Ashton-v-West Mercia Police (Employment Tribunal, 1999)

Employment Tribunal ruling

September 1999

Foreword

This Employment Tribunal held that West Mercia Constabulary's dismissal of a trans woman employed as a communications officer did not amount to discrimination under either the Sex Discrimination Act or the Disability Discrimination Act.

The applicant, Claire Ashton, had served as a police constable in the West Mercia force, but at the force's request she retired from that post in 1997 when she began medical treatment for transsexualism, and was promptly re-employed as a communications officer. A year later she was dismissed from that post due to alleged underperformance.

Ms Ashton claimed that her dismissal amounted to discrimination against her because she was transsexual, contrary to the 1975 Sex Discrimination Act. Following the European Court of Justice's ruling in the P *v*. S and Cornwall County Council case, the SDA outlaws discrimination on grounds of transsexualism. The applicant also claimed that failure to accommodate her needs whilst undergoing medical treatment contravened the Disability Discrimination Act 1995. The tribunal rejected the claim on both grounds, finding that the applicant had indeed underperformed in the post of communications officer.

There are grounds for questioning the wisdom of the tribunal's finding that the employer took reasonable steps to accommodate the applicant as she learnt her new job … but even if those findings are accepted, the fact remains that she was doing that particular job only because the police had refused to allow her to continue to serve as a police officer. The tribunal acknowledged her "excellent prior performance as a Police Constable", a post she held for ten years.

Claire McNab, October 1999

Tribunal decision

Case Number: 2901131/98

The Employment Tribunal
Reserved decision
between

Applicant: Ms C Ashton
and
Respondent: The Chief Constable, West Mercia Constabulary

Decision of the employment tribunal held at Shewsbury on:
22 February 1999 to 5 March 1999
26 April and 24 to 27 May 1999
5 July and 7 July 1999

Chairman: Mr S J Williams
Members: Dr B Marsh, Mr J Bennett

Representation

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

Decision

The unanimous decision of the Tribunal is that the applicant was not discriminated against, contrary to section 5(1) or 5(2) of the Disability Discrimination Act 1995; further, the applicant was not discriminated against for a reason based on her sex, contrary to section 6(2) of the Sex Discrimination Act 1975; further, the applicant was not discriminated against contrary to the principle of equal treatment laid down in the Council Directive (76/207/EEC). The applicant's claims are therefore dismissed.

Representation

For the Applicant: Mr D O'Dempsey, counsel
For the Respondent: Mr M Kurrein, counsel

Extended reasons

1. Mr O'Dempsey on behalf of the applicant adduced the evidence of Dr Gould and Clive Webster, in addition to that of the applicant. Mr Kurrein, on behalf of the respondent, adduced the evidence of Jan Bennett, Sergeant Dewerson, Vicki Dobson, Sergeant Lyons, Superintendent Smith and James Spence. All witnesses gave evidence in chief from prepared witness statements. The Tribunal received in evidence a bundle of documents containing pages 1 to 790 to which page numbers in this decision refer. We were also assisted by the

submission of agreed documents setting out the chronology of major events and the issues to be determined by us in the case. The Tribunal took the opportunity of visiting the Respondent's Operations Room and was thereby helped in its understanding of the evidence. The Tribunal wishes to record its gratitude to both counsel for their able assistance in a case raising sensitive issues and for their preparation and submission of their closing arguments, together with supporting materials, in advance of the final day of the hearing.

2. By her Originating Application the applicant complains that the respondent's dismissal of her with effect from 31 March 1998 amounted to discrimination contrary to the Disability Discrimination Act 1995, discrimination contrary to the Sex Discrimination Act 1975 and/or discrimination contrary to the Equal Treatment Directive (76/207/EEC). By its Notice of Appearance the respondent denies that it discriminated against the applicant as alleged or at all, and it further denies that the applicant had a disability within the meaning of the Disability Discrimination Act 1995 and further asserts that, in view of the fact that the Originating Application was presented to the Tribunal on 25 June 1998, no act or omission of the respondent which occurred prior to 25 March 1998 should be admitted as a matter of substantive complaint, under either the act of 1975 or the act of 1995.

3. The scope of the issues to be determined by us was further considered at an Interlocutory Hearing held on 27 September 1998 and further at a Preliminary Hearing held on 21 January 1999.

4. In the result, the matters for our decision have been summarised in the document "Issues in the Case" and are as follows:

(i) Is the applicant disabled within the meaning of S.1(1) Disability Discrimination Act (DDA). It is suggested that the questions for the Tribunal will include:-

   a. does the applicant have an impairment that is either mental or physical?
   b. does the impairment affect the applicant's ability to carry out day to day activities, and does it have an adverse effect?
   c. is the adverse effect substantial within the section?
   d. is the adverse effect long-term?

(ii) If so were: -

   a. the assessments of her work performance;
   b. the extension of her probationary period;
   c. the recommendation and decision to dismiss her;

   acts of discrimination contrary to S.4(2)(d) DDA?

(iii) Was there any duty on the Respondent to make adjustments pursuant to S.6 DDA and, if so, what were they, were they made or, if not, has the Respondent justified such failure?

(iv) Has the Respondent justified the treatment in question?

(v) Would the treatment have been justified if the Respondent had carried out such reasonable adjustments as the Tribunal have identified.

(vi) In any event, were the matters at paragraph 2(ii) acts of discrimination contrary to Ss.1 (1)(a) and 6(2) Sex Discrimination Act 1975 and/or the Equal Treatment Directive.

