

X v NHS Trust Pensions Agency (Employment Tribunal, Feb 1999)

Employment Appeal Tribunal ruling

1999

Foreword

N.B. To protect the privacy of the appellant and her partner, their names have been replaced throughout with “X” and “Y”.

This Employment Appeal Tribunal considered the appeal of a woman who had sought to ensure that her partner, a trans man, could benefit from the pension to which she had contributed for more than 20 years as a senior employee of the National Health Service.

The EAT upheld the decision of an Employment Tribunal that if she died, he was not entitled to receive the share of her pension which would, under the rules of the pension scheme, be due to a surviving spouse. The issue at stake was whether this amounted to unlawful sex discrimination.

X claimed that since she was legally not allowed to marry her partner (because the law did not recognise him as male), the pension scheme’s rules illegally discriminated in requiring that a couple must be married for the surviving partner of a deceased former employee to benefit from the pension.

Making a fine (though troubling) distinction, the EAT held that while the [P v S](#) ruling prevented trans people from being treated less favourably than the sex in which they had lived before transition, the case did not establish that transsexual people were entitled to equal rights with the sex in which they now lived. It remains to be seen how higher courts will view this interpretation of the “principle of equal treatment”.

Claire McNab, November 2000

Tribunal decision

EMPLOYMENT APPEAL TRIBUNAL

Judgments

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

Appeal No: EAT/1211/98

At the Tribunal On: 21 & 22 July 1999

Before:

THE HONOURABLE MR JUSTICE MORISON (P)

**MRS T A MARSLAND
MR T C THOMAS CBE**

X

v

1) THE NHS TRUST PENSIONS AGENCY 2) SOS FOR HEALTH

APPEARANCES

For the Appellant	LAURA COX QC & MR T EICKE (of Counsel) Legal Officer Justice 59 Carter Lane London EC4V 5AQ
For the Respondents	MR N PAINES QC & MR R HILL (of Counsel) Office of the Solicitor Department of Social Security Pensions Branch Room 418 New Court 48 Carey Street London WC2A 2LS

MR JUSTICE MORISON:

Y is a transsexual. He was born in a female body. He was biologically and physically a female at birth. In other words, all the biological tests would, if done, have been congruent. However, he suffered from gender dysphoria, a condition of the mind [which may or may not be caused by, or attributable to, physical features within the brain]. People with this condition experience a lack of compatibility between their biological sex and the sex which they believe themselves to have. Some people with this condition undergo operative procedures [gender re-assignment] designed to bring harmony between the physical and psychological. Y suffered from gender dysphoria, probably from birth, and underwent operative procedures. He regards himself as a man and, for most purposes within society, he is accepted as a man.

1. A citizen who is a transsexual, whether or not he or she has undergone operative procedures, may change their name by deed poll, may change their gender in their passport and driving licence and their mode of address. However, under English Law, a transsexual [whether or not he or she has undergone operative procedures] cannot change their biological condition which they had at birth and cannot, therefore, have their birth certificate amended. Accordingly, a transsexual may not lawfully marry a person of the same sex as he or she had at birth. The gender on a birth certificate may, in limited circumstances, such as where the biological tests are not congruent, be changed. But such circumstances do not apply in this case. Despite all the other indications of his gender, and his position in society, Y remains, in the eyes of English Law, a biological female.

2. Y has enjoyed a long-term relationship with a woman, X - the appellant. It is common ground that they are accepted by society as a man and a woman. They would wish to be married but are barred from doing so. They have gone through a religious ceremony blessing their relationship.

