

White v. British Sugar (Industrial Tribunal, 1977)

Industrial tribunal ruling, 1977

Foreword

Now of largely historical interest, this tribunal ruling held that the Sex Discrimination Act 1975 did not prevent discrimination on ground of gender reassignment.

The applicant, a trans man who had changed his name and related documentation, had applied for employment as a male, and was offered temporary work at the factory. His gender rapidly became a matter of gossip, and when confronted by management, he explained his trans status and was promptly dismissed. The employer cited as reasons the embarrassment of all concerned and the applicants unsuitability for the job.

Declaring that “the laws of this country and the SDA in particular envisage only two sexes, namely male and female”, the tribunal held the applicant to be legally female. As such, an Exemption Order would have been required under the provisions of the Factories Act for the applicant to work on sundays, as the job required, and the employer was entitled to legally refuse him employment for such a job.

The panel construed the applicant’s gender transition as a form of deceit, and held that “the dismissal did not stem from sex discrimination but from the initial actions of the applicant, albeit with the best intentions, of holding herself out from her recruitment as a male when she was a female”.

By construing gender transition as deceit, the tribunal left trans people in the UK without protection against workplace discrimination. Although an industrial tribunal ruling does not set a binding precedent for other tribunals, the principles set out in *White v British Sugar* guided lawyers for nerly two decades.

This situation was only reversed in 1996, when the European Court of Justice ruled in the *PvS* case that the 1976 Equal Treatment Directive (ETD) did preclude discrimination on ground of gender reassignment. The ETD had not entered into force when this case was heard in 1977, and could not have been cited at that time.

Claire McNab, February 2001

Tribunal decision

Case Number 37485/76

The Industrial Tribunals between

Applicant: EA White

Respondent: The British Sugar Corporation Ltd

Appearances:

For the Applicant: In person

For the Respondents: Mr WEBB, Solicitor

Decision of the industrial tribunal held at Cambridge on 1st February 1977

1. On 8.11.76 the applicant complained to an Industrial Tribunal of dismissal by the respondents contrary to the provisions of the Sex Discrimination Act 1975, hereinafter referred to as the SDA. On 22 November the respondents entered an Appearance admitting the dismissal and giving the reason therefor as being that the applicant was unsuitable.
2. At the hearing the applicant appeared in person and the respondents were represented by Mr Webb (Solicitor).
3. As appears hereinafter this was a most unusual case, but happily there was no real conflict between the evidence for the parties which established as follows:
 - a. The applicant, now 21 years of age, was registered at birth as a female and christened Deborah Susan. The applicant had not applied to the Registrar of Births for any change in that registration but had changed her name some years ago to Edwynn Anzac White.
 - b. From the age of 8 years the applicant had taken up the position that she wished to be treated as a male. She had attended mixed schools until the age of 12 years when she went to convent school remaining there until 15 years of age.
 - c. The applicant had the physical attributes and sexual organs of a female. She had a soft voice and did not grow facial hair. She admitted that physically and biologically she was a woman but not in any other respect, eg outlook. She had not sought a sex change operation because she had been advised that the size and shape of her female organs would not permit a successful operation.
 - d. The applicant regarded all things and matters feminine as repugnant. She dressed as a man.
 - e. With obvious sincerity the applicant stated on more than one occasion during the hearing that she wanted to be treated in all respects as a man and called such.

