

ENGLAND AND WALES / JUDGMENT

Croft v Royal Mail Group Plc

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Neutral Citation No [2003] EWCA Civ 1045 IN THE SUPREME COURT OF JUDICATURE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE EMPLOYMENT TRIBUNAL (LINDSAY J) Case No: A1/2002/2092 Royal Courts of Justice Strand, London, WC2A 2LL Friday 18 th July 2003 Before: LORD JUSTICE PILL LORD JUSTICE JONATHAN PARKER and LORD JUSTICE KEENE

- ----- Between : Sarah CROFT
- and - Royal Mail Group plc
- ----- (Transcript of the Handed Down Judgment of Smith Bernal Wordwave Limited, 190 Fleet Street London EC4A 2AG Tel No: 020 7421 4040, Fax No: 020 7831 8838 Official Shorthand Writers to the Court)
- ----- Appellant Respondent Miss D Rose (instructed by Equal Opportunities Commission) for the Appellant Mr P Rose QC (instructed by Eversheds, Nottingham) for the Respondent
- -----

Judgment

As Approved by the Court Lord Justice Pill: 1. This is an appeal against a decision of the Employment Appeal Tribunal Mr Justice Lindsay, President, presiding, dismissing an appeal by Ms Sarah Croft (“the applicant”) against a decision of an employment tribunal held at Leicester and sent to the parties on 5 June 2000. The unanimous decision of the Employment Tribunal was that the applicant’s claim of direct sexual discrimination by her employers Royal Mail Group plc (“the respondents”) failed and was dismissed. It was further held that the applicant was discriminated against on the grounds of her sex by employees of the respondents but that there was no liability for those acts in the respondents as they had taken such steps as were reasonably practicable to prevent the acts of discrimination. It was also held that the applicant was not dismissed by the respondents and her claim of unfair dismissal failed and was dismissed. The facts 2. The applicant began her employment with the post office in March 1987. She was then a man and had been married and fathered three children. Her work involved driving a mail van to and from the Leicester sorting office and to and from another centre. The appellant had for many years had doubts about her sexuality and she sought medical advice in about August 1997. A medical specialist expressed the opinion in January 1998 that the applicant had long- standing gender dysphoria with awareness of female self-identity from an early age and regular cross-

dressing. She was counselled about the difficulties in changing gender role and because she still wished to proceed was prescribed feminising hormones. In about April 1998 the applicant started to suggest to friends and colleagues that she was proposing to change to a female role. On 20 July, there was a meeting attended by the operations manager to discuss the plans to be implemented. It was recorded that the applicant proposed to attend work dressed as a woman from 24 August onwards. 3. In view of the issues to be decided, it is necessary to quote the findings of the Employment Tribunal, which they have set out with great care, in some detail: “7. Prior to the meeting on 20 July there was some discussion between various management representatives of the respondent about how to deal with the change. As the applicant had been at work for over 10 years as a male and because the respondent had experience, in another part of the country, of a proposed walk out by other staff in a similar situation, it was considered that the approach should be low key. At the meeting there was the applicant, Mr De Marco [operations manager at Leicester] and Ms Berry, the local personnel manager. The meeting was amicable. Both sides appreciated that this was a difficult position. Prior to the meeting the applicant had obtained a letter from her psychiatrist, which confirmed that she was under his care for gender identity disorder, male to female transsexualism. It confirmed that she would start living and working as a female, which was part of her ‘real life test’ of living exclusively as a woman to ensure that was the correct way to proceed. It was confirmed that she was taking feminising and anti-male hormones. It was also suggested that she would wish to be addressed by a female name and that it would be important that her colleagues were able to discuss various matters which might arise and the applicant would be pleased to field any questions as best she could.” The Tribunal also found that at that meeting the applicant: “did suggest that Press for Change, a pressure group for the interests of transsexuals, might be able to assist and that she would be pleased to discuss the position with any of her colleagues. Neither of those proposals were taken up, as the respondent was taking the low-key approach.” 4. The Tribunal continued: At the meeting it was agreed that the applicant would speak “8. herself to her customers and there was no requirement at that stage for the respondent to become involved. It was agreed that at team briefings employees would be notified of the applicant’s change and that the respondent’s harassment code would be stressed. Prior to the meeting the applicant had discussed with Mr Capewell [line manager] the possibility of using the disabled toilet. Mr De Marco and Ms Berry thought that was a good idea. At the meeting the applicant suggested that she should use a particular female toilet near the loading dock, but agreed that for the time being she would use the disabled toilet. No timescale for the continued use of the disabled toilet was discussed. The applicant was thinking in terms of one to two months. The respondent had no particular timescale in mind, but considerably longer than that. Following the meeting the respondent’s records were altered 9. to show the applicant as female, using the name Nikki Simpson. She had a week away from work and returned on 24 August in her female role. The team briefings for that week included informing the staff that the applicant was now to be treated as a woman and would be called Nikki Simpson. The respondent’s harassment policy was stressed in that context to the teams. ...” 5. The Employment Tribunal referred, at paragraph 10, to the issue which caused the problems: “10. ... As expected, when the applicant started working as a woman from 24 August some of her colleagues complied with the change better than others. Some still referred to her as ‘he’ or ‘mate’ and ‘Nick’, whereas