3. X held a senior post in the National Health Service from which she resigned in 1996 after over 20 years of service. She was a member of the Statutory Pension Scheme [‘the Scheme’]. She has a preserved pension and has survived for more than 12 months after leaving her pensionable employment. Under paragraph G7(1) of the Scheme, if X were to die before reaching pensionable age her widower would be entitled to one half of the preserved pension [G4(3)]; and if she died whilst in receipt of her pension then again her widower would be entitled to one half of the pension [G3]. The only people, other than dependent children, who may receive benefit under the Scheme are widowers and widows. Although there is no definition of the words ‘widow’ or ‘widower’ within the Scheme, it seems to us that their meaning is clear and obvious. Unlike many other pension schemes, which give the trustees a discretion to pay what might be loosely called ‘derived’ pensions to unmarried partners of scheme members, there is no such discretion in the NHS Scheme. X is concerned that her partner Y, to whom she regards herself as married, will not, in the event she predeceases him, be able to benefit from the pension which she has earned during her twenty odd years of service.

4. She presented a complaint to an Employment Tribunal against the NHS Pension Agency [the first named respondent] who administer the Scheme on behalf of the Secretary of State for Health [the second named respondent] alleging unlawful discrimination on grounds of sex, and a breach of [what was then] Article 119 of the Treaty and the Equal Pay Directive. If the Scheme unlawfully discriminated against those who may qualify for a ‘derived’

pension, there is no dispute between the parties that X is entitled to maintain the claim herself for the benefit of her partner Y.

5. On 14 December 1995, Advocate General Tesauro delivered his opinion in the case of [P v S & Cornwall County Council](#) [1996 ECR I - 2143]. P, a biological male, suffered from gender dysphoria and told his employers that he was about to undergo a gender reassignment operation. He was dismissed for that reason. The opinion can properly be described as enlightened and sympathetic. On 30 April 1996, the Court gave its ruling. The crucial parts of the Court's Decision are to be found at paragraphs 20 and 21.

"Accordingly the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender re-assignment of the person concerned.

Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, 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."

6. The complaint in this case was presented in February 1997. On 30 September 1997 Advocate General Elmer gave his opinion in the [Grant](#) case [[Grant v South West Trains](#) [1998] ECR I - 621]. Ms Grant lived with another woman in a long term relationship. She described her partner as her common law spouse when applying for concessionary travel facilities from her employers. Under the concessionary travel facilities scheme, the spouses [if not separated] qualified for privilege tickets, as did "one common law opposite sex spouse ... subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more." Thus, under the rules of the scheme, Ms Grant's partner did not qualify for privilege tickets.

7. The Court gave judgment in [Grant](#) on 17 February 1998, 9 days before the Employment tribunal commenced their hearing of the present complaint. The Court identified three questions. On the first question the Court concluded that the condition of the scheme applied regardless of the sex of the worker concerned. The same condition applied equally to gay males and gay females.

8. Second, the Court noted that the laws of the Member States varied as to how persons with a stable relationship who shared the same sex were treated. In some, such a relationship was treated as equivalent to marriage; in others, such relationships are recognised in respect of a limited number of rights; and in some others, such relationships were not recognised in any particular way. It observed that stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the Human Rights Convention. The Court continued:

"In another context, the European Court of Human rights has interpreted Article 12 of the Convention [the right to marry] as applying only to the traditional marriage between two persons of the opposite biological sex

It follows that, in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community Law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex."

9. The third question related to the submission made on Ms Grant's behalf that it followed from the decision in **P v S** that differences in treatment based on sexual orientation are included within 'discrimination based on sex' prohibited by Article 119 of the Treaty. The Court said that the question at issue in that case was whether a dismissal based on the change of sex of the worker concerned was to be regarded as 'discrimination on grounds of sex'. It referred to the argument of the UK Government and the Commission that the Equal Treatment Directive did not apply because the complaint was not concerned with differential treatment between one sex and another but rather with gender reassignment. The Court restated its decision that "such discrimination was in fact based, essentially if not exclusively, on the sex of the person concerned". It rejected the submission that the word "sex" in the Directive included "sexual orientation" and also rejected an argument based upon the International Covenant on Civil and Political Rights. It accepted that the Covenant was one of the international instruments relating to the protection of human rights which the Court would take account of in applying fundamental principles of Community Law.

