Tribunal decision

Case Number 1802020/98

The Employment Tribunals between

Applicant: 'A'
Respondent: Chief Constable of the West Yorkshire Police

Second decision of the employment tribunal held at Leeds on Thursday 25 November 1999 and Friday 26 November 1999

Chairman: Mr D R Sneath TD TL
Members: Mrs T L Frost, Mr G Nicol

Representation

For the Applicant: Ms S Harrison, Counsel
For the Respondent: Mr D Jones, Counsel

Second Decision

The unanimous decision of the tribunal is that:

a. 7B(2)(a) of the Sex Discrimination Act 1975 as amended by the Sex Discrimination (Gender Reassignment) Regulations 1999 is not consistent with Council Directive 207/76 (The Equal Treatment Directive) and does not prevent the respondent from lawfully recruiting the applicant as a police constable.

b. the applicant is entitled to compensation for the discrimination identified in our first decision with effect from 1 September 1999 on the basis that she would at that date have been able to enter the respondent's induction system as a new recruit.

Extended reasons

1. This decision should be read in conjunction with our first decision sent to the parties on 18 March 1999. By that decision we found that the respondent had discriminated against the applicant contrary to part II of the Sex Discrimination Act 1975 by refusing the offer her employment in the office of constable. We have now heard legal submissions and some evidence on two issues. The first issue was whether or not section 7B(2)(a) of the Sex Discrimination Act 1975 as amended precluded us from giving relief to the applicant in respect of the discrimination found by us in our first decision. The second issue was a purely factual one, namely, whether the applicant would not have joined the respondent's police force in the normal course of events because the recruitment process in which she was engaged was terminated. We have not been called upon to determine whether or not to make a recommendation or to award compensation because our first decision is the subject of an appeal to the Employment Appeal Tribunal. The applicant has cross-appealed. The issues we have been called upon to determine are those considered by the parties to be necessary to put before the Employment Appeal Tribunal all the legal issues which it is likely to have to determine.

2. First a short chronology. Our first decision was a reserved decision made on Monday 8 March. It was, as we have indicated, sent to the parties on 18 March. The Sex Discrimination (Gender Reassignment) Regulations 1999 came into force on 1 May 1999. There followed some debate as to whether or not we should list the case for a remedies hearing as a result of which there has been some delay in getting the matter on now.

3. Whilst it has nothing to do with our reasoning, we note that the 1999 Regulations came into force as a result of an Order in Council. We are told that they were the subject of consultation, although the period of consultation was shortened. It is believed that police forces were consulted but that the Equal Opportunities Commission was not. If that is so, then it is unsatisfactory, in our respectful view. Also the Chairman is aware that the Presidents of Employment Tribunals (England and Wales) and (Scotland) were not consulted. Had they been, our first decision could have been considered. Finally, we were told that these regulations would have been laid before Parliament but were not the subject of any debate, there being no objection taken to their terms by any Member of the House.

4. Having said all that, we acknowledge that our function is to construe section 7B(2)(a) using the normal tools of construction. It is common ground that, although the regulations are not retrospective, we cannot ignore them simply because we made our first decision before they came into force. For we are bound to consider the matter of remedies in the light of law and evidence as it stands today. The respondent argues that section 7B(2)(a) vindicates the decision of the respondent to deny the applicant access to the office of constable. The applicant says that we have the power to disregard section 7B(2)(a) if it offends Community law. She says that it does because it offends the principle of proportionality, something which lay at the heart of our first decision.

5. Turning then to the matter of construction, we observe that section 7A introduces the concept of a genuine occupational qualification (GOQ) for the job into the new section 2A which in turn proscribes gender reassignment discrimination. Significantly 7A(3) imports section 7(4) into the GOQ equation.

6. Section 7(4) gives effect to the Community notion of proportionality. It does so by disapplying the GOQ exception to the right not to suffer discrimination on the ground of sex in situations where the employer already has employees of the right sex who are capable of carrying out the duties giving rise to the GOQ and whom it would be reasonable to employ on those duties and whose numbers are sufficient to meet the employers' likely requirements in respect of those duties without undue inconvenience.