- f. At the applicant's instigation her doctor had altered her registration to her male name about 2 years ago, that her unemployment benefit card and registration with Department of Health and Social Security had been altered likewise and communications to her were addressed as 'Mr'. Her driving licence and certificate of motor insurance were in her male name.
- g. In October 1976 the applicant telephoned the respondents' Wissington factory to ascertain if they had any employment to offer and was invited to attend for an interview on 6 October. On that date she was interviewed by Mr Howell (Personnel Officer). She completed an application form in her male name. At the interview the applicant was dressed as a man and gave no indication that she was other than a man or that she had any health or other problems. Mr Howell, believing her to be a man, offered the applicant the job of electrician's mate for a special project at the works involving four to six weeks' work. The job entailed working from 0730 to 1600 hours daily for a continuous period (including Saturdays and Sundays) of 13 days and then having 1 rest day. This work involved no special skills or training being, in the main, fetching, carrying and holding items for an electrician. The applicant was shown the mens' changing and toilet facilities. The applicant accepted the job and was told to report for duty the following morning.
- h. On 7 October the applicant reported for work and was taken by the respondents' foreman (Mr Morley) to the electrician (Mr Jennings) with whom she was to work and introduced to him as Mr White and called 'Ted'. The applicant worked with Mr Jennings throughout that day and the next day and it is convenient to say at this point that neither he nor the respondents had any cause to complain about her work.
- i. On the morning of the following day, ie 8 October, rumours began to circulate in the factory about the sex of the applicant and eventually another employee told Mr Jennings that his brother had gone to school with the applicant and that she was then a girl. Mr Jennings reported the situation to Mr Morley and asked him if the applicant was a girl what was she doing in the mens' toilets? He had seen her there.
- j. Mr Morley informed Mr Howell who had already heard rumours about the situation and that gentleman telephoned the Department of Employment. He was informed that the Department was not sure of the sex of the applicant. Immediately after lunch Mr Howell sent for the applicant, told her of the rumours and said that the Department had told him that she was a woman masquerading as a man and he would like her to leave at the end of the day. The applicant told him that she had changed her name. Mr Howell told the applicant that she was unsuitable for the job and that for her to remain in the respondents' employ would cause embarrassment to all concerned. Although Mr Howell did not ask the applicant specifically if she was a male or female the applicant said that her overall impression was that he thought that she was female. The Tribunal accept this to be the case.
- k. The men's changing room and lockers were separate from their toilet facilities. There was evidence that some men changed down to their underpants in the changing room. The toilets comprised wash basins, urinals, closets and showers and there was evidence that to get to closets one had to walk past the urinals.

- l. Females were employed at the factory and had separate toilet etc facilities. For females to work on Sundays, and some female labour was so employed on shift work during the production season roughly October to December in each year, it was necessary under the Factories Act for the respondents to obtain a special Exemption Order from the Health and Safety Executive. The respondents would have had to obtain such an Order in respect of the applicant if she were a female to cover her continuous working including Sundays and this would have taken time.
- m. Apart from female production workers the respondent employed female labour during the factory close down period (roughly January to September in each year) on maintenance on a day work basis not involving an Exemption Order. Mr Jennings (electrician) gave evidence that in the maintenance periods from 1974, 1975 and 1976 he had worked with a female mate. He had no objection to this.
- n. The job for which the applicant had been engaged finished in four weeks. After her dismissal the applicant was replaced by a male electrician's mate.

Mr Howell gave his reasons for dismissing the applicant as being that she had deceived him into believing that she was a man and he did not feel able to take the responsibility of the applicant moving round the factory and using the male toilets and changing facilities when she was a woman. He agreed that it did not occur to him to offer the applicant the use of the female toilets etc. He knew that an Exemption Order was necessary for the employment of a female in the job given to the applicant and this was in his mind at the time of her dismissal.

The applicant did not make a closing address beyond saying that she hoped that the present proceedings would establish her status as a male. Mr Webb's basic arguments were twofold:

First that although most of the hearing had proceeded on the basis that the applicant was a woman because the Tribunal had refused to make a preliminary ruling on the issue of the applicant's sex until it had heard all the evidence, he contended that for the purposes of the SDA the Tribunal should treat the applicant as a man. As that Act was concerned with discrimination between men and women and vice versa the applicant could have no claim under it and the Tribunal had no jurisdiction. Mr Webb accepted that the applicant was born a woman but pointed out that from the age of 8 years she had acted and sought to be treated as a male. The applicant had pushed aside her female physical side and the only fact standing in her way from being a man was that she could not have a successful operation to complete the physical transformation. Everything in the case, including the application, presented the applicant as a man. She dressed as a man. Various Government Departments addressed correspondence to her as a man. Her doctor had acceded to her request to register her in her male name. In common sense the applicant's background militated against a Tribunal treating her as a male.

