West Yorkshire Police v A (Employment Appeal Tribunal, July 2001)

Employment Appeal Tribunal ruling

2 October 2001

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Judgment

Appeal No: EAT/661/99
EAT/231/00

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 3, 4 & 5 July 2001

Before:

THE HONOURABLE MR JUSTICE LINDSAY (PRESIDENT)

MRS D M PALMER

MR S M SPRINGER MBE

THE CHIEF CONSTABLE OF
THE WEST YORKSHIRE POLICE — APELLANT

(1) 'A'
(2) SECRETARY OF STATE FOR EDUCATION AND
EMPLOYMENT — RESPONDENTS

Transcript of Proceedings

JUDGMENT

Revised

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APPEARANCES

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Judgment delivered 2 October 2001

MR JUSTICE LINDSAY (PRESIDENT)

1. We have before us 2 related appeals, both concerning the Applicant below, Ms A, a female-to-male transsexual and, as respondent below and appellant before us, the Chief Constable of the West Yorkshire Police, who appears by Mr Bean Q.C. leading Mr David Jones. Ms "A" appears by Ms Harrison.

2. The appeals are directed against two separate decisions in the same matter. The first appeal concerns sexual discrimination against a transsexual applicant seeking to join the West Yorkshire force as a constable and falls to be judged by the Sex Discrimination Act 1975 as both the events and the decision were before the changes made by the Sex Discrimination (Gender Reassignment) Regulations 1999.

3. The second appeal concerns a consideration of a part of those changes and introduces a third party to the argument, the Secretary of State for Work and Pensions (formerly for Education and Employment), who appears by Mr Singh. The question here is as to consistency or inconsistency between one of the new provisions introduced by the 1999 Regulations and the Equal Treatment Directive.

We shall deal with the two appeals separately.

The Appeal against the First Decision

4. The Applicant below, A, respondent to the appeal, had, at birth, characteristics such that she was, we understand, registered as male. However, in May 1996 she, as an adult, underwent gender reassignment surgery. Since then she has, as it is put, "presented" as a woman. In context that means that she has looked and dressed as a woman and has passed as a woman. She needs to conceal the fact that she is a transsexual if she is to function normally in society.

5. In late 1996 or early 1997 she applied to join West Yorkshire Police with a view to becoming a Constable. She made it plain in her application and in later correspondence that she was a male-to-female transsexual. After passing initial assessments and tests she was told on 9th March 1998 that a decision had been made that transsexuals would not be appointed to the Force; candidates would not be appointed unless they were capable of performing the full duties of a Police Constable, including duties as to searches, as to which provisions included requirements as to the search being by or in the presence of a person of the same sex as the person to be searched.

6. On 13th May 1998 A presented her IT1 for "Sex Discrimination". In response to the Police saying, in their letter of 9th March 1998 that "Unfortunately, as you are already aware, legislation affects the carrying out of searches on persons in custody by transsexuals and, therefore, you would not be able to undertake full duties" she asserted that the Force had 5295 officers who could undertake searches without undue inconvenience and that the ability to do all searches was not, she said, an essential "Genuine Occupational Requirement". She asserted also that the Police had accepted that they had discriminated against her on the ground of her transsexuality but had claimed that such discrimination was not unlawful. The Police's IT3 of 3rd July 1998 accepted and asserted that that was the case.

7. There was a hearing spread over 4 days in February 1999 before the Employment Tribunal at Leeds under the Chairmanship of Mr D.R. Sneath. The decision was sent to the parties on 18th March 1999. It was unanimous and was that the Chief Constable had discriminated against A contrary to Part II of the Sex Discrimination Act 1975 by refusing to offer her employment in the office of Police Constable. Remedy was left over for some future hearing. On 19th April 1999 the Chief Constable lodged his Notice of Appeal. It is important to notice that A's IT1 was presented, heard and the decision given before the Sex Discrimination (Gender Re-assignment) Regulations 1999, came into effect on 1st May 1999. They have not been claimed to have had retrospective effect.

