

I.C.R.

Smith v. Gardner Merchant Ltd. (E.A.T.)

A *Strathclyde Regional Council* [1986] I.C.R. 564. But there are clear distinctions between that case and the present. The Lord President, Lord Emslie, said, at p. 569E, that in his opinion a particular point of the campaign adopted against Jean Porcelli was because she was a woman. The campaign alleged to have been adopted against the applicant was not because he was a man, but because he was a homosexual.

B Miss Cunningham invites us to refer the matter to the European Court of Justice for a preliminary ruling on the question whether to dismiss a man or to subject him to any other detriment on grounds of his homosexuality is contrary to the Equal Treatment Directive. However, in the light of the views expressed by the Court of Appeal in the case to which we have referred, we are of the opinion that the interpretation to be placed on that Directive by the English courts is clear. There is no need for any further ruling upon the matter.

C In our opinion the industrial tribunal reached a correct decision. Accordingly, the appeal is dismissed. Nor is there any reason to remit the case to the industrial tribunal for further consideration.

Appeal dismissed.

D *Solicitors: Free Representation Unit; Dibb Lupton Broomhead.*

C. N.

E

[COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES]

F

P. v. S. AND ANOTHER

(Case C-13/94)

1995 March 21;

Dec. 14;

1996 April 30

G

President G. C. Rodríguez Iglesias

Presidents of Chambers C. N. Kakouris.

D. A. O. Edward, J.-P. Puissochet and G. Hirsch

Judges G. F. Mancini, F. A. Schockweiler.

P. J. G. Kapteyn, J. L. Murray, H. Ragnemalm

and L. Sévon

Advocate General G. Tesauro

Discrimination, Sex—Employment—Dismissal—Dismissal of transsexual for reason related to sex change—Whether discrimination within principle of equal treatment—Council Directive (76/207/E.E.C.), art. 5(1)

H

After the management of an educational establishment had been informed that the applicant, an employee at the establishment, intended to undergo gender reassignment and that intention

had begun to be given effect to by, inter alia, preliminary surgical operations, the applicant was given notice of dismissal which took effect after the final operation had been performed. In proceedings in which the applicant claimed that she had been the victim of sex discrimination, the industrial tribunal found that the reason for the dismissal was the applicant's proposal to undergo gender reassignment. The tribunal referred to the Court of Justice for a preliminary ruling questions which the court construed as asking whether the dismissal of a transsexual for a reason related to his or her gender reassignment was precluded by article 5(1) of Council Directive (76/207/E.E.C.).¹

On the reference:—

Held, that the scope of Directive (76/207/E.E.C.) was not confined to discrimination based on the fact that a person was of one or other sex, but also extended to discrimination arising from the gender reassignment of a person; that, where a person was dismissed on the ground that he or she intended to undergo or had undergone gender reassignment, he or she was treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment; and that, accordingly, article 5(1) of the Directive precluded dismissal of a transsexual for a reason related to a gender reassignment (post, p. 814C–E, F–G).

The following cases are referred to in the judgment:

Defrenne v. Sabena (Case 149/77) [1978] E.C.R. 1365, E.C.J.

Razzouk v. Commission of the European Communities (Cases 75 and 117/82) [1984] E.C.R. 1509, E.C.J.

Rees v. United Kingdom (1986) 9 E.H.R.R. 56

The following additional cases are referred to in the report of the Judge Rapporteur and the opinion of the Advocate General:

B. v. France (1992) 16 E.H.R.R. 1

Cossey v. United Kingdom (1992) 13 E.H.R.R. 622

Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus (Case 177/88) [1992] I.C.R. 325; [1990] E.C.R. I-3941, E.C.J.

F. (Mr. and Mrs.) v. Belgian State (Case 7/75) [1975] E.C.R. 679, E.C.J.

Grossman v. Bernards Township Board of Education (1975) 11 F.E.P. 1196

Holloway v. Arthur Andersen & Co. (1977) 566 F.2d 659

Kalanke v. Freie Hansestadt Bremen (Case C-450/93) [1996] I.C.R. 314; [1995] E.C.R. I-3051; [1996] All E.R. (E.C.) 66, E.C.J.

Kirkpatrick v. Seligman & Latz Inc. (1981) 636 F.2d 1047

Richards v. United States Tennis Association (1977) 400 N.Y.S.2d 267

Sommers v. Budget Marketing Inc. (1982) 667 F.2d 748

Speybrouck v. European Parliament (Case T-45/90) [1992] E.C.R. II-33, E.C.J. (C.F.I.)

Ulane v. Easter Airlines (1984) 35 F.E.P. 1332; 35 F.E.P. 1348

Van Oosterwijk v. Belgium (Application No. 7654/76), report of 1 March 1979 of European Commission on Human Rights; *Rapport européen sur les droits de l'homme* (1981), p. 557

White v. British Sugar Corporation Ltd. [1977] I.R.L.R. 121

¹ Council Directive (76/207/E.E.C.), art. 5(1): see post, p. 797F.

A REFERENCE by an industrial tribunal sitting at Truro.

The report for the hearing before the Court of Justice prepared by the Judge Rapporteur, Judge Kapteyn, states as follows.

(A) *The relevant law*

B *Community law*

1. Article 1(1) of Council Directive (76/207/E.E.C.) of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (O.J. 1976 L.39, p. 40) provides:

C "The purpose of this Directive is to put into effect in the member states the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph (2), social security. This principle is hereinafter referred to as 'the principle of equal treatment.'"

2. Article 2(1) is worded:

D "For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."

3. Article 3(1) provides:

E "Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy."

4. Article 5(1) provides:

F "Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex."

(B) *Background to the main dispute*

G 5. P., the applicant in the main proceedings, worked as a manager at an educational establishment operated at the relevant time by Cornwall County Council, the administrative authority for the area. S. was the principal, chief executive and financial director of the establishment. On being dismissed at the end of 1992, the applicant brought proceedings against S. and Cornwall County Council before the industrial tribunal. The applicant claimed that, in being dismissed, she had suffered discrimination on grounds of sex. S. and Cornwall County Council maintained that the applicant was dismissed by reason of redundancy.