7. Section 7B(2)(a) does not come with the benefit for applicants of section 7(4). Section 7B(1)(a) provides that in relation to gender reassignment discrimination section 6(1)(a) or (c) does not apply to any employment where there is a supplementary genuine occupational qualification for the job. Section 7B(2)(a) provides that there is a supplementary genuine occupational qualification for a job only if the job involves the holder of the job being liable to be called upon to perform intimate physical searches pursuant to statutory powers.

8. Our attention has focused on the word "liable" and the phrase "intimate physical searches pursuant to statutory powers". Dealing with the latter, we are bound to ask what statutory powers are there being referred to. In the context of this case we have to look no further than the Police and Criminal Evidence Act 1984. Section 55 of that Act provides that, subject to the following provisions of that section, if an officer of at least the rank of superintendent has reasonable grounds for believing that a person who has been arrested and is in police detention may have concealed on him anything which he could use to cause physical injury to himself or others and that he might so use it while he is in police detention or in the custody of a Court or that such a person may have a class A drug concealed upon him and was in possession of it with the appropriate criminal intent before his arrest, he may authorise an intimate search of that person. An intimate search which is only a drug offence search has to be by way of examination by a suitably qualified person. Subject thereto, an intimate search has to be by way of examination by a suitably qualified person unless an officer of at least the rank of superintendent considers that this is not practicable. The section goes on to say where such searches can take place. A suitably qualified person is defined by section 55(17) as a registered medical practitioner or a registered nurse. Under section 65 intimate search is defined as meaning a search which consists of the physical examination of a person's body orifices other than the mouth.

9. According to Home Office statistics for 1996, 132 intimate searches were conducted of which only 4 were conducted by police of officers. In the same year in the West Yorkshire Force area 5 persons were intimately searched, 4 by suitably qualified persons and one by a police officer. In a Home Office custody record sample of 10,496 suspects, only 17 were the subjects of intimate searches.

10. Thus, it can be seen that the incidence of intimate searches is so low as to present no obstacle to the appointment of the applicant to the office of constable. For if the prohibition is confined to such searches, she could still perform the full range of duties of a police constable. If exceptionally she was called upon to attend an intimate search, we have no reason to think that other arrangements could not easily be made for a biologically female officer to attend in her place. That is why the focus of our first decision was on what might be described as routine searching whether or not it involved the removal of clothing.

11. Turning to the meaning of the word "liable", we accept Mr Jones submission that it means having to do something if called upon to do so by virtue of being the holder of a particular job. The fact that it is theoretically unlikely that a person would be called upon to attend an intimate physical search does not, in our judgement, mean that that person is not liable so to do.

12. Thus we construe section 7B(2)(a) as having the effect of imposing a ban upon the recruitment of transsexuals to the police force. That ban is absolute, there being no equivalent of section 7(4) in section 7B. Given the reasons set out in our first decision for finding that the applicant had been unlawfully discriminated against, we feel bound to find that section 7B(2)(a) offends Community law because it precludes the application of the principle of proportionality. We have already decided in paragraph 37 of that decision that the risks to the respondent in permitting the applicant as a transsexual to carry out the full range of duties including the searching of women are so small that to give effect to them by denying the applicant access to the office of constable would be wholly disproportionate to the denial of the applicant's fundamental right to equal treatment. Likewise denying the applicant her fundamental right by reference to a form of searching which any Police force including this one can easily accommodate by calling upon another officer to attend is also wholly disproportionate.

13. We have been referred to a number of authorities starting with the decision of the European Court of Justice in Simmenthal (1978) ECR 629. From there we were taken to R v Secretary of State ex parte Equal Opportunities Commission (1994) ICR 317. In particular we were taken to the passage in the judgment of Lord Keith beginning at paragraph D on page 325. From there we were taken to another decision of the ECJ, that of Johnston v Chief Constable RUC (1987) IQB 129. At paragraph 52 of the judgment, the Court said:

    The derogation from the principle of equal treatment which, as stated above, is allowed by Article 2(2) constitutes only an option for the Member States. It is for the competent national court to see whether that option has been exercised in provisions of national law and to construe the content of those provisions. The question whether an individual may rely upon a provision of the directive in order to have a derogation laid down by national legislation set aside arises only if that derogation went beyond the limits of the exceptions permitted by Article 2(2) of the Directive."