8. The case was argued below on the footing that what the Police had done did prima facie involve sex discrimination falling within the 1975 Act itself - see Chessington World of Adventures Ltd -v- Reed [1998] ICR 97 EAT. Looking only at that Act one is entitled to have doubts; the Police, it seems, treated A, a male-to-female transsexual, exactly as it would

have done a female-to-male one and her treatment has not, arguably, been on the ground of her sex but on the ground of a want of congruity between her presenting as a woman but (in the Police's view) being registered as, and at law being required to be taken to be, male. Moreover, the form the amendments took in May 1999, including adding a separate section 2A, 7A and 7B, rather suggests that discrimination on gender reassignment grounds was not caught by the unamended provisions of the Act. However, before us, as before the Employment Tribunal, Chessington was accepted, both on A's behalf and the Police's, as correct, though Mr Bean has indicated that were this case to go further he might wish to argue that it was not. For immediate purposes Mr Bean accepts, indeed avers, that discrimination under the unamended Act on the grounds of transsexualism is discrimination on the grounds of sex and also that the Police did discriminate against A on the grounds of transsexualism. Given this history to the matter we shall accept that there has been discrimination within section 1 (1) (a) of the 1975 Act or under section 2 and, in turn, that under section 6 (1) (c), read alone or with section 2, there has been discrimination which was prima facie unlawful. On that basis the matter comes down to the excepting provisions of section 7.

9. It is far from easy to read those provisions as dealing with the sorts of difficulties that can arise in gender reassignment cases, but, the parties having argued on the basis we have mentioned, we were left with the procrustean task of applying section 7 to an area - gender reassignment - which, at lowest, it may not have contemplated it was dealing with.

10. The relevant provisions of section 7 are as follows:-

"7. (1) In relation to sex discrimination -

(a) section 6 (1) (a) or (c) does not apply to any employment where being a man is a genuine occupational qualification for the job, and

(b) section 6 (2) (a) does not apply to opportunities for promotion or transfer to, or training for, such employment.

(2) Being a man is a genuine occupational qualification for a job only where -

(a) the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a woman; or

(b) the job needs to be held by a man to preserve decency or privacy because -

(i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman, or

(ii) the holder of the job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities;

(3) …….

(4) Paragraph (a), (b) … of subsection (2) does not apply in relation to the filling of a vacancy at a time when the employer already has male employees -

(a) who are capable of carrying out the duties falling within that paragraph, and

(b) whom it would be reasonable to employ on those duties, and

(c) whose numbers are sufficient to meet the employer's likely requirements in respect of those duties without undue inconvenience."

11. As for section 7 (2), paragraph (a) - "reasons of physiology" or "authenticity" - were not argued to be of any materiality. As for paragraph (b), only (i) was dealt with by the Employment Tribunal and it was (i) that was concentrated on before us. It is not easy to discern how section 7 (2) (b) (i) is to be read on the premise that the unamended Act contemplated discrimination on the ground of transsexualism but presumably it would be thus:-

"(b) the job needs to be held (other than by a transsexual) to preserve decency or privacy because -

(i) it is likely to involve physical contact with men [or women] in circumstances where they might reasonably object to its being carried out by [respectively, a female-to-male or male-to-female transsexual] [or by any transsexual]."

That the Act says nothing of the kind only underlines the difficulty of our task here, which is crucial as it was only section 7 that was argued to take the Police out of the liability that was otherwise consequent upon their admission of discrimination. Moreover, it is to be noticed that section 7 (2) (b) (i) makes no mention of the frequency or infrequency of the likely physical contact of which it speaks nor does it describe whether all or only some of those so contacted are required to object if a "genuine occupational qualification" is to emerge. We shall take it that it suffices that there has to be a likelihood of physical contact of a frequency that is not negligible or minimal and that the proportion of those contacted who might reasonably object is also above the trivial or minimal.

