

## **Sheffield v. Air Foyle Charter Airlines**

Industrial tribunal ruling, 1998

Full text of the industrial tribunal ruling in which the applicant, Kristina Sheffield, was found to have been unlawfully discriminated against because she was trans when her application for employment was rejected. In September 1998, damages of £77,000 were awarded to the applicant.

**Case Number 1200389/97**

**Promulgated on 29 May 1998**

### **The Industrial Tribunals between**

**Applicant:** Miss Kristina Sheffield

**Respondent** Air Foyle Charter Airlines Limited

**And decision of the industrial tribunal held at Bedford** on 8th & 9th April 1998,  
28th April 1998

**Chairman:** Mr G Plenderleath

**Members:** Mr D M Walsh Mrs A Jones

### **Decision**

The unanimous decision of the Tribunal is that the applicant's complaint that the respondent has discriminated against her contrary to the provisions of the Sex Discrimination 1975 is well founded. The question of remedy is adjourned either party having liberty within 28 days to apply to have that question determined by the Tribunal.

### **Representation**

**For the Application :** In Person

**For the Respondent :** Mr S Cheves, Counsel

## Extended reasons

1. The applicant Kristina Sheffield complains that the respondent Air Foyle Ltd unlawfully discriminated against her on the grounds of her sex contrary to Part II of the Sex Discrimination Act 1975 (“The 1975 Act”). She, together with many other applicants, responded to an advertisement in February 1996 in Flight International magazine and applied to the respondent for a job as a Pilot/First Officer on a Boeing 737/300. She, in common with the other applicants, was called to attend one of two seminars organised at Luton Airport but she was not called for interview and having written on a number of occasions to the respondent, she was given no explanation as to why she was not interviewed. When she later replied to a further advertisement in Flight International magazine she was again not called for interview and she asserts that the reason that her application did not result in at least an interview is that in 1988 she underwent gender-reassignment surgery and that this fact was known to the respondent.
2. The respondent denies having discriminated against the applicant and avers that it is not the practice in the airline industry to enter into correspondence with unsuccessful candidates for employment. In their Notice of Appearance, the respondent further contended that it was acting as agent on behalf of Easy Jet Limited, an assertion which it repeated in its response to a questionnaire served by the applicant pursuant to section 74(1)(a) of the 1975 Act.
3. At the opening of the proceedings, the applicant applied for an adjournment and the basis for her application was that she was uncertain from the Notice of Appearance and from the response to the questionnaire whether it was necessary for her either to join Easy Jet as a second respondent or to have Easy Jet substituted for Air Foyle as the respondent to the proceedings, and further the solicitors who had acted for her throughout the course of this application were no longer able to represent her and she had been unable in the time available to arrange alternative representation.
4. Mr Cheves opposed the application for an adjournment. He conceded that Air Foyle Charter Airlines Limited were correctly named as respondent to these proceedings and he argued that it would be unreasonable to grant the applicant’s request for an adjournment given the length of time since the proceedings commenced. Having considered the application the Tribunal unanimously decided that the interests of justice did not require the proceedings to be adjourned.
5. We have heard evidence from the applicant and for the respondent we have heard evidence from Captain Line, the former General Manager of the respondent, from Captain Veal, the Airline Training Captain for Easy Jet and from Mr C M S Soper, the Company Secretary for Air Foyle Limited. We have considered those documents to which we have been referred in the agreed bundle produced by the respondents as Exhibit R1 and in the two supplementary bundles produced by the applicant and numbered respectively A1 and A2.
6. The applicant qualified with a Private Pilot’s Licence in August 1964 and prior to 1986 there was nothing controversial about her career which was varied and successful. In 1970 she entered the Royal Air Force as an Officer Cadet at Henlow and in January 1971 was promoted to Acting Pilot Officer receiving her RAF wings in 1972. In August 1972 she completed her advanced flying training and was promoted to Flying Officer. In June 1975 she left the Royal Air Force and joined the Rhodesian Air Force which she left in 1978 having received awards for gallantry and having been promoted to pilot VIPs including the Prime

Minister. In January 1979 she obtained her United Kingdom Commercial Pilot's Licence and in October 1979 she joined Britannia Airways as a First Officer. In 1981 she gained her Airline Transport Pilot's License and, although still employed by Britannia, between May 1985 and May 1986 she flew for Luxair and during this period she attended a Gender Clinic in Germany for assessment and for treatment. In May 1986 she informed Britannia Airways that she was proposing to undergo gender-reassignment surgery and was in consequence dismissed by the airline although the Civil & Aviation Authority ("CAA") was happy for her to keep her Pilot's Licence.