5. In addition to the statutory bases for the applicant's complaints, we were referred extensively to the Code of Practice for the Elimination of Discrimination in the Field of Employment against Disabled Persons or Persons who have had a Disability, issued under section 53(1)(a) of the Disability Discrimination Act 1995, and to the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability, issued under section 3 of that Act. We were also referred to the following authorities:

- **Transsexualism**
  - P -v- S and Cornwall County Council [1996] IRLR 347
  - M -v- The Chief Constable of West Midlands Police (unreported) ET Decision
  - Chessington World of Adventures Ltd -v- Reed [1998] ICR 97 EAT
- **Disability**
  - O'Neill -v- Simm & Company Ltd [1998] IRLR 233
  - Morse -v- Wiltshire [1998] IRLR 352
  - Rideout -v- T C Group [1998] IRLR 628
  - Goodwin -v- The Patent Office [1999] IRLR 4
  - Kenny -v- Hampshire Constabulary [1999] IRLR 76
  - Clark -v- Novacold Ltd [1999] IRLR 318
- **Discrimination**
  - Kingston -v- British Railways Board [1982] IRLR 274
  - James -v- Eastleigh Council [1990] ICR 554
  - King -v- Great Britain-China Centre [1991] IRLR 513
  - Glasgow City Council -v- Zafar [1998] IRLR 36
- **General**
  - Meridian Global Funds Management -v- Securities Commission [1995] 3WR 413

The facts

6. Based on the evidence we heard we found the following facts relevant to our decision:

(i) The applicant was born on 26 March 1951 and until the summer of 1996 she presented and was regarded as a male. For many years, however, she had harboured deep-rooted feelings, sometimes more and sometimes less suppressed, that she was really female. In the summer of 1996 she was diagnosed as suffering from gender identity dysphoria (GID). The applicant has had a varied working career. She was for three years a surveyor in the Royal Artillery. She was passionately interested in mountaineering and worked for time as an instructor. She has worked as an HGV driver, in a wholesale electrical goods business and in her father's printing business. Before joining the Police Force she was for six years a Special Constable, in which capacity she dealt with over 100 serious incidents. From September 1987 until March 1997 she held the office of Police Constable in the West Mercia Constabulary based at Shrewsbury Police Station. Since her time in the Army the applicant has been interested in firearms and pursued this interest whilst she was a constable. She

pursued the sport of pistol shooting and competed successfully at European Championship level. She was also skilled at firearms engineering and made and modified pistols for herself and for others. The applicant has developed a keen interest in computing, which she practises at a level which enables her to advise others and to create websites.

Following her diagnosis of GID in the summer of 1996 the applicant determined that she would no longer continue to live as a man and harbour secretly the feelings referred to above, but decided to change her life radically by declaring what she regarded to be her true self to her family, friends, colleagues and employer. She informed the Assistant Chief Constable of her diagnosis and told him that she intended to follow a course of medical treatment which would allow her to live at the conclusion of it as a woman, that is to say she intended to undergo gender reassignment. On 19 August 1996 she wrote an open letter to her colleagues (pages 74 to 77) setting out her position in some detail. Initially, the applicant hoped to be allowed to complete her proposed course of treatment and continue her service as a Police Officer as a woman. At that stage the case of P -v- S and Cornwall County Council [1996] IRLR 347 had been reported and the case of M -v- The Chief Constable of the West Midlands Police was proceeding in the Birmingham Industrial Tribunal but had not been decided. Pending clarification of the law as it applied to transsexuals, the applicant was given a period of compassionate leave, was seen by the respondent's Occupational Health Physician, Dr Laidlaw, who reported on 28 September 1996 (page 78), and was relieved of normal patrol duties and assigned to clerical tasks, initially in the Child Protection Unit (CPU) and thereafter in the Criminal Justice Support Unit. The decision in M -v- The Chief Constable of the West Midlands Police was promulgated on 20 December 1996.

(iii) The medical treatment which the applicant underwent consisted of the following. She began a course of hormone treatment in June 1996. She began a course of Androcur in February 1997 which continued until about July 1997 when it was stopped because Dr Gould believed it might be causing depression. Dr Gould formally diagnosed depression on 4 August 1997 and prescribed Lofepramine. On 11 November 1997 Lofepramine was stopped but then restarted on 29 November. Zoladex was prescribed in August 1997 and continued until March 1998 when all treatment was stopped in preparation for the applicant's forthcoming surgery.

(iv) On 23 January 1997 the applicant met Mr Spence, the respondent's Head of Personnel, as a result of which Mr Spence wrote to the applicant on 7 February 1997 (page 82 to 84) setting out the terms proposed for her future employment by the respondent. In essence, these were that the applicant would resign her office as a Police Constable with effect from 31 March 1997, that she would receive an immediate pension based on her previous service, that she would not be required to work during the month of March and that with effect from 1 April 1997 she would be appointed as a Communications Operator at the maximum point on the relevant pay scale and subject to six months', rather than the normal 12 months' probation. By her letter of 9 February (page 85) the applicant accepted those terms. Thereafter, a formal offer was made by the respondent and accepted by the applicant. The applicant had wished to be subject to no probation at all and Mr Spence had originally proposed that the usual 12 months should apply. The period of six months was a negotiated compromise between the two. Mr Spence advised the applicant to keep the terms of her employment confidential and did not himself inform Mrs Bennett, the Divisional Operations Room Manager, under whom the applicant would be working, or anyone else of her salary or length of probation. Mrs Bennett, and the tutor with whom the applicant was initially placed, believed that the applicant was on 12 months' probation and continued so to believe until the

applicant's initial assessment in July. By his certificate of 24 February 1997 (page 103) Dr Laidlaw certified that the applicant was suffering from gender identity dysphoria and that she was disabled from performing the ordinary duties of a member of the Police Force. This contrasted markedly with Dr Laidlaw's opinion expressed on 28 September 1996 (page 78), that the applicant was "at present … perfectly fit to carry out the duties of a Policeman." The respondent at that time was seeking to secure the best possible terms for the applicant's continued employment and remuneration.