12. On section 7 the Tribunal said:-

"33. The Tribunal also explored with Counsel for [the Police] the meaning and extent of the expression "might reasonably object" where it appears in section 7(2) (b) of the Sex Discrimination Act 1975. Inspector Spencer [a woman officer] told us that a Muslim woman prisoner assisted with shower or toilet facilities by a transsexual would be offended if she discovered that the officer in question was such. We accept and acknowledge that there are many people in our society who would have been religious, cultural and moral objections to being searched by a transsexual. Whilst repeating those objections, we do not think that they are contemplated by the expression "might reasonably object". Instead we think that it is a reflection of the embarrassment which many people feel in the circumstances outlined in section 7 (2) (b)."

13. It is difficult to see how one can simultaneously "respect" those objections held by "many people in our society" on "religious, cultural and moral" grounds whilst assigning them to the bin marked "not reasonable". It is of the essence of many religious beliefs and the attitudes

they engender - examples hardly need to be given - that they are not explicable in exclusively rational terms to those who do not believe or adopt them. When an objection within section 7 (2) (b) (i) is made on, for example, genuinely and widely held religious grounds we do not read the words "might reasonably object" as excluding it being given weight simply because the objection is not wholly answerable to or explicable by reason. Nor, whilst it may very well be right to dismiss objections founded on nothing more than embarrassment, ignorance or prejudice, can an objection be described as not reasonable merely because it is cultural or moral.

14. We thus see reason to doubt the correctness in law of, and will need to return later to, the Tribunal's first response to section 7 (2) (b) (i), a doubt the Tribunal may itself have entertained as, by way of a second response, it continued:-

"… we cannot see that there is any obligation upon [the Police] to disclose to anyone that the applicant is transsexual"

and, a little later:-

"If she is treated, as she wishes, in all respects as a woman, nobody will be any the wiser."

That leads to the questions; is A male at law and, if she is, could the Police (knowing that) properly hold her out to act as if she were a female constable?

15. As for whether A is, in law, male, we received an extensive argument. It is a question the Employment Tribunal never answered. The argument begins with Corbett -v- Corbett [1971] P. 83 in which, relative to marriage, Ormrod J. held that:-

"It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest) and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex."

16. Reg -v- Tan [1983] Q.B. 1053 dealt with whether a person who was born and was biologically a man (albeit, as a result of medical treatment, psychologically and socially a female) was a man for the purposes of the criminal law as to the keeping of a disorderly house. The Court of Appeal (Criminal Division) adopted the Corbett approach on the grounds that commonsense and the desirability of certainty and consistency demanded that Corbett should apply not only for the purpose of marriage but in relation to the charges with which it was concerned. The House of Lords dismissed a petition for leave to appeal.

17. In Bellinger -v- Bellinger [2000] 3 FCR 733 Johnson J. had to determine whether Mrs Bellinger, a male to female transsexual, was, at the time of her marriage to a man, female for the purposes of section 11 of the **Matrimonial Causes Act**, an Act which provided, as a ground of avoidance of a "marriage", that the parties "are not respectively male and female". In the course of a full review of domestic, overseas and European case law he held that a person's sex was, under English law, still to be determined (for the purpose with which he was concerned) by the chromosomal, gonadal and genital tests that had been set out in Corbett and that where all three were congruent (and here there is no suggestion they had not been in A's case) that determined sex and operative intervention was to be ignored. Johnson J., as does Miss Harrison, drew attention to criticism of the Corbett approach abroad and to

the weak and weakening tolerance of it in the European Court of Human Rights - see Cossey -v- U.K. [1990] EHRR 622; Rees -v- U.K. [1993] 2 FCR 49; Sheffield and Horsham -v- U.K. [1998] 27 ECHR 163; see also, in the ECJ, P -v- S and Anor [1996] ICR 795. Johnson J. noted that the Corbett approach was now such as to put the law of England and Wales very much, in European terms, in a minority position and that in April 1999 the U.K. government had set up an inter-departmental working group which had reported in April 2000. He adopted a remark by Thorpe L.J. in a different context, namely that:-

"If a fundamental change is to be introduced, it is for the legislature and not the judges to introduce it. Not only is the legislative process the democratic process but it enables the route of future change to be surveyed in advance of adoption by extensive research and consultation."

