M-v-West Midlands Police (Industrial Tribunal, 1996)

Industrial tribunal ruling, 1996

This Industrial Tribunal ruling cruelly exposed the limitations of the current status of trans people in the UK, where even hard-won anti-discrimination protection can fall foul of the state's continued failure to legally recognise the status of trans people in their true gender.

Case Number 08964/96

The Industrial Tribunals between

Applicant: M
Respondent The Chief Constable of the West Midlands Police

And decision of the industrial tribunal held at Birmingham on 7 - 14 October 1996

Chairman: Mr A C Tickle
Members: Mr A J Jennings Mrs P M Linnell

Decision

The unanimous decision of the tribunal is that the application is dismissed.

Extended reasons

1. This application alleges that the respondent discriminated against the applicant on grounds of sex, in rejecting her application to join the West Midlands Police. The applicant is a transsexual. In 1992 she was diagnosed as suffering from gender identity dysphora. She received gender reassignment surgery in 1994 and regards herself as female. She presents as a female and is female in appearance.

2. In August 1995, she applied to join the West Midlands Police. She passed the initial test. She completed an application form in her present female name. She was waiting to be admitted to the extended test: she expected to be called for a medical examination. She was requested to provide copies of her school certificate, which were in her former male name. On her application form, she had stated that she had had corrective surgery. She spoke to the recruiting officer PC Somra, and explained that she had had gender reassignment surgery and wished to see the medical officer before the next assessment. Mr Somra referred the matter to superior officers. Superintendent Taylor, and eventually Assistant Chief Constable Wardle, dealt with the application. The applicant was never seen in respect of her application. On 29 November 1995, she received a letter, document 34, in which the respondent said that due to her gender reassignment, she would be precluded by law from undertaking certain routine duties that all police officers are required to perform on a daily basis, for example, the searching of persons in custody. The respondent also referred to practice and procedure often dictating that an officer of a certain sex will deal with a

particular incident. The respondent said that due to her reassignment, it was inappropriate for her to undertake these roles. As a matter of policy, the force was rejecting her application because it did not accept candidates who were restricted in any way from carrying out the full range of police functions. The respondent took the view that the applicant's legal sex was male.

3. The application is brought under the Sex Discrimination Act 1975, ("the Act"), and the Equal Treatment Directive, 76/207/EEC ("the Directive"). The case for the respondent is based on justification of the treatment afforded to the applicant under Article 2(2) of the Directive. Further, should the tribunal decide that, by reason of the decision of the ECJ in P-v-S (1996) IRLR 347, ("P-v-S") the Act also applies, the respondent says that there is a genuine occupational qualification which excludes the applicant. Both defences are based upon the premise that the applicant's legal status is male. If the tribunal were to find that the applicant's legal status was female, the respondent's case would be very differently cast, and indeed might fail in limine.

The applicant's legal status

4. Mrs Cox for the respondent submits that it is not appropriate for an industrial tribunal, as a matter of policy, to decide, on a case by case basis, how legal sex is defined, and quotes authorities and policy in support of her argument. Mrs Harrison for the applicant asks us to consider the legal sex of the applicant, and submits that, for employment purposes, the applicant should be regarded and treated as a female. That, she says, flows from the decision in P-v-S. "Woman", in Sections 32 and 5(2) of the Act, should be taken as including a transsexual, certainly a post-operative transsexual.

5. It is not our intention to review and quote from the authorities extensively. Nevertheless, it would be improper not to comment upon them in this decision, having regard to the submissions of Counsel. In Corbett-v-Corbett (1971) 2 AER 233, P83, the High Court dealt with the case of April Ashley. Mr Justice Ormrod concluded that the respondent, registered at birth as male and who, in 1960, had undergone gender reassignment surgery, was, in law, a biological male. The learned Judge held that to determine sex, for the purposes of marriage, the law should adopt the chromosomal, gonadal and genital tests, and if all three were congruent, to determine sex accordingly, ignoring any operative intervention. The term "change of sex" is inappropriate, except where there was a mistake as to sex at birth. We observe that "woman" was being considered in the context of marriage: the case did not determine the legal sex of the respondent for all purposes.

6. That decision was considered by the Court of Appeal in R-v-Tan and Others (1983) 1 QB 1053. The appellant was charged with living off immoral earnings. She had been born a male, but as a result of medical treatment, was psychologically and socially female. The Court held that a person, born a male, remained biologically a male and was a man for the purposes of the offence, even though the person had undergone operative treatment. "Common sense and the desirability of certainty and consistency," said the Court of Appeal, "demand that the decision in Corbett-v-Corbett should apply for the purposes, not only, of marriage, but also for a charge under Section 30 of the Sexual Offences Act 1956."

7. The applicant in this case was registered as male at birth. However, a birth certificate is no more than a record of historical fact, see most recently R-v-Registrar General for England and Wales ex-parte P & G, an unreported decision of the Division Court on 16 February 1996, which echoes earlier decisions of the European Court of Human Rights. In Cossey-v-United Kingdom 13 EHRR 622, it was held that an entry in the register of births and birth certificates are records of the fact at the time of birth. They do not constitute documents revealing current identity, only historical fact. They establish the connection of families for purposes relating to succession, legitimacy and distribution of property. (While this applicant's birth certificate shows her as male, most of her other documentation - social security, national insurance, income tax, passport, driving licence and the like - are in her female name.) Cossey was concerned with the United Kingdom's refusal to alter particulars on a birth certificate. The Court held that, although later in life a person's psychological sex may be at variance with the biological criteria, namely chromosomal, gonadal and genital, that does not mean that the entry on the record of birth was a factual error. It would be different where the sex of the child was wrongly identified at birth.