"However, although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community."

10. It is common knowledge amongst lawyers that the Court's decision in **Grant** came as something of a surprise, having regard to the Advocate General's opinion and the willingness of the Court to uphold P's complaint.

11. The reason why it has been necessary to deal with these two decisions at length is because the Employment Tribunal concluded that had it not been for the **Grant** decision

"... there might have been some doubt in our minds as to whether the [provisions of the Scheme] did have a discriminatory flavour about them in relation to transsexuals and homosexual couples. However, in the light of the lengthy and fully argued judgment of the European Court in Grant we are left in no doubt as to the position and we do not consider that this is an appropriate case to refer the further questions posed"

This appeal largely turns on the proper interpretation of the two decisions of the European Court.

The Parties Submissions

12. On behalf of the appellant

Ms Cox QC submitted:

(1) The appellant does not contend that transsexuals are a separate and identifiable category different from male or female workers nor that they constitute some kind of third sex or third gender as was mentioned in the Employment Tribunal's decision. Further, she submitted that transsexuals are not homosexuals and that the law's attitude to whether there has been unlawful discrimination on grounds of sex must recognise this obvious distinction. The issues arising where partners are of the same sex [in a homosexual relationship] are issues of sexual orientation. Whereas, where there is a relationship between a person of one sex who is living with a transsexual who has undergone gender reassignment the issues do not concern sexual orientation but rather discrimination on grounds of the transsexual's sex. She referred to the Court's judgment in **Grant** where the distinction was drawn. Nor was she contending that the EAT should be concerned with rights under Article 12 of the Convention: she was not asking the EAT to say that X and Y should be allowed to marry, as that was a family issue falling outwith the provisions of Community Law.

(2) Pensions are pay within the meaning of Article 119, and survivor's pensions also fall within that Article's scope: **TenOever** [1995] ICR 74. The principle of Equal Pay, enshrined in Article 199 and the Equal Pay Directive entitles the applicant to treatment free from all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

(3) According to Advocate General Elmer, "in order to be effective [Article 199 and the Equal Pay Directive] must be understood as prohibiting discrimination against employees not solely on the basis of the employer's own gender but also on the basis of the gender of the employee's child parent or other dependent." Discrimination means the application of different rules to comparable situations or the application of the same rule to different situations: **Gillespie & Others v Northern Health & Social Services Board & others** [1996] ECR I-475, paragraph 16.

(4) In the context of social legislation of this kind, domestic law [both primary and secondary legislation] must be construed purposively and so as to give effect to the United Kingdom's obligations under Community Law. Where necessary, in order to avoid a conflict with the United Kingdom's obligations enshrined in the European Communities Act 1972, words might have to be added to statutory material; for example see **Litster**.

(5) If the EAT were in any real doubt as to the correct answer, then it should ordinarily refer the issue to the European Court of Justice: **ex parte Else** [1994] QB 534 at 545D-F. In making its judgment, the domestic court should recognise that arguments which might not appear attractive to it might find favour with the ECJ, whose approach to interpretation of the Treaty and European legislation is more widely based.

(6) The decision in **P v S** [paragraph 21] confirms that the European Court accepted that discrimination against a transsexual was discrimination on grounds of sex. The **Grant** case did not, expressly or by implication, overrule **P v S**; on the contrary, **Grant** was concerned with sexual orientation and **P v S** with transsexuals. The fact that discrimination on grounds of sexual orientation is not, as yet, embraced by European legislation does not compel the conclusion that discrimination against transsexuals is also excluded.

(7) In **Grant**, the comparator taken by the court was a male employee living with another male; whereas in **P v S** the court compared P's position with the sex he or she had before the gender re-assignment. Thus, the appropriate comparator in this case should be between Y as a woman [the sex he had at birth] living in a married relationship with a male nurse member of the Scheme. If he had been a woman, Y could have married a male nurse and become a widow entitled to benefit; because Y is a transsexual he has been deprived of the opportunity to become a widow entitled to benefit.