Johnson J. took that observation to be particularly apt in relation to reform in the case of the law he was dealing with.

18. On 17th July 2001 (after oral argument before us had finished) the Court of Appeal in Bellinger -v- Bellinger upheld Johnson J.'s judgment by a majority. We received brief written supplementary argument on the Court of Appeal's decision in late July 2001. We have not been told whether Bellinger is en route to the House of Lords. The joint judgment of the majority, Dame Elizabeth Butler-Sloss, President, and Robert Walker L.J., whilst recognising that the plight of transsexuals required careful consideration and that the present situation was profoundly unsatisfactory, left the law, as it seems, as it had been in and since Corbett but emphatically leaving to Parliament the decisions as to whether, in what manner and when the law should be changed.

19. The domestic authorities speak with one voice, an echo of Corbett. No decision of the European Court of Justice binds us to ignore those domestic authorities. Whilst we recognise the very real strength of Miss Harrison's argument that it is time that a change was made, we see irresistible force in leaving any change to Parliament. The need for certainty and consistency in Tan supra suggests that on a subject that has implications as diverse as, for example, the meaning of marriage, the definition of incest, the ingredients of rape and the availability of one or other of differential annuity or pension rights, it would be undesirable for a case-by-case judge-made departure from or extension of or failure to depart from or extend Corbett with, inevitably, finer and finer distinctions been drawn between past and present cases as the incremental development of case law progressed. Better by far that Parliament should deal with the subject, as both Johnson J and the majority in the Court of Appeal in Bellinger have underlined. Accordingly, whilst we add our voices to those inviting the legislature to grasp this nettle, we shall, adopting Corbett, recognise A as male in law, notwithstanding surgical or other intervention and notwithstanding her wish, to be treated as, and such ability as she has to be taken to be, female.

20. If, then, A is male, can the Police, knowing that, properly allow her to act as a constable as if she were female? Can they properly hold her out, so to speak, as a female police constable? For, surely, if they cannot, then the Employment Tribunal's solution (that if she is treated as a woman, "nobody will be any the wiser" as the religious, cultural or moral objections to being searched by her would then never even come into existence) would be an inadequate answer. A wrong act is still just that even if one can "get away with it".

But would it be wrong and would the Police be likely to "get away with it"? This involves a brief look at some Police powers.

21. Under section 54 of the Police and Criminal Evidence Act 1984 ("PACE") a search of a detained person - subsection (6) and 6 (A) - is to be carried out by a constable - subsection (8) - of the same sex as the person searched - subsection (9). An intimate search - section 55 - may not be done by a constable of the opposite sex to the person searched even in the relatively unlikely case of its being capable of being done by a constable - subsection (5). Under the Codes of Practice issued by the Secretary of State under section 66 of the Act any search involving more than the removal of the outer wear may only be made by an officer of the same sex as the person searched and may not be made in the presence of a person of the opposite sex unless the person searched specifically requests it - Code A: 3.5.

22. These provisions, as it seems to us, are concerned with what is a constable's sex at law, not with what seems to be or might very well be taken to be the constable's sex. We cannot think it right for a Chief Constable or other senior officer, knowing that at law A was male, to condone a system under which she was to be held out as female and thus enabled to make or witness the searches a female constable might make or witness. No one would think it right for a Senior Officer to permit the 1984 Act or the Code to be circumvented by having a constable of one sex dressed up to pass as of the other sex or by hiding the sex of the searcher by an opaque cloth between the constable and the person searched, yet the difference between that and allowing a male (albeit transsexual) constable to search as if a female is only one of degree. Mr Bean characterises the prospective deployment of A as if female whilst known to be, at law, male, as a deception. We agree. There may, as the Tribunal held, be no obligation on the Chief Constable to disclose that A is transsexual but there is, in our view, an obligation upon him not to authorise or condone a representation that she is female when he knows that in law (as we have held) she is not. It would be wrong to do so.