8. Cossey was decided 1990, and was in accordance with the Court's decision in Rees-v-United Kingdom (1986) 9 EHRR, 56, which pointed out that there was no document in the United Kingdom which constituted proof of current civil status, which could validly record current sex rather than original sex. The Court also said that a person may be regarded as male or female for different social purposes. In B-v-France, (1992) ECHR 1, the Court recognised that national laws were evolving in the light of developments in knowledge about the nature of transsexualism, but the question of sexual identity was still unresolved from the medical point of view. The law should fasten on the reality. Things were in a state of flux legally, morally and socially. The Court held that there was, as yet, no sufficiently broad consensus between member states of the Council of Europe to persuade the Court to reach different conclusions from the decisions in Rees and Cossey.

9. Medical opinion before us shows this evolution. A report in November 1995 hypothesises that gender identity stems from an inter-action between the developing brain and sex hormones, and notes that the possible aetiology of transsexuality has been debated for many years. A report produced for the Parliamentary Forum on Transsexualism, dated January 1996, records that, at present, legally persons who have been diagnosed as transsexual immediately lose a substantial part of their civil liberties. It refers to the test in Corbett. The report notes that the test has been applied to transsexuals in employment by placing them outside the remit of the Sex Discrimination Act: it refers to the Advocate General's opinion in P-v-S. It suggests that scientific knowledge has progressed considerably since Corbett and that the evidence used then is no longer reliable. Medically, there is no reason they say, why people receiving treatment, or who have received treatment for transsexualism should be given any lesser legal status than any other person. The present status acts as a stigma which marginalises individuals who have no visible or obtrusive differences from others, and entails a lack of substantive employment rights.

10. In February 1996, the Divisional Court in ex-parte P & G, in considering an application to alter entries in the Register of Births, recognised that the Corbett criteria on their own may be outdated, but concluded that medically, the definition of the sex of individuals is still unresolved. The Court expressed reservations about Dr Reid's evidence that the construction of the brain was the key.

11. In P-v-S, the European Court held that the scope of the Directive was such as to apply to discrimination arising from the gender reassignment of the person concerned. On dismissal, 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. Dismissal of a transsexual for a reason related to gender reassignment must be regarded as contrary to Article 5 of the Directive. The Court referred to the nature of the rights which the Directive seeks to safeguard. To tolerate such discrimination would be "tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the court has a duty to safeguard." The arguments behind that decision are set out in the Advocate General's opinion. He recognised the growing support in medical and scientific circles for a redefinition of sex, but did not propose that the Court should follow that path. The idea, however, that the law should deny protection to those who are discriminated against by reason of sex, merely because they fall outside the traditional man/woman classification, was obsolete. His opinion was that, where unfavourable treatment of a transsexual is related to, or rather caused by, a change of sex, there is discrimination by reason of sex, or on grounds of sex, if that is preferred. He said that transsexuals did not constitute a third sex, and so were protected by the Directive. He was, we think, proposing that the court regard transsexualism as a characteristic which relates to sex, and adverse decisions made against such people on that basis are decisions which are discriminatory, based or grounded as they are upon sex. Crucially, the opinion did not call upon the Court, nor did it, to consider whether the applicant was legally female. The equal treatment afforded by the Directive applied to transsexuals, irrespective of the issue of the legal status of the person.

12. Finally, we refer to the short statement of Doctor Russell Reid produced in evidence. He is an expert in this field. His conclusion is that the applicant qualifies in all regards as having the condition of transsexualism and has made a successful adjustment to cross-gender living. Essentially, "she is a woman socially, psychologically, hormonally and since surgery, able to function sexually as a woman. Despite still being chromosomally male and lacking the internal sex organs of a woman, recent studies suggest that she may have the micro-anatomical brain structure of a woman." We have considered that in the light of the medical opinions and theses, documents 52 to 91. We find that medical opinion is not yet certain or clear, as did the Divisional Court in February 1996, who considered the present medical position in depth.

13. Against this background, is it appropriate to say that the legal status of the applicant has changed from that of a male? The respondents say that, as a matter of policy, it is inappropriate for an industrial tribunal to decide legal sex or how it should be defined. However, the nature of our law is that such an exercise has to be undertaken by some court or other on case by case basis, reviewing the evidence before it. On the evidence before us, the medical case for a change of legal status has not been made out. Medical opinion is not settled, but still developing. No definitive opinion has emerged. While we accept that medical science and society is developing all the time and that the law must be responsive, the situation has not developed to such an extent that we could be satisfied, on balance of probabilities, that the legal status of the applicant has altered. We accept that the applicant might have a different gender status for different purposes, - Corbett decided the issue of marriage, Tan decided matters relating to the Sexual Offences Acts 1956 and 1967. Legal status in an employment context could be decided differently. However, for the reasons already set out, we do not consider there is evidence upon which we can depart from the Corbett test which is chromosomal, gonadal and genital. Dr Reid states that the applicant

retains the male chromosomes. It has not been suggested that we use another test - given the state of medical knowledge and opinion, no satisfactory alternative exists upon which there is a consensus. Further, legal authorities, including P-v-S, do not require us to treat a transsexual as female or as a woman for the purposes of the Sex Discrimination Act or the Directive. On the medical evidence before us, we are unable to conclude that the applicant's sex has changed, and it is inappropriate to decide otherwise. The applicant's sex, as revealed by her chromosomes, is male. For the purposes of this application, this applicant has male status.

The Facts

14. As set out above, the applicant applied to join the West Midlands Police in 1995; her application is document 1 Section 69. She passed the initial recruitment test. She was awaiting the extended assessment procedure. On 16 October, she telephoned the recruiting department and stated that prior to August 1994, she was of the male gender and that she had undergone gender reassignment surgery. Her name had been changed by statutory declaration. She had supplied her medical history in her application; she stated that she was taking a synthetic oestrogen replacement, and that she had had corrective surgery in 1994, "details of which are private and would not affect my ability to do a job. 1 would discuss this with the medical officer if required". The matter was referred to senior officers.

15. The West Midlands Police has an Equal Opportunities Policy for police officers and civilian staff: procedures supporting that policy are in place. These apply equally to applicants to the force. We are satisfied the respondent was concerned to consider the application in a fair and proper manner, and in accordance with the Policy.

