seventh issues

40. We have listed these issues separately, but Ms Rose accepts that if we uphold the tribunal's decision to exercise its discretion under s.76(5) of the Act, it is unnecessary for us to rule on the fifth and sixth issues which are raised by way of cross-appeal in relation to the primary limitation period under s.76(1). We shall in these circumstances turn to the seventh issue, to which the fourth issue relates on the tribunal's findings.

41. The tribunal dealt with the question of time limits in paragraph 51-53 of their reasons. It held that there was a continuing act of discrimination which terminated in March 1994. Accordingly, the originating application was presented outside the primary limitation period of three months. However, it went on to exercise its discretion in favour of extending time for the reasons set out in paragraph 53.

42. Mr Bowers's principle attack on the tribunals exercise of discretion lies in the finding, which the tribunal regarded as determinative, that there was here a continuing act rather than a series of unrelated matters between 1991 and 1994.

43. In our judgement, the tribunal was side-tracked by the distinction between a continuous act (see Owwsu v London Fire and Civil Defence Authority [1996] IRLR 574) and a series of separate acts of discrimination (see Sougrin v Haringey Health Authority [1992] IRLR 516); a distinction which is becoming increasingly difficult to draw (see Rovenska v General Medical Council [1997] IRLR 367). That distinction, on the authorities, is principally relevant to the date on which time begins to run for the purpose of the primary limitation period. For the purpose of exercising discretion under s.76(5), what is important is the tribunal's finding that there was a course of discrimination which continued over a period of years. That finding is unassailable, and is the relevant finding for the purpose of exercising the 'just and equitable' discretion.

44. It is well-established in authority that such a discretion is a wide one: Hutchison v Westward TV Ltd [1977] IRLR 69. It has been held in Hawkins v Ball and Barclays Bank [1996]IRLR 258 that reliance upon incorrect advice (there, by a lawyer; here by the respondents father) may be a relevant factor in considering this exercise of discretion.

45. Applying the approach taken in those cases, we are satisfied that the tribunal properly took into account relevant factors in exercising its discretion in favour of the respondent, and we can see no grounds in law for interfering with their conclusion that this case should be permitted to continue.

46. In these circumstances, we shall dismiss the appeal and make no order on the cross-appeal.

47. Finally, we are conscious that there has been some delay in promulgating this judgement. The reason for the delay is that a procedural point, arising out of an interlocutory order made by the president in the case has only recently been resolved.