others called her 'Nikki' or 'she'. The issue, however, which was easily the most important as far as the applicant was concerned was the use of the toilets. The applicant wanted to live in every way as a woman. In addition that was important to her 'real life test', whereby the applicant needed to show that she was able to and wanted to live as a woman, before taking further steps in relation to gender reassignment. At the respondent's Leicester operation, where the applicant worked, there were a number of male and female toilets. The applicant wanted to use the female toilets, but was prepared to use only a specifically designated female toilet. She wanted to use the toilet nearest to the loading bay. At this point there is a male and a female toilet. The female toilet has a single locking cubicle and an area with a wash basin and mirror, where female employees would often get changed and it incorporated female sanitary arrangements. Informal soundings of the staff had indicated that female staff would not be happy with the applicant, who they had known as a man for many years, using their facility. The disabled toilet and the other male and female toilets were at the other side of the building near to the reception area. To get to the disabled toilet from where the applicant was usually working involved walking across the main sorting area. The entrance to the disabled toilet was in the main reception area. The applicant was unhappy at using the disabled toilet, when it was clear she was not a disabled person and because its entrance was very public. 11. On 2 October 1998, the applicant wrote a letter, which was given to Mr Gaunt [line manager]. The applicant referred to the difficulties with her name and said she would be happy to change her name completely to avoid confusion. She said that she could cite other examples of harassment, but it would serve no useful purpose to do so. She then pointed out that, whilst she accepted it would not be practical for her to use the male facilities given her appearance, she wished to use the female toilets as being appropriate to her recognised gender. She suggested that it should be pointed out in a very low-key manner how hurtful and offensive derisory and thoughtless remarks could be. The applicant was then seen in a counselling interview by Mr 12. Capewell on 20 October (the applicant had a week's sickness in between that and the letter of 2 October). It was explained that the local management was seeking guidance on the issue of the use of toilets and that she would in due course be told the position with written reasons including any policy guidelines. The harassment in the workplace policy was discussed, but the applicant did not wish to make use of that policy. At that point the respondent started to make enquiries of its other regions to see what had happened in similar cases. The respondent which has 160,000 employees has had, including the applicant's, only five cases of transsexuals seeking gender reassignment during their employment. The information obtained suggested that others in the position of the applicant had not been permitted, to use the female toilets elsewhere. The area personnel department obtained internal legal advice, which was that, if the applicant had completed gender reassignment including surgery, it would almost certainly be sexual discrimination to prevent her using the female toilets. If she had not reached that stage, but was currently dressing as a woman, it would be reasonable to use the gender-neutral toilet. It was at this point that Mr Jones [area personnel manager] became more involved and he took the view that the applicant's current status should be established through a medical enquiry, to see principally whether the applicant had or had not undergone surgery. If she had not, there would be time to deal with any negative attitudes. He was not aware of the letter from the applicant's doctor, which covered most of the points, as it was not on her file and Ms Berry,