16. Mr Somra sought advice on the legal, medical and Equal Opportunity issues. The force has some 5,900 male police officers and 1,300 female officers. It has within it declared homosexuals. This can give rise to managerial problems, said by Assistant Chief Constable Wardle to relate to welfare matters rather than operational issues. The advice upon which senior officers made the decision in this case is at documents 27 seq. PC Somra summarised the position in a memorandum to Chief Inspector Monahan, who was in charge of recruiting.

(a) The Home Office Policy Unit had said it was a matter of local policy. (b) A similar application had been received by the Devon and Cornwall Constabulary in 1995: a male police sergeant, who had resigned in 1989, underwent corrective surgery and reapplied as a female applicant. She was allowed to undergo the three day selection process, but failed a physical fitness test. (c) As a matter of law, the gender of an individual cannot be changed. (d) The problem areas were the search processes under the Police and Criminal Evidence Act 1984 ("PACE") and the Codes of Practice ("the Codes"). Mr Kilbey, of the Legal Services Department, was of the opinion that because of these, all searches carried out by such an officer would be unlawful, and therefore the applicant would not be able to perform all the duties expected of a police officer. (e) The Chief Medical Advisors report (page 29) stated that the applicant was likely to be quite healthy and pretty fit, but he thought that there were bound to be quite marked, psychological upsets associated with the sex change. "It is very difficult for such an individual to orientate themselves into society." The majority of relationships with a partner are doomed to failure. Suicide is a much higher risk. (He had not met the applicant). He also stated that he could understand the circumstances of strip search and agreed it could cause annoyance, embarrassment or anger if such a sex change officer

were to be involved. Police station scenarios of locker changes might create some difficulties. Such an officer would be unable to fulfil her multi-various roles. (f) The advice of Mr Spence, solicitor, at page 29A, stated that at law an individual cannot change gender. The applicant therefore remains a male and cannot carry out all the functions and duties of a police officer, in particular the searching of suspects. He noted the possibility of objections from fellow female officers. He advised that the application should not proceed, and that it should be refused on the basis of physical incapability to carry out certain aspects of the job. "Should similar applications be received, policy should remain the same, as obviously the same difficulties will persist."

17. Mr Monahan agreed with this advice, and passed the documents up the management line, eventually to Mr Wardle, the Assistant Chief Constable, who decided that the application should be refused on the basis of the documentation referred to. The letter rejecting the application is document 34, from which we quoted earlier.

18. The respondents case is that, as a matter of policy, it does not accept candidates who are restricted in any way from carrying out the full range of policing functions. While noting that there was no such policy in writing, and that candidates are not told this when information about joining the force is sent to them, we are satisfied that that was the basis upon which the respondent refused the application.

19. The respondent relies on The Police and Criminal Evidence Act, the Codes issued pursuant to that Act and the force's Procedure Manual ("the Manual") which reflects the purpose of those statutory enactments. Part V of PACE deals with "Questioning and Treatment of Persons by Police". Section 54 concerns searches of detained persons. Subsection (6) permits a person to be searched "if the custody officer considers it necessary to enable him to carry out his duty" to record everything a person has with him when he is either brought to the station after being arrested or, when he is arrested at the station. "That search shall be carried out by a Constable" (Subsection (8)), and that Constable "shall be of the same sex as the person searched" (Subsection (9)). We have taken the word "shall" in Section 54 (9) as mandatory, in the absence of legal authority to the contrary. Intimate searches are dealt in Section 55. Subsection (7) states that a constable may not carry out an intimate search of a person of the opposite sex.

20. The Codes of Practice are issued pursuant to Section 66 of the Act. Under Section 67(8), police officers are liable to disciplinary proceedings for a failure to comply with any provision of a code, though that does not of itself, render the officer liable to any criminal or civil proceedings. (Section 67(1)). The provisions of a Code are admissible in evidence in all criminal and civil proceedings Section 67(11).

21. The relevant Code is Code C, which is shown at document 47 seq. "Conduct of the Search" has an important general statement at its outset: Paragraph 3.1

"Every reasonable effort must be made to reduce to the minimum the embarrassment that a person being searched may experience".

Searching by consent and seeking the co-operation of a person to be searched, principles next set out, have been emphasised. These are regarded as essential by the respondent. A forcible search should only be made if it is established that the person is unwilling to co-operate or

resists. The length of time for which a person may be detained, while depending on the circumstances, must be reasonable - paragraph 3.3, and the search must be conducted at or nearby the place where the person was first detained - paragraph 3.4. Examples of protection of public decency are found in paragraph 3.5:

"When, on reasonable grounds it is considered necessary to conduct a more thorough search…. this shall be done out of public view, for example, in a police van or police station if there is one nearby. Any search, involving the removal of more than an outer coat, jacket, gloves, head gear or footwear, may only be made by an officer of the same sex as the person searched and may not be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it."

The Notes for Guidance, 3B emphasise that the search of a person in public should be a superficial examination of outer clothing and that such searches should be completed as soon as possible: there is no restriction on the sex of the officer conducting such a search.

22. Intimate searches are dealt with in Annex 4 of the Code (Page 51 of the documents). Paragraph 6 stipulates that where such a search

"is carried out by a police officer, the officer must be of the same sex as the person searched. No person of the opposite sex, who is not a medical practitioner or nurse, shall be present."

The same rules apply to strip searches.

23. Superintendent Taylor was the respondent's Head of Career Development and Employment Services at the material time. He considered these provisions in evidence. Duties specific to the sex of an officer arise as a requirement either of law, or of common decency and privacy. Paragraph 3.1 of the Code is clearly based on considerations of common decency and privacy - we agree. This is also the basis for the provisions in the respondent's manual which deal with same sex operations, - page 38 seq.

