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**CONTENTS**



# Equal pay compensation: how far back can you go?

**B S Levez v T H Jennings (Harlow Pools) Ltd (Unreported EAT/812/94 - 24.6.96)**

The Employment Appeal Tribunal has referred the two year limit on back pay in equal pay cases to the European Court of Justice. That means the Levez case could be as significant as the case of Marshall (No. 2) [1993] WLR 1054 that removed the ceiling on compensation in sex discrimination cases.

Applicants' advisers should now consider delaying assessing compensation in equal pay cases until the ECJ has ruled. At present, Industrial Tribunals award compensation in equal pay cases for up to two years before the tribunal case started until the date the tribunal makes its Order.

Compensation is calculated on the difference between the man's pay and the woman's pay over the two year period, plus interest. The woman's pay is protected for the future by including an equality clause in her contract of employment making her pay equal to the man's.

Although there is no limit to the financial compensation the IT can award, the two year limit on back pay means women do not get full compensation for the pay difference.

*Mary Stacey – Head of Equality*

Mrs Levez was a betting shop manager paid £600 a year less than her male predecessor. She did not learn of this difference until she had left her job because her employer had misled her about the previous manager's salary.

She won her case but was not compensated for the seven months of pay difference that happened more than two years before she started her case. Mrs Levez appealed to the Employment Appeal Tribunal, with backing from the Equal Opportunities Commission, claiming full compensation.

She argued the two year limit on back pay breaches Article 119 of the Treaty of Rome and that the limit is in breach of European legal obligations to fully compensate her in accordance with the relevant national rules. The limit also failed to provide protection and have a real deterrent effect on employers, as required by European discrimination law.

The limit for compensation in the Equal Pay Act is less favourable than comparable domestic law such as breaches of contract and racially discriminatory contract terms. There is no limit on back pay under the Race Relations Act 1976. The limit in contract claims is six years from the breach with courts having discretion to extend the period still further.

In Levez the other side argued the UK Government was entitled to place reasonable limits on how far claims can be backdated A two year limit is not therefore unlawful. Unusually the EAT - which consists of a Judge and two lay members, one from each of the management and union sides - could not reach a unanimous decision.

Both lay members agreed with Mrs Levez that the two year limit was unlawful. But EAT President, Mr Justice Mummery, thought it was clear there was no breach of Article 119.

They resolved their disagreement by referring the question direct to the ECJ. Let's hope we will not wait too long for the answer.

# Tough line on time limit

**Westley v SEBBCO Capital Markets Ltd EAT 1169/95 23/4/96 (unreported)**

The Employment Appeal Tribunal has revisisted the question of when it is "not reasonably practicable" to present an Industrial Tribunal claim for unfair dismissal within three months from the termination of employment.

Westley concerned an IT1 form which had been sent to the right address by first class post before the three month limit was up, but never arrived.

The EAT held that even when an application is properly sent, the Applicant, or advisor, must make certain that the document has arrived on time. On the last day for lodging the claim the solicitor in the case had tried to check the application had arrived but was told over the phone that the Central Office of Industrial Tribunals could not tell him whether the form had been received because of a backlog of applications. The EAT refused to extend the three month limit saying the solicitor could have sent another copy by fax that day.

# Staff get shirty with sweater shop over deductions from pay packets

**Kerr v The Sweater Shop 1996 [IRLR 424] (EAT)**
**The Sweater Shop v Park 1996 [IRLR 424] (EAT)**

The Wages Act 1986 stops employers making unlawful deductions from wages under a contract of employment, service or apprenticeship. Employers can make lawful deductions from wages in certain situations.

Where, for example, a contract of employment gives authority to make deductions and has been given, in writing, to the employee before the deductions have been made;

In kerr the Sweater Shop had displayed a notice in the factory changing the company rules so that accrued holiday pay would no longer be paid in gross misconduct cases that resulted in dismissal. The EAT ruled that for a contractual term authorising a deduction to be valid, its existence and effect must be "notified to the worker individually in writing".

The decision means written notification must be given to each individual worker affected by the change. The public display of a notice within the employer's premises is not enough.

In the related case of Park the EAT held that, where an employee was individually notified of a new contractual term, there is no requirement for the employee's consent to be given in writing in order for the change to be valid. Where the employee continues to work without objection after notification of the change, he or she may well have impliedly agreed to the new term.