who had seen the letter, was no longer involved. 13. At the beginning of November the applicant decided to change her name to Sarah Croft in an effort to differentiate her position and stop people calling her Nick. At the next appropriate team briefing the workforce were told that they should now address the applicant as Sarah Croft.” 6. 7. 8. The Employment Tribunal described the further discussions which took place. The position of Mr Jones was that his employers would be prepared to allow the applicant to use the female toilet facilities but “how we move to this and when we move to this is a key issue”. He sought consent to approach the applicant’s medical advisers. The applicant said that she felt that was unfair, as no one else had been asked to allow access to the records. The applicant complained of an incident when other employees were simulating homosexual intercourse but she was not willing to give any names. In evidence, she stated that she felt that if she gave names and disciplinary action was taken against an individual, that was likely to cause her more problems at work rather than less. Mr Gaunt reissued the harassment policy at the next team briefing. On 14 January 1999, Mr Jones again requested a consent form. That was not forthcoming, the applicant expressing concern as to who would have access to the medical records and also that it would be expensive. Mr Jones was unaware that there had been a letter from the applicant’s consultant. He said that all that was wanted was a report from her medical adviser and the employer would pay. The applicant continued at work and complained about comments from three postmen, saying that “each time she walked past they would make a comment or start to sing the theme song from the Full Monty ‘You Sexy Thing’”. A manager spoke to the three men involved. They denied making any such comments but were reminded of the seriousness of harassment and asked to stop. They did stop and the applicant had no further problems from those three people. She also complained that “people were constantly referring to her as ‘he, him, mate’ etc”. People were constantly bringing her situation to the attention of new employees and firms on her collection round. 9. On 26 January 1999, the applicant went off work suffering from stress and depression. She rang Mr Capewell on 4 February to say: “she no longer wanted to use the disabled toilet facilities as she felt this was an obstacle to her gaining acceptance as a female. She said if she could not use the female toilets, she would start using the male toilets. The applicant confirmed to us [the Tribunal] that she did not want to use the male toilets, but said this only in an attempt to force the Post Office to permit her to use the female toilets.” 10. On 10 February, Mr Jones wrote to the applicant dealing with the points she had raised. He suggested that forcing her change in status on people would be counterproductive and she should be patient. He repeated his request for a medical consent and said that he was fully prepared to discuss matters by phone or by a visit. 11. A consent having been given, the respondents’ doctor made enquiries and reported: “the view expressed by the respondent’s doctor, Dr Searle, was that the applicant should be allowed to use the female toilet facilities, if she was now regarded as female from an external anatomical point of view. The doctor does not appear to have had a reply from the applicant’s consultant, but did from the GP confirming that she had undergone feminising hormone treatment, was making good progress, was suffering from depression, which was understandable considering her major life style change, but had not yet undergone gender reassignment surgery, but that would be undertaken in the relatively near future. The respondent’s doctor then reported to management confirming that the applicant had received hormone treatment for her medical condition of gender

dysphoria, had not undergone surgery, but would do so in the relatively near future. He expressed his opinion that it would be appropriate at the present time for her to continue using the disabled toilet, rather than the male or female toilets, but once she had undergone the surgery, it would be appropriate for her to use the female toilets. There is no evidence that Mr Jones had asked for Dr Searle's opinion other than on medical issues. He was prepared to allow the applicant to use the female toilets at an earlier stage than suggested by Dr Searle," 12. 13. On 24 March, Mr Jones wrote to the applicant saying that it was not considered that the time was right for her to use the female facilities and she should continue using the disabled facility because her progress was not sufficiently advanced. The applicant replied that she was going to return to work on 12 April and that she intended to use the toilet facilities for her gender. Mr Jones told her that the arrangements in place must continue. He said "please be in no doubt, if you insist on using the female toilets I feel we would suspend you on no pay for clear insubordination". An officer of Press for Change wrote to Mr Jones offering the services of the organisation to resolve the issue. Mr Jones responded that he would not seek assistance at that moment but the offer would be reconsidered as the issues were pursued. The applicant returned to work for two days in April but then went off sick. On 21 May, the applicant returned to work. The team briefing included a further reminder about the harassment policy. By letter, the applicant's solicitors requested that the applicant should be given a firm date on which she could use the female toilets, no later than the end of June. They suggested that arrangements be made for a representative of Press for Change, a consultant psychiatrist experienced in gender dysphoria or some other experienced individual to address the employees. Mr Jones replied on 3 June stating that it had been agreed that the applicant would be allowed to use the female facilities once a suitable period of communication and consultation with the workforce had been undertaken. It was not possible to put a fixed timescale on that, but arrangements had been made to discuss the issues with the applicant. The respondents took the view that, if employment of specialist advice was needed, either Press for Change or a consultant psychiatrist would be employed. The respondents were considering allowing the applicant to use the female toilets at some stage, which Mr Jones had preliminarily considered to be in about six months time, before final surgery. 14. 15. The applicant presented a letter of resignation stating that she had accepted the respondents' repudiatory breach of contract and considered herself to be constructively dismissed. It became clear that the contents of Mr Jones' letter of 3 June were not something taken into account by her when she did resign. There was evidence that some of the female staff would be unhappy sharing facilities with the applicant, particularly changing facilities. The respondents had a number of female employees from ethnic minorities who had specific objections to sharing facilities with the applicant whom they had known as a man and who was still anatomically male. Mrs Parker, manager of one of the areas, accepted that use of a specific female toilet had been raised by the applicant at the outset but had not been progressed. Mr Jones was not even aware that the suggestion had been made. The respondents accepted that the applicant had suffered acts of harassment from other employees in comments made suggesting that she was still male and other hurtful asides. Apart from the incident dealt with by Mrs Parker, the applicant never gave the respondents any details of anyone who was causing her problems and never made any formal complaint asking for action to be taken under the harassment