(a) A custody Officer, of a different sex to the detained person, has an obligation to obtain the services of an officer of the same sex as the detained person. He or she will then hold the key to the cell or detention room during the time the detained person is in custody, and will be responsible for that person's welfare needs. (b) In cases of prostitution, a woman can be directed to a police station to see a police woman for assistance. (c) In sexual offences, the services of a woman detective officer, or an experienced woman uniformed officer on duty, should immediately be sought, and she should be present during any medical examination of the victim. (d) In child abuse and domestic violence cases, officers of a particular gender may be called upon to deal with victims, defendants and witnesses, depending on the circumstances.

24. There were also circumstances where victims, suspects or witnesses request to be dealt with by an officer of a particular sex: the force tries to comply with such a request where possible. If a prisoner is in hospital with a police guard, there is always an officer present of the same sex as the prisoner. Where the suspect is a transsexual, officers try, where possible, to follow the wishes of the transsexual and arrange for that person to be searched by a person of the same sex as the transsexual wishes to be regarded. However, officers have to comply

with the Act and the Codes where they are gender specific.

25. Mr Taylor also considered operational difficulties. What physical training test should the applicant undertake - male, as in law, or female as she now is? Where should she reside during her training - with the females or males? There might be problems in the use of locker room and shower facilities. Should the applicant dress as a woman in police uniform? These are not the kernel of this case, it is agreed. Nor should they be. The respondent never saw the applicant before refusing her application. She is extremely feminine. We have no doubt that she would pass for a woman: nobody, unless they knew of her circumstances, would question her sex. These "problems" could have been overcome by treating the applicant as female, as had happened in her previous employment: there, she used the female facilities, and was accepted by her female colleagues. A sympathetic employer, carefully managing the situation, would experience little difficulty with this applicant. That, however, is not the issue in this case.

26. All applicants accepted into the force undergo a probationary period of 2 years, during which time they work as operational police constables. There are 9 divisions in the force, which are sub-divided into units to police the streets. All probationary constables are assigned to such units. These operate round the clock on a shift system and are responsible for all police matters outside the police station. There is a familiarisation process for the first two weeks. 10 weeks is then spent at a training school. The remaining time is spent on modular work. The period of probation can be extended.

27. We find that a core task of a constable is searching members of the public and suspects. This skill is the subject of training during the probationary period. It is part of the acquisition and development of what Mr Taylor calls "street craft," and we are satisfied that it is an integral and essential part of any police constable's responsibilities. Skill in street craft can diffuse potentially confrontational situations. Policing in this country is by consent - the police force is not armed. It is vital that officers learn to recognise potential problems before they happen: searching of persons in the street is clearly potentially confrontational. Consent is less likely to lead to confrontation, violence and other trouble. A search may involve collection of evidence, protection of the officer carrying out the search, protection of colleagues, and of course protection of the public. All these are jeopardised if the officer is unable to search lawfully.

28. We recognise that several times more males commit crimes than females. But the sexual makeup of the force to some extent reflects this, in that there are 4 times more male officers than female officers, though it is likely, even so, that female officers will search individuals less regularly than male officers. Nonetheless, statistics within this force indicate that the requirement to search is significant. There were 17,000 PACE searches last year, but consent searches exceeded that number. Further, 112,000 persons were detained, all of whom had to be searched in custody: the vast majority were also searched outside the police station beforehand too. Overall therefore, in 1994, there were over 250,000 searches of persons, many, of course, by consent. With a force of 7200 officers, 1300 of whom are females, we are satisfied that a female officer will carry out a significant number of searches annually. In 25 years experience, Mr Taylor has never encountered a search of a male by a female or visa versa.

29. Mr Taylor was asked to consider the situation, which does occur in police stations, where no female officer is present on duty: a female officer is summoned from other duties to search the prisoner. However, if the applicant was the female in the unit (all units have at least one female officer), it would still be necessary to summon another female officer to search the female in custody. In a street situation, where a search, other than superficial, has to be carried out by an officer of the same sex, officers may be summoned by radio if need be. (Such occurrences are not that frequent). However, in such a situation, the applicant would have to summon a female officer. This makes her less effective - two officers doing the job of one. It could also cause a loss of credibility with the person being searched: why should an apparently female officer summon another female officer to do that which the detained person might expect the applicant, a female, to do? Contrariwise, says Mr Taylor, because the applicant presents as a female, she would, as a matter of practice, be disqualified from carrying out searches of males on grounds of common decency and privacy. So, Mr Taylor, concludes, the applicant as an officer would have to call for assistance in every case where a search was other than superficial. If it were otherwise, the applicant would be committing an indecent assault. As a legal male, although presenting as a female, searching a female, even by consent, would be an indecent assault, because such consent would not be genuine, because the person being searched would not know the applicant was a transsexual. If the fact had to be spelt out each time, the force would lose credibility in the community. Within the force, there would be a loss of effectiveness - another officer would always be involved in a search, wasting time and resources.

30. Mr Taylor distinguished homosexual or lesbian officers. Under the Act and Codes, they may search persons of their own sex and there is no need for other officers to know their sexual orientation. In the applicant's case, officers with whom she worked would need to know that she was a transsexual, so that she was not ordered to do an illegal act. Unlike homosexual officers, her effectiveness is limited: she could not carry out all the duties required. The force could not guarantee that someone else could always cover for her, nor should there be any such requirement, since it limits the effectiveness of the covering officers as well.

31. Mr Taylor accepts that if the law were such that her legal status was female, there would be no problem, because she could carry out her duties lawfully. It might still create difficulties with the public if they discovered they were being, or had been, searched, not by the apparent woman before them but by a transsexual, but the respondent would accommodate her. But as the law stands, as he sees it, any search by the applicant could be challenged in court. Searches by other officers might then be challenged similarly, such that officers would have to prove their sex in court. Further, persons detained might decline to be searched until the officer proves their gender. This was not fanciful, in his view: PACE searches are likely to involve more awkward people, of their very nature: it could amount to an important problem.

32. Could the applicant be recruited as a restricted operational officer? The answer is no. The force has a small number of officers on restricted duties. However, we are satisfied that none of those officers joined the force on restricted duties: they are presently on restricted duties because of an injury or disability sustained while employed by the respondent. Further, duties to which they have been assigned are limited in time, because there is a

requirement that officers should return to operational duties within a specified time, or else be medically retired. The policy is to recruit officers, who are able to perform all operational duties.