H 6. The industrial tribunal found that the true reason for the dismissal was the applicant's intention to undergo a sex change, even though there was a situation of redundancy. It has to be made clear that, while the

applicant was referred to as “she,” she had been taken on as a male employee. A

7. The industrial tribunal then found that there was no remedy under the Sex Discrimination Act 1975, the applicable United Kingdom statute, since English law took cognisance only of situations in which men or women were treated differently because they belonged to one sex or the other, and did not recognise a transsexual condition in addition to the two sexes. Under English law, the applicant was at all times a male. B

8. The industrial tribunal is, however, uncertain whether the application of Council Directive (76/207/E.E.C.) is not wider than that of the Act of 1975. For that reason the industrial tribunal decided, by order of 11 January 1994, to stay proceedings until the Court of Justice had given a preliminary ruling on the following questions:

“(1) Having regard to the purpose of Council Directive (76/207/E.E.C.), which is stated in article 1 to be to put into effect the principle of equal treatment for men and women as regards access to employment etc., does the dismissal of a transsexual for a reason related to a gender reassignment constitute a breach of the Directive? C

“(2) Does article 3 of the Directive, which refers to discrimination on grounds of sex, prohibit treatment of an employee on the grounds of the employee’s transsexual state?” D

(C) Procedure before the court

9. The order for reference of 11 January 1994 was received at the Court Registry on 13 January 1994.

10. Pursuant to article 20 of the Protocol on the Statute of the Court of Justice of the E.E.C., written submissions were submitted by the applicant, the United Kingdom and the Commission of the European Communities. E

11. On hearing the report of the Judge Rapporteur and the views of the Advocate General, the court decided to open the oral procedure without any preparatory inquiry. F

Summary of the written observations submitted to the court

12. The applicant claims since birth to have suffered gender identity disorder, commonly referred to as “transsexualism.” She asserts that, despite her male physical characteristics, her true sexual identity has always been female. She explains that, according to the majority of medical publications, gender identity disorder constitutes a biological condition which is present at birth but does not become evident until later in life. For that reason the criteria for determining sex must now incorporate the sociobiological outlook which propounds that certain behaviours are grounded in a genetic and biological causality and are then enabled to find expression through and within social structures and behaviours. Applied to gender identity disorder, that outlook seems to indicate that the only known effective treatment requires particular medication and reconstructive or corrective surgery. G H

13. The applicant claims that she began to be treated less favourably once she declared that her true sex was female. The discrimination resulted

A from her employers' refusal to accept that true sexual identity, which in itself constitutes discrimination on grounds of sex.

B 14. She points out that the purpose of Directive (76/207/E.E.C.) is to lay down the principle of equal treatment of men and women in the field of employment. The application of that principle implies that there is to be no discrimination whatsoever on grounds of sex. In essence, she claims that, although she always displayed physical male characteristics, she had always been female. She suffered discrimination because of her decision to undergo sex reassignment in order to be able to assert her female identity. The applicant submits that, if she was protected by the Directive as a man before 1992 and is now protected as a woman, there is no reason to exclude the intermediate state of transsexuality. She argues therefore that discrimination on grounds of transsexualism also constitutes discrimination on grounds of sex.

C 15. The applicant then submits that, if those arguments are not successful, there is nevertheless indirect discrimination not justified on objective grounds, since research shows that there are more male to female transsexuals than the reverse.

D 16. Finally, she proposes that, having regard to the objective pursued by the Council in adopting Directive (76/207/E.E.C.), the dismissal of a transsexual for a reason related to sex reassignment constitutes a breach of the Directive and that article 3 thereof, which refers to discrimination on grounds of sex, prohibits treatment of an employee based on grounds of her transsexual state.

E 17. The United Kingdom submits that the dismissal of a transsexual because of that person's transsexual state or because of sex reassignment surgery does not amount to discrimination on grounds of sex for the purposes of Directive (76/207/E.E.C.).

F 18. First, it points out that the principle of equal treatment applies only to men and women, and prohibits unfavourable treatment only by reason of belonging to one sex or the other. The United Kingdom considers that its point of view is supported both by the provisions of the Directive and by the court's decisions.

G 19. According to the United Kingdom, the applicant was adversely treated not because of her sex but because she had decided to undergo a particular form of surgery. The industrial tribunal found that she would have been dismissed for undergoing sex reassignment surgery whether she had been a man or a woman.

G 20. Lastly, the United Kingdom submits that the question of adverse treatment of persons for reasons related to transsexualism raises issues of principle and policy which cannot properly be addressed within the context of a Directive designed to secure equal treatment as between men and women.

H 21. The Commission points out that, for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) and in the light of the case law of the European Court of Human Rights, it appears to be accepted that, whilst a change of sex by a transsexual is to be recognised, some latitude is

afforded the member states as to the circumstances in which they decide to recognise that change. In that context, purely social or psychological factors may be regarded as going only to sexual identity rather than to sex in the sense of classification as male or female. Taking those decisions into account, the classification of the applicant as a man from the point of view of English law does not constitute a breach of the Convention and should not be called in question by the court.

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22. According to the Commission, Directive (76/207/E.E.C.) does not cover the situation of a transsexual changing sex. Nothing in the Directive supports the proposition that the principle of equal treatment with regard to sex runs wider than between men and women, since those are the only two categories referred to. In order for the applicant in this case to be able to invoke the Directive, it would have to be admitted that the word "sex" in the Directive comprehended psychological and social sexual identity.

B

C

23. The Commission notes that, according to consistent case law, the court has used the word "sex" simply to refer to the male and female sex: see *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* (Case 177/88) [1992] I.C.R. 325. The fundamental right not to suffer discrimination on grounds of sex, as identified by the court in *Defrenne v. Sabena* (Case 149/77) [1978] E.C.R. 1365, in particular at p. 1378, para. 27, also does not appear to justify any wider concept of sex discrimination. Thus the Commission considers that the word "sex" is to be given its plain meaning and does not encompass discrimination based on transsexualism.