23. Moreover, he would not "get away with it". He would have to give discreet instructions that A was not to conduct or witness searches as if a woman. That would mean that she could in some cases have to decline to search a woman or witness such a search when called upon by a colleague to do so. Her appearance and perceived sex as a woman would preclude, in some cases, her searching or witnessing the search of men. That her immediate colleagues would notice the apparently anomalous way in which some searches were declined, seemingly without reason, to be done or witnessed by her and would query why it was so seems to us inevitable. The Employment Tribunal accepted that her transsexualism might come out into the open. In its paragraph 28 the Tribunal contemplated circumstances in which, the Police having recognised that A was male, she could be unable to search a woman but would call in a woman constable to do so. "That", said the Tribunal, "would inevitably draw attention to [A's] transsexualism and could lead to confrontation, the loss of evidence and manipulation of the situation to the suspect's advantage".

24. If the Chief Constable thought it right to send A out as a constable as if female but sought to mitigate any prospective deception by giving special instructions as to her rÃ´le in searches, it would, even so, be likely to come out that A was not what she seemed. The destructive effect that would have on her private and social life does not need to be imagined as affidavits sworn in connexion with her applications to ensure the anonymity of these proceedings make it plain.

25. In these circumstances we regard the Tribunal's second escape from the objections which they held many people would have - namely that if A were to be held to be a woman "nobody will be any the wiser" - as not open to them in law. It would either involve the Chief Constable in a deception or (if he tried to mitigate or avoid that) would destroy A's privacy. The Tribunal held that in order to function normally in society she needs to conceal the fact that she is transsexual. The Tribunal added (with our emphasis):-

"She is willing, however, to disclose that fact to those who need to know it for whatever purpose."

Read consistently with the evidence adduced on her part at earlier stages of the proceedings, that cannot be understood to mean that she could tolerate that her work-a-day colleagues or, still less, the persons she searches or declines to search, should know of her transsexualism. A cannot be heard to blow hot and cold as to the need for her transsexualism being kept secret barring the few in senior police circles who would inevitably need to know of it. In turn, unless any need for her to make searches can be obviated without undue inconvenience, she cannot be heard to commend as practical any instigation of what would otherwise be a deception by the Chief Constable by his giving special instructions as to searches or the witnessing of searches by her.

26. As for the likely frequency of physical contact of the kind involved in the various forms of search that a constable in the West Yorkshire force can be expected to carry out, the Employment Tribunal had before them statistics which they summarise in their paras 25-27. We could not describe the prospective likely frequency as negligible or minimal and, in practical terms, the Tribunal added:-

"The consequence is that there is on occasions a shortage of women police officers to conduct searches and carry out in other operation tasks for which being a woman is an occupational qualification. Sometimes a woman police officer has to be brought in from another Division in order to fulfil a search or related task."

That observation would seem to rule out section 7 (2) (b) being disapplied under the provisions of section 7 (4), as to which the Tribunal made no direct findings.

27. As for the proportion of those searched by a transsexual who, if they knew that that was the case, would object on grounds of decency or privacy, the Tribunal made no finding save, as we have already cited, that "there are many people in our society who would have religious, cultural or moral objections to being searched by a transsexual". Against that finding, we cannot take the proportion which would so object of those with whom physical contact would be likely to be involved were A to conduct searches as avowedly transsexual as negligible or minimal.