33. We were impressed by Mr Taylor. He was a quality witness giving quality evidence. He was supported by Inspector Bottomley, a female officer who has been attached to the family protection unit and has specialised in domestic violence and child abuse cases. She confirmed that there are many occasions when the services of female officers are required during a tour of duty, including searching female suspects inside and outside the police station, in matters of welfare and the like. She foresaw embarrassment to officers and the public, should it be necessary to explain the status, legal or physical, of an officer who has undergone gender reassignment. The moral sensibilities of ethnic minorities might be outraged. This contrasts with officers of, say, homosexual orientation, who can continue to act in accordance with the law. She confirmed that searching was a vital part of an officer's duties: she had undertaken an average of 2 to 3 searches a week. She gave further examples of the extent of the duties which might be required of the applicant - searching persons entering turnstiles at football matches; participating in drug raids which involved searches, critically for evidence; responding rapidly to situations, affrays and the like. Much of this occurs at short notice, and can affect any unit. You cannot pick and choose. She confirmed that rapport with persons suspected of crime, and members of the public who are being searched, can be lost very quickly and consent withdrawn - the situation can quickly become confrontational. Searching persons is a core task, requiring training and an essential element of the acquisition of street craft.

34. We accept the evidence of Mr Taylor and Inspector Bottomley. They clearly explained the requirements of a constable and why there was a need for every officer to be able to perform all operational duties to maintain their effectiveness, the efficiency of the force, and the trust and credibility of and within the community.

35. We are completely satisfied that this was a genuine application to the force. The applicant was keen to accept the challenge of the job. She had worked for 9 years as a service technician for an office equipment company. However, her salary had been frozen and her career prospects were extremely limited, hence the desire for a career change. She is extremely feminine looking. She is also strong minded, experienced in life and well able to cope with difficult situations. She saw the job as having career and promotion opportunities. In her application, page 24, she expressed the hope that the West Midlands Police Force would offer her "the chance to impress" and give her "the opportunity to become a fully trained, valued police officer". She did not want to be treated differently, though, given her circumstances, she was prepared to compromise if need be. She wanted to participate fully in the demanding and challenging role of a police officer. Her biggest disappointment was not being interviewed by the respondent on a one-to-one basis at any time - she felt she was just a paper name.

The Law

36. We are indebted to the written and oral submissions of counsel, in the course of which many cases were referred to and examined: a list of these is appended to this decision. In applying the law to the facts of this case, we deal first with the Equal Treatment Directive.

37. It is accepted, and we so find, that the respondent is an emanation of the state as defined in Foster-v-British Gas (1990) IRLR 353. It is also not disputed, and we so find, that:

(a) the respondent discriminated against the applicant in rejecting her application on the grounds of her being a transsexual; (b) this constituted discrimination on grounds of sex within the meaning of the Directive; and (c) this was a breach of Article 3 of the Directive.

The respondent relies on Article 2.2 of the Directive:

"This Directive shall be without prejudice to the right of member states to exclude from its field of application those occupational activities and where appropriate, the training leading thereto, for which, by reason of their nature, or the context in which they are carried out, the sex of the worker constitutes a determining factor".

The respondent says that its decision to reject the applicants application to join the force, was based on the need for conformity of the apparent and legal sex. That constitutes a determining factor, having regard to the nature of the activities - that of fully operational police officers - and the context in which they are carried out. Mrs Cox submits that the decision was justified as being appropriate and necessary in the circumstances of the case. The principle of proportionality is also observed: no alternative non-discriminatory means were available to achieve the necessary result.

38. The European Court in Johnston-v-Chief Constable of the Royal Ulster-Constabulary (1987) ICR 83, at page 104, held that Article 2.2 "being a derogation from an individual right laid down in the Directive, must be interpreted strictly". The Court also emphasised the principle of proportionality, which

"requires the derogation remain within the limits of what is appropriate and necessary for achieving the aim in view, and requires the principle of treatment to be reconciled, as far as possible, with the requirements of public safety which constitutes the decisive factor as regards the context of the activity in question".

(That case concerned the arming of police officers in Northern Ireland.) It is for the National Court to say whether the reasons on which the decision was based are in fact well founded and justify the specific measure taken. The National Court should "ensure that the principle of the proportionality is observed".

39. Mrs Harrison submits that the respondent cannot rely on the derogation in the Article: the Sex Discrimination Act 1975 does not exclude transsexuals from any occupational activities on the grounds of the sex of the worker: the legislation covers transsexuals. For reasons we give later, we disagree that transsexuals are covered by the Act. We are satisfied Article 2.2 can apply to the respondent since it is an emanation of the state. She submits then that the derogation does not apply because sex is not a determining factor in the recruitment and

employment of the police officers. They are all employed to carry out identical tasks, only some of which are sex specific. However, we find that those tasks which are sex specific are occupational activities where sex is a determining factor by reason of PACE and the Codes. In that case, she submits, the respondent is seeking to rely on factors which are themselves discriminatory on grounds of sex, by applying a definition of sex by reference to the applicant's legal status. That is sex discriminatory in nature, and one cannot rely upon exclusions in national law to justify discrimination - see the decision in Decker (1992) ICR 325. Mrs Cox agrees that the respondents case relies upon the definition of legal status in national law, that is to say the Corbett test, as applied to PACE and the Codes.