(8) Alternatively, there has been indirect discrimination: the requirement or condition of the Scheme applies so as to exclude all transsexuals from derived benefits. Such a condition cannot be justified. If the Court were to conclude that Y had no right to derived benefit it would amount to "a moral condemnation" of the position of transsexuals within the law. The EAT are invited to take a bold approach, or a functionalist approach such as was adopted by Ward LJ, in a dissenting judgment, in **Fitzpatrick v Sterling Housing Association Limited** [1998] Ch 304. There the Court was concerned with the issue whether a same sex partner could 'succeed' to a Rent Act Protected tenancy. That case is, we were told, to be considered by the House of Lords.

(9) To give effect to the overriding principle of fairness and justice, the EAT were invited to supplement the words of the Scheme to add after the word 'widow' or 'widower' words to the effect "or would have been a widow(er) save for the inability to marry due to the partner's inability (in law) to amend his or her birth certificate to show his or her true gender".

13. On behalf of the Respondents

Mr Nicholas Paines QC submitted

(1) The words 'widow' and 'widower' should be given their ordinary and natural meaning. As was stated in the case of *Rees v United Kingdom* [1986] 9 ECHR 56, a decision of the Strasbourg Court of Human Rights, it is a necessary condition for there to be a valid marriage that the spouses should be of different biological sexes. As the law presently stands, it would be unlawful for a transsexual to marry otherwise than as a person of the biological sex contained in the birth certificate, unless it could be shown, on medical grounds, that the gender was wrongly recorded. Gender re-assignment does not alter the biological sex of the individual who has undergone it. Thus, Y may not lawfully or validly marry a woman although he could validly marry a man. Although transsexuals may well not be properly classified as homosexual, and their condition should not be equated with homosexuality, in practice they are in no different position in the eyes of the law, whether or not they have undergone gender re-assignment.

(2) The rule in the Scheme is non-discriminatory. As the Employment tribunal found, the rule applies equally to men and women.

(3) The ratio of **P v S** did not require transsexuals to be accorded the full legal rights of their psychological sex, whether or not they had had surgery. As such, transsexuals have no special or separate status in the eyes of European Law.

(4) In the **Grant** case, the ECJ referred to the case-law of the European Court of Human Rights and concluded that European Law did not require member States to treat a homosexual relationship as equivalent to marriage or a stable heterosexual relationship. One of the cases cited by the ECJ was **Rees**, a case concerning a transsexual. It is clear that the

Court was not just referring to people of the same sex who were unable to marry, but also to a transsexual who is unable to marry otherwise than as a person with their gender assigned at birth.

(5) **P v S** was concerned with an act of discrimination against a person who had proposed to undergo gender re-assignment surgery. It was clear from the Court's decision in that case and from the case of Grant that the transsexual succeeded because he was treated less favourable than he would have been had he not proposed to undergo that surgery. To treat someone less favourably on grounds that they were undergoing a 'sex change operation' was to treat him less favourably by reason of his sex. It was not an answer to say that another transsexual, who was a woman changing to a man, would have been treated the same: she, too, would have been disadvantaged by reason of her gender. In effect, **P v S** was a case where, as with pregnancy, there is no need to look for a comparator.

(6) It cannot make any difference why X is unable to marry her partner. Y would not have been entitled to any derived benefit if X was already married and not divorced, or he or she had some philosophical or other objection to the status of marriage. The same problem would arise for those in a homosexual relationship.