# Express track just the ticket

**Grant v South West Trains Ltd. IT Southampton 1784/96**

In edition 1 we reported the European Court of Justice case of P v S and Cornwall County Council 1996 IRLR 347. The ECJ said it was a breach of the Equal Treatment Directive to discriminate against a male to female transsexual for a reason related to gender reassignment.

We said that, logically, this decision should apply to discrimination on the grounds of sexuality. The Southampton tribunal in the Grant case would appear to agree with us.

In Grant the IT said the decision in P v S "is at any rate persuasive authority for the proposition that discrimination on the grounds of sexual orientation is unlawful".

South West Trains Limited refused to give Ms Grant a concessionary travel permit for her female partner. Ms Grant claimed this was an act of sex discrimination in breach of the Equal Pay Act 1970, Article 119 of the Treaty of Rome and/or the Equal Treatment Directive.

She argued that, in view of P v S, the UK courts' interpretation of the Equal Treatment Directive in sexual orientation cases was wrong. Ms Grant argued the conclusion to be drawn from P v S is that discrimination against lesbians and gays is discrimination on the grounds of sex. The tribunal has put the case on the express track: it has referred Ms Grant's case direct to the ECJ, bypassing the EAT, Court of Appeal and the House of Lords.

# Scots EAT flings a spanner in the TUPE works

**Hay v George Hanson (Building Contractors) Limited [1996] IRLR 427**

The Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) transfer employees from one employer to another on the same terms and conditions. Usually TUPE works to the employee's benefit, but what if the employee does not want to transfer?

If the new employer is offering substantially worse terms and conditions, then the employee can refuse to transfer and claim unfair dismissal (see for example Merckx v Ford Motor Co in edition 1).

There will be times when the employee does not want to transfer even where the new employer offers the same terms. TUPE Regulation 5(4A) says that if an employee tells either the new or the old employer that he objects to the transfer, his employment is not transferred but he cannot claim unfair dismissal or redundancy.

The Scottish Employment Appeal Tribunal in Hay upheld the Industrial Tribunal's finding that the employee had objected to the transfer and could not claim unfair dismissal. Mr Hay had opposed the transfer.

> What if the employee doesn't want to transfer ?

The EAT said that objecting meant 'a refusal to accept the transfer'. Mr Hay had objected to the transfer in principle, and communicated that objection by his attitude and conduct before the transfer.

It seems an extraordinary decision. The EAT rightly observed that the consequences for the employee were 'draconian'. Yet it refused to adopt an approach to give effect to the purpose of the legislation by protecting employee rights.

The EAT said objecting was 'a state of mind' and it was enough that this was 'communicated to the employer'. This cannot be right.

The protection of TUPE should only be removed from those employees who specifically refuse to transfer. Protection should not be removed from those whose conduct shows they object to the transfer, but who may well have to accept the transfer in the absence of an acceptable alternative.

# IT thaws pay freeze move

**Ball v BET Catering (Industrial Tribunal, unreported 9 April 1996)**

Employees who transfer under TUPE have their terms and conditions preserved. Following the Employment Appeal Tribunal decision in Wilson v St Helens BC (see Edition 1), it is now much more difficult for employers to alter contracts when a transfer occurs.

But what about gaining improvements to terms and conditions after the transfer and, specifically, pay rises after the transfer? A recent UNISON case shows employers cannot freeze pay where the contract of employment contains a clause requiring national pay increases.

The Industrial Tribunal found the individual contracts of the employees incorporated national collective agreements. The national agreements provided for annual pay increases determined by a National Joint Council of unions and local authority employers. The employees were now employed by a contractor who could not participate in those discussions.

The IT rejected the argument that only the mechanism for determining pay transferred, requiring the new employer to negotiate pay with the union. The IT decided the employees had a continuing right to national pay increases set by national agreements.

This is being challenged on appeal. But it must surely be right that, where an employee's contract includes a collective agreement which provides a nationally negotiated pay rise, that contractual right transfers under TUPE. The new employer cannot escape liability.