40. We have found that the Corbett test is the appropriate test to decide legal status in the United Kingdom for this purpose: no new test of sex is yet available. Although we were not asked to do so by Mrs Harrison, we did consider whether a reference to the European Court was necessary, the possible question being whether the Directive should be interpreted in such a way as to render unlawful provisions of PACE and the Codes whereby a police officer, charged with the duty of searching persons in particular circumstances, must be of the same sex as the person to be searched, when the police officer is legally of a different sex from the person to be searched, but is a transsexual, and by appearance and presentation therefore apparently of the same sex as the person to be searched. However. we decided it was unnecessary to do so since the test of sex set out in Corbett has been examined in detail in superior courts in Europe and the United Kingdom, most recently in 1996, and has been upheld. Consequently we consider that the provisions of PACE and the Codes are not discriminatory on grounds of sex, relying as they do upon a test which has been approved by courts in Europe and the United Kingdom. It is not, therefore, a discriminatory test. Even in P & S (sic), the Advocate General stressed there was no third sex. A transsexual must therefore have a legal status either as a male or a female. It must be for Member states and national courts to decide what is the appropriate legal status. In the United Kingdom, the applicant's legal status is male. We therefore reject the applicant's submission that the respondents are not allowed to rely on the derogation provided by Article 2.2, or that they are relying upon discriminatory provisions of national law in order to prove justification.

41. Has the respondent justified the admitted discriminatory treatment of the applicant on the facts? The decision to reject the applicant flow directly from the conflict between the apparent and the legal sex of the applicant. The respondent relies principally on particular duties of operational officers which must legally, or in some cases should procedurally, be carried out by officers of the same sex as the person with whom they are dealing. These relate primarily to searching of persons, in the street and in custody. The force must protect the human rights of such persons, among them the right to be treated in accordance with principles of decency and privacy, and in accordance with the law. The European Court recognised in The Commission-v-United Kingdom (1984) ICR 192 at page 217 that derogation is likely to be determined case by case, and that personal sensitivities may play an important role in the relations between the parties in a particular case. Reconciliation of the principle of equality of treatment with the fundamental principle of respect for private life is one of the factors which must be taken into consideration in determining the scope of the derogation provided for in Article 2.2.

42. We have no doubt that it is appropriate for this tribunal, as the National Court, to have regard to the right of persons to be treated in accordance with principles of decency and privacy. Code C recognises that at paragraph 3.1: "Every reasonable effort must be made to

reduce to the minimum the embarrassment that a person being searched may experience". It is apparent that decency and privacy are factors which condition the circumstances of all searches under the Code - a thorough search must be done out of public view, and as soon possible; persons searching and others present in specified circumstances must be of the same sex as the person being searched. Further, Section 54(9) of PACE is mandatory, we consider, out of respect for the decency of persons being searched. Officers are required to follow the Act and the Code: failure to do so amounts to a disciplinary offence. They also run the risk that in court proceedings, any evidence obtained by a search in breach of the Act or the Code may be ruled to have been obtained unfairly, and therefore not be placed before the jury or magistrates, thereby adversely affecting the prospect of success for criminal prosecutions.

43. The ability to search is a fundamental requirement of any operational police officer - a core task. Mrs Cox described it as one of the building blocks of an officer's policing skills. We are satisfied that the respondent quite appropriately expects officers, on joining the force, to be fully trained in all operational duties. Insofar as there are some officers undertaking limited roles, we are satisfied that they were not, on joining the force, restricted from carrying out all operational duties: subsequently, through injury or otherwise, they became unable to perform certain duties. Unless they could resume all duties in time, those officers would be retired from the force.

44. We find that it is reasonable, appropriate and necessary to require full flexibility from officers on duty. Policing is largely a reactive activity by its very nature. Police have to be ready to respond to all emergencies and activities straightaway. It would, in our judgment, be unreasonable for the force to be expected to provide cover for searches which involve the applicant. One can never predict when they are necessary, or the circumstances, or the availability of other officers. Further, we find that the credibility of the applicant and also the force was likely to be undermined in circumstances where she had to call for a female officer to assist her, and that it could lead to legal challenges of otherwise lawful searches. We are satisfied that the applicant could not legally search females and could not search males by reasons of decency and privacy. She was thus prevented from carrying out searches at all. We are satisfied that sufficient searches are required on a regular basis as to make exclusion from the duty of searching a wholly inappropriate proposition: the force would be employing an officer with limited effectiveness. Consequently, we find that it was appropriate and necessary to require all applicants, at the time of their application, to be able to perform the full range of policing duties.

45. We have considered proportionality. We have no evidence as to the numbers of transsexuals in the population. It has not been challenged that the applicant is the only transsexual, who has not been a police officer before, who has applied to join the police force. We are satisfied that a finding that the treatment of the applicant was justified does not affect a significant number of people. We compare that with the disruption to the effectiveness of the force if it accepted the applicant. We are satisfied that the respondent cannot realistically take less discriminatory measures, and exclude the applicant from carrying out searching duties. The respondent has proved that it is necessary, for an effective police force, for officers to be able to carry out all operational functions: the evidence meets the objective justification required.

46. Mrs Harrison submits that it is not proportionate for the respondent to exclude the applicant from specific activities because these do not require the applicant to be legally male

or female. A psychologically and physically congruent male to female transsexual should be properly treated in all respects as a female. We reject those submissions. The provisions of PACE and the Codes refer to "same sex": they do not say "appears to be of the same sex". It is appropriate for the force to take the view that a person is of the same sex as the person searched if they are legally of the same sex, applying the Corbett test. In our view, the force's policy is appropriate and necessary for achieving a legitimate aim - namely, an effective police force staffed by fully operational officers. The policy is transparent: there is a lack of conformity between legal and apparent gender. It is also adaptable, in that if the Courts rule otherwise than at present, the policy can be reviewed, and as Mr Taylor said, the force would accommodate transsexuals.

47. Accordingly, we find that the respondent has justified the discrimination and satisfies the derogation provided by Article 2.2 of the Directive. The application on that ground is dismissed.

48. We turn to the Act. We are asked by the applicant to construe the Act so that it applies to the facts of this case. We are referred to the ECJ decision in Marleasing (1990) ECR 435.

"In applying national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret it, is required to do so as far as possible in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter".