28. Drawing these strands together, we conclude that the Tribunal erred in law in its treatment of section 7 (2) (b) (i), a crucial error as that was the main plank in the Police's defence. Transcribing the provision to apply to transsexuals as we have mentioned above, the job A sought did need to be held other than by a transsexual to preserve decency or privacy because it was likely to involve physical contact with men or women in circumstances where they might object to its being carried out by a transsexual. The Tribunal's first escape - that the objections had to be reasonable but were not - was perfunctory; once it had accepted that many people would have religious, cultural or moral objections there could be no simple

dismissal of the objections as not being reasonable without a careful scrutiny of what those religious, cultural or moral objections were and why they were unreasonable. That was not done. The Tribunal's second escape - that if the Police held out A as female no one would be any the wiser and hence no one would raise objections - was not open as it would involve the Police in a deception and in any event, if it were sought to mitigate that deception by the giving of special instructions as to searches by A, so far from preserving privacy, it would destroy that of A.

29. We add that the Tribunal's view of "proportionality" - that the denial of access to the office of constable was wholly disproportionate to the denial of A's fundamental right to equal treatment - was obviously coloured by the Tribunal's incorrect conclusion, as we have held it to be, that A's transsexualism could, so to speak, be kept quiet and that no one would then be any the wiser.

30. Accordingly we allow the appeal against the First Decision. However, we are not so confident that the only proper conclusion was that there was no unlawful discrimination that we feel able ourselves so to declare. The matter thus has to be remitted. Neither side has any ground for a lack of confidence in the Tribunal which first heard the matter and which, of course, did not have the benefit of Bellinger -v- Bellinger either at first instance or in the Court of Appeal. We remit to the same Tribunal as before for a fresh consideration of section 7 (2) (b) of the unamended 1975 Act on the basis, firstly, that the religious, cultural or moral objections which they held many would have cannot be dismissed, if at all, without their careful study and without full reasons being given and, secondly, that for the Police, in relation to searches, to hold out A as a female constable would not be a course open to the Police if A was to be given the office of constable, the only office the refusal of which was in issue. If, thirdly, proportionality falls to be considered at the remission, as it may, then it is to be considered afresh against the background that, at least in relation to searches, a concealment of A's transsexuality as a Constable would be neither proper nor even practicable. Section 7 (4) will also need to be considered. Whether the Tribunal will need to receive fresh evidence and, if so, in what form, together with any other procedural issues, is best left to a directions hearing by the Chairman, Mr Sneath, either alone or, as he sees fit, with the same Tribunal members as before.

The Appeal against the Second Decision

31. As we have already mentioned, on 1st May 1999 there came into effect the Sex Discrimination (Gender Re-assignment) Regulations 1999. These introduced into the 1975 Act a section 2A and 7A and B which includes as follows:-

"2A Discrimination on the grounds of gender reassignment

(1) A person ("A") discriminates against another person ("B") in any circumstances relevant for the purposes of -

(a) any provision of Part II,

(b) section 35A or 35B, or

(c) any other provision of Part III, so far as it applies to vocational training,

if he treats B less favourably than he treats or would treat other persons, and does so on the ground that B intends to undergo, is undergoing or has undergone gender reassignment.

(2) ………..

(3) For the purposes of subsection (1), B is treated less favourably than others under such arrangements if, in the application of the arrangements to any absence due to B undergoing gender reassignment -

(a) he is treated less favourably than he would be if the absence was due to sickness or injury, or

(b) he is treated less favourably than he would be if the absence was due to some other cause and having regard to the circumstances of the case, it is reasonable for him to be treated no less favourably.

(4) In subsections (2) and (3) "arrangements" includes terms, conditions or arrangements on which employment, a pupillage or tenancy or vocational training is offered.

(5) For the purposes of subsection (1) a provision mentioned in that subsection framed with reference to discrimination against women shall be treated as applying equally to the treatment of men with such modifications as are requisite."