D

24. The Commission then adds that the applicant does not claim to have been discriminated against because she was a man or a woman, but rather because she is a transsexual who has chosen to change sex. That type of claim is not actionable under the Directive and is certainly not in violation of the principles of equal treatment for men and women.

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25. Finally, the Commission explains that the only argument which the applicant could put forward to support a claim of sex discrimination would relate to her treatment in the wider context of her ultimate sex reassignment to becoming a woman. That would be the case if it could be established that it was a condition of the applicant's employment that she should remain a man. If it could not, then that would indicate that her treatment was not on grounds of sex, but of behaviour. It is the Commission's submission that a decision based on an employee's social behaviour, even if explicable by reference to sex-related norms of social behaviour, falls outside the scope of the Directive.

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26. The Commission therefore concludes that treatment of an employee on grounds of his transsexual state does not, in itself, fall within the scope of the principle of equal treatment laid down by Directive (76/207/E.E.C.).

Helena Kennedy Q.C., Rambert De Mello and Ben Emmerson for the applicant.

David Pannick Q.C. and John E. Collins, agent, for the United Kingdom.

H

Nicholas Khan, agent, for the Commission of the European Communities.

A 14 December. MR. ADVOCATE GENERAL TESAURO delivered the following opinion.

B 1. Once again the court is called on to give a ruling on the interpretation of Council Directive (76/207/E.E.C.) of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

C What is new, and certainly no small matter, is the fact that a transsexual is seeking to rely on the Directive. As a result, the questions referred by the industrial tribunal at Truro direct the court's attention to transsexuality from the point of view of the prohibition of sex discrimination: can a transsexual, if he or she is dismissed because he or she is a transsexual, in particular when he or she undergoes gender reassignment, successfully rely on the Directive?

Relevant legislation, the facts and the questions referred for a preliminary ruling

D 2. According to article 1(1) of Directive (76/207/E.E.C.), the purpose of the Directive is

E "to put into effect in the member states the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph (2), social security. This principle is hereinafter referred to as 'the principle of equal treatment.'"

Next, article 2(1) of the Directive states:

"the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."

F The application of that principle relates in particular to "the conditions, including selection criteria, for access to all jobs or posts" (article 3(1)) and to "working conditions, including the conditions governing dismissal" (article 5(1)).

G 3. The national legislation relevant to this case is the Sex Discrimination Act 1975 which defines—and prohibits—as direct sex discrimination, treating a woman less favourably than a man on the ground of her sex (section 1(1)(a)). In addition, it provides that the provisions relating to sex discrimination against women are to be read as applying equally to the treatment of men, without prejudice to the special treatment afforded to women in connection with pregnancy and childbirth (section 2). Finally, after defining "man" as including a male of any age and "woman" as including a female of any age, the Act provides that a comparison of the cases of persons of different sex or marital status "must be such that the relevant circumstances in the one case are the same, or not materially different, in the other" (section 5).

H There is, however, no specific provision relating to the state of transsexuals, not even after they have undergone a gender reassignment

operation. (This would be a suitable moment at which to make it clear that in the United Kingdom no legal formality is required for a surgical operation to change sex and all the costs are borne by the National Health Service. I would add that under English law any person may change his or her name and use the new one without any restriction or formality, with the result that a transsexual has no difficulty in changing his or her name and using the new one on documents such as his or her driving licence, passport, vehicle log book and social security and tax documents. For a complete picture of the position and rights of transsexuals in the United Kingdom, see Bradley, "Transsexualisme—L'Idéologie, les principes juridiques et la culture politique" in *Transsexualisme, médecine et droit*, Actes du XXIII Colloque de droit européen, Amsterdam, 14–16 April 1993, p. 63.) Contrary to what is provided in some national legal systems, in the United Kingdom every person retains the male or female sex which he or she had at birth: it is therefore impossible to have the original sex attributed to a person altered in the register of births, marriages and deaths.

4. I shall now turn to the case itself, which involves the dismissal of a transsexual on account of gender reassignment. To be more specific, the person concerned stated the intention to undergo surgery in order to change her biological sex (male) to suit her sexual identity (female). I shall refer to this person, the applicant, who is identified as P. for obvious reasons of anonymity, as a female; and I would stress that I do so regardless not only of her original sex (male) as it appears on her birth certificate, but also of the moment at which, as a result of the final surgical operation, she actually changed her physical sex.

5. In April 1991 the applicant was taken on as a manager at an educational establishment operated at the material time by Cornwall County Council, the competent administrative authority for the area. A year later, the applicant told S., the principal and chief executive of that establishment, that she intended to undergo a sex change operation. At first S. appeared supportive and tolerant, and reassured her about her position within the establishment, but later his attitude changed. According to the national court's reconstruction of the facts, S.'s change in attitude was essentially due to the opposition of the board of governors, who at one time put forward the idea that the applicant should continue to work for the establishment as a self-employed contractor.

In the meantime, in summer 1992 the applicant underwent initial surgical treatment with a view to her gender reassignment, as a result of which she was absent from work on sick leave. It was during that period that S. and the governors took the decision to dismiss her, of which she was given three months' notice expiring on 31 December 1992. At the same time the applicant was asked to complete by that date a number of specific tasks which she was preparing. When the applicant informed them that she would be returning to work dressed as a woman, they told her that she could complete the tasks assigned to her from home, so that it was not necessary for her to attend the establishment's premises. Finally, the applicant's contract of employment with the establishment terminated on the date fixed without her having returned to work.

6. The applicant underwent the final gender reassignment operation on 23 December 1992, that is to say, before her dismissal took effect but after

A she was given notice on 15 September 1992 of the termination of her employment. On 13 March 1993 the applicant brought proceedings before the industrial tribunal, claiming that she had suffered discrimination on grounds of sex. Both S. and the council claimed, on the contrary, that the applicant had been dismissed by reason of redundancy.

B The industrial tribunal found that, whilst there was a case for redundancy, the true reason for the dismissal was the objection on the part of S. and the council to the applicant's intention to undergo a gender reassignment operation.