49. Mrs Harrison submits that to include discrimination on grounds of transsexuality does not result in impermissible distortion of the wording of the Act. Rather, it is to give a broad construction to "sex" consistent with the objectives of the Act, that being equality between persons. The requirement of a comparator should be interpreted so as to not to embody the discrimination complained of. Transsexualism is a gender based condition, inherently linked with the sex of the person. The comparison required by Section 5(3) of the Act should be between a male and a person who is female because of being transsexual. That is to say, to look how the applicant would be treated if she had stayed male legally and factually, and compare that with her treatment once it is known that she is transsexual, - female by diagnosis or female by reason of gender reassignment surgery. We are dealing with the latter in this case. That is the comparison that the European Court applied in P & S.

50. Mrs Cox submits that it is not possible to construe the Act to accord with the Directive without impermissible distortion of language. The Act contains no express provisions relating to transsexuals, and proceeds on the basis of a comparison between a legal male and a legal female. The comparison propounded in P & S is not permissible.

51. Section 5(2) and 82 of the Act define "man" as including a male of any age and "woman" as including a female of any age. Neither section refers to legal sex. Mrs Cox says the Act proceeds on the basis of legal sex - transsexualism was not contemplated. Both advocates agree that there is ambiguity and that, using the principles in Pepper -v- Hart, we may refer to Hansard. Regrettably, in our view, that merely muddies the waters. In our bundle, we have the report of proceedings on 24 April 1975. The question was asked of the Government "Are they sure that the Bill either here or elsewhere adequately and clearly covers the cases of sex change which we read about occasionally and which we should hate to be overlooked in such

a comprehensive Bill". Dr Summerskill for the Government replied as follows:

"We considered this. Clearly people who have legally changed sex will be covered by the Bill under whatever sex they have legally changed to. Clause 5 goes out of its way to provide key definitions for the purposes of the Bill and it provides that sex discrimination means discrimination falling within Clause 1 or 2, that is discrimination against a woman or a man. The point that the Honourable Gentleman raised is covered".

52. Mrs Cox suggests the answer was referring to persons who were biologically inter-sex and who could therefore legally effect changes to their birth certificates. It cannot, she says, refer to transsexuals because they could not legally change sex, as the Court had decided in Corbett in 1970. Mrs Harrison rejects that. A person defined as inter-sex has not changed sex - the change to a birth certificate was merely correcting a mistake. She submits, with some justification, that the question had in mind transsexuals and the April Ashley case, Corbett -v- Corbett. However, the answer is less than helpful because it cannot cover the Corbett decision. Dr Summerskill, twice, referred to persons who have "legally changed sex". That, says Mrs Harrison, refers to the fact that gender reassignment surgery was legal and that therefore one could legally change sex in fact. It was not a crime, unlike abortion at the time, to effect a sex change. We appreciate the force of that argument, but it seems to us that the Minister's answer is itself ambiguous and not conclusive. We are not assisted by Hansard.

53. We turn to Webb -v- Emo Air Cargo, No2 (1995) IRLR 645. The House of Lords had referred a question to the European court, who decided that Article 5 of the Directive prevented dismissal of an employee, recruited for an unlimited period, who cannot work because shortly after recruitment she is found to be pregnant, because it would be discriminatory. The House of Lords then had the problem of construing the Act in accordance with that ruling. They did so by retaining the fundamental comparison between a legal male and a legal female. The comparison used was between a male, and a female performing her natural biological function, but for the purposes of Section 5(3) of the Act, the latter sex specific function had to be taken out of the relevant circumstances, leaving the comparison as between a male and non-pregnant female. However, in this case we are required to make a comparison between a male and a male who has undergone reassignment surgery - someone who is female by presentation and appearance because of being a transsexual. The essential comparison required by the Act - namely the comparison between a male and a female - is missing.

54. Can the case nevertheless be brought within the Act? In Macmillan -v- Edinburgh Voluntary Organisations Council (1995) IRLR 536, the EAT, presided over by Mr Justice Mummery, considered Sections 65 and 66 of the Act which deals with unintentional indirect discrimination. The Act does not permit compensation for such discrimination. In Marshall No.2 the ECJ had decided that the exclusion of compensation in such circumstances was contrary to the provisions of the Directive. Mummery J. referred to Lord Templeman's judgment in Duke -v- GEC Reliance (1988) IRLR 118, who held that it was

"for a United Kingdom Court to construe domestic legislation in any field covered by a Community Directive so as to accord with the interpretation of the Directive as laid down by the European Court, if that can be done without distorting the meaning of the domestic

legislation".

The EAT in Macmillan was unable to construe the clear words of the Act to accord with the provisions of the Directive. Any suggested wording was tantamount to a distortion of the meaning of the Act. That was not permissible in the guise of interpretation. The EAT was being asked to dis-apply provisions of the Act and that was not a permissible exercise.

55. It seems to us that we have a similar problem. The Act states that discrimination occurs if a woman is treated less favourably than a man on the grounds of her sex. Equal treatment in the Directive means that there shall be no discrimination "on grounds of sex". That phrase, "on grounds of sex", enables gender based characteristics more easily to be considered within the principle of Equal Treatment. Thus, a female who is pregnant, has a female characteristic, and if there is unequal treatment based on that characteristic, it contravenes the Directive. The difficulty in similarly construing "on grounds of her sex" in the Act, was demonstrated by the House of Lords' decision in Webb. However, the comparison adopted retained the essential male/female comparison.

56. In P & S, the European Court dealt with the case on the basis there was unequal treatment of a transsexual on grounds of sex, identifying transsexualism as a sexual characteristic. Given the view of English law, that the legal status of a person is fixed by reference to tests set out in Corbett, we are not dealing with a female who has a particular characteristic who can be compared with a male, but a person of legal male status who has a particular characteristic, namely transsexualism, which transforms the male into a female, in most respects, though not in law. It is distorting the wording of the Act to say that the characteristic of this applicant can be a basis for the comparison required by Section 5(3) because the applicant remains a man: the basic comparison required by the Act, namely that between a man and a woman, is not present. We consider, like the EAT in Macmillan, that we are being asked to dis-apply the Act, which is not permissible. We are satisfied that the Act does not encompass a transsexual. The application is dismissed on that basis.