procedure. 16. The Employment Tribunal noted that the main issue on the facts was “in relation to how we assess the respondents’ actions”. The Tribunal referred to the repeated and lengthy attack on Mr Jones at the hearing by Miss Rose, counsel for the applicant, who tried, they held, to portray him not only as ignorant of transsexuality but as phobic towards transsexuals. The Tribunal’s finding was: “In successfully withstanding that battering Mr Jones satisfied us fully that he was doing his best to resolve a difficult situation both for the applicant and the rest of the workforce. Although motivation and inferences are not really a relevant issue in this case, none of the points put forward to us by Miss Rose lead us to believe that there were anti-transsexual feelings in Mr Jones or in other people at a management level in the respondent, although they undoubtedly saw the applicant’s transition as a problem.” Bellinger and the medical treatment 17. 18. In *Bellinger v Bellinger* [2003] UKHL 21, the issue was whether a person can change the sex with which he or she was born. The question arose in the context of the validity of a marriage; two people, both born male, went through a ceremony of marriage one of them having undergone treatment with a view to becoming a woman. Lord Nicholls of Birkenhead’s analysis of transsexuality and gender re-assignment provides a very helpful background, if I may say so with respect, against which the issues in the present case can be considered. Lord Nicholls stated that: “transsexual is the label given, not altogether happily, to a person who has the misfortune to be born with physical characteristics which are congruent but whose self-belief is incongruent. Transsexual people are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex ... It is now generally recognised as a psychiatric disorder, often known as gender dysphoria or gender identity disorder. It can result in acute psychological distress” (paragraph 7). While treatment depends upon the severity of the condition and the circumstances of the individual: “ultimately the most medical science can do in order to alleviate the condition is, in appropriate cases, to rid the body of its intensely disliked features and make it accord, as far as possible, with the anatomy craved. This is done by means of hormonal and other treatment and major surgery, popularly known as a “sex change” operation.” While the change of body can never be complete, “a normal body in one sex can be altered so as to give the appearance of a normal body of the other sex” (Paragraph 8). 19. Lord Nicholls identified what are typically four stages of treatment: “The four steps are psychiatric assessment, hormonal treatment, a period of living as a member of the opposite sex subject to professional supervision therapy (the ‘real life experience’) and, finally, in suitable cases, gender reassignment surgery.” 20. Dealing with gender reassignment, Lord Nicholls first considered biological criteria: The distinction between male and female exists throughout “28. the animal world. It corresponds to the different roles played in the reproductive process. A male produces sperm which fertilise the female’s eggs. In this country, as elsewhere, classification of a person as male or female has long conferred a legal status. It confers a legal status, in that legal as well as practical consequences follow from the recognition of a person as male or female. The legal consequences affect many areas of life, from marriage and family law to gender- specific crime and competitive sport. It is not surprising, therefore, that society through its laws decides what objective biological criteria should be applied when categorising a person as male or female. Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological

basis of the distinction.” 21. Having stated that the position had now changed with the advent of gender reassignment treatment, Lord Nicholls continued: “30. ... Recognition of transsexualism as a psychiatric disorder has been accompanied by the development of sophisticated techniques of medical treatment. The anatomical appearance of the body can be substantially altered, by forms of treatment which are permissible as well as possible. It is in these changed circumstances that society is now facing the question of how far it is prepared to go to alleviate the plight of the small minority of people who suffer from this medical condition. Should self-perceived gender be recognised? 31. Recognition of gender reassignment will involve some blurring of the normally accepted biological distinction between male and female. Some blurring already exists, unavoidably, in the case of inter-sexual persons. When assessing the gender of inter-sexual persons, matters taken into account include self-perception and style of upbringing and living. Recognition of gender reassignment will involve further blurring. It will mean that in law a person who, unlike an inter-sexual person, had all the biological characteristics of one sex at birth may subsequently be treated as a member of the opposite sex. Thus the circumstances in which, and the purposes for which, 32. gender reassignment is recognised are matters of much importance. These are not easy questions. The circumstances of transsexual people vary widely. The distinction between male and female is material in widely differing contexts. The criteria appropriate for recognising self-perceived gender in one context, such as marriage, may not be appropriate in another, such as competitive sport.” 22. Lord Nicholls considered the difficulty in drawing the line marking the transition from one sex to the other. Surgical intervention takes many forms. Lord Nicholls stated: “41. But the problem is more fundamental than this. It is questionable whether the successful completion of some sort of surgical intervention should be an essential prerequisite to the recognition of gender reassignment. If it were, individuals may find themselves coerced into major surgical operations they otherwise would not have. But the aim of the surgery is to make the individual feel more comfortable with his or her body, not to ‘turn a man into a woman’ or vice versa. As one medical report has expressed it, a male to female transsexual person is no less a woman for not having had surgery, or any more a woman for having had it: see *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 477.” 23. Having stated that these are “deep waters”, Lord Nicholls concluded that the House was not “in a position to decide where the demarcation line could sensibly or reasonably be drawn”. Moreover the recognition of gender assignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion (paragraph 45): “The decision regarding recognition of gender assignment for the purpose of marriage cannot sensibly be made in isolation from a decision of a like problem in other areas where a distinction is drawn between people on the basis of gender. These areas include education, childcare, occupational qualifications, criminal law (gender specific cases), prison regulations, sport, the needs of decency, and birth certificates.” Lord Nicholls, with whom the other members of the House agreed, declined to make a declaration that the marriage was valid. The issues were altogether ill-suited for determination by courts and court procedures and were pre-eminently a matter for Parliament (paragraph 37). 24. The treatment summarised by Lord Nicholls is described in more detail in the standards of care promulgated by the Harry Benjamin International Gender Dysphoria Association Inc. These are set out in a document prepared by the

Gender Identity Clinic at the Charing Cross Hospital. There are first consultations with psychiatrists followed by counselling and follow-up appointments. There may be a recommendation for contra-sex hormone therapy, followed by a decision, if made, to “continue in their transsexual ambitions and to begin to live in the opposite gender role”. Paragraph 7 provides: “The patient then attempts to fulfil a valid ‘Real Life Test’ living full time in the chosen gender role. The patient would need to demonstrate acceptance by society in this role and improved social and psychological functioning. For one year of this two year period the patient would need to demonstrate acceptance and integration in society by being financially independent in employment, or involved in full time education or training. For some patients of limited psychological or social resources or in place of very high unemployment our clinic might accept evidence of significant employment in the voluntary sector.” There then follow further consultations and a decision as to surgery. It is clear that a period of several years is contemplated for the entire treatment. Statutory Code 25. Section 1 of the Sex Discrimination Act 1975 (“the 1975 Act”) sets out the circumstances in which a person discriminates against a woman and section 2 provides that section 1 is to be read as applying equally to the treatment of men. Section 6(2) provides, amongst other things, that it is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her in the way he affords her access to facilities or services or by refusing or deliberately omitting to afford her access to them or by dismissing her, or subjecting her to any other detriment. It is common ground that toilet facilities are “facilities” within the meaning of the subsection. (I adopt the expression “toilet facilities” because it was used by the Employment Tribunal.) Section 2A of the Act was inserted by statutory instrument as from 1 May 1999 but I approach the case on the basis that it was in force at the material times. It provides in subsection (1): “ (1) A person (“A”) discriminates against another person (“B”) in any circumstances relevant for the purposes of— (a) any provision of Part II, [which includes section 6]

(b) ...