7. In December 1986 she became a First Officer with Airways International CYMRU ("AIC"). AIC was made aware by Britannia of the applicant's proposed gender-reassignment and at this time the applicant was, as she put it, "living the role" although she had not then undergone surgery. She remained with AIC until that company went into liquidation in February 1988.

8. Having heard the evidence and having considered those documents to which we have been referred, the Tribunal finds the following facts proved on the balance of probabilities :-

- a. The applicant had no problem with her career in the United Kingdom until she let it be known in 1986 that she was a transsexual.
- b. The applicant's flying skills and experience qualified her for the position for which she applied in February 1996 and this is evidenced by the fact that she was originally shortlisted for interview a fact which only became apparent in evidence before this Tribunal.
- c. After dismissal by Britannia Airways the applicant was employed by AIC and it was in that employment that she first became known to the respondent's witnesses, Captains Line and Veal.
- d. AIC went into liquidation early in 1988. The applicant underwent gender-reassignment surgery later that year. Her change of sex was and is well-known within the airline industry.
- e. The applicant found it difficult to find employment after 1988 particularly in the United Kingdom and this was partly as a result of a recession in the air transport industry generally and partly because of the publicity which surrounded her gender-reassignment. From 1989 onwards, the applicant had a series of freelance employments with various airlines as appears from document C3 in bundle R1. Although there were certain breaks in the applicant's employment which are not apparent from document C3 we accept that it is in general a fair and accurate summary of the applicant's career between 1989 and 1997. We do not find that any document was produced by the applicant with the intention to mislead.
- f. In February 1996, in answer to an advertisement placed in Flight International magazine by the respondent, the applicant applied for employment and her application letter which is dated the 14 February 1996 is at pages D1 and D2 of bundle R1. She, in common with other applicants, was called to one of two seminars held at the offices of Easy Jet at Luton Airport. The respondents were recruiting on behalf of Easy Jet as at that time Easy Jet did not have the relevant Air Operation Certificate. ("AOC")

- g. The purpose of the seminars was to explain the type of operations and the contractual terms which were being offered, particularly in relation to remuneration, as Easy Jet were proposing a scheme of remuneration which differed substantially from that commonly in use in the aviation industry. At the close of each seminar the applicants were informed that a shortlist had already been prepared of people to be interviewed, although the names of those shortlisted were not disclosed, and the candidates were then asked to complete a questionnaire to establish whether or not they were still interested in applying for a position as Pilot the details of the post and of the remuneration scheme having been explained to them. The applicant replied that she was still interested in the applying for the post.
- h. The applicant heard nothing further and only after she contacted the respondents was she informed by a letter dated the 11 April 1996 that her application had been unsuccessful but she was told that the respondents would keep her C.V. on file.
- i. The applicant wrote to the respondents on a number of occasions asking for the reason why her application had been unsuccessful and received no explanation. The respondent's policy is not to give reasons for failing to call candidates for interviews or for rejecting their job applications and we find that the respondents practice is neither uncommon nor unreasonable.
- j. It is clear from the respondent's evidence that the applicant's name was included in the shortlist but was removed on the instructions of Captain Line. Captain Line said in evidence that the reason he had given instructions for the applicant's name to be removed and that she should not be called for interview was that he recalled that between 1987 and 1990 he had interviewed the applicant for employment by Berlin European Airways at a time when he was employed as Chief Pilot of that company and that his "gut reaction" to the applicant was that he would not be comfortable flying with her. He was aware at the date of that interview that the applicant is a transsexual.
- k. The applicant has no recollection of being interviewed by Captain Line but if the interview did take place, it is clear from Captain Line's own evidence that he had previous knowledge of the applicant and was aware that she is transsexual. We find that it was this awareness that made him consider her unsuitable for employment as a pilot. In his own evidence, he confirms that he was influenced by the fact that she is a transsexual as in paragraph 5 while dealing with the reasons why he did not consider that she would fit in with the flight deck crews he states "this view was not simply based on the fact that she had undergone a sex change operation but the subjective impression I had formed of her personality ..."
- l. In February 1996 Easy Jet operated under the umbrella of the AOC held by the respondent. The respondent was responsible for all matters relating to the safe operation of Easy Jet including the recruitment of crew. Easy Jet was seeking their own AOC and with the approval of CAA had an increased involvement in crew recruitment although the respondent continued to have legal responsibility for such matters and to have a final veto on who was employed. The officer ultimately responsible was Captain Line.