14. Thus, we have construed the provisions of the national legislation, namely, section 7B(2)(a). We find that the derogation laid down therein has gone beyond the limits of the exceptions permitted by Article 2(2) of the Directive because it does not, in our judgement, admit consideration by the national tribunal of the concept of proportionality.

15. Accordingly, we find that the provisions of section 7B(2)(a) do not preclude this tribunal from granting to the applicant the full range of remedies set out in section 65 of the Sex Discrimination Act 1975.

16. Secondly, we have been called upon to decide a factual issue, namely, whether the applicant should be compensated for the loss of the chance of being recruited into the respondent's force sometime in early or mid 1998. The applicant submits that not only was she discriminated against by the respondent refusing to offer her employment in the office of constable but also in the arrangements he made for the purpose of determining who should be offered that employment. In particular, she adverts to the delay caused at the outset by the Assistant Chief Constable (Personnel) having to consider her case as a transsexual. The consequence, it is said, was that the delay caused the applicant to be placed in a group of recruits who ultimately suffered as the result of a cut or reduction in funding.

17. The respondent has argued that we are being asked to consider the factual basis for compensation in respect of a form of discrimination not found in our first decision. In effect, we found discrimination contrary to section 6(1)(c) of the Sex Discrimination Act 1975, as amended. We are being asked now by the applicant to extend our finding to one under section 6(1)(a).

18. There has been a debate as to whether or not we are entitled to do that. We have decided that we are and to analyse the evidence before us in that context. We heard from Gary Robinson, the respondent's Head of Personnel. He was able to produce some helpful documents. Earlier there had been a request for information as a result of which tables were produced showing applicants by date of application and date upon which each joined the respondent's force.

19. We make the following further findings of fact. We apologise in advance for repeating any factual matters already set out in our first decision. The applicant applied for appointment as a constable by letter dated 4 January 1997. She adverted straight away to the fact that she was transsexual. She had intended to enclose a report from the surgeon Mr J O Dalrymple. She was asked for that report by letter dated 10 January. She sent it on 15 January and the following day the respondent's force medical officer, Dr Shinn wrote to the applicant. He said that, on the basis of Mr Dalrymple's report and after further consideration, he had decided to allow the applicant's application to continue. That was to be subject to a final decision following the medical examination at the end of the recruitment process.

20. The applicant queried that and by letter dated 3 February Dr Shinn made himself clear to her.

21. Meanwhile the applicant had not had a formal acknowledgment from Mr Wilks, the respondent's Principal Personnel Officer; to her application. The respondent had earlier indicated that it would reply within three weeks. Thus on 25 February the applicant asked for an acknowledgement. On 3 March Mr Wilks confirmed receipt of the application form and apologised for it not having being earlier acknowledged. He said that her application was receiving attention and hoped to be in a position to respond to her specific questions in the very near future. That was a reference to questions arising from her transsexual state. Finally, on 11 April 1997 Mr Wilks again wrote saying that full consideration had been given to her application and the points raised in her letter. Mr Wilks was happy to proceed with her application.

22. Meanwhile Mr Wilks had referred the matter to Assistant Chief Constable Wilkinson. The applicant's was the first such application for appointment from a transsexual person. There is no indication in Mr Wilkinson's evidence that he delayed making a decision. He told us that he decided to deal with the application as for any other female applicant. He did not then perceive a legal problem. It was only after the applicant had got through the screening process successfully that he decided, as he put it, to cover his back by getting legal advice.

23. On those facts, we find that there was some delay in the processing of the applicant's application by reason of the fact that she was transsexual.