In the result, for the court the starting point—in that this was found by the industrial tribunal—is that the applicant was dismissed solely and exclusively because of the sex change of which she first gave notice and which was later carried out before her dismissal took effect.

C 7. The industrial tribunal considers that English law provides no helpful answer in the circumstances—in particular, the tribunal notes that the termination of employment cannot be assessed from the point of view of unfair dismissal, since for that purpose in the United Kingdom a person must have been employed for at least two years; at the time of her dismissal the applicant had worked for the establishment concerned for only 20 months—and in particular that no discrimination against the applicant can be identified on the basis of the Sex Discrimination Act 1975. The tribunal is, however, of the opinion that the Community Directive on equal treatment for men and women may allow a broader interpretation that would cover discrimination against transsexuals as well, inasmuch as it refers to discrimination “on grounds of sex.” It is from exactly that point of view that it asks the Court of Justice: [for the questions referred, see ante, p. 798C–D].

E

Transsexuality and law

F 8. First, what is transsexuality? Far be it from me to venture into territory requiring quite different knowledge and learning. I consider it preferable to recall the definition given in a recommendation of the Council of Europe (Recommendation 1117 of 29 September 1989 “on the condition of transsexuals”—in which, moreover, the Council of Ministers was asked to request the member states to legislate on the subject) which states:

G “transsexualism is a syndrome characterised by a dual personality, one physical, the other psychological, together with such a profound conviction of belonging to the other sex that the transsexual person is prompted to ask for the corresponding bodily ‘correction’ to be made.”

H The applicant has produced a great number of learned articles which claim that the causes of the condition are to be found in biological dysfunctions which are therefore present already at birth, or else in psychological disorders linked to environment. The effect is however the same: biological sex and sexual identity fail to coincide. (For a consideration of those points in greater depth, see Reed, “Aspects psychiatriques et psychologiques du transsexualisme,” and Gooren, “Aspects biologiques du transsexualisme et leur importance pour la

réglementation en ce domaine,” in *Transsexualisme, médecine et droit*, Actes du XXIII Colloque de droit européen, Amsterdam, 14–16 April 1993, pp. 25 and 123 respectively.) Let it suffice here, however, to note the fact that studies relating to transsexuality have produced highly interesting results, in any event such as to refute entirely groundless old taboos and prejudices, by turning attention away from the *moral* dimension of the question, which is entirely reductive and at times misleading, to the strictly medical and scientific.

9. What I am concerned to emphasise is that the phenomenon of transsexuality, even though it is not of great significance in statistical terms—according to figures supplied by the applicant, in Europe one in 30,000 males and one in 100,000 females seek to change sex by means of surgery—constitutes a reality today which has been discussed in various bodies, not only scientific but also legal, in particular from the point of view of fundamental personal rights. (That is the case, for example, of the Council of Europe’s Parliamentary Assembly, whose proceedings culminated in the adoption of the above-mentioned Recommendation 1117 on the condition of transsexuals.) Consequently, the law is faced with that reality—and is destined to come up against it to an increasing degree. This is inevitable. In society as it is today, in which customs and morals are changing rapidly, citizens are guaranteed ever wider and deeper protection of their freedoms, and social and legal studies are increasingly taking on present day—and, for that very reason, real—values, on the principle that it is effective to do so, it would be unjustifiable to reject out of hand the problem of transsexuality—which certainly can still be assessed quite independently in moral terms—or simply to condemn it and consider it contrary to the law.

To my mind, the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise it risks imposing outdated views and taking on a static role. In so far as the law seeks to regulate relations in society, it must on the contrary keep up with social change, and must therefore be capable of regulating new situations brought to light by social change and advances in science. From that point of view, there is no doubt that for present purposes the principle of the alleged immutability of civil status has been overtaken by events. This is so in so far as and from the time that the fact that one cannot change one’s sex for bureaucratic and administrative purposes no longer corresponds to the true situation, if only on account of the scientific advances made in the field of gender reassignment.

10. A swift glance at the situation in the various member states of the Community reveals a clear tendency, especially since the early 1980s, towards ever wider recognition of transsexuality, both by legislation and by judicial decision. That recognition is reflected in the first place by the fact that sex changes are accepted, in the specific sense that surgery to that end is now permitted, albeit subject to differing rules, in nearly all the states. (On this point, it is worth repeating that in the United Kingdom, where it is still not possible to have the attribution of sex altered in the register of births, not only is “transsexual” surgery permitted without any legal formality, but it is wholly paid for by the National Health Service.) In the second place, the move to make sex change surgery lawful usually

- A goes hand in hand with authorisation, again subject to differing rules, to rectify the sex recorded in the registers of civil status, with all the ensuing consequences.

- Some states have given a legal response to transsexuality by adopting special legislation. As far as member states of the Community are concerned, this is so in the case of Sweden (Law of 21 April 1972 [1972] Svensk Författningssamling 119): see the French translation in (1976) 74 Revue trimestrielle de droit civil 295; the Federal Republic of Germany (Law of 10 September 1980 [1980] I Bundesgesetzblatt, vol. 2, p. 1654)—it is interesting to note that this law provides both for the so-called “minor solution,” which is permission to change name, and the so-called “major solution,” which provides for sex change surgery; Italy (Law No. 164 of 14 April 1982 [1982] Gazzetta Ufficiale della Repubblica Italiana 2879—it should be explained that, in judgment No. 161 of 24 May 1985 (1985) 108 Il Foro Italiano, vol. 1–2, col. 2162, the Italian Constitutional Court dismissed the objection that the rules on the correction of sex were unconstitutional); and the Netherlands (Law of 24 April 1985 [1985] 2 Staatsblad van het Koninkrijk der Nederlanden 243). The laws concerned authorise transsexuals to correct their birth certificates so as to include a reference to their new sexual identity, with the result that they have the right to marry, adopt children and enjoy pension rights according with their *new* sexual identity.
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- D