- m. In July 1996, Captain Veal was employed by the respondent as a 737/300 Fleet Chief Pilot and became responsible for running the fleet for Easy Jet.
- n. By July 1996 Easy Jet was seeking to recruit more pilots and through a recruitment agency names CTC Aviation Services Limited it placed a further advertisement in Flight International magazine (document C1 in bundle R1). The applicant, who was working abroad at the time, did not hear about the advertisement until September 1996 at which time she phoned the respondent to ask if it was too late to apply for a position as a pilot and she was advised that if she she was interested she should apply. She did so but heard nothing further despite contacting the respondents on a number of occasions.
- o. The names of the candidates responding to the July advertisement were passed by Captain Veal to Michael Keane, the Chief Pilot of Easy Jet, who was dealing with the responses to the advertisement (but subject to the final responsibility remaining with the respondents). Captain Veal, prior to passing the names and details to Michael Keane, discussed the applications with Captain Line. Captain Veal did not put the applicant's name forward because, as he told the Tribunal, he felt that she was unsuitable.
- p. Captain Veal's opinion of the applicant was, he said, based upon his knowledge of the applicant when she flew for AIC in 1987 and 1988 and his evidence was that she was unable to work in a team, was hazardous to safety, that she flaunted her femininity and that pilots were unwilling to fly with her. These matters were not brought to her attention at the time, she was never counselled about her behaviour nor reprimanded, and Captain Veal in October 1987 signed the applicant's Aircraft Rating Certificate of Test after the applicant had successfully completed the regular tests of her rating as a pilot in command. Part of the test for Aircraft Rating Certificate involves a consideration of the applicant's ability in Crew Resource Management which, we were told, is part of the annual simulator training, is a CAA requirement and which is designed to test the ability of members of crew to work together as a team, to deal with emergencies and to relate properly to each other. Captain Veal had only flown with the applicant on three occasions.
- q. The Tribunal does not accept Captain Veal's evidence as to the applicant's alleged personality flaws given his failure to discuss such matters with her and the fact that he passed her as fit to fly as pilot in command.

9. In his final submission, Mr Cheves referring to the European Court of Justice in P -v- S and Another 1996 ICR 795 pointed out that that case was a decision based on the council directive (76/207/EEC) and although it related to the position of transsexuals he argues that the case is not binding upon this Tribunal and is of no assistance when the respondent is a private body. He concedes however that the decision of the Employment Appeal Tribunal in Chessington World of Adventure -v- Reid 1998 ICR 97, although a dismissal case, does apply in the case of transsexuals, is binding upon this Tribunal, and cannot be distinguished on the facts insofar as this application is concerned. He asked us to find if there was no direct evidence to show any discrimination, reminds that the Tribunal is only entitled to draw inferences where there is evidence before it that actions by the respondents had a discriminatory motive and his primary submission is that no such facts have been established and that the necessary evidential burden has been discharged by the respondents. He refers to