(v) On 7 April 1997 the applicant took up her duties as a Communications Operator assigned to D Squad under the management of Mrs Bennett and being tutored by Kathy Griffiths and supervised by Sergeant Lyons. Ordinarily, candidates for the post of Communications Operator are required to undergo an assessment at the Force Headquarters Assessment Centre before taking up their appointment. The applicant did not do so, but did undertake such an assessment on 10 April. Her results are shown at pages 132ff. The applicant scored four Grade 3s, which was below the standard expected to meet the requirements of the post in question (page 132). If Mr Spence had seen the results of that assessment before the applicant was appointed, then it is very doubtful whether she would have been appointed. Mr Spence assumed that the applicant's previous experience as a Constable meant that she would be able to cope with the demands of the Communications Operator's role.

(vi) On 7 July 1997 Sergeant Lyons conducted an assessment of the applicant's progress during her probation (page 264-75). The results of that assessment were not satisfactory. The complaints about the applicant's performance which were made at this time, and continued to be made thereafter, were that she was slow in her responses to instructions, she was frequently forgetful and exhibited poor concentration with the result that her records of information given were inaccurate. It was said that she had difficulty communicating with others because she was unwilling to raise her voice to shout across the room. It was also complained that she was unable or unwilling to make records of incidents directly on the computer without first writing notes in hand. It was also complained that she seemed unable to the required degree to work "multi-functionally", that is to say performing various of the procedures required in the Communications Room simultaneously. The Tribunal had no reason to think that Sergeant Lyons had any covert or otherwise improper motive for assessing the applicant as he did. In the light of the evidence we heard we accepted that the assessment was fair and the shortcomings identified in it were explicable by a combination of factors, namely the side effects of the drug therapy which the applicant had embarked upon, her depression (which, although not yet diagnosed as such, was beginning to manifest itself), the stressful environment of the Communications Operations Room, the further stress of the applicant having to prove herself and the still further stress caused to the applicant by her undergoing a major life change. The view that there were genuine and serious shortcomings in the applicant's performance at that time is also supported by the evidence of the anonymous, and therefore unbiased, assessment at the Headquarters Assessment Centre (page 133ff) referred to above. At this stage the applicant had not suggested to the respondent that any lack of performance on her part might be due to her treatment or the side effects of it. In particular, it is noteworthy that the applicant's job-holder's comments on her assessment (page 270 to 272) do not suggest that her treatment regime was having any adverse effects on her. On 8 July the applicant met Sergeant Lyons and Mrs Bennett in the Staff Club to discuss her assessment. Subsequently, on 10 July she gave her comments, as noted above. On 11 July she met Mrs Bennett again to discuss the assessment, on which occasion Mrs Bennett informed the applicant that she would be requesting an extension to her probation period in order that steps might be taken in an effort to address the areas of concern (page 275). The

system in operation required Mrs Bennett either to confirm a candidate in post or to extend the candidate's probation two months before the end of the probationary period. Mrs Bennett formalised her request for an extension of the applicant's probation by her letter of 16 July (page 180) and ultimately her probation was extended by a further six months, of which the applicant was informed on 4 August (page 188 to 189).

(vii) Meanwhile, another matter raised its head. When the applicant resigned her office as a Constable, a leaving card was presented to her signed by many of her colleagues, including a PC Jeff Morris who wrote on it words to the effect that he wished to be the first to "have a kiss" from the applicant. In April the applicant wrote a note to PC Morris saying words to the effect of "where is my kiss?" which note was given to PC Morris by Kathy Griffiths. PC Morris misunderstood the origin of the note and said "anytime Kathy". When it was pointed out to him that the note was from the applicant and not from Kathy Griffiths, PC Morris blushed and left the room. Three months later, in early July Kathy Griffiths recounted the event to Sergeant Lyons in the Staff Club and was overhead doing so by D S Ingham, who later made fun of PC Morris over it. This in turn, was overheard by Mrs Bennett, who saw fit to report the matter to Vicki Dobson. PC Morris made no complaint, putting the matter down to what he himself had written on the applicant's card. He was absolutely right. D S Ingham was spoken to by an Inspector and warned about his future conduct. The Tribunal concluded that this was an extremely trivial incident, originated by P C Morris himself and brought up three months after the event after being overheard twice. This matter then became the subject of an allegation of sexual harassment by the applicant against P C Morris. The applicant was interviewed about it on 16 July (page 175ff).

(viii) In the same interview (page 176ff) another allegation of sexual harassment by the applicant was also brought up. During a telephone conversation between the applicant and P C Lainchbury, an officer on patrol, the applicant commented "I am still waiting for a kiss". This was overhead by Kathy Griffiths, the applicant's tutor, and reported to Mrs Bennett. Mrs Bennett reported it to Vicki Dobson. PC Lainchbury made no complaint. The view of the Tribunal was that this also was a very trivial matter which might ordinarily not even have merited further action. These were not matters of substantive complaint before us. It was conceded that they could only be of relevance to us as material on the basis of which we might draw inferences as to the respondent's reasons for treating the applicant as they did in the case of the substantive complaints. The Tribunal accepted that Mrs Bennett and Vicki Dobson found themselves in a sensitive situation. They knew that there was a background of some personal comments being directed at the applicant by some of her colleagues. The applicant herself referred to this in her comments on her Assessment (page 271). Sergeant Lyons also gave evidence about it and gave, examples to us of comments which he had heard but, out of sensitivity to the applicant did not pass on to her. We took the view that that background could well explain why Mrs Bennett and, in due course Vicki Dobson, took the view they did of the two allegations of sexual harassment and wished to warn the applicant that ill-thought out remarks by her could give offence. In that way the climate of adverse comment directed at the applicant might be made worse, to the applicant's detriment.