24. Under the new section 2A of the Sex Discrimination Act 1975 a person ("A") discriminates against another person ("B") in any circumstances relevant for the purposes of any provision of Part II if he treats B less favourably than he treats or would treat other persons, and does so on the ground that B has undergone gender reassignment. We have already referred to the provisions of section 6(1)(a). Thus we have to ask whether the respondent discriminated against the applicant in the way defined in the new section 2A(1) in the arrangements he made for the purpose of determining who should be offered appointment as a police constable. We are not concerned with detriment as such but simply less favourable treatment in that way. Given that the applicant's application was delayed in its progress as compared with the person described as comparator number 2 in the details supplied by the respondent, we do find that there has been gender reassignment discrimination in that respect. The person in question applied to join the respondent's force on 29 January 1997 (compare the applicant 4 January 1997). That person underwent assessment on 16 May 1997 (compare the applicant's first offer of 22 May). That person then underwent the police initial recruitment test and physical tests on 6 June 1997 (compare the applicant undergoing such tests on 5 September 1997).

25. That comparison exposes the problem in this case. We can see from the tables that assessments were held regularly in the first part of 1997. The dates on page 5 of the list, for example, show assessments on 7 and 8 January, 16 January, 4 March, 11 March, 12 May and 16 May. The applicant was offered 22 May.

26. In the event, the applicant could not attend on 22 May because she had by then booked a holiday between 18 May and 8 June. We do not know when that holiday had been booked but it is suggested that, had there not been a delay and the applicant had been offered an earlier assessment date, then she might not have booked it.

27. Thus it was that the applicant attended for assessment on 11 July and the further testing on 5 September. She was rejected by the respondent in March 1998. Meanwhile all the recruits on the September police initial recruitment and physical fitness tests received letters at the end of 1997 and recruitment and physical fitness tests received letters at the end of 1997 and the beginning of 1998 indicating that there was a freeze on recruitment. That freeze continued until 1 September 1999. Thus it was in October 1998 that those recruits were again written to and told that there was no change in the situation. In February 1999 the respondent decided that it was unfair to keep them waiting any longer and that their recruitment process should be cancelled. They would be obliged to reapply if they still wanted to join the respondent's force.

28. Thus, we are satisfied and find that, if the applicant had not been discriminated against in March 1998, she would nevertheless not have been recruited sometime that year in the events which actually happened. Instead she would have to have reapplied on or about 1 September this year, 1999.

29. Under section 65(1) where an employment tribunal finds that a complaint presented to it under section 63 is well founded the tribunal should make such of the following as it considered just and equitable, namely, an order declaring rights, an order requiring compensation to be paid and a recommendation. As for compensation, it is to be an amount corresponding to any damages the respondent could have been ordered by a County Court to pay to the complainant if the complaint had fallen to be dealt with under section 66. That section provides that a claim by the complainant that the respondent has committed an act of discrimination may be made the subject of civil proceedings in like manner as any other claim in tort.

30. In making our decision, we have engaged with the phrase in section 65(1) "just and equitable" and the word "tort" in section 66(1). In connection with the phrase, we have looked at the case of Chief Constable of Greater Manchester Police and Another v Hope (1999) ICR 338. Reading that decision, we construe the expression "just and equitable" as governing the decision in principle whether or not to award compensation. We do not read it as meaning that we can somehow reduce the amount of compensation on grounds of justice and equity. It seems to us an all or nothing situation. Thus, we do not see those words as helping us in the decision we have to make on this issue. If they did, we had in mind that it would not be just to order compensation in a situation where the respondent was faced with a novel situation which one of his officers resolved in the applicant's favour albeit after some delay.

31. Reference to tort, on the other hand, determines how we approach questions of causation and remoteness. As a matter of causation, we can accept the argument that, but for the delay which was discriminatory at the beginning of the process, the applicant might well have got on the ladder earlier and might have escaped the recruitment axe. Without more, therefore, we may have been obliged to evaluate the chance of her being recruited in percentage terms.

32. In the event, we have focused on remoteness and determined that the loss for which the applicant claims compensation in this narrow issue is too remote a consequence of the discrimination. We find that when Mr Wilks decided to refer the matter to Mr Wilkinson, neither he nor Mr Wilkinson could reasonably have foreseen that there would be a recruitment freeze and that the recruitment freeze would in turn cause the applicant to be in an affected cohort of recruits as a result of a delay in processing her application because she was transsexual.

33. In simple terms, we find that the discrimination for which she is entitled to be compensated is that which we found in our first decision, namely, the refusal to offer her employment in the office of constable. Any loss in that connection can only flow from 1 September 1999 which is the earliest date upon which the recruitment process could have been started again.