(c) ... if he treats B less favourably than he treats or would treat other persons, and does so on the ground that B intends to undergo, is undergoing or has undergone gender reassignment.” Subsection (5) provides: For the purposes of subsection (1), a provision mentioned in “(5) that subsection framed with reference to discrimination against women shall be treated as applying equally to the treatment of men with such modifications as are requisite.” 26. Section 5, an interpretation section, provides at subsection (3), as amended: “A comparison of the cases of persons of different sex or marital status under section 1(1) or (2) or (3)(1), or a comparison of the cases of persons required for the purposes of section 2A, must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.” Section 2A was inserted into the Act, and section 5(3) amended consequentially, following the decision of the European Court of Justice in *P v S* and another [1996] ICR 795. An employee at an educational establishment told management that he intended to undergo gender reassignment. He was given notice of dismissal. The Court held that the scope of Council Directive 76/207/EEC was not confined to discrimination based on the fact that a person was of one or other sex but also extended to discrimination arising

from the gender reassignment of a person. The Court stated: “21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. 22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the court has a duty to safeguard.” 27. General interpretation provisions are set out at section 82 of the Act and these include: “ ‘gender reassignment’ means a process which is undertaken under medical supervision for the purpose of reassigning a person’s sex by changing physiological or other characteristics of sex, and includes any part of such a process.” 28. Section 41 provides: “(1) Anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer’s knowledge or approval. (2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Act as done by that other person as well as by him. In proceedings brought under this Act against any person in (3) respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.”

Submissions

29. Each of the parties first takes what the other categorises as an extreme position and then explores possible middle ground. For the appellant, Miss Rose submits that it is unlawful for an employer to refuse to allow a pre-operative transsexual to the female sex, who presents with a female gender, to use the female toilets in the factory or, alternatively, to require her to use only a unisex toilet. Save in the exceptional circumstances contemplated in the legislation (which do not exist in this case), anatomical or biological sex was of no concern to the employer. The employer’s only concern was with social gender, that is the sex in which employees present themselves, provided they are in good faith in seeking the change of sex. It was inappropriate to apply in the social context of the workplace a test appropriate to the intimate context of marriage. A person who lives and dresses as a woman, has changed her name to a female name, and sounds and looks like a woman must be treated in the workplace as a woman. There is no room for intrusive medical examination. Biological sex should remain private and there was no need for the employer to be informed of it.
30. Where there was a lack of congruence between sex and gender, the employer should have regard to gender, it is submitted, and if a transsexual employee is denied the right to be treated in her chosen gender there is sex discrimination within the meaning of the Act. There is true equality only if a person living as a woman is treated as a woman.

31. Miss Rose takes the example of a workplace where men wear one type of uniform and women another. There would be sex discrimination if an employee presenting as a woman was required to wear the male uniform. 32. 33. If her primary submission is not accepted, Miss Rose goes on to submit that any flexibility, or discretion, given to employers in deciding when the transsexual can use the toilets of the sex to which she or he aspires is a narrow one. A refusal could be justified only strictly and in the short term. The applicant presented as a female in August 1998 and consent had still not been given by May 1999. Even then, a fixed timescale was not provided. No consideration had been given to the suggestion that the applicant should use a single designated female toilet. While not removing, that would have reduced significantly the problems of stigmatisation and isolation and would have reassured other employees. The more serious interference in the applicant's right that occurred was disproportionate to the circumstances, it is submitted. For the respondents, Mr Rose QC first submits that it is necessary to identify the treatment complained of. The complaint, as found as a fact by the Employment Tribunal, was a refusal to permit the applicant access to the female toilets. The Tribunal drew attention to the applicant's evidence that it would not be practicable for her to use male facilities given her appearance. They found that her suggestion that she would start using the male toilets was said "only in an attempt to force the Post Office to permit her to use the female toilets". The Tribunal concluded, at paragraph 48: "Although the applicant at one point said that she would use the male toilets, if the position was not resolved, she accepted that she did not in fact wish to use them and was only using that as a threat to try to force the respondent into agreeing she could use the female toilets. It cannot be less favourable treatment to deny someone access to facilities that they do not want to use. It would be a completely different matter if the applicant had been denied access to the male toilets if she had really wanted to use them." The Tribunal later reaffirmed (paragraph 61) that the use of the female toilets was "the issue that she wanted resolved. It was to her the fundamental and prime issue".
34. Mr Rose draws attention to the particular problem posed by toilet facilities. The introduction in section 2A of the 1979 Act of a category of persons who must not be treated less favourably than other persons does not in most contexts present a problem but in the context of toilet facilities it presents a practical and legal problem because a distinction must be made between men and women in toilets and separate facilities must be provided. Indeed, Workplace Directive 89/391 stipulates at Annex 2, paragraph 13.2.3, that "provision must be made for separate lavatories or separate use of lavatories for men and women (carried into domestic law by the Workplace (Health, Safety and Welfare) Regulations 1992 SI 1992/3004, Regulation 20). The introduction of a category of persons in section 2A of the 1975 Act did not alter the dichotomy between men and women recognised in sections 1 and 2. With reference to toilet facilities, it is first necessary to determine to which sex the applicant belonged and then to decide whether the applicant was treated less favourably than others of that sex, it is submitted. That was the approach adopted by this Court in *A v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1584. Kennedy LJ stated, at paragraph 13, that it was necessary to decide first what is "the appellant's legal gender".