(ix) When she had started work in the Communications Room the applicant had continued to use a toilet adjacent to the CPU. The applicant, being aware of the sensitive issue of toilet usage, had suggested this arrangement herself. The applicant was upset at being accused of sexual harassment by her managers, and in apparent response to it, decided to change her practice and start to use the ladies' toilet adjacent to the Communications Room. She did not make clear her intention to do this in advance. That in turn led to complaints from some of

her female colleagues in the Operations Room. Whilst the Tribunal could well understand the applicant's dismay at the suggestion that she had sexually harassed colleagues, we nevertheless took the view that her reaction was an insensitive response by her to her irritation with management and, moreover, was calculated to lose her goodwill amongst colleagues. The applicant was subsequently spoken to about this on 30 July by Mrs Bennett and Mr Bradburn, the Divisional Personnel Officer (page 182). Out of sensitivity to the applicant, evidence concerning the complaints was given in writing to the Tribunal. Again, this not a matter of substantive complaint for our decision. It suffices to say that the Tribunal did not think that there was any real substance to the applicant's colleagues' complaints concerning her use of the toilet and we are quite sure that the matter could easily have been resolved if a little more tact and thought had been brought to bear. We were, however, satisfied that in tackling the applicant about her use of the ladies' toilet, the respondent was not itself harassing or bullying her. Mrs Bennett had received complaints, however insubstantial or unfounded they might be, from colleagues of the applicant who plainly regarded the issue with some seriousness. That was a sensitive matter which Mrs Bennett had to take up as a manager and which it was difficult to take up without risking causing some embarrassment either to the applicant or to the complainants. Mrs Bennett frankly said that she shared some of the complainants' concerns. Again, this was a matter which could only be of relevance to us if we were minded to draw inferences as to the true reason for the respondent's treatment of the applicant.

(x) On 31 July complaints from the Oswestry Station concerning the applicant's performance as a Controller were transmitted by Sergeant Jones to Inspector Broomfield (page 184ff). On 31 July and 1 August the applicant was absent from work due to sickness consisting of a high temperature (page 409). On 4 August at the meeting at which the applicant was told of her extended probation, the applicant alleged that she had been bullied by Mrs Bennett over the allegations of sexual harassment and in the way that she had been spoken to concerning her use of toilet facilities (page 189). On 6 August a further complaint was received concerning the applicant's performance, this time from PC Cebo at the Church Stretton Station (page 190).

(xi) On 7 August Mr Spence wrote to the applicant (page 199) formally advising her of the extension of her probation by a further six months until 1 April 1998. On the same day the applicant submitted a letter invoking the Grievance Procedure in regard to her appraisal, a further letter invoking the Grievance Procedure in regard to the extension of her probation period, a further letter confirming her verbal complaint concerning the allegations of sexual harassment made against her by Mrs Bennett and alleging that the latter's questioning of her concerning her use of toilet facilities was discriminatory and oppressive, and a further letter confirming her verbal complaint to Chief Inspector Charteris that confidential information concerning her had apparently been passed to a local newspaper from, as she alleged, a source within the respondent (pages 200 to 202a). On 8 August a Return to Work Proforma was completed following the applicant's two days' absence on which it was noted "Claire has seen her doctor regarding high temperature and has been advised that it may be triggered by depression. The timing of which coincided with other problems at work" (page 409). On 11 and 13 August meetings were convened at which the applicant's grievances and complaints were further discussed.

(xii) On 24 August a further complaint was received from the Oswestry Station regarding the applicant's performance as a Communications Operator (page 213ff).

(xiii) On 9 September Vicki Dobson met the applicant to discuss the results of her investigation into the applicant's grievances and complaints (page 226-7). The applicant was advised that she might take the matter further if she wished. She considered doing so but in the end did not.

(xiv) With effect from 26 September the applicant was transferred from D Squad to A Squad where she was placed with Sophie Warren as her tutor. The supervising sergeant on A Squad was Sergeant Dewerson. Sergeant Dewerson advised Sophie Warren to keep notes on matters relevant to the applicant's progress, which notes he saw from time-to-time. The purpose of this transfer was to afford the applicant an opportunity to start afresh with new colleagues.

(xv) A further complaint was received concerning the applicant's performance as an Operator in the relation to an incident which occurred on 20 October (page 299-40). This complaint emanated from the Shrewsbury Station.

(xvi) On 25 October Sophie Warren noted that she and Sergeant Dewerson had spoken to the applicant privately with reference both to the recent complaint and to the applicant's progress generally since her transfer to A Squad. The applicant was told that her performance was still not satisfactory. The applicant became upset. She said that she was currently taking anti-depressant tablets and attributed the need for these to the reports and appraisals that she had from D Squad. She said that she felt she could just put her head on the desk when she came into work because she was so tired of all of this, and the tablets and other medication she was on. Sophie Warren expressed the view that there was simply too much going on in the applicant's personal life for her to be able to cope with a challenging job as well and concluded "I don't think the Coms Room is the place for Claire to be". The Tribunal accepted that these notes were not written for Sophie Warren's exclusively private purposes, but were in all probability seen by Sergeant Dewerson and very probably others.

(xvii) On 11 November further complaints were received relating to the applicant's performance of her duties (page 251-2).

(xviii) On 13 November Mrs Bennett reviewed the applicant's progress in a memorandum to Superintendent Smith, enclosing numerous appendices, and concluded "unfortunately we, as individuals or as an organisation are unable to identify or provide any training which would address these areas (the areas of complaint). I therefore respectfully request that consideration be given to the termination of Claire's employment with West Mercia Constabulary." (page 257 to 283). On the same day Vicki Dobson wrote to Superintendent Smith saying that she had seen Mrs Bennett's report and fully supported her recommendation (254-5). On the same day Superintendent Smith transmitted those two reports to Mr Spence, saying "I am now of the view that all avenues of help are exhausted and in the interests of the efficiency of my division, Claire' services must be dispensed with." (page 256)

(xix) On 18 November the applicant spoke to Sergeant Dewerson concerning the apparent side effects of her drug therapy, referring to her anti-depressant tablets, saying that a symptom of depression was weepiness, pointing out that she was on three different types of tablets of which the side effect were drowsiness (page 287).