57. We have considered the genuine occupational qualification defence under Section 7 of the Act for completeness. We take it that the burden of proof is on the employer. The respondent relies on Section 7(2)(b):

"Being a man is a genuine occupational qualification for a job only where the job needs to be held by a man to preserve decency or privacy because

It is likely to involve physical contact with men in circumstances where they might reasonably object to it being carried out by a woman or (ii) The whole of the job is likely to do his work in circumstances when men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities."

Section 7(4) is also relevant - the above paragraph does not apply in relation to the filling of a vacancy

"at a time when the employer already has male employees…. (c) whose numbers are sufficient to meet the employers likely requirements in respect of those duties without undue inconvenience."

58. Mrs Harrison submits that to be the same legal sex as your current sex is not an occupational qualification within the meaning of Section 7(2). Matters of decency and privacy do not arise where a female transsexual carries out functions of a female police officer. As a matter of fact, no person being dealt with by the applicant would be aware that she was a transsexual. We do not entirely agree with that. Matters of decency and privacy could, we think, arise where a female transsexual carries out the functions of a female police officer. Further, although we have seen the applicant and consider her to be in appearance very feminine, it is not improbable that her transsexualism would become known. Such information does get about, in our experience, and the criminal fraternity would quickly seek to use the information to their advantage. She also submitted that the legal consequences arising from a breach of PACE and the Codes are different from an occupational requirement based on the preservation of decency and privacy. That is not well founded. Implicit in the Code is the preservation of decency and privacy in our judgment. Further, as we have found, it is not reasonable to expect the respondent to employ other female officers to perform duties the applicant is unable to perform by law. We distinguish Etam -v- Rowan (1989) IRLR 150 on its facts. Employing one male among 16 female staff in a ladies clothing shop would not cause a loss of effectiveness or efficiency. It would be quite possible for one of the female staff to carry out fitting of women without impeding efficiency. That is not the case here.

59. Mrs Cox on the other hand, submits that the respondent is entitled to rely on Article 2.2 as a defence. We consider that is wrong in principle. The Directive may be used to assist interpretation of domestic legislation, to ensure the purpose of the Directive is fulfilled. Section 7 of the Act provides a defence under national law to cases of unequal treatment. It has not been argued that it is in conflict with the derogation permitted by Article 2(2) of the Directive. The respondent is therefore restricted, in answering the claim of discrimination under the Act, to the defences permitted by the Act.

60. We find that conformity of the legal and apparent gender is a genuine occupational qualification for the job of police officer. The factors we have set out earlier, and referred to by Mrs Cox in her submission, insofar as they relate to the preservation of privacy and decency, are powerful and conclusive factors in favour of the respondent. We have no doubt that the "same sex search" principle is aimed primarily at preserving policing by consent and a person's right to privacy and decency. In terms of Section 7(4) of the Sex Discrimination Act, we are satisfied that it is wholly unreasonable to require the force to reorganise the duties of other police officers to take account of a transsexual. The requirement for all police officers to be fully operational is reasonable and appropriate. Consequently, had it been necessary to do so, we would have dismissed the application on this basis as well.

61. We wish to thank Counsel for their hard work and organisation in this case, and for the support given by their instructing solicitors. Much work was undertaken to present this case in a methodical and organised fashion. The written and oral submissions of Counsel were pertinent, relevant and succinct, and assisted the tribunal greatly. They enabled the lay members to play a full part throughout the hearing and in the decision making process. The chairman is grateful for the careful analysis and assistance given by the lay members.

62. We conclude by observing that the question of sexual identity is still in the course of evolution from the medical point of view. We endorse the view that the law should fasten on the reality. Things are in a state of flux legally, morally and socially. The legal situations which result from the transsexuality are complex and there is as yet no broad consensus

between states of the Council of Europe - see B-v-France (1992) ECHR 1. We support the view of the European Court of Human Rights in Cossey -v- United Kingdom (1990) ECHR 622, at 641.

"The Court is conscious of the seriousness of the problems facing transsexuals and the distress they suffer. It seems the Convention always had to be interpreted and applied in the light of current circumstances. It is important that the need for appropriate legal measures in this area should be kept under review."

This case has highlighted the distinct situation of transsexuals, who, assuming they are fit and law abiding, are the only identifiable group excluded from access to the police force and possibly, certain other occupations. This is due to the national law's view of a person's legal status. We trust that legal, medical and social opinion will be kept under review.

Appendix 1

List of Authorities quoted during submissions.

1. P -v- S & Cornwall County Council (1996) IRLR 347 and Case 16132/93 (IT).

2. Decker -v- Stichting etc (1992) ICR 325.

3. Regina -v- Tan & Others (1983) 1QB 1053.

4. Reed -v- Chessington World of Adventures Ltd IT Case 60989/94.

5. Webb -v- Emo Air Cargo UK Ltd (1993) ICR page 175.

6. Webb -v- Emo Air Cargo UK Ltd No 2 (1995) IRLR 645.

7. R -v- Registrar General for England and Wales ex-parte P & G Div Court — unreported 16 February 1996.

8. Cossey -v- United Kingdom (1990) ECHR 622

9. B -v- France (1992) ECHR 1.

10. Corbett -v- Corbett (1971) 83.

11. Marleasing Case C-106/89 European Court.

12. Macmillan -v- Edinburgh Voluntary Organisations Council (1995) IRLR 536.

13. Johnston -v- Chief Constable of Royal Ulster Constabulary (1987) ICR 83.

14. Commission -v- United Kingdom (1984) ICR 192.

15. Rees -v- United Kingdom (1986) EHRR 56.

16. Foster -v- British Gas Plc (1990) IRLR 353.

17. Hansard 1974/75 Volume 3 page 102.

18. Bilka-Kaufhaus GMBH -v- Weber von Hartz (1986) IRLR 317

19. Rinner-Kuhn -v- F W W (1989) IRLR 493

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