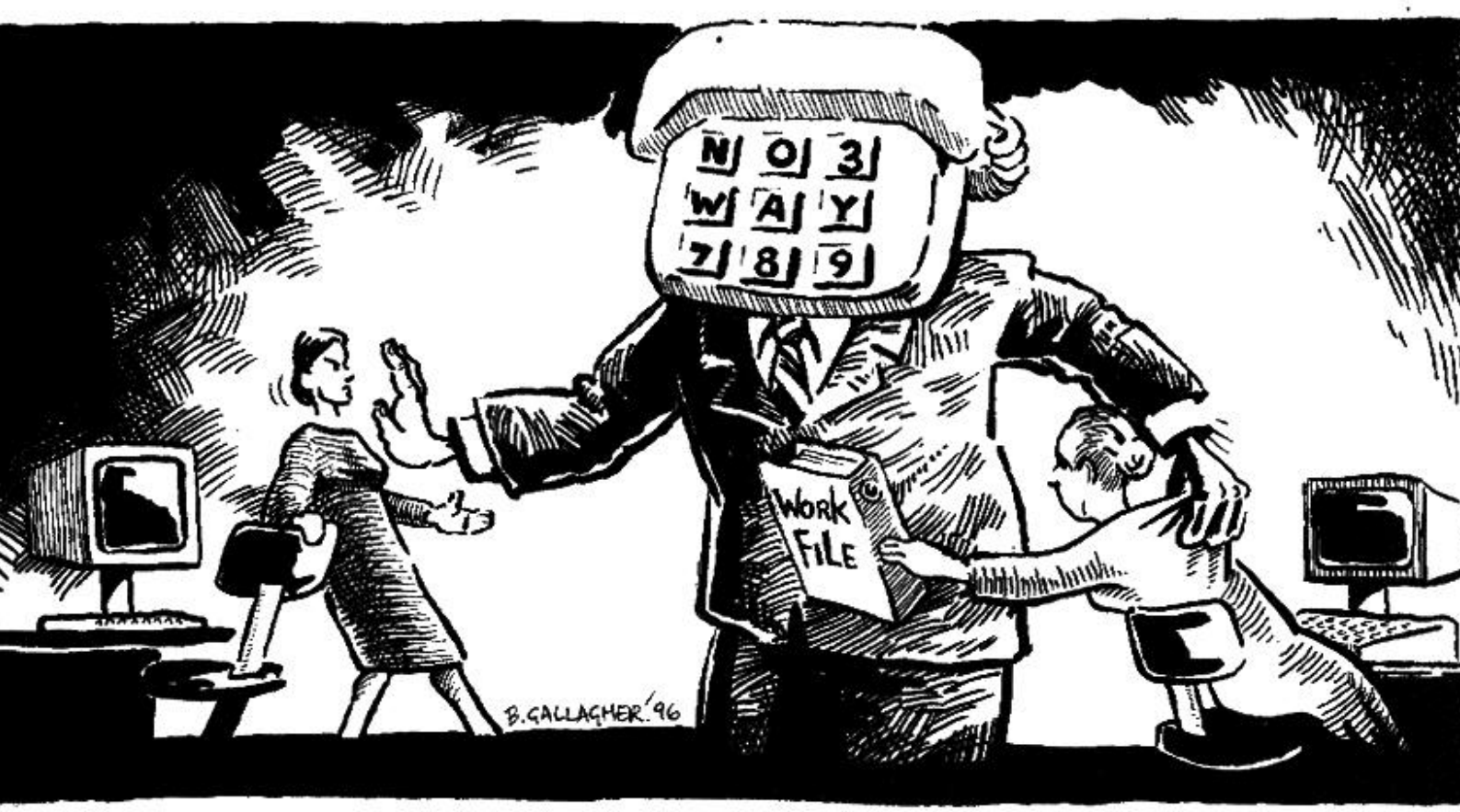
# Left on the Shelf

**Addison & 157 others v Safe Service AB and others (Industrial Tribunal, unreported 5 July 1996)**

An Aberdeen Industrial Tribunal has ruled that workers on mobile accommodation vessels in the North Sea are not covered by TUPE. The IT said the business was based outside the UK and was excluded from TUPE by Regulation 3(1).

The decision that the Continental Shelf is not in the UK denied the workers TUPE protection. This is surprising given that the Directive extends to all undertakings within the territory of the European Union. The territory of the European Union is not defined in the treaties and the IT decided it did not extend to the Continental Shelf. This leaves a substantial gap in protection for offshore workers.