(xx) On 25 November 1997 the applicant and others met Mr Spence (page 307Aff). The applicant told Mr Spence that she was on anti-depressants which made her drowsy and that

her emotional life had affected her performance. Mr Spence noted that Jan Bennett's concern was with the morale of the other operators in the Squad. Mr Spence noted (page 307D) that he wished to seek the views of the applicant's GP concerning the impact of her medication on her multi-functionality and her speed. By her letter of 26 November (page 308ff) the applicant responded to that meeting saying, inter alia, that she was aware that at times she appeared emotionally distressed and had explained the reason. She concluded by saying at when she was permanently retired because of GID, she was redeployed to her present position and that no attempt had been made during that period to ascertain what her continuing treatment entailed or what possible effect it could have on her work. At pages 311 to 317 we were shown statistics purporting to demonstrate comparative speeds of work of various Operators. We found the statistics unhelpful and drew no conclusions from them.

(xxi) On 27 November 1997 a complaint was received from the Whitchurch Station concerning the slow speed and inaccuracy of the applicant as an Operator (page 318-9).

(xxii) On 28 November 1997 Mr Spence wrote to the applicant (page 320-21) recording that her Divisional Managers had concluded that her services should be dispensed with, and that he was satisfied that five of the seven concerns which had been communicated to the applicant were well-founded. These were:

(i) An inability to work multi-functionally.

(ii) The recording of inaccurate details on OIS.

(iii) The lack of direct recording of incident details.

(iv) An unacceptable speed of incident creation.

(v) A lower than average OIS incident workload.

Mr Spence went on to note the applicant's concerns regarding the side effects of medication and/or the consequences of ceasing to take some medication and said that he needed to obtain medical advice from the Force Medical Officer on these issues and that the latter would no doubt wish to contact the applicant's GP. He enclosed a medical consent form. Mr Spence concluded that it would be unwise for the applicant to continue work until the question of medical issues affecting her performance had been resolved and therefore advised her that she should not attend for work until further advised and that she would be treated as on special leave on full pay - not sick leave. The applicant was assured that whatever the outcome of Mr Spence's deliberations her probationary period would be honoured until 31 March 1998. On 2 December the applicant replied to Mr Spence, asking that he forward a further medical consent form so that she might authorise Mr Spence to approach her consultant psychiatrist. No consent form was ever forwarded and Mr Spence did not contact the applicant's consultant psychiatrist. On 6 January 1998, acting on behalf of Mr Spence, Miss Southall, Occupational Health Officer, posed two questions for answer by Dr Gould, the applicant's GP. Dr Gould replied in his letter of 15 January (page 326). The Tribunal was of the view that although the questions posed by Miss Southall were relevant, they were far from exhaustive and not adequate to draw from Dr Gould the information which Mr Spence needed in order to enable him to assess the impact of the applicant's medical regime on her past performance and on her likely future performance. In particular, no question is asked about the applicant's then present condition or her prognosis. Mr Spence did not see the questions posed to Dr Gould, he see Dr Gould's reply in full. Instead, Miss Southall relayed

to Mr Spence in her memorandum of 3 February (page 332) a summary of what Dr Gould had said and his concluding paragraph.

(xxiii) Mr Spence discussed the matter with Dr Laidlaw, the Force Medical Officer, on the basis of the summary he had received. He did not ask Dr Laidlaw to see the applicant again. On 23 February (page 333-4) Mr Spence wrote to the applicant setting out in part the summary of Dr Gould's report which he had received, noting that he had discussed the applicant's case with Dr Laidlaw and concluded that, whilst he was satisfied that the applicant's medication had had some impact on her performance as a Communications Operator, the overall concerns expressed regarding the applicant's performance were well-founded. Mr Spence had therefore decided that he should accept the recommendation that the applicant not be confirmed in post at the end of her extended probationary period. The applicant was given notice that her appointment would therefore end on 31 March 1998 on the grounds of "compatibility". The Tribunal accepted Mr Spence's explanation that the word "compatibility" was used in error and should have read "capability". The Tribunal did not accept that anything sinister underlay the use of that word.

(xxiv) On 6 March the applicant's trade union submitted an appeal on her behalf, supported by a Statement of Case (page 336) in which it is said that at the time of transition from being a Police Office to a member of the support staff the applicant "was not given a skills audit in order to determine the most appropriate position to deploy her into". Reliance was also placed on the high stress level in the Communications Room and it was argued that the impact of the applicant's medication on her work had not been fully appreciated. Because of her length of service as a civilian staff member, the applicant did not enjoy an automatic right of appeal, but the respondent entertained her appeal nevertheless. Prior to the hearing of the appeal a report dated 31 March 1998 from the applicant's consultant psychiatrist, Dr Russell Reid, was submitted (page 342-3). A further report of the same date was sent by Dr Reid to Dr Gould (page 553). No allegation was made on behalf of the applicant at her appeal that she had been the subject of discrimination on the grounds of disability or sex. The applicant told Dr Reid that she intended to claim that her dismissal was unfair. Dr Reid noted that as at the date of his consultation, 27 March 1998, the applicant was "psychologically stable and well with no sign of depression". The applicant's appeal was heard by Mr Neyroud on 24 April and by his letter of 29 April 1998 (page 406) that appeal was dismissed.

(xxv) An integral part of the applicant's preparation for gender reassignment was that she should undergo a period of 12 months, known as the "real life test", in which she would live and work exclusively in the female role before proceeding to irreversible surgery. In the applicant's case that period coincided with her 12 month's probation as a communications operator. The applicant commenced taking hormone treatment in June 1996 when Dr Russell Reid prescribed a trial of Ethinyloestradiol (confirmed in Dr Reid's report to Dr Gould of 27 June 1996 at page 546). From about February until July 1997 the applicant took Androcur tablets; these were stopped by Dr Gould Who thought they were making her depressed. Androcur was replaced by Zoladex injections which are also reported to cause depression, dizziness and headache. The applicant continued taking Zoladex into the early part of 1998 before ceasing all medication on 1 March prior to her surgery. On 4 August 1997 Dr Gould diagnosed the applicant as suffering from depression and prescribed Lofepramine. Lofepramine was stopped on or about 11 November and re-started on about 29 November 1997. As already noted, Dr Reed found no evidence of depression in March 1998.