There had been gender reassignment surgery in that case and the Court concluded that the appellant had become female. 35. 36. Counsel refer to the decision of the European Court of Human Rights in *Goodwin v United Kingdom* (Application No 28957/95) delivered on 7 July 2002. The issue was as to the status of fully achieved and post-operative transsexuals (paragraph 91). The Court held (paragraph 90) that the “unsatisfactory situation [in domestic law] in which post-operative transsexuals lived in an intermediate zone as not quite one gender or the other is no longer sustainable”. In “A,” Kennedy LJ stated that it was in the light of *Goodwin* that it was no longer possible, in the context of employment, to regard the appellant as other than female. In *Bellinger*, for reasons which he set out in detail, Lord Nicholls stated that while the House of Lords was prepared to make a declaration of incompatibility in the light of *Goodwin*, the House was not prepared to lay down what pre-conditions should be satisfied before recognition is given to a transsexual person’s acquired gender. In the light of that finding, Mr Rose expresses doubt as to whether this Court in “A” should have been prepared to apply *Goodwin* as Kennedy LJ thought appropriate. It is not necessary to decide that question in order to determine the present appeal or to consider in more detail the approach to *Goodwin* in *Bellinger*. Mr Rose’s submission is that in all three cases the courts concerned were dealing with a post-operative transsexual and treated that stage in the process, and not the assumption of a gender, as the decisive factor. Moreover, importance was attached to a determination of the sex to which the party belonged. The applicant was still in law a man, and, as in the case of any other man, there was no sexual discrimination in not permitting the use of the female toilets. Mr Rose further comments that the comparison made in *P v S* was with persons of the sex to which the applicant belonged before undergoing gender reassignment. Comment 37. The Employment Tribunal accepted Mr Rose’s primary submission. They stated, at paragraph 45: “The issue which has not been resolved by any earlier case is when the change of sex occurs. It is essential for the decision we have to make in terms of what toilet facilities are available to this applicant that we make a determination as to at what point in law does a transsexual, who was classed as male for the purposes of the Sex Discrimination Act, become females for the purposes of the Act. Although the process is referred to as transition there cannot be a transitional state of a third sex and the point of change has to be established. It could be when a transsexual is born, when the decision to seek medical advice is taken, when the person changes to a different social gender or when the change is completed by the final operative treatment.” The Tribunal referred (paragraph 46) to the statement of the Advocate General in *P v S* describing the applicant in that case as female: “I do so regardless not only of her original sex (male) as it appears on her birth certificate but also of the moment at which, as a result of the final surgical operation, she actually changed her physical sex.” 38. 39. The Tribunal held (paragraph 46) that “a male to female transsexual changes gender for the purpose of the Sex Discrimination Act when the final operation to change the physical characteristics is performed” and (paragraph 48) that at the material time “for the purposes of the Sex Discrimination Act as applied in accordance with the Directive the applicant was a male”. The primary submissions of both parties are, as Mr Rose put it, counterintuitive. It produces a surprising result if the applicant, at the material time, could be required to use a male