# Dialling J for job share




**British Telecom PLC v Roberts EAT 2.5.96 315/95**
**Puttick v Eastbourne Borough Council. Brighton Industrial Tribunal 17.11.95 COIT 3106/2**

In 1984 the case of Home Office v Holmes 1984 IRLR 299 established the principle that the refusal to allow women to return to work from maternity leave on a part time or job share basis could amount to sex discrimination. Industrial Tribunals have revisited this area on numerous occasions since then and there are two recent decisions that are of interest.

The Employment Appeal Tribunal has held in BT v Roberts that two women who were refused a

> Women refused a job share on return from maternity leave

job share on return from maternity leave were not directly discriminated against on the grounds of sex.

The Brighton Tribunal had held that because the refusal followed directly from the fact of pregnancy and maternity leave there had been direct discrimination on the grounds of sex. They were therefore entitled to the special protection given to women following the arguments in Webb v EMO Cargo [1994] QB 718.

But the EAT disagreed saying that it is not the circumstances in which the requests for job share were made which is important but the reason why the requests were refused. The statutory right to return to work from maternity leave was to

return to the old job on the old terms. BT's refusal of a job share may have been unreasonable but was not unlawful direct sex discrimination. The EAT stressed that childcare responsibility was not a circumstance

## A claim for indirect discrimination is more promising

unique to women and so it was appropriate to ask how a comparable man would have been treated. In the absence of any evidence that such a man would have been allowed to job share the claim of direct discrimination failed.

The EAT stated that the specific protection afforded by cases such as Dekker was limited to the protected period. In the UK the protected period is 11 weeks before and 29 weeks after childbirth for those with two years continuous employment and, under the Pregnant Workers Directive, 14 weeks for those with less than two years continuous employ-

ment. The EAT remitted the case to the tribunal to consider a claim for indirect discrimination where the applicants' case may fare better.

In Puttick the Brighton tribunal found, on similar facts to those in BT v Roberts, that the employer's refusal to allow a job share was indirect sex discrimination. The employers had applied a requirement that the employee worked full time; that requirement operated to Ms Puttick's disadvantage and it was a requirement which could be complied with by a considerably smaller proportion of women than men. The requirement for full time work was not justified.

These cases reaffirm the argument that except where a woman is pregnant or on "protected" maternity leave a claim for direct discrimination is unlikely to succeed unless it can be established that a comparable man would have been treated more favourably. Protected maternity leave will be either the 14 weeks under the Pregnant Workers Directive or the extended maternity leave which gives a right to return after 29 weeks under the Employment Rights Act.

The much more promising argument is to be found in a claim for indirect discrimination using the Puttick formula first set out in the case of Holmes. Although Holmes was called into question by the case of Clymo v Wandsworth London Borough Council 1989 IRLR 241, Clymo has rarely been followed since. In Clymo the EAT held that an obligation to work full time could not be regarded as a requirement or condition for the purposes of indirect discrimination.

On the facts of that case it was held that the requirement of full time work for Ms. Clymo, a senior librarian, was not a requirement or condition but part of the nature of the job itself. The EAT said it was for management to decide whether the nature of the job required full time work.

But in Briggs v North Eastern Education & Library Board 1990 IRLR 181 the Northern Ireland Court of Appeal preferred Holmes to Clymo and stated that an employer who wished to deny discrimination when he insisted on full time work should show "objective justification" of that requirement.

As the numbers of part time workers continues to rise it will become increasingly difficult for

employers to objectively justify a requirement to work full time. In the last 25 years the numbers of those in part time work has nearly doubled, jumping from 15 per cent of all employment in 1971 to 28 per cent in 1994.

## In 25 years the number of part-time workers has doubled

The vast majority of those who work part time work are women. In 1994 nearly nine out of ten part time workers (86 per cent) were women and in 1991 one in three married women with children had a part time job.

Successful cases establishing the right to work part time have been fought in the gas industry, for teachers, for supermarket managers and in magazine and periodical production. Although it is necessary in each case to prove indirect sex discrimination, as more successes are recorded, the easier that task becomes.

# Is ET coming into land

The Department of Trade and Industry has published proposals for changes to Industrial Tribunals. The consultation paper Resolving Employment Rights Disputes invites responses by 27 September 1996. The proposals would require an Act of Parliament and the consultation paper includes a draft of the legislation.

