## Cash v Ministry of Defence (Royal Navy) (EAT)

Employment Appeal Tribunal ruling

October 2000

# Foreword

The Employment Appeal Tribunal upheld the earlier decision of an industrial tribunal to dismiss Ms Cash's claim for unfair dismissal and sex discrimination should be disllowed.

The EAT upheld the tribunal's decision to dismiss her complaints of medical negligence and unfair dismissal on the grounds of lack of jurisdiction. Her complaint of sex discrimination on the grounds that it was not just and equitable for the tribunal to consider that complaint out of time.

*Claire McNab, October 2000*

# Tribunal decision

## EMPLOYMENT APPEAL TRIBUNAL

Judgments

**58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS**

**Appeal No: EAT/1035/99**

**At the Tribunal On: 3 July 2000**

**Before:**
**HIS HONOUR JUDGE PETER CLARK**

**MS S R CORBY**
**MR K M YOUNG CBE**

**MISS L CASH**
***v***
**THE MINISTRY OF DEFENCE (ROYAL NAVY)**

## APPEARANCES

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|---|---|
| For the Appellant | MR J MILLER<br>(of Counsel)<br>Messrs Parkinson Wright<br>Solicitors<br>64 Friar Street<br>Droitwich Spa<br>Worcestershire<br>WR9 8EF |
| For the Respondent | MS J COLLIER<br>(of Counsel)<br>The Treasury Solicitor<br>Queen Anne's Chambers<br>28 The Broadway<br>London<br>SW1H 9JS |

Judgment delivered on 17 October 2000

## JUDGE PETER CLARK:

1. This case goes back a long way.

2. The appellant, Miss Cash, was born a man, Brian Waling on 25th June 1950. On 5th January 1988 she completed a course of gender reassignment (GRA) surgery. We shall hereafter refer to her as a female.

3. In November 1971 she joined the Royal Navy as a nurse and operating department assistant. She saw service during the Falklands War in 1982, undergoing traumatic experiences including the death in horrific circumstances of two men she was helping to treat.

4. In October 1985 she was judged to be performing poorly in her work at RNH Haslar. Unknown to the Navy she attended a Gender Identity Clinic from December 1985 at the Charing Cross Hospital, where she was identified as a transsexual.

5. On 28th May 1986 she voluntarily tendered 18 month's notice of resignation from the Navy.

6. In June 1986 she notified the Navy of her proposed GRA and was prescribed a course of hormonal medication. On 29th August 1986 she adopted her present female names.

7. On 7th August 1986 a Naval Consultant Psychiatrist, Group Captain (retd.) Rollins wrote a report to her Commanding Officer, detailing her attendance at the Gender Identity Clinic Charing Cross Hospital and her desire to seek a new gender role. The report concluded that she was no longer suited nor able to fulfil her duties as a serviceman. Indeed further service would, in the doctor's opinion, lead to a major breakdown. There was no chance of recovery. She displayed a severe degree of temperamental unsuitability for service life. He recommended that she be " discharged shore", in accordance with DCI6/81, that is, a person considered to be "a danger to himself, his ship or his comrades."

8. On 18th November 1986 she was duly discharged.

9. On 14th May 1998 she was diagnosed as having post-traumatic stress disorder (PTSD). As a result she was awarded a War Pension on 24th July 1998. Her disablement assessment in respect of PTSD is now put at 30%.

10. In August 1998 she commenced a correspondence with Miss Jellyman of the Navy over her discharge in November 1986. Finally on 16th October 1998 she presented an Originating Application to the Southampton Employment Tribunal complaining of unfair dismissal due to sexual orientation and discrimination against the respondent, MOD, in relation to her naval service which terminated in November 1986.

11. The respondent took limitation points, both in relation to her complaint of unfair dismissal and sex discrimination.

12. An Employment Tribunal sitting at Southampton on 13th January 1999, chaired by Mr S J W Scott, dismissed her complaint of unfair dismissal on the grounds of lack of jurisdiction. A further claim of medical negligence was dismissed similarly. That decision was promulgated with extended reasons on 5th February 1999 ['the first decision']. An

application by the appellant for a review of the first decision was summarily dismissed by the Chairman under Rule 11(5) by a decision ['the first review decision'] promulgated on 18th February 1999. Further, an appeal against the first decision was dismissed at a preliminary hearing held before a division of the Employment Appeal Tribunal presided over by Charles J sitting on 21st July 1999.