- The fact that the other member states do not have special laws on the subject does not mean that the position of transsexuals is ignored. As a matter of fact, in some states, the legality of surgery performed on transsexuals and of the resulting change of civil status is based on laws which themselves have nothing to do with the question of transsexuality. (This is the case, for example, in Denmark, where the Law of 11 May 1935 (sic!) on voluntary castration is applied by analogy. Persons authorised to undergo surgery on the basis of that Law are automatically granted the right to change their civil status.) In most of the other states the problem is, by contrast, resolved case by case by the courts—this is the case in France, Belgium, Spain, Portugal, Luxembourg and Greece (although in Greece only hermaphrodites have until now been permitted to change their civil status)—or even, much more simply, at the administrative level (this is the case in Austria, where it has been settled practice since 1981 for the registrar of births, marriages and deaths to add a note of the sex change to the birth certificate on the sole condition that the person concerned has undergone surgery, which has to be evidenced by a report drawn up by experts from the Institute of Forensic Medicine of the University of Vienna).
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11. Transsexuality has, furthermore, been tackled by the Commission and the European Court of Human Rights from the twofold angle of violation of the right to respect for private life (article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms) and of the right to contract valid marriages (article 12 of the Convention).

- H The way was opened by a decision of the European Commission on Human Rights, which in 1979 decided unanimously that the refusal by the Belgian state to adopt measures to enable the registers of civil status to reflect lawful sex changes constituted a violation of the right to respect for

private life enshrined in article 8(1) of the Convention: *Van Oosterwijck v. Belgium* (Application No. 7654/76), report of 1 March 1979 of European Commission on Human Rights; *Rapport européen sur les droits de l'homme* (1981), p. 557.

12. The approach of the European Court of Human Rights, when called on to rule on an alleged violation by the United Kingdom of articles 8 and 12 of the Convention, was different. In *Rees v. United Kingdom* (1986) 9 E.H.R.R. 56, 67, para. 47, it held that it must:

“be left to the respondent state to determine to what extent it can meet the remaining demands of transsexuals. However, the court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances. . . . The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.”

The same solution was later adopted in *Cossey v. United Kingdom* (1990) 13 E.H.R.R. 622, 641, para. 42.

In the subsequent case of *B. v. France* (1992) 16 E.H.R.R. 1, by contrast, the court in Strasbourg found against France, stating, at p. 33, para. 63, that the fact that the applicant, who had undergone surgery in 1972 to become a woman also from the sexual point of view, could not adopt a feminine name or change her civil status, constituted a violation of article 8(1) of the Convention. In reaching that conclusion—and distinguishing *B. v. France* from *Rees* and *Cossey*: in particular, it emerged that in France, unlike the system in force in the United Kingdom, the civil status register could be amended without any difficulty (on that point, see paragraph 3 of this opinion, above)—the Court of Human Rights explained that attitudes had changed and science had progressed and increasing importance was attached to the problem of transsexualism.

13. It is clear from this survey that at present “transsexual” surgery is regarded as legal, even in those countries which still do not allow a corresponding change of civil status. This fact alone means that the law, as a result of scientific and social progress which has taken place in this area, is paying more and more attention to transsexuality, by regulating those aspects which are liable to have significant repercussions on relations in society. As we have seen, this is borne out by the fact that in most national legal systems it is permissible to change civil status, either by virtue of specific laws or because of judicial involvement on a case by case basis.

There remains the question whether there can be legal protection for persons who have changed sex or are living through the period of change when, specifically and solely on that account, they are discriminated against or, in any event, treated unfavourably in the field of employment, possibly even, as in this case, by being dismissed.

Answers to the questions

14. The national court asks the court to determine whether, in the light of the purpose of Directive (76/207/E.E.C.), as set out in article 1, the

A dismissal of a transsexual on account of a sex change constitutes discrimination prohibited by the Directive, and, more generally, whether article 3(1) must be interpreted as also encompassing, with regard to working conditions, discrimination against transsexuals.

The national court starts from the premise that the Directive, in particular article 3(1) in so far as it prescribes that “there shall be no discrimination whatsoever on grounds of sex”—in addition to article 3(1), article 2(1) also provides in general terms to that effect—does not mean, or at least does not necessarily mean, that discrimination can exist only as between a male and a female, but may be interpreted as covering discrimination against transsexuals as well.

15. First of all, I would observe that the provisions of the Directive relevant to this case are rather article 2(1), which lays down in general terms the prohibition of discrimination on grounds of sex, and article 5(1), which more specifically prohibits discrimination on grounds of sex with regard to the conditions governing dismissal. The question referred must therefore be reformulated to that effect.

That having been said, it is necessary in any event to establish whether the dismissal of a transsexual because of her change of sex falls within the field of application of Community law, more specifically of the Directive concerning equal treatment for men and women.

16. While it is quite true that Directive (76/207/E.E.C.) prohibits any discrimination whatsoever on grounds of sex, it is equally indisputable that the wording of the principle of equal treatment which it lays down refers to the traditional man/woman dichotomy.

In order to ascertain whether the Directive can, as the industrial tribunal suggests, be so interpreted as to cover discrimination against transsexuals too, it must, in any event, be determined in the first place whether the unfavourable treatment of transsexuals constitutes discrimination on grounds of sex. It will then be necessary to decide whether it is only discrimination between men and women which is covered by the expression “discrimination on grounds of sex” or, more generally, all unfavourable treatment connected with sex.

17. I shall start by calling to mind the proposition, which has ever stronger support in medical and scientific circles, that it is necessary to go beyond the traditional classification and recognise that, in addition to the man/woman dichotomy, there is a range of characteristics, behaviour and roles shared by men and women, so that sex *itself* ought rather to be thought of as a continuum. From that point of view, it is clear that it would not be right to continue to treat as unlawful solely acts of discrimination on grounds of sex which are referable to men and women in the traditional sense of those terms, while refusing to protect those who are also treated unfavourably precisely because of their sex and/or sexual identity.

The argument just put forward, attractive as it is, requires a redefinition of sex which merits deeper consideration in more appropriate circles. Consequently, that is not the path that I propose that the court should follow. I fully realise that from time immemorial a person’s sex has merely been ascertained, without need of the law to define it. The law dislikes ambiguities and it is certainly simpler to think in terms of Adam and Eve.

