Jumping the hurdles of Gender: transsexuals make legal headway

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Finally transsexual people in the United Kingdom have achieved a break through in their on-going battle with the United Kingdom's archaic legal approach to their gender status. In the employment discrimination case of P v S and Cornwall County Council, the Advocate General's recommendation to the European Court of Justice (1) is that The European Council Directive on the principle of equal treatment for men and women should be held to cover transsexuals.

The decision, confirmed by the court on April 30th 1996, means that throughout Europe it is now unlawful to discriminate against a transsexual, whether female to male or male to female, on the grounds that they are going to have or have had gender reassignment. The direction given by the Advocate General is that …

Articles 2(1) and 5(1) of Council Directive 76/207/EEC must be interpreted as precluding the dismissal of a transsexual on account of a change of sex

The case of P v S and Cornwall County Council involved a male to female transsexual, P, who worked as a senior manager in a Cornwall Education Establishment. On informing her employers that she was undergoing gender reassignment, and wished to come to work as a woman, she was given notice of the termination of her contract. She was not allowed to return to work during the period of her transition, that was when she was living full time as a woman but had not undergone surgical genital reassignment, and her period of employment terminated without her returning to work. P brought an action before an Industrial Tribunal claiming that she had suffered discrimination on the grounds of sex. Both S and Cornwall County Council claimed that, on the contrary, she had been dismissed by reason of redundancy.

The Industrial Tribunal found that whilst there was a case for redundancy, the true reason for dismissal was the objection to P's intention to undergo gender reassignment.

At this stage the Industrial Tribunal found that English law provides no protection to transsexuals, it long being the case that under the Sex Discrimination Act all that an employer needed to show was that they would have treated a transsexual of either (natally recorded) sex in the same manner. However the Attorney General has approached the question differently. He asked not whether P would have been dismissed if she had in fact been a female to male transsexual, but rather would she have been dismissed if she had remained a man. Holding that she would not have been, therefore he could see no reason for not upholding a claim that there had been discrimination by reason of sex, or as he put it: '*on grounds of sex, if that is preferred*'.

He held that for the purposes of this case, and the European Directive, sex is important as a social convention. Discrimination is frequently to do with the social roles of women rather

than their physical characteristics, similarly discrimination suffered by transsexuals is linked to moral judgements which have nothing to do with their abilities in the sphere of employment. As the Court has a duty to ensure that the general principles of Community Law are upheld, and as these include a respect for certain fundamental rights, one of which is the elimination of discrimination based on sex as expressed in the directive, then the directive must be held to cover changes from one sex to another as much as it covers whether a person is discriminated against because they are a man or woman.

This decision is a monumental decision for transsexuals throughout Europe. It is the first piece of case law to come into existence, anywhere in the world, which prevents discrimination because someone is a transsexual. Throughout the rest of the world, where transsexuals may be able to change their birth certificates and marry a member of their opposite gender grouping, employment protection has long been elusive. In the USA, as happened with Sex Discrimination law in Britain, no court has found Title VII of the 1965 Civil Rights Act applicable to discrimination cases brought by transsexuals. The statute provides ..

It shall be unlawful employment practice for an employer

i. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual … because of such individual's … sex.

In a very few short years, from the first reported case of Voyles v R.K.Davies Medical 1975 in which an employer was granted permission to dismiss a male to female transsexual who asked to be called by her new name, to the decision in Kirkpatrick v Seligman & Latz Inc. (1979) in which a beauty salon employee was dismissed, the courts made discrimination claims by transsexuals impossible to pursue. According to the 1993 Employment Law Project of The International Conference on Transgender Law and Employment Policy the courts have …

"gone out of their way to find that existing federal non-discrimination laws do not apply to transgendered individuals."

The courts have repeatedly held that the word "sex" in Title VII is to be given its plain meaning and is not to encompass transsexuals, the major thrust of the legislation being to provide equal opportunities for women.

The recommendation by the Attorney General in P v S and Cornwall County Council, is asking the European Court, as he admits, to make a courageous decision. But to make that decision is to acknowledge what he considers a universal fundamental value: the irrelevance of a person's sex with regard to the rules regulating relations in society.

Transsexuals in the United Kingdom have a lot to be grateful for as a result of the decisions in this case. Now they can ask for there to be reporting restrictions on their Industrial Tribunal cases, after the decision at the lower level that not to afford privacy to transsexuals was to severely restrict their access to justice. Now they can actually assert sex discrimination and have hopes of being successful in their claims. Finally, they can hope the decision will lead employers' to rethink their Equal Opportunities policies, and other relevant practices, just as happened with the introduction of the Sex Discrimination legislation. Case Law and legislation cannot possible stop all discrimination on otherwise essentially arbitrary grounds,

but they do provide an educational thrust which forces those in positions of power to reconsider their practices, especially when not to do so might cost them far more than a little adaptation over the use of the staff toilets.

This recommendation came as Alex Carlile Q.C, M.P, announced his intention to promote a Private Member's Bill on behalf of Press For Change, to allow legal gender status change for transsexuals in the United Kingdom, and the European Commission of Human Rights have once again recommended a case concerning a transsexual to be forwarded to the Court. The tide of public opinion has probably long since turned as can be seen through the welter of articles, television programmes etc. which now portray transsexuals in a very positive light. Perhaps now we are seeing the turning of the legal stream which for an interminable period has refused to acknowledge what medicine has long since known; that the only effective treatment for the transsexual is reassignment and such treatment helps an individual form a productive life.

References

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4. White v British Sugar Corporation [1977] IRLR 121
5. para 18, Attorney General's decision 14th December 1995
6. [1975] 403 F.Supp. 456 (N.D.Cal), comment in Wein, S.A., Remmers, C.L.: "Employment Protection and Gender Dysphoria: Legal Definitions Of Unequal Treatment On The Basis Of Sex And Disability", Hastings Law Journal, (1979), Vol 30: 1075-1129
7. [1979] (M.D.Fl 1979) 636 F.2d 1047
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