The proposals follow the Green Paper of 1994. It was the cost of the IT system that prompted Government concern. Spending had increased significantly, but this was due to a rising number of cases rather than an increase in costs per case.

Greater demand for ITs was not matched by more resources to cope. This led to longer delays.

The Green Paper identified the likely causes, but avoided the obvious conclusion. More people bring tribunal cases because increasing numbers consider their employment rights have been infringed. Employers who do not recognise unions, and those who have no proper internal procedures for resolving disputes, are more likely to face claims. The significant number of cases against smaller employers reinforces this view.

## Solutions

Possible solutions open to the Government include laws which encourage employers to have procedures for resolving employment disputes. Tribunal time limits could also be extended where internal procedures are followed. Bad employment practices could be deterred by increasing compensation limits.

These were never likely to be put forward by the present Government. Ian Lang, Trade and Industry Secretary, has now said that time limits will not be changed before the general election.

Instead the main thrust of the proposals is to reduce the number of cases which proceed to a Tribunal hearing, by increasing the Tribunal's powers to dismiss cases at an earlier stage. And, in a more welcome step, encouraging arbitration.

## One-sided

The changes are not even-handed. Tribunals will be able to dismiss cases *without a hearing* where the employee appears to have a hopeless case. But tribunals will not have the power to dismiss an employer's defence (the notice of appearance) which shows no grounds to resist the claim.

The rules will be changed to allow a tribunal to dismiss a case *during a hearing* where it is clear the employee's case will fail. But it cannot dismiss an employer's defence.

It is proposed to allow an employer to claim there is 'no case to answer' at an early stage. This overlooks that in unfair dismissal cases the employer puts its case first: the employee should equally be able to submit that there is no defence.

Where an employer fails to turn up, the tribunal can hear the case in his or her absence, but the employee still has to prove the case. There is no power to decide automatically in favour of the employee .

The rules will allow an employer 21 days rather than 14 to enter a defence (notice of appearance). What is needed is for this to be strictly applied, as frequently

employers are allowed to put in a defence very late in the proceedings.

**Sensible streamlining**

Some of the proposals involve sensible streamlining. Tribunals can decide cases without hearing evidence where, on the undisputed facts, the same point has already been decided by a higher court. Cases can be decided on written evidence alone if both parties agree. Appointing legal officers to deal with procedural issues should help cut delays.

**Still a tribunal?**

There will be a wider range of cases where tribunal Chairs can sit alone, notably cases on redundancy payments and the right to a written statement of employment particulars. In both these areas the industrial experience of the lay members will be missed. Fortunately the Government backed away from a more widespread use of Chairs sitting alone in the face of strong opposition to this proposal in the Green Paper.

**Offers and Costs**

The Green Paper proposed that employees should face costs if they reject an offer and subsequently get the same or less. A majority opposed this in the consultation, and there is now a more even-handed approach. Employers face paying costs if the employee offers to accept a sum, the employer refuses and the employee gets the same or more.

**Internal appeals and compensation**

If an employee fails to use an appeals' procedure after dismissal, she or he faces a reduction in compensation for unfair dismissal if the appeals' procedure was spelled out to them when they accepted the job. This seems harsh, bearing in mind how few internal appeals overturn a dismissal.

Employers face paying extra compensation if they refuse to allow an employee the right to appeal - but only if they have an appeals' procedure: An employer who does not escapes this risk!

**Compromise Agreements**

Trade unions and other advisers can now advise on compromise agreements provided they are covered by insurance against the risk of negligent advice.

**Arbitration**

The Government says it favours conciliation and arbitration. Moves towards arbitration are welcome, but the proposals are too cautious to result in a substantial shift away from tribunals.

Although confined to unfair dismissal cases, the Advisory, Conciliation and Arbitration Service will devise an arbitration scheme which will be activated when both parties agree in writing. The draft ACAS scheme prepared by the Government, and included as an example, envisages the same law and the same remedies as a tribunal. The only advantage is likely to be speed and informality - although there is no prohibition on involving lawyers.

A more attractive solution would involve a speedy resolution before an arbitrator who effectively acts as a final stage of appeal from the employer. The arbitrator's powers should include imposing a lesser penalty or ordering that the disciplinary hearing be re-run.