"7A Corresponding exception relating to gender reassignment

(1) In their application to discrimination falling within section 2A, subsection (1) and (2) of section 6 do not make unlawful an employer’s treatment of another person if -

(a) in relation to the employment in question -

(i) being a man is a genuine occupational qualification for the job, or

(ii) being a woman is a genuine occupational qualification for the job, and

(b) the employer can show that the treatment is reasonable in view of the circumstances described in the relevant paragraph of section 7 (2) and any other relevant circumstances.

(2) In subsection (1) the reference to the employment in question is a reference -

(a) in relation to any paragraph of section 6 (1), to the employment mentioned in that paragraph;

(b) in relation to section 6 (2) -

(i) in its application to opportunities for promotion or transfer to any employment or for training for any employment, to that employment;

(ii) otherwise, to the employment in which the person discriminated against is employed or from which that person is dismissed.

(3) In determining for the purposes of subsection (1) whether being a man or being a woman is a genuine occupational qualification for a job, section 7 (4) applies in relation to dismissal from employment as it applies in relation to the filling of a vacancy.]

7B <u>Supplementary exceptions relating to gender reassignment</u>

(1) In relation to discrimination falling within section 2A -

(a) section 6 (1) (a) or (c) does not apply to any employment where there is a supplementary genuine occupational qualification for the job,

(b) section 6 (2) (a) does not apply to a refusal or deliberate omission to afford access to opportunities for promotion or transfer to or training for such employment, and

(c) section 6 (2) (b) does not apply to dismissing an employee from, or otherwise not allowing him to continue in, such employment.

(2)‘ Subject to subsection (3), there is a supplementary genuine occupational qualification for a job only if -

(a) the job involves the holder of the job being liable to be called upon to perform intimate physical searches pursuant to statutory powers;

(b) …………"

Section 6 of the 1975 Act had an added subsection 8.

32. At a 2-day hearing in November 1999 the Tribunal, under the Chairmanship of Mr Sneath, heard argument on, inter alia, whether <u>section 7B (2) (a)</u> was consistent with the Equal Treatment Directive (207/76). They held that it was not. Although the Notice of Appeal and A’s Answer and Cross-Appeal as to this second decision raise issues beyond that, the parties are content that we rule only on that question at this juncture and adjourn generally those other issues. We shall adjourn all other issues.

33. Because this question raises the validity of primary legislation, the Secretary for Education and Employment, to use the then-applicable title, was, upon his application and by consent, added as a party to the appeal on the second decision. Accordingly we have heard argument not only from Mr Bean and Miss Harrison but also, and chiefly, from Mr Singh, on behalf of the Secretary of State.

34. It was common ground that section 7B was not retrospective. What relevance the question posed therefore had to anything the Tribunal truly needed to decide is unclear to us but the parties were as one in asking us to deal with what appeared to be a merely hypothetical question on the basis that they were ready to do so and as the Secretary of State had, in particular, been added to do so. In the circumstances we yielded and overrode our doubts as to the propriety of the point.

35. The reasoning of the Tribunal is as follows. Looking at our domestic law, a Constable is "liable to be called upon to perform intimate physical searches pursuant to statutory powers" within section 7B (2) (a). There is therefore, in respect of Constables, a "Supplementary genuine occupational qualification for the job". Therefore the bar on refusing to offer a candidate the job under section 6 (1) (c) does not apply - section 7B (1) (a) - where, as in A's case, the consequential less favourable treatment is on the ground of the candidates' having undergone gender re-assignment - section 2A (1). But that in practical terms imposes a total ban upon the recruitment of transsexuals into the police force; it is a domestic absolute ban that leaves no room for the doctrine of proportionality. This added legislation thus offends Community law by reason of its precluding proportionality.

The argument to the contrary has focused on two words or phrases; what is meant by "liable" to be called upon and what is an "intimate" physical search?