13. The Scott tribunal adjourned the question of whether the appellant's claim of sex discrimination ought to be allowed to proceed to a merits hearing until 24th February 1999. Following a meeting held in Chambers on 2nd March 1999 that tribunal dismissed her complaint of sex discrimination on the grounds that it was not just and equitable for the tribunal to consider that complaint out of time. That decision ['the second decision'] was promulgated with extended reasons on 9th June 1999. An application by the appellant for a review of the second decision was also dismissed by the Chairman under Rule 11(5) by a decision ['the second review decision'] promulgated on 29th June 1999.

14. Against both the second decision and the second review decision the appellant appealed by a Notice dated 12th July 1999. That is the present appeal before us.

15. The present appeal came on for preliminary hearing before a division presided over by Judge Wilkie QC on 19th November 1999. On that occasion the appellant, who had previously represented herself, had the assistance of counsel under the ELAAS *pro bono* scheme.

16. Having considered submissions made in support of the appeal the EAT permitted the case to proceed to this full hearing. In giving the judgment of the Court Judge Wilkie identified, it seems to us, two points only which required argument at the full inter partes hearing. They were:

(1) whether the Employment Tribunal erred in law in finding that time for bringing her complaint of sex discrimination ran from 1st February 1995, that is the date on which the provisions of the **Sex Discrimination Act 1975 (Application to Armed Forces, etc) Regulation 1994** ['the 1994 Regulations'] came into force. It was said to be arguable that time began to run sometime after the report of the European Court of Justice (ECJ) decision in **P v S and Cornwall CC [1996] IRLR 347** was promulgated. Judgment was delivered in that case on 30th April 1996; and

(2) whether the Employment Tribunal misdirected themselves as to their own findings of fact on the state of the evidence in concluding that the respondent would be prejudiced evidentially if the matter was to proceed.

## The appellant's claims of sex discrimination

17. The appellant put her case in two ways:

(1) that the respondent discriminated against her by discharging her from the Navy in November 1986 as a result of her wish to undergo GRA and discrimination immediately preceding it in relation to her being put on guard duty (second decision, paragraph 30). "The first claim".

(2) that the respondent discriminated against her as a person who was suffering from PTSD and undergoing GRA, in that they treated her less favourably than they would have treated a person who was suffering only from PTSD. (Second decision, paragraph 32). "The second claim".

## The second decision

18. The Employment Tribunal made the following relevant findings:

(1) time for bringing her claim under the Sex Discrimination Act ran from 1st February 1995, the date on which the 1994 Regulations came into force. Accordingly the ordinary three months time limit under s. 76(1) expired on 30th April 1995. They made an alternative finding that, if they were wrong about that date, the limitation period expired on 17th February 1987, three months after her naval discharge. That alternative finding is, self-evidently, less favourable to the appellant's cause.

(2) On the basis of the later date, 30th April 1995, they found that it would not be just and equitable to allow the claim to proceed, applying s. 76(5) of the Act for the following reasons:

(a) taking the first claim, the appellant had advanced no good reason why she could not bring a claim promptly after time began to run, on their primary finding, on 1st February 1995.

(b) as to the second claim, the appellant acted reasonably and promptly in bringing that claim in October 1998, following the diagnosis of PTSD, of which she became aware in July 1998.

(c) making a broad assessment of the merits of her claims, the appellant would have to show, in relation to the first claim, that the grounds for her dismissal were her GRA rather than, as the respondent contended, her psychiatric and temperamental unsuitability for naval service. As to the second claim, the appellant would need to show that the Navy was aware, at the time of her discharge, that she was suffering from PTSD and that a diagnosis of PTSD had been made. It would then be necessary for her to show that another person suffering from PTSD but not undergoing GRA would have been treated differently in circumstances amounting to less favourable treatment of her. The tribunal rated her chances of succeeding on the second claim as 'very low'.

(d) the quality and cogency of the evidence to be adduced at the full hearing was likely to be adversely affected by the appellant's delay in bringing the proceedings. The tribunal accepted the respondent's evidence from Miss Jellyman that the Navy had not retained confidential reports and similar documentation relating to the appellant at the time of her discharge. Oral evidence was likely to be unreliable in view of the lapse of time.

(e) balancing all the factors taken into account, including the inevitable hardship caused to the appellant by not allowing the matter to proceed, the tribunal concluded that it would not be just and equitable to allow the claims to proceed. The Originating Application was dismissed.