Employers and employees can agree to refer any employment or discrimination case to an independent arbitrator agreed by them, but they would have to pay the cost. This is likely to act as a deterrent. Arbitration is an attractive option, but a more imaginative approach is needed than the one the Government has opted for.

And finally....It is goodbye to Industrial Tribunals and hello to Employment Tribunals. No more 'IT', but 'ET' has landed.

**The main proposals are:**

- Change name from Industrial Tribunals to Employment Tribunals
- If both sides agree, decide cases on written evidence
- Decide cases without a full hearing if employer does nothing
- Decide cases without a full hearing if claim is hopeless
- More cases where Chair sits alone
- Appoint legal officers to deal with procedural issues
- Option of binding arbitration
- Compromise agreements need not involve lawyers
- Take account of use of appeals procedure when deciding compensation

**In addition, new tribunal rules will mean:**

- More time for employers to file a defence
- Tribunals can dismiss hopeless claims before or during the hearing
- Costs can be awarded if reasonable offer refused.

# Keeping up appearances

**Smith v Safeway PLC**
**[1996] IRLR 457(CA)**

The Court of Appeal has upheld an Industrial Tribunal's decision that a man dismissed for refusing to cut his hair was not discriminated against on the grounds of his sex even where a woman with identical hair length would not have been dismissed. The court said requiring a conventional standard of appearance was not of itself directly discriminatory.

Safeway's appearance rules on hair length were different for men and women. An IT rejected a complaint of sex discrimination after Safeway said the aim of the policy was to promote a "conventional image" which was attractive for their customers.


The tribunal found that a retail store was entitled to have an appearance code, pointing to Schmidt v Austicks Bookshops Limited EAT 1977 IRLR 360.In Schmidt the Employment Appeal Tribunal held that it was not discriminatory to require a woman to wear a skirt rather than trousers.

The EAT held that where rules applied to men and women "although obviously, men and women being different, the rules in the two cases were not the same", there was no discrimination because "the employers treated both female and male staff alike in that both sexes were restricted in the choice of clothing for wear whilst at work".

In Smith the EAT overturned the tribunal's decision and held that a restriction on hair length for male employees was discriminatory. Schmidt was distinguished on the grounds that a uniform rule affected employees' appearance whilst at work whereas a hair length rule extended beyond work.

The Court of Appeal stated that "there is an important distinction between discrimination between the sexes and discrimination against one or other of the sexes. It is the latter that is forbidden by the Sex Discrimination Act 1975". "A code which applies conventional standards is one which, so far as the criteria of appearance is concerned applies an even handed approach between men and women, and not one which is discriminatory".

The court confirmed that a package approach should be adopted to the effect of an appearance code. The fact that a restriction on appearance extends beyond work is a factor to be taken into account in assessing whether or not the rule is discriminatory but does not affect the test itself.The court found the tribunal had applied the test in Schmidt correctly and upheld their decision.

The argument that to require a "conventional" appearance for both men and women is not discriminatory is a variation on the theme, familiar to followers of English case law on discrimination on the grounds of sexual orientation, that to discriminate against a gay man and lesbian woman equally is not sex discrimination. Since the case of Smith, the ECJ has ruled in P v S and Cornwall County Council 1996 IRLR 347 (see edition 1) that dismissal of a transsexual for a reason related to a gender reassignment must be regarded as contrary to Article 5(1) of the Equal Treatment Directive guaranteeing to men and women the same working conditions without discrimination on the grounds of sex.

The Advocate General's opinion in P v S made a number of points about the comparable argument on transsexuals. "The objection is taken too much for granted that the factor of sex discrimination is missing on the grounds that "female transsexuals" are not treated differently from "male transsexuals". In short, both are treated unfavourably, hence there can be no discrimination at all....I am not convinced by that view. How can it be denied that the cause of discrimination was precisely, and solely, sex?"

By analogy this argument holds good for Mr Smith. If he had been a woman he would not have been dismissed for refusal to cut his hair. No doubt the issue of appearance codes will be revisited in the light of P v S.

And what about Safeway's argument that a requirement for "conventional" dress is justified by customer preference? Justification is no defence to a claim of direct discrimination. So had the court decided there had been direct sex discrimination, the views of the customers would offer no defence.

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