(xxvi) It is a feature of work in the Communications Room that "multifunctionality", so-called, is required of those working as Operators there. From time to time Operators are required simultaneously or in quick succession to communicate by means of radio and telephone with officers on patrol and at the same time to interact with a computer terminal by reading messages which appear on the screen, and by typing on the keyboard. In addition, from time-to-time it may be necessary for operators to communicate with other operators in the Communications Room by shouting to them. The work is by its nature spasmodic in that periods of relative quiet may be succeeded by periods of hectic activity. The Tribunal was able to gain a helpful insight into the nature of the work undertaken in the Communications Room in the course of a short visit during the hearing.

7. Our conclusions on the factual issues before us were as follows. There was a persuasive body of evidence that notwithstanding her excellent prior performance as a Police Constable, the applicant did not perform at the expected level after her transfer to the position of communications operator. The concerns and complaints about her performance expressed by officers came from different sources in different stations and were in most cases well documented and, at least in some cases, accepted by the applicant to have been grounded in fact. The anonymous assessment carried out at Headquarters suggests, albeit after the event, that the applicant perhaps did not have the qualities required for success in this post in sufficient degree to make it a wise move to transfer her into the Communications Room. The decision of Mr Spence so to transfer the applicant was based on the best of motives and intentions and we reject entirely any suggestion that the applicant was "set up to fail". In the early days, just before and just after the applicant's transfer into the Communications Room, she was full of praise for the support she had from fellow officers and, in particular, from Mr Spence. We accept that Mr Spence took the course he did because it seemed to him that it was the best way to meet the applicant's desire to remain working for the respondent and to enable her to continue to earn at the best possible level whilst she did so. Whilst it must have been obvious to all around her that the applicant was going through a difficult emotional stage in her life, we do not think that that alone was sufficient to explain satisfactorily the applicant's poor performance in her new role. It was not until October 1997 that the applicant began in her conversations with others at work, for example, Sophie Warren and Sergeant Dewerson, to suggest a link between her poor performance and her medical regime. The assessment of the applicant's performance in July 1997 was carried by Sergeant Lyons. There was no evidence before us that in assessing her as he did, Sergeant Lyons acted out of any improper motive at all. We conclude that the assessment was fairly and properly carried out and that it reflected Sergeant Lyons' honest views on the applicant's then state of progress.

8. After the assessment of July 1997 the respondent reasonably and on proper grounds concluded that the applicant could not realistically be expected to achieve an adequate level of performance in her new role within the initially contemplated probationary period of six months. Accordingly, the respondent determined to extend that probationary period to the 12 months usual for all other probationers at that time. Lyn Gibb, another probationer who started at the same time as the applicant, and who had been an officer in the British Transport Police, had to do 12 months' probation from the outset. In earlier times, when the standard probationary period had been six months, it was not unknown for probationers to have that period extended if they had not reached a satisfactory standard after six months. There was therefore nothing unique about the way in which the respondent handled the applicant's case. It was part of the respondent's strategy for dealing with the applicant's unsatisfactory standard to date in an attempt to bring her up to the required level of performance. It must be

borne in mind that one alternative open to the respondent at that time would have been simply not to confirm the applicant in post at the end of the six months. The Tribunal accepted that the reason for the extension of the applicant's probation was as stated in the letter of Mr Spence dated 7 August 1997 (page 199). The- applicant accepted that Mr Spence was at all times sympathetic to her position and there is no evidence before us upon the basis of which we could impute any covert or improper motive to Mr Spence. If the respondent, whether in the person of Mr Spence or anyone else, had been antipathetic to the applicant for some improper reason, it would have been far more likely that they would have sought to bring the applicant's service in the Communications Room to an end at the conclusion of her six month's probation, rather than to extend it. The extension of probation was not the only part of the respondent's strategy for dealing with the applicant. She was also transferred from D Squad to A Squad so that she might make a fresh start in her training under a new and experienced tutor, Sophie Warren, and a new supervising sergeant, Sergeant Dewerson.

9. After the applicant's transfer to A Squad, further complaints were received in October and November. The Tribunal accepted that these complaints were based on the honest views of the complainants and not on any improper motive. Sergeant Dewerson formed the view that the applicant had become withdrawn and uncooperative and her tutor, Sophie Warren, formed the view that the Communications Room was not the right place for the applicant. When, at a late stage, the applicant did suggest that the side effects of her medication and/or ceasing to take some prescribed medication might have affected her performance adversely, Mr Spence took the view that she should be relieved of her duties and placed on special leave. It will be recalled that by that time Mr Spence had received recommendations for the termination of the applicant's employment from Mrs Bennett, Mrs Dobson and Superintendent Smith. Yet Mr Spence did not take that course in November 1997. In evidence Mr Spence accepted the criticism that the period of three months between his letter of 28 November 1997 and his letter of 23 February 1998 dismissing the applicant was unnecessarily long. He also accepted with hindsight that he had not made all the enquiries of medical experts that he might reasonably have been expected to make, for example by securing a full report from Dr Gould, by taking up the applicant's offer of a report from Dr Reed and by asking Dr Laidlaw to see the applicant again before giving a final opinion. In the context of a complaint of unfair dismissal, which this is not, those matters might well have been the subject of more extensive criticism but in the context of this enquiry we are concerned to establish the reason why the respondent acted as it did towards the applicant. We concluded that the reason for the recommendation to dismiss the applicant and the reason why Mr Spence ultimately acted upon those recommendations, was that the applicant had persistently failed to perform to the standard required of communication operators and because the respondent, having pursued a number of strategies in an attempt to enable the applicant to achieve the required standard, in the end came to the view that the applicant would never be able to do so.

The law

10. To those facts we have to apply the law as set out in (1) the Disability Discrimination Act 1995, together with the associated Code of Practice and Guidance, and (2) the Sex Discrimination Act 1975 and the Council Directive (76/207/EEC) "the Equal Treatment Directive".

