

DA-v-Suffolk County Council (Employment Tribunal, Nov 1999)

Employment Tribunal ruling

November 1999

Foreword

This Employment Tribunal held that Suffolk County Council's decision to prevent a (trans woman) Social Services care worker from providing personal services to a client with a learning disability amounted to discrimination contrary to the Sex Discrimination Act 1975 (as amended by the Sex Discrimination (Gender Reassignment) Regulations 1999).

This case once again highlights the invidious position in which trans people and others are placed by the continued failure of the UK government to allow transsexual people full legal recognition in their new gender and, in particular, by the refusal to correct their birth certificates.

The applicant in this case was represented by a volunteer employment advisor from the Citizens Advice Bureau, Jan Cobb, who has not been legally trained. Jan is also a trans woman and a PFC activist.

Claire McNab, February 2000

Tribunal decision

Case Numbers 1501602/99, 1501152/99

Promulgated on 22/12/1999

The Employment Tribunals between

Applicant: Ms D.A.

Respondent: Suffolk County Council

Decision of the employment tribunal held at Bury St Edmunds on 30th November 1999

Chairman: Mr C R Ash

Members: Mrs S Moran, Mr B Orrell

Decision

The unanimous decision of the Tribunal is that the applicant's claim is well founded.

Representation

For the Applicant: Ms J Cobb, CAB

For the Respondent: Mr A J Gillespie, Solicitor

Extended reasons

1. The applicant is a transsexual female, having undergone full sex reassignment surgery on 28th June 1999. On 25th May 1999 whilst working as an assistant Day Care officer for the respondent Authority, she was told by the Manager of the Hadleigh Community Resource Units, Nicky Lamb, that she could not carry on caring for a female client with learning difficulties because the client's mother had objected to the service being provided by other than a woman. The applicant had been providing the service for the client before that date, effectively and satisfactorily.
2. The applicant brings a claim that she was discriminated against pursuant to the provisions of the Sex Discrimination Act 1975, as amended by the Sex Discrimination (Gender Reassignment) Regulations 1999, in that she was treated differently to that of other female members of staff. The respondents deny the claim and pray in aid 7B(2)(d) as a genuine occupational qualification in circumstances where the applicant provided valuable individual and personal services promoting the welfare of similar personal services, and in the reasonable view of the employer, those services could not effectively be provided by that person whilst undergoing gender reassignment.
3. We heard evidence from the applicant. Nicky Lamb, Community Resources Manager, Miss D Wilkinson, Personnel Officer and Miss A Wilkinson, Principal Personnel Officer gave evidence for the respondents. We took into account and agreed that bundle of documents and heard submissions from Mr Gillespie and Miss Cobb respectively. We reached the following relevant findings of facts on the balance of probabilities.

4. The applicant was first employed by the respondent Authority on 19th February 1998, as an Assistant Day Care Officer, with a requirement to provide occasional intimate, personal care to male and female service users in any of the Day Care centres in the Social Services Southern Division's Community Resource units. Since March 1999 she had, on occasions, given intimate personal care to a client with learning difficulties, one "D.L".
5. On 25th May 1999 the applicant was told by Nicky Lamb that as she was a pre-operative transsexual female she was not to assist with the personal care of D.L. due to the recent wishes of D.L.'s mother that male members of staff should not attend their daughter's personal care needs. Neither D.L. nor her mother knew that the applicant was a transsexual female. The applicant was told by Nicky Lamb that a Genuine Occupational Qualification (GOQ) could be attached to a future post involving the service user in question and she should not, in the circumstances carry out any more personal care with that user.
6. The applicant was employed on an as and when needed basis by the Hadleigh Resource Unit and a list of duties she carried out from time to time, are set out at page 54 of the agreed bundle of documents. The applicant was only paid for when she was working on a relief basis.
7. It is not disputed in this case that the applicant at all stages up to the 25th May provided care satisfactorily and effectively for D.L.
8. As a result of the wishes of D.L.'s mother, and funding being obtained from an outside source, a draught advertisement was drawn up in April 1999 to advertise for a dedicated post to care for D.L; the application was restricted to females.
9. The reason, and the sole reason, that the applicant was not allowed to carry on caring for D.L. was the wish of the mother that the carer should be a female. The Authority took the view that the applicant being a pre-operative transsexual was not a female, and until they'd had advice from the Equal Opportunities Commission personnel department and their own lawyers, that they did not wish the applicant to carry on caring for D.L. Understandably and without malice, and as a precaution, the respondents stopped the applicant caring for her.
10. The applicant was very upset by her treatment. She was of the view, rightly, that she was prima facie being discriminated against by reason of the fact that she was undergoing gender reassignment. She was, from the time she was employed by the Authority, treated as a woman, and this was the first occasion that she had been treated on any other basis. She refused to work in the Hadleigh Unit from then on. In due course, at the beginning of July 1999, she had her final reassignment operation, and at the end of July 1999 she learnt by letter that she would in future be treated, in every respect, as a woman.
11. Thus, the only complaint of discrimination in this case arises from the refusal of the respondent to allow the applicant to continue to care for D.L.
12. Mr Gillespie, on behalf of the Authority, relies primarily on Section 7B(2)(d), one of the supplementary exceptions relating to gender reassignment. That section provides that the Authority may discriminate where the holder of the job provides vulnerable individuals with personal services promoting their welfare, or similar personal services and in the reasonable view of the employer those services cannot be effectively provided by a person whilst that person is undergoing gender reassignment.

13. The problem confronting Mr Gillespie is that the applicant was providing effective services to D.L. before she was told that she could no longer do so. The reason for discriminating against her, and there is no dispute that there is prima facie discrimination in this case pursuant to Section 2 A of the Act, was because D.L.'s mother had specified that the carer should be female.
14. On the evidence we have heard, we are satisfied that the respondent never addressed their mind to the question of whether or not the service could effectively be provided by the applicant. The respondents, understandably, but without the exception provided by the statute, decided for reasons of prudence, taking into account the wishes of D.L.'s mother, not to allow the applicant to carry on until they had cleared up, in their own minds, the position in law.
15. Mr Gillespie also submitted that the applicant did not suffer a detriment at all because she could be allocated other duties at any time in her post. We find that submission too sanguine. The applicant took offence and, rightly, at being treated differently by reason of gender reassignment from a natural born woman; she was treated differently.
16. The degree of injury to feeling, if any, to the applicant and any consequential loss will be determined at a Remedy Hearing, the date of which will be communicated to the parties in due course.

(Signature Mr C R Ash) Chairman
RESERVED DECISION

Decision sent to the parties on 22/12/1999 and entered in the register

Transcribed by DA and proof read by Jan Cobb

» by Claire McNab