## Fresh evidence

19. On the morning of this appeal hearing, 3rd July 2000, Mr Miller applied, without proper notice to the respondent having been given, he having been instructed late in the day, for evidence which was not before the Employment Tribunal in the form of a letter dated 24th June 1999 from Mr Isted, Navy Personnel Secretariat 2, to the President of the Royal Naval Medical Board of Survey ['the letter'], to be admitted in evidence before us. The application was opposed by Miss Collier, but due to the lateness of the application we adjourned consideration of that matter for 14 days so that written submissions on the point could be lodged.

20. The relevant principles are clear. The evidence must be such that it could not have been obtained with reasonable diligence for use at the Employment Tribunal; it must be apparently credible and not only must it be relevant but also likely to have had an important influence on the outcome of the case. **Wileman v Minilec Engineering Ltd [1988] ICR 318**; applying the test in **Ladd v Marshall [1954] 1 WLR 1489**.

21. The real issue here is whether the letter would probably have had an important influence on the outcome of the case.

22. The letter, which follows the second decision, is a submission for exceptional approval by the Board for retrospective invaliding of the appellant, instead of the original administrative discharge.

23. Mr Miller submits that the letter shows that arguably the Navy knew about PTSD in 1986 and ought to have known that the appellant's symptoms then were attributable to PTSD. He places considerable reliance on a medical report dated 30th March 1999 from Surgeon Captain Churcher-Brown, referred to in the letter.

24. In our view that puts the matter at its highest. Nothing in the letter or the medical report obtained many years later indicates that in 1986 the doctors then examining the appellant attributed her symptoms to PTSD.

25. It follows that the letter and its enclosures are irrelevant to the first claim and does not materially assist the appellant in the second claim, which, as the tribunal found, depends upon her showing that she was less favourably treated than a person suffering from PTSD only and that in turn depends on her showing that she was in fact treated as suffering from PTSD in 1986.

26. In these circumstances we have concluded that had the letter been before the Employment Tribunal when they reached the second decision it would not have been likely to have had an important influence on the outcome of the case, that is, that the tribunal would have exercised their discretion differently under s. 76(5). Accordingly we shall not admit the letter in evidence on this appeal.

## The appeal

27. We return to the two grounds upon which this appeal has been permitted to proceed.

(1) Ought the tribunal to have found that time for bringing the first claim ran from 30th April 1996 (the date of the ECJ judgment in **P v S**) rather than 1st February 1995, when the 1994 Regulations came into force, or alternatively the date of her discharge in 1986?

In our judgment time began to run from the date of discharge. That is the discriminatory act complained of in the first claim.

The question of the appellant's knowledge of her legal rights goes to the exercise of discretion under s. 76(5), not the start of the limitation period. **British Coal Corporation v Keeble [1997] IRLR 336**; **Mills and Crown Prosecution Service v Marshall [1998] IRLR 494**.

As to that, the appellant asserted that she recognised unlawful discrimination on the grounds of gender reassignment at the time of her discharge in 1986. (Second decision, paragraph 36).

In these circumstances we can see nothing in the first ground.

(2) Did the tribunal fall into error in finding that the respondent would be prejudiced evidentially if the matter was to proceed to a full merits hearing?

We think not. A principal issue in the second claim would be the real reason for the appellant's discharge in November 1986. That inevitably depends in part on the oral evidence of the officers involved, with the attendant difficulty of fading memories, not helped by the routine destruction after time of contemporaneous confidential reports and documentation.

In our view the tribunal reached a permissible conclusion on the potential prejudice to the respondent evidentially.

28. Those were the grounds on which the matter was permitted to proceed. Before us Mr Miller has sought to develop a further point, that the tribunal was wrong to find that the appellant's prospects of success in the second claim were very low. (Second decision, paragraph 35).

29. Strictly, that is not a point properly before us. However, having heard argument on it we accept Miss Collier's submission, first that the tribunal reached a permissible conclusion as to the underlying merits of the second claim and secondly that that finding played a small part in their overall exercise of discretion, correctly applying the approach to be found in **Hutchison v Westward Television Ltd [1977] IRLR 69**, paragraph 10 (per Phillips J).

## Conclusion

30. It follows in our judgment that no error of law is made out. The Employment Tribunal exercised its wide discretion permissibly. The appeal must be dismissed.

» by Claire McNab