36. Under section 65 of PACE supra an "intimate search" is defined as one which consists of the physical examination of a person's body orifices other than the mouth. The authorisation and making of such searches are, unsurprisingly, carefully fenced in; authorisation has to come from an officer of at least the rank of Superintendent and he has to have reasonable grounds that specified conditions are made good - section 55 (1). He has, inter alia, to have reasonable grounds for believing that nothing short of an intimate search will suffice - section 55 (2). Where the intimate search is for a drug offence, it has to be by a Nurse or Doctor - section 55 (4) and section 55 (17). In all other cases the search is to be by a Nurse or Doctor "unless an officer of at least the rank of Superintendent considers that this is not practicable" - section 55 (5), in which case only can it be carried out by a Constable - but only one of the opposite sex - section 55 (6) and (7) and only at prescribed premises - section 55 (8).

37. Although section 7B (2) (a) adds the word "physical" to PACE's reference to "intimate" searches, the word "physical" is already included as part of PACE's definition. Equally (because, of course, it has to be remembered that section 7B (2)(a) is directed to all those having relevant statutory powers, not just to the Police) the definition of an "intimate search" within section 164 (5) of the Customs and Excise Management Act 1979 also includes the word "physical". It may be that in section 7B (2) (a) the word is added to "intimate search" to make the point - see the 1979 Act - that a merely visual examination is not an intimate search (although one might think a visual examination to be intimate enough). At all events, we do not see the introduction of the word "physical" in section 7B (2) (a) as requiring an understanding of "intimate physical search" that differs from the meaning of "intimate search" in PACE. To that extent there is a theoretical possibility that a Constable, including a

transsexual Constable, could be asked to perform an "intimate physical search" pursuant to a statutory power, namely PACE - section 55 (6) and (7).

38. But does such a theoretical possibility drive one inescapably to a conclusion that therefore the Constable is "liable to be called on" so to perform? The intrinsic unlikelihood of any one particular constable being called upon to do an intimate search is illustrated by statistics accepted by the Tribunal; in the Home Office statistics for 1996 (presumably for at least the whole of England) there were in that year only 132 intimate searches of which only 4 were by Police Officers. In that year the West Yorkshire force conducted only 1 intimate search by a Police Officer. The Secretary of State submits that "liable" in section 7B (2) (a) means "liable in practice". Both Mr Bean and Ms Harrison accept that to be the case and there is warrant for such a construction derivable from Mandla -v- Dowell Lee [1983] 2 A.C. 548 at 565 when Lord Fraser of Tullybelton (in a speech with which none of their Lordships disagreed and at least a majority agreed) indicated that the word "can" may, in context exclude theoretical possibilities and may look instead to ability "in practice". We accept that both at a merely linguistic level and on a more purposive approach "liable to be called upon to perform" in section 7B (2) (a) means liable in practice so to be called on.

39. The Tribunal found a conflict to exist between the domestic and the superior European legislative provision to exist because, although, as they held, the incidence of intimate searches was so low as to present no obstacle in practice to A's appointment as a Constable, the theoretical possibility that she could be called upon to perform one led to her falling within section 7B (2) (a) and amounted therefore to an absolute bar on her and all transsexuals becoming Constables.

40. The Tribunal erred in law, in our view, in taking that theoretical possibility to have that consequence. Had they had the benefit of Mr Singh's argument they would be likely to have shared our view that, reading "liable" as "liable in practice", that theoretical possibility can be ignored, that section 7B (2) (a) creates no absolute bar on the appointment of any transsexual as a Constable and that the perceived conflict between an absolute domestic provision and a Community requirement for flexibility does not exist. Accordingly the only reason the Tribunal had for holding section 7B (2) (a) to be incompatible with the Equal Treatment Directive does not exist.

41. We thus allow the appeal against the second decision; section 7B (2) (a) is not inconsistent with the Directive. The facts found - that the incidence of intimate physical searches is so low as in practice to present no obstacle to A's appointment as Constable - involve that, were consideration of section 7B (2) (a) to be relevant to A's IT1, it would not prevent her recruitment to that office.

42. All other issues relating to the Second Decision are, as was indicated earlier, adjourned generally, with liberty for them to be restored to the EAT on not less than 8 days' notice.