(7) As recently as 30 July 1998, the European Court of Human Rights refused to depart from its earlier decisions relating to transsexuals in the context of their right to marry or to respect for their private lives. In *Sheffield & Horsham v United Kingdom* 27 EHRR 163 the Court said (in relation to the article 8 claim):

"The Court is ... not persuaded that it should depart from its *Ress* and *Cossey* decisions and conclude on the basis of scientific and legal developments alone the respondent State can no longer rely on a margin of appreciation to defend its continuing refusal to recognise in law a transsexual's post operative gender. For the Court, it continues to be the case that transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the contracting States."

(8) As to indirect discrimination, there was no evidence before the tribunal to suggest that a considerably higher proportion of female members of the Scheme than male members of the Scheme have a transsexual partner.

Decision

14. It seems to us that society's tolerance of transsexualism is a topic not best determined by courts of law. As the European Court of Human Rights rightly said, there are complex issues involved. It is probably neither possible nor sensible to isolate the problems which society has had in coming to terms with transsexualism from those it experiences when dealing with homosexual partnerships. It was not clear to us whether the claim in this case would have been any different had Y not undergone gender re-assignment operative procedures. It is likely to be the case that there are many transsexuals who, for a variety of reasons, do not undergo surgery but lead lives in the gender in which they feel more comfortable. If a distinction were to be drawn between those who had, and those who had not, undergone surgery, some transsexuals who have declined surgery for sound reasons would then feel discriminated against and obliged to undergo it. If such a distinction were not made then there would be some homosexual relationships which would be barely distinguishable from relationships involving transsexuals. Whilst this Court might well take the view that all relationships should be treated equally under the law, others might take a different view. Attracted as we were to the invitation to adopt a truly functionalistic approach to the problem

at hand, we recognise that this Court would lose all its respect if we ignored the law and tried to do justice according to our own views as to how the underlying complex problems should be resolved.

15. The legal position does seem to us to be plain, although we admire the arguments which Ms Cox presented to us. In the first place, we consider that the Scheme discriminates between members who are married and members who are not. The words 'widow' and widower' mean and can only mean the surviving spouse. Thus, unmarried partners can never obtain derived benefits, whatever the reason for the fact that they are not married. Y, as with other unmarried partners of members, is not entitled to derived benefits because he is unmarried and not because he is a transsexual. It is being unmarried which disqualifies him. He is not being discriminated against because he is a transsexual but because he is unmarried (whether because he is a transsexual or because he is gay or because he objects to marriage or because he or X is already married). If it is not unlawful to deprive transsexuals of the right to get married, it seems to us an odd result if he has a valid claim against the Scheme based on his inability to get married.

16. The case of **P v S** does not carry the argument as Ms Cox was submitting. In that case, P was treated less favourably than he would have been had he not indicated a desire to undergo gender re-assignment. In other words, he was treated worse than he would have been had he not given that indication. Thus he was treated less favourably than an 'ordinary' male or a transsexual who did not intend, or announce an intention, to undergo the surgery. The case did not establish that transsexuals were entitled to equal rights with those of the sex to which they were seeking re-assignment. The Court, in **Grant**, specifically rejected that contention by re-affirming its previous decision and by reference to the Human Rights cases.

17. Furthermore, we reject the complaint of indirect discrimination for the reasons advanced by Mr Paines. The question of justification only arises where the differential impact of a condition has been identified. None such has been identified in this case.

18. Like the Employment Tribunal, to whose decision we pay tribute, we consider that in the light of the Grant decision, this appeal was bound to fail.

19. But we can and do invite those who are responsible for such matters to consider whether it is sensible in modern times for eligibility to any concession or benefit to depend upon the marital status of the people concerned. It is the experience of the members of this court that many if not most pension schemes give trustees a discretion to make payments where relationships outside marriage are stable. We can think of no good social reason why travel facilities or derived pension benefits should not be available where there is a stable long-term relationship between two unmarried people, whatever the reasons for not being married. Such a change would not have to address the more complicated and difficult question as to whether persons of the same sex should be permitted to marry or transsexuals be permitted formally to change their birth certificates.

» by Claire McNab