Having said that, I regard as obsolete the idea that the law should take into consideration, and protect, a woman who has suffered discrimination in comparison with a man, or vice versa, but denies that protection to those who are also *discriminated against*, again by reason of sex, merely because they fall outside the traditional man/woman classification.

18. The objection is taken too much for granted (and has been raised on several occasions in these proceedings) that the factor of sex discrimination is missing on the ground that “female transsexuals” are not treated differently from “male transsexuals.” In short, both are treated unfavourably, hence there can be no discrimination at all. A survey of the relevant national case law confirms that point of view, albeit with some exceptions. (I refer first to the judgment in *White v. British Sugar Corporation Ltd.* [1977] I.R.L.R. 121, in which an English industrial tribunal held that the Sex Discrimination Act 1975 did not apply to the case of the dismissal of a female transsexual who had not undergone any sex change surgery but who had held herself out to be a man when she obtained the job. There are many judgments of United States courts on the issue. Nearly all held the dismissal of transsexuals to be lawful, on the ground that no discrimination on grounds of sex could be identified: see, for example, *Grossman v. Bernards Township Board of Education* (1975) 11 F.E.P. 1196; *Kirkpatrick v. Seligman & Latz Inc.* (1981) 636 F.2d 1047; *Sommers v. Budget Marketing Inc.* (1982) 667 F.2d 748 and *Ulane v. Eastern Airlines* (1984) 35 F.E.P. 1348. *Holloway v. Arthur Andersen & Co.* (1977) 566 F.2d 659 deserves a separate mention; that was a case exactly like the present one, in which it was held to be lawful to dismiss a transsexual for starting treatment to become a woman. As to the exceptions, see the judgment at first instance in *Ulane v. Eastern Airlines*, 35 F.E.P. 1332, in which the court held that dismissal of an employee on account of her transsexual state was equivalent to dismissal on grounds of sex. Another notable exception may be found in *Richards v. United States Tennis Association* (1977) 400 N.Y.S.2d 267, relating to a tennis player who, following an operation to become (also) physically a woman, sought to take part in women’s tournaments. Despite the opposition of the tennis association, which maintained that Richards, by retaining her male muscular structure, would be at an advantage, the Supreme Court of the State of New York permitted her to take part in the 1977 United States Women’s Open. (To complete the picture, I would observe that Richards was beaten in the first round by Wade 6–1, 6–4.)

I am not convinced by that view. It is quite true that, even if the applicant had been in the opposite situation, that is to say changing from female to male, it is possible that she would have been dismissed anyway. One fact, however, is not just possible, but certain: the applicant would not have been dismissed if she had remained a man.

So how can it be claimed that discrimination on grounds of sex was not involved? How can it be denied that the cause of discrimination was precisely, and solely, sex? To my mind, where unfavourable treatment of a transsexual is related to (or rather is caused by) a change of sex, there is discrimination by reason of sex, or on grounds of sex, if that is preferred.

19. On this subject I cannot do other than recall that the prohibition of discrimination on grounds of sex is an aspect of the principle of

- A equality, a principle which requires no account to be taken of discriminatory factors, principally sex, race, language and religion. What matters is that, in like situations, individuals should be treated alike.

Consequently, the principle of equality prohibits unequal treatment of individuals based on certain distinguishing factors, and these specifically include sex. This means that importance may not and must not be given to sex as such, so as to influence, in one way or another, the treatment afforded, for example, to workers. That is the reasoning on which my opinion in *Kalanke v. Freie Hansestadt Bremen* (Case C-450/93) [1996] I.C.R. 314 is based. In that opinion, as I recall, I declared myself opposed to employment and promotion quotas for women, because I believe that the principle of non-discrimination on grounds of sex permits only those exceptions which, because they aim at attaining *substantive* equality, are justified by the objective of ensuring actual equality between persons.

- C In the present case, what is required is at least a rigorous application of the principle of equality so that, therefore, any connotations relating to sex and/or sexual identity cannot be in any way relevant. Moreover, in trying to justify their relevance, it would be very hard to argue, and in any event it has not been claimed, that the abilities and role of the person in question were adversely affected by her change of sex.

- D 20. I must add that, for the purposes of this case, sex is important as a convention, a social parameter. The discrimination of which women are frequently the victims is not of course due to their physical characteristics, but rather to their role, to the image which society has of women. Hence the *rationale* for less favourable treatment is the social role which women are supposed to play, and certainly not their physical characteristics. In the same way it must be recognised that the unfavourable treatment suffered by transsexuals is most often linked to a negative image, a moral judgment which has nothing to do with their abilities in the sphere of employment.

- E Such a situation is still less acceptable when the social change and scientific advances made in this area in recent years are taken into consideration. Whilst it is true, as I have already said, that transsexuals are in fact not very significant in statistical terms, it is equally true that for that very reason it is vital that they should have at least a minimum of protection. On this view, to maintain that the unfavourable treatment suffered by the applicant was not on grounds of sex because it was due to her change of sex, or else because in such a case it is not possible to speak of discrimination between the two sexes, would be a quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value which is equality.

- G 21. It remains to be determined whether a Directive whose purpose, according to its wording, is to ensure the elimination of discrimination between men and women may also cover unfavourable treatment afforded to transsexuals. In other words, in the absence of specific legislation which expressly takes transsexuals into consideration, must it be concluded that transsexuals—once they have suffered discrimination—are deprived of any legal protection whatsoever?

- H In this regard, a judgment of the German Constitutional Court of 11 October 1978 [1979] *Neue Juristische Wochenschrift* 595 is of some

interest. The court recognised—in the absence of relevant legislation—transsexuals’ right to change their civil status. The judgment stated:

“Clearly it is in the interests of legal certainty that the legislature should regulate questions concerning personal legal status connected to a change of sex and their effects. But until such legislation is adopted, the task of the courts is none other than that which arises from the principle of equality between men and women before the entry into force of a law putting them on an equal footing.”

22. First, transsexuals certainly do not constitute a third sex, so it should be considered as a matter of principle that they are covered by Directive (76/207/E.E.C.), having regard also to the recognition of their right to a sexual identity mentioned previously: see, in particular, paragraphs 10 to 13 above.