Second if the Tribunal found that the applicant was female then she had been dishonest at her original interview in failing to disclose her state and problems. The respondents did not discriminate against women and indeed had employed female mates for electricians. In this case if the applicant had disclosed initially that she was female the respondents would have been entitled to refuse her employment without being accused of discrimination having regard to the provisions of s.7 and in particular sub-sections (1) (a) and (2) (f) thereof — sex being a genuine occupational qualification. The Factories Act imposed restrictions on the employment of women on Sundays and though no doubt an Exemption Order could have

been obtained the job being offered to the applicant was of short duration and exemptions could not be obtained speedily. This apart, the respondents had good reason to dismiss the applicant. There was a cloud of mystery round the situation and the respondents could not obtain a clear answer from the Department of Employment as to the applicant's sex. At this point at the dismissal interview the applicant told Mr Howell of her change of name. It was an embarrassing situation with an element of deception. What could Mr Howell do. Problems had arisen after one and a half days' employment. There was the problem of the toilet and changing facilities. The applicant's dismissal arose from her own conduct.

Basically the SDA as its title and preamble envisages is related to discrimination by a person between the sexes, though s.4 thereof refers to discrimination in specified circumstances and between 'persons' by victimisation as defined therein. S.1 refers to discrimination against a woman but s.2(1) states that references to sex discrimination against women in s.1, Parts II (Discrimination in the Employment Field) and Part III (Discrimination in Other Fields) of the SDA are to be read as applying equally to the treatment of men subject to appropriate modifications. In s.5(2) and 82(1) of the SDA woman is defined as including a female of any age and man to include a male of any age. Person is not defined in the Act.

7. While it could not fail to have sympathy with the applicant in her personal and personality predicament the Tribunal is of the opinion that the laws of this country and the SDA in particular envisage only two sexes, namely male and female. The current edition of The Shorter Oxford English Dictionary defines male as of or belonging to the sex which begets offspring or performs the fecundating function. The same dictionary defines female as belonging to the sex which bears offspring. On her own evidence the applicant, whatever her physiological make up may be, does not have male reproductive organs and there was no evidence that she could not bear children. Accordingly despite the heart felt plea of the applicant to be regarded and treated as a man for all purposes and the supporting contentions of Mr Webb for the respondents the Tribunal decided that for the purposes of the SDA the applicant was a woman.

8. Having found as above the Tribunal considered the evidence and argument in this case in the light of the provisions of the SDA applicable to discrimination against a woman in the employment field and in particular the following:

S.1(1)(a). A person discriminates against a woman in any circumstances relevant for the purposes of this Act if on the grounds of her sex he treats her less favourably than he treats or would treat a man.

S.6(2)(b). It is unlawful for a person in the case of a woman employed by him at an establishment in Great Britain to discriminate against her by dismissing her or subjecting her to any other detriment.

S.7. As referred to in paragraph 5 hereof.

9. Undoubtedly the respondents had dismissed the applicant because of their discovery that she was a female but was that discrimination? In the circumstances did the respondents treat the applicant on the ground of her sex less favourably than they would have treated a man? If the applicant had been a man and had he held himself out to the respondents as a female and been employed as such and used the female toilet facilities and the like and it had then been discovered that he was a man the Tribunal had no hesitation in deciding that in the

circumstances the respondents would have dismissed him. Accordingly in the present case there was no discrimination on the ground of the applicant's sex. If this be thought to be too narrow a view the Tribunal would point to the general background to the case as indicating that the dismissal did not stem from sex discrimination but from the initial actions of the applicant, albeit with the best intentions, of holding herself out from her recruitment as a male when she was a female. If she had told the respondents at the beginning that she was a female they would not have employed her for in the nature of this employment as indicated by the evidence and emphasised in the closing address of Mr Webb there was a genuine occupational qualification for a male employee — see paragraphs 3 (1), 4 and 5 hereof. Furthermore there was nothing in the evidence to indicate any hostility by the respondents to female employees. They employed a number of female employees on production work and more significantly they had employed at least one female employee as an electrician's mate on day work, ie not requiring an Exemption Order, for substantial periods. In all the circumstances the Tribunal was not satisfied that the applicant had made out a case under the Sex Discrimination Act or any other industrial legislation falling within the jurisdiction of an Industrial Tribunal.

» by Claire McNab