The Disability Discrimination Act 1995

11. Mr O'Dempsey argued that the applicant was a disabled person within the meaning of section (1) of the Act. The applicant did not have any physical impairment. The applicant was diagnosed as suffering from gender identity dysphoria (GID) which, it was agreed by both parties, was a clinically well-recognised illness. The applicant was also diagnosed on 4 August 1997 as suffering from depression. Depression also, it was agreed by both parties, is a clinically well-recognised illness.

12. The Tribunal accepted that the applicant's GID was a long-standing condition which had lasted for many years. The Tribunal accepted that the onset of the applicant's depression predated its diagnosis on 4 August 1997 and was probably a side effect of Androcur which manifested itself in about June/July and was the reason why Dr Gould discontinued that drug in July 1997. Dr Reid reported on the basis of his consultation of 27 March 1998 that the applicant displayed no sign of depression and his impression was that she had been free of depressive symptoms for some months. The applicant therefore suffered from depression from about June 1997 until about December 1997. Mr O'Dempsey argued that we should look at the applicant's condition "in the round" and over the years, and conclude from the general tenor of her evidence that she had been depressed for many years. He submitted:

"The issue of whether Miss Ashton was suffering from a depression (not having a substantial adverse effect, but having an effect on her) can be settled by reference to the issue of the diagnosis of GID. It is submitted that before that diagnosis on a balance of probabilities she was suffering from a depression, otherwise the GID diagnosis could not have been made, relating to her sex."

We found no evidence upon which we could draw any such inference. We reminded ourselves that in order for it to constitute a mental impairment within the meaning of the Act, the applicant's depression had to be a clinically well-recognised illness. We took that to mean an illness which a qualified medical practitioner would categorise as depression and not a generalised feeling of low spirits. On the evidence before us the applicant's depressive condition lasted less than twelve months and therefore did not have a long-term effect within the meaning of section 1(1) and Schedule 1 paragraph 2 of the Act.

13. The applicant's depression was a side effect of her treatment for another condition, namely GID. We considered that Schedule 1 paragraph 6 of the Act did not preclude its being considered an impairment producing a disability. We did not have to concern ourselves with the cause of the impairment (Guidance, paragraph 1373).

14. In the judgement of the Tribunal the applicant's condition of GID did not have substantial adverse effect on her ability to carry out normal day-to-day activities, as defined in Schedule 1 paragraph 4 of the Act. The activities relied upon by Mr O'Dempsey prior to the applicant's decision in June 1996 to change her lifestyle are mobility and manual dexterity. However, the evidence before us demonstrated that for many years up to and including June 1996 the applicant had not been compromised at all in her, mobility and manual dexterity. She had performed to a high level as a Police Constable and had an enviable record. We did not accept that the fact that the applicant chose not to socialise outside work, preferring to keep herself to herself, because of her condition, amounted to an adverse effect on her mobility. The applicant gave evidence, which we accepted, that towards the end of her Police career she was less able to perform the precision engineering tasks required to make and repair firearms than earlier. However, we did not accept that that level of manual dexterity amounted to a day-to-day activity. The applicant's move from

uniformed patrol duties to clerical duties in about August 1996 was not the result of any effect on the applicant's ability to perform day-to-day activities but was to avoid publicity and remove the applicant from the public gaze. The applicant has throughout retained her high degree of competence in computing.

15. After the applicant's decision to change her lifestyle, Mr O'Dempsey argued that there was an effect on the applicant's speech in that she chose to modulate her voice so as to soften it and make it sound more feminine. That, he argued, was the cause of some of the alleged difficulties of communication whilst the applicant worked in the Communications Room. We could not accept that argument. There was no evidence before us that the applicant's ability to speak was in any way affected. We could not accept that a conscious decision to alter the way in which one speaks amounts to an effect on one's ability to speak. We concluded that at no point did the applicant's condition of GID have any adverse effect on her ability to carry out normal day-to-day activities as defined, and that it was therefore not a disability within the meaning of the Act. We did not consider that Schedule 1 paragraph 6 of the Act was directly in point here either. There was no evidence that the applicant's condition of GID, untreated, would be likely to have a substantial adverse effect on her ability to carry out normal day-to-day activities. The evidence of the applicant's previous history was to the contrary. The consequence of the applicant's treatment, so far as it is relevant, was to cause a side effect, namely depression, which as set out above, we accepted could amount to an impairment within the Act, its cause being irrelevant. Accordingly, we also regarded it as irrelevant whether, as Mr Kurrein argued, the applicant's depression was brought on by critical events at work, such as her adverse appraisal in July and her being placed on special leave in November. That depression manifested itself in a number of symptoms which the applicant set out in her witness statement at paragraph 1 0 (a) - (c). The Tribunal was of the view that the applicant correctly attributed the symptoms she described to her depression, and not to her gender identity dysphoria. (The applicant's description of her symptoms is set out in part below where we consider her claim under the Sex Discrimination Act.)

16. So far as the applicant's condition of depression is concerned, we accepted the evidence of the applicant that that condition did have an adverse effect on her memory and ability to concentrate, which was from time to time substantial. The applicant found difficulty absorbing and following instructions, she was unusually slow to respond on the radio and telephone and from time to time she was seen staring blankly at the screen. In significant respects, however, the requirements placed on a communications officer went well beyond normal day-to-day activities. Each activity performed by an operator, taken separately, might well amount to a normal day-to-day activity, but the striking feature of the work was that a high degree of co-ordination, both mental and physical, was required in order to perform different activities either simultaneously or in rapid succession, whilst maintaining a high degree of accuracy. We were supported in this view by the fact that the former period of six months' probation had been generally extended to 12 months and the fact that communications operators were the most highly paid civilian employees in the Respondent's Force. As noted above, we had an opportunity of observing work in the Communications Room.

17. For the reasons set out above the Tribunal concluded that the applicant was at no material time a disabled person within the meaning of section 1 of the Act by virtue of suffering from either GID or depression.