Secondly, I note that the Directive is nothing if not an expression of a general principle and a fundamental right. Here I would point out that respect for fundamental rights is one of the general principles of Community law, the observance of which the court has a duty to ensure, and that “There can be no doubt that the *elimination of discrimination based on sex* forms part of those fundamental rights:” see *Defrenne v. Sabena* (Case 149/77) [1978] E.C.R. 1365, 1378, para. 27 (emphasis added). (See also more recently *Speybrouck v. European Parliament* (Case T-45/90) [1992] E.C.R. II-33, 46, para. 47, in which the Court of First Instance reaffirmed precisely that:

“the principle of equal treatment for men and women in matters of employment and, at the same time, the principle of the prohibition of any direct or indirect discrimination on grounds of sex form part of the fundamental rights the observance of which the Court of Justice and the Court of First Instance must ensure pursuant to article 164 of the E.E.C. Treaty.”)

23. When the problem is expressed in those terms, it seems to me only too clear that Directive (76/207/E.E.C.), which dates from 1976, took account of what may be defined as “normal” reality at the time of its adoption. It is quite natural that it should not have expressly taken into account a question and a reality that were only just beginning to be “discovered” at that time. However, as the expression of a more general principle, on the basis of which sex should be irrelevant to the treatment everyone receives, the Directive should be construed in a broader perspective, including therefore all situations in which sex appears as a discriminatory factor.

It should, moreover, be borne in mind that the statement of reasons for the Directive, in the third recital in the preamble, expressly states:

“equal treatment for male and female workers constitutes one of the objectives of the Community, *in so far as the harmonisation of living and working conditions while maintaining their improvement are inter alia to be furthered . . .*” (Emphasis added.)

The Directive is thus essentially intended, with a view to attaining the economic goals prescribed by the E.E.C. Treaty while satisfying criteria of social justice, to ensure equal treatment as between workers. From this

A point of view, it seems to me only too obvious that all workers, thus including those who have changed sex as a result of surgery, are entitled to enjoy the protection conferred by the Directive; and this, I would repeat, is so whenever sex is a discriminatory factor.

The European Parliament expressed itself to the same effect in a Resolution on discrimination against transsexuals of 12 September 1989 (O.J. 1989 C. 256, p. 33) in which, *inter alia*, it:

B “Calls on the Commission and the Council to *make it clear* that Community Directives governing the equality of men and women at the workplace also outlaw discrimination against transsexuals; . . .” (Emphasis added.)

C The very fact that Parliament asked only for it to be made clear that the Community Directives cover transsexuals also means that for that institution transsexuals should already be able to avail themselves of the protection guaranteed by the Directives in question.

24. Finally, I am well aware that I am asking the court to make a “courageous” decision. I am asking it to do so, however, in the profound conviction that what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries: *the irrelevance of a person's sex with regard to the rules regulating relations in society*. Whosoever believes in that value cannot accept the idea that a law should permit a person to be dismissed because she is a woman, or because he is a man, or because he or she changes from one of the two sexes (whichever it may be) to the other by means of an operation which—according to current medical knowledge—
D is the only remedy capable of bringing body and mind into harmony. Any other solution would sound like a moral condemnation—a condemnation, moreover, out of step with the times of transsexuality, precisely when scientific advances and social change in this area are opening a perspective on the problem which certainly transcends the moral one.

E I am quite clear, I repeat, that in Community law there is no precise provision *specifically* and literally intended to regulate the problem; but
F such a provision can readily and clearly be inferred from the principles and objectives of Community social law, the statement of reasons for the Directive underlining “the harmonisation of living and working conditions while maintaining their improvement” and also the case law of the court itself, which is ever alert and to the fore in ensuring that disadvantaged persons are protected. Consequently, I consider that it would be a pity to miss this opportunity of leaving a mark of undeniable civil substance, by
G taking a decision which is bold but fair and legally correct, inasmuch as it is undeniably based on and consonant with the great value of equality.

Finally, I would point out, in the words of Mr. Advocate General Trabucchi in an opinion now 20 years old in *Mr. and Mrs. F. v. Belgian State* (Case 7/75) [1975] E.C.R. 679, 697:

H “If we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of social justice and to the requirements of European integration, not only of the economy but

of the people, we cannot disappoint the [national] court's expectations, which are more than those of legal form."

A

25. In the light of the foregoing considerations, I propose that the court should reply as follows to the questions referred by the industrial tribunal at Truro: articles 2(1) and 5(1) of Council Directive (76/207/E.E.C.) must be interpreted as precluding the dismissal of a transsexual on account of a change of sex.

B

30 April 1996. The following judgment was delivered in open court in Luxembourg.

1. By order of 11 January 1994, received at the court on 13 January 1994, the industrial tribunal at Truro referred to the court for a preliminary ruling under article 177 of the E.C. Treaty two questions on the interpretation of Council Directive (76/207/E.E.C.) of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

C

2. Those questions were raised in proceedings brought by the applicant in the main proceedings, P., against S. and Cornwall County Council.

3. The applicant used to work as a manager in an educational establishment operated at the material time by Cornwall County Council, the competent administrative authority for the area. In early April 1992, a year after being taken on, the applicant informed S., the director of studies, chief executive and financial director of the establishment, of the intention to undergo gender reassignment. This began with a "life test," a period during which the applicant dressed and behaved as a woman, followed by surgery to give the applicant the physical attributes of a woman.

D

E

4. At the beginning of September 1992, after undergoing minor surgical operations, the applicant was given three months' notice expiring on 31 December 1992. The final surgical operation was performed before the dismissal took effect, but after the applicant had been given notice.

5. The applicant brought an action against S. and the county council before the industrial tribunal on the ground that she had been the victim of sex discrimination. S. and the county council maintained that the reason for her dismissal was redundancy.

F

6. It appears from the order for reference that the true reason for the dismissal was the applicant's proposal to undergo gender reassignment, although there actually was redundancy within the establishment.