three features in the applicant's case the first being that she was not called for interview following the applications and asks the Tribunal to see the respondents actions in the light of the number of applications received and he reminds the Tribunal that a prospective employer can make its own selection of candidates (providing the rules of discrimination are not breached) and that he does not even have to act reasonably. The second feature of the applicant's case is the failure by the respondent to give reasons for failing to call her to interview and he reminds the Tribunal that there is no requirement in law for the respondent to give any reason or even to inform an applicant that he or she has not been successful. He suggests that it would be unusual for any prospective employer to give reasons, certainly at a primary stage in the selection process, in view of the costs that would be involved. The third feature of the applicant's case is that she is transsexual and Mr Cheves asked us to say on the evidence that that factor was not an issue during her application in 1996 and that the sole issues in the mind of of Captain Line and Captain Veal were her character and personality. He accepts that this cannot be divorced from the fact that she was transsexual but asserts that this was not the reason for her rejection. The airline industry is one in which safety is paramount and although it has never been suggested that the applicant was other than competent to fly the aircraft what was of concern was her ability to fit in with the crew in the cockpit and be part of a team. Emergencies occur in aircraft and all members of the flight crew have to have trust in their colleagues to overcome emergencies. Mr Cheves suggests that it was the clear view of Captain Veal that the applicant's attitude in the cockpit was not conducive to the creation of a good and safe atmosphere with other pilots. Mr Cheves suggested that the applicant had sought to create a false impression about her career, sought to create the impression that she had flown with certain airlines for longer periods of time than was the case and that her log book gave a misleading impression as to the amount of time the applicant had been engaged as pilot in command.

10. Miss Sheffield in her final submissions asked the Tribunal to accept that the respondents had not dealt primarily with the issue of her transsexuality in its response to her allegations but had done anything possible that it could do to discredit her. She denied that any documents that she produced, including her log book, were misleading and told us that her flying record had never been questioned by any employer to date. She reminded the Tribunal that she had no recollection of the interview which Captain Line said that he had with her and suggested that as Captain Line had interviewed a large number of pilots over the last ten years he must have mistaken her for someone else. As to her general attitude, she could not have survived seven or eight years with Britannia if her character was of the nature described by Captain Veal. She complained that Air Foyle had throughout been evasive and misleading in correspondence and suggested that it was they who had set out to deceive, not her.

11. It is the unanimous decision of the Tribunal that the reason or the principal reason for the respondents' decision not to call the applicant for interview following the advertisement in February and again in July 1996 is because of Captain Line's and Captain Veal's knowledge that she is transsexual. It is common ground that she had the experience and qualifications necessary for the position. Apart from the evidence of Captain Veal, we have heard no evidence that the applicant has other than an unblemished flying record. The fact that she remained with Britannia Airways for some 7 years supports this view and for the reasons which have been given we do not accept Captain Veal's evidence relating to her character and demeanour. The Tribunal further notes that in the respondents Notice of Appearance there is no suggestion that there was anything in the applicant's record which was detrimental to her nor was this suggested in the replies to the questionnaire under the 1975 Act.

12. Section 6 of the 1975 Act provides:-

“(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman —

(a) in the arrangements he makes for the purpose of determining who should be offered that employment

(b) in the terms in which he offers her that employment, or

(c) by refusing or deliberately omitting to offer her that employment.”

13. Section 1 of the 1975 Act provides:—

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

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

14. We find that the respondent has discriminated against the applicant in relation to the arrangements that it made for the purpose of determining who should be offered employment. Although originally shortlisted, following the advertisement in February 1996, the applicant’s name was removed and following her response to the advertisement later that year Captain Veal took steps to ensure that her name did not go forward with that of other applicants. We find that the reason for both of these actions was that both Captain Line and Captain Veal were aware that the applicant had undergone gender-reassignment surgery and were uncomfortable with her for that reason. The evidence shows nothing in her previous career which would render her unsuitable for interview for the position which had been advertised. From the decision of the Employment Appeal Tribunal in the case of *Chessington World of Adventure -v- Read* (1998) ICR page 97, it is clear that the 1975 Act does apply in the case of transsexuals and Mr Cheves, in his final submission, conceded that that case cannot be distinguished from the facts of the present case. It follows therefore that the applicant has been treated less favourably on the grounds of her transsexuality and that this amounts to less favourable treatments on the ground of her sex. Her claim that she has been the victim of unlawful discrimination is therefore well founded.

*Transcribed and proof read by Mairi MacDonald*