18. Strictly speaking, therefore, no question of discrimination under the Act arises but in deference to the arguments advanced before us we make the following further observations. The applicant alleges that she was subjected to a detriment when the respondent assessed her in the way it did in July and, further, when the respondent extended her probation. She also relies upon her dismissal as an act of discrimination. We accepted that the respondent had a bona fide reason to take each of those steps in relation to the applicant and we have rejected the argument that there was any improper motive for those steps. It follows in our judgement that the applicant was not treated less favourably by the respondent than any other person would have been who had performed as she did at the stage when it took each of those steps.

The Sex Discrimination Act 1975

19. Mr Kurrein submitted that the Act of 1975 had no application to alleged discrimination against a transsexual. He based that argument on the decision in P -v- S and Cornwall County Council and sought to support it by arguing that the legislature would not have made the Sex Discrimination (Gender Reassignment Regulations 1999), which amended the Act of 1975 so as to cover discrimination on the grounds of gender reassignment, if the Act of 1975 already prohibited such discrimination. However, this very point was considered by the Employment Appeal Tribunal in Chessington World of Adventures Limited -v- Reed, where it was held that it was possible to construe the Act of 1975 consistently with the ruling of the European Court of Justice in P -v- S. It was conceded that the Equal Treatment Directive could be relied upon directly by the applicant against this respondent since they were an emanation of the State. This Tribunal is bound by the ruling of the EAT referred to above and, accordingly, we consider that the applicant is entitled to rely upon both the Act of 1975 and the Directive. The applicant relied upon the same three alleged three acts of discrimination as she advanced in her claim under the Act of 1995. These are set out in paragraph 4(ii) above. She also relied on the same supplementary matters (the complaints of sexual harassment and the complaints concerning her use of the toilet facilities) and invited us in like manner to draw inferences from these. It seemed to us that there was some conflict between the ways in which the applicant put her claim under the Disability Discrimination Act, on the one hand, and under the Sex Discrimination Act/Equal Treatment Directive on the other. For the purposes of her sex discrimination claim the applicant alleged that the respondent's treatment of her was motivated by ill-feeling because of her transsexualism. On the other hand, however, for the purposes of her disability claim she asserted that she was performing poorly in a number of respects but that her poor performance was explicable by her GID and/or her depression and/or the regime of treatment she was undergoing. The central question for us was whether the applicant was indeed performing poorly, the respondent would say incompetently, and if she was, was the treatment of which she complains properly motivated by that poor performance or incompetence, or was it on the ground of her sex as explained by the EAT in Chessington World of Adventures Ltd -v- Reed.

20. In our judgment the evidence that the applicant was indeed performing consistently at a level well below that expected of a successful probationer was overwhelming. The applicant, in her statement to us had this to say:

"I began to repeat instructions, would pause and hesitate and could not take in what was being said to me. I found it difficult to concentrate and the more I tried to rectify things the worse it would become. Because I had no confidence at that stage in my voice I would often be- inaudible. Communicating became a real problem, particularly at work and the more I

tried the more confused 1 would get. As the main part of my job involved listening to a problem whilst at the time taking a note and giving instructions to officers on the ground I would often simply grind to a halt in the confusion. It became such that I dreaded going into work because of both the know and the unknown. In particular my trainers instead of realising my difficulties, simply compounded them by getting irritated with me which would simply make me worse. When out I would avoid speaking to people as much as possible and would arrange my schedule so as to minimise the possibility of having to speak to people unless it was unavoidable. Whereas before, as a police officer, I would instinctively and through training know what sort of questions to ask to clarify matters, I could no longer do this. I had no idea what to ask. In trying to work out what to ask it would take me an age to do things 1 would normally have done within seconds. So, for example, if I was asked for directions to somewhere familiar I would have great difficulty in explaining clearly where the place was or how to get to it without getting confused. It would also have taken me so long to explain that the enquirer would give up in exasperation."

21. Mr Webster told us that, whilst preparing for the applicant's appeal, "… the results (of the Headquarters assessment) were sufficiently bad that I was told that had she been a normal applicant she would have been rejected."

22. That evidence closely mirrored what Mr Spence said to us, namely that if he had seen the results of the assessment early on he would have had doubts about the wisdom of appointing the applicant to the Communications Room. We repeat the applicant accepted that Mr Spence was sympathetic to her throughout and it was ultimately his decision to accept the recommendation that she be dismissed.

23. In James -v- Eastleigh Council Lord Goff said:-

"… cases of direct discrimination under section 1 (1)(a) can be considered by asking the simple question: Would the complainant have received the same treatment from the defendant but for his or her sex?"

24. In the light of the EAT's decision in Chessington World of Adventures Limited -v- Reed, it is perhaps necessary to modify that question slightly and to say: Would the applicant have received the same treatment from the respondent but for her declared intention to undergo gender reassignment? To that question, based on the evidence we have set out, we answer unequivocally that she would. From the time in 1996 when the applicant first declared her position and intentions to the respondents they were accommodating and sympathetic to her throughout. Given the efforts which the respondent made to keep the applicant in employment with them it must have been a matter of considerable regret to them, as no doubt it must have been a great regret and disappointment to the applicant, that the effects on her of the depression she suffered, though they were not particularly long-lasting, were sufficiently serious to prevent her from completing satisfactorily her probation as a communications operator. That is why she was assessed as she was, why her probationary period was extended and why, ultimately, it was recommended that she be dismissed, and not because she had declared her intention to undergo gender reassignment.

Since we have-been obliged to construe the Act of 1975 consistently with the Equal Treatment Directive and have rejected the applicant's claim under the Act, it follows also that we reject her claim under the Directive.

26. The applicant's claims are, therefore, dismissed.

CHAIRMAN *[signature]*
DATE 24 SEPTEMBER 1999
DECISION SENT TO THE PARTIES ON 27 September 1999.
AND ENTERED ON THE REGISTER

» by Claire Mcnab