G

7. The industrial tribunal found that such a situation was not covered by the Sex Discrimination Act 1975, inasmuch as it applies only to cases in which a man or woman is treated differently because he or she belongs to one or the other of the sexes. Under English law, the applicant is still deemed to be male. If the applicant had been female before her gender reassignment, the employer would still have dismissed her on account of that operation. However, the industrial tribunal was uncertain whether that situation fell within the scope of Directive (76/207/E.E.C.).

H

8. According to article 1(1) of the Directive, the purpose of the Directive is to put into effect in the member states the principle of equal

A treatment for men and women, in particular as regards access to employment, including promotion, and to vocational training, and as regards working conditions. Article 2(1) provides that the principle of equal treatment means that there is to be “no discrimination whatsoever on grounds of sex either directly or indirectly . . .”

B 9. Furthermore, the third recital in the preamble to the Directive states that equal treatment for men and women constitutes one of the objectives of the Community, in so far as the harmonisation of living and working conditions while maintaining their improvement is to be furthered.

10. Considering that there was doubt as to whether the scope of the Directive was wider than that of the national legislation, the industrial tribunal decided to stay proceedings and refer the following questions to the court for a preliminary ruling:

C “(1) Having regard to the purpose of Council Directive (76/207/E.E.C.), which is stated in article 1 to be to put into effect the principle of equal treatment for men and women as regards access to employment etc., does the dismissal of a transsexual for a reason related to a gender reassignment constitute a breach of the Directive?

D “(2) Does article 3 of the Directive, which refers to discrimination on grounds of sex, prohibit treatment of an employee on the grounds of the employee’s transsexual state?”

11. Article 3 of the Directive, to which the industrial tribunal refers, is concerned with application of the principle of equal treatment for men and women to access to employment.

E 12. A dismissal, such as is in issue in the main proceedings, must be considered in the light of article 5(1) of the Directive, which provides:

“Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.”

F 13. The industrial tribunal’s two questions, which may appropriately be considered together, must therefore be construed as asking whether, having regard to the purpose of the Directive, article 5(1) precludes dismissal of a transsexual for a reason related to his or her gender reassignment.

G 14. The United Kingdom and the Commission submit that to dismiss a person because he or she is a transsexual or because he or she has undergone a gender reassignment operation does not constitute sex discrimination for the purposes of the Directive.

15. In support of that argument, the United Kingdom points out in particular that it appears from the order for reference that the employer would also have dismissed the applicant if the applicant had previously been a woman and had undergone an operation to become a man.

H 16. The European Court of Human Rights has held, in *Rees v. United Kingdom* (1986) 9 E.H.R.R. 56, 64, para. 38:

“The term ‘transsexual’ is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous

identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group.”

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17. The principle of equal treatment “for men and women” to which Directive (76/207/E.E.C.) refers in its title, preamble and provisions means, as articles 2(1) and 3(1) in particular indicate, that there should be “no discrimination whatsoever on grounds of sex.”

B

18. Thus, the Directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law.

19. Moreover, as the court has repeatedly held, the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the court has a duty to ensure: see, to that effect, *Defrenne v. Sabena* (Case 149/77) [1978] E.C.R. 1365, 1378, paras. 26 and 27, and *Razzouk v. Commission of the European Communities* (Cases 75 and 117/82) [1984] E.C.R. 1509, 1530, para. 16.

C

20. Accordingly, the scope of Directive (76/207/E.E.C.) 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 reassignment of the person concerned.

D

21. 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.

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22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the court has a duty to safeguard.

23. Dismissal of such a person must therefore be regarded as contrary to article 5(1) of the Directive, unless the dismissal could be justified under article 2(2). There is, however, no material before the court to suggest that this was so here.

F

24. It follows from the foregoing that the reply to the questions referred by the industrial tribunal must be that, in view of the objective pursued by the Directive, article 5(1) of the Directive precludes dismissal of a transsexual for a reason related to a gender reassignment.

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Costs

25. The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

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On those grounds, the court, in answer to the question referred to it by the industrial tribunal at Truro by order of 11 January 1994, hereby rules:

A In view of the objective pursued by Council Directive (76/207/E.E.C.) of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, article 5(1) of the Directive precludes dismissal of a transsexual for a reason related to a gender reassignment.

B *Solicitors: Tyndallwoods & Millichip, Birmingham; Treasury Solicitor.*

[Reported by MICHAEL HAWKINGS ESQ., Barrister]

C

[EMPLOYMENT APPEAL TRIBUNAL]

COX v. CAMDEN LONDON BOROUGH COUNCIL

D

1996 Jan. 24;
April 16

Judge Altman, Miss C. Holroyd
and Mrs. P. Turner

Employment—Unfair dismissal—Compensation—Assessment—Redundancy selection procedure flawed—Finding of 95 per cent. chance of dismissal in any event—Whether percentage reduction to be made before or after deduction of employer's severance payment—Employment Protection (Consolidation) Act 1978 (c. 44), s. 74

E

The applicant was dismissed for redundancy and received a termination payment which included his statutory redundancy payment. On his complaint of unfair dismissal, the industrial tribunal found that the employers had failed to carry out the selection procedure fairly and that the dismissal was unfair. In calculating his compensatory award in accordance with section 74 of the Employment Protection (Consolidation) Act 1978¹ the tribunal found that even if the employers had complied with the proper procedure there would have been only a five per cent. chance of the applicant retaining his employment. They reduced the total losses claimed by 95 per cent. and then deducted the amount by which the termination payment exceeded the statutory redundancy payment.

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On the applicant's appeal:—

Held, allowing the appeal, that calculation of the "loss" sustained by an employee in consequence of the dismissal, as required by section 74(1) of the Employment Protection (Consolidation) Act 1978, involved the deduction of any appropriate part of the termination payment not including the statutory redundancy payment deductible under section 74(3) or the enhanced redundancy payment deductible under section 74(7); that the application of a percentage reflecting the likelihood of dismissal even if the employer had acted fairly should be made,

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¹ Employment Protection (Consolidation) Act 1978, s. 74: see post, pp. 818F–819B.