toilet, but, submits Mr Rose, it is no less counterintuitive to find that a person who is anatomically male must be treated, for toileting purposes, as female, if she asserts a female role. A voyeur or transvestite might do that. Mr Rose relies upon the view of Lord Hope in *Bellinger* (paragraph 62) that a distinction has to be drawn between pre-operative and post-operative transsexuals. “Any attempt to enlarge its meaning [the meaning of the word “male” in this context] would be bound to lead to difficulty as there is no single agreed criterion by which it could be determined whether or not a transsexual was sufficiently “male” for the purpose of entering into a valid marriage ceremony.” Lord Hobhouse stated, at paragraph 76, that “there are cogent arguments against adopting any specific criterion” when deciding “how far the person must go to qualify as a transsexual”. Accepting that it is for Parliament to lay down the test of sexuality as provided in *Bellinger*, the Court has to consider a current and practical problem about the use of lavatories. Pending any action by Parliament, the Court must attempt to resolve the question and I agree with the submission of Mr Rose about the unattractiveness of the primary submission of each party. To hold that the applicant must still use the male toilets is no less unacceptable than allowing a person, who has been known to the female workforce as a man for many years and has male genitals, an immediate right to use the female toilets. While the good faith of the applicant in this case in wishing to be a woman is not in doubt, the gender test is open to abuse and, quite apart from that, what Lord Nicholls described as self- definition presents a serious practical problem in this context. 40. In *Goodwin* the magnitude of the decision taken by the transsexual is underlined at paragraph 81: “Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment.” At paragraph 91, the Court considered the possible consequences of a change to the status of transsexuals and stated: “The Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.” 41. The Court’s general approach was stated at paragraph 90: “Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, inter alia, *Pretty v the United Kingdom*, no. 2346/02, judgment 29 April 2002, section 62, and *Mikličić v Croatia*, no. 53176/99, judgment of 7 February 2002, section 53, ...). In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.” But, as Mr Rose underlines, that was stated in the context of post-operative transsexuals and not in the present context. Moreover, the House of Lords in *Bellinger* has not fully accepted the reasoning in *Goodwin* (Lord Nicholls

at paragraph 24). Conclusions 42. I find the primary arguments of both parties to be unacceptable. The jurisprudence of the ECHR, reflected in section 2A and section 5(3) of the 1975 Act, as amended, does provide for a category of persons who are not to be discriminated against. By virtue of the definition in section 82 of the Act, the category includes persons at all stages of gender reassignment under medical supervision but it does not follow that all such persons are entitled immediately to be treated as members of the sex to which they aspire. Nor does it follow that, until the final stage is reached, they can necessarily be required, in relation to lavatories, to behave as if they were not undergoing gender reassignment. Given the unacceptability of either approach the Court must consider what amounts to less favourable treatment in the context of a person within the definition in section 82 and whether any such less favourable treatment is on the ground that the applicant is undergoing gender reassignment. 43. The basic points are: (i) At the material time the applicant was a transsexual. She had reached the stage of gender reassignment where she had begun, but (ii) not long begun, to present as a woman attempting a “real life test”. (iii) The applicant was in good faith in wishing to become female. 44. The finding of the EAT, at paragraph 60, was: “He [the employer] could, not unfavourably, bar her use of the female facilities as she was known to him not at law to be, nor was believed to be, female. He had thus no need, under the workplace provisions, to provide any further or other facilities for her. Common decency, though, suggests that he should provide something for her. He suggested the use of the gender-neutral disabled facilities. She agreed. We fail to see how the employer is to be held to be acting unlawfully when he provides something by way of adequate sanitary facilities in a context in which it has become impossible for him to treat a complainant as are all his other employees, when there is strictly no workplace requirement for him to do anything further and where allowing her to use the female facilities would breach the separateness which the workplace provisions require”

45. Miss Rose submits that the applicant has been treated differently from comparable employees of both sexes in that she has been refused access to the toilets appropriate to her social gender and required to use only a unisex disabled toilet. She has been deprived of a choice valued by her (*R v Birmingham City Council ex parte Equal Opportunities Commission* [1989] AC 1155 at 1193 per Lord Goff of Chieveley). She is deprived of the option of using the female toilets. Unlike indirect discrimination, direct discrimination such as this cannot be justified under the statute. 46. 47. 48. I do not accept that the respondents can escape liability on the basis that the applicant was at the material time a man and that a prohibition on the use of the female toilets meant that she was treated no differently from other men. Transsexuals have been recognised by statute, not as a third sex, but as a group who must not be discriminated against as such. That involves not only providing members of the group with toilet facilities no less commodious than other toilets but considering whether the transsexual should be granted the choice she seeks. I would accept, applying the statement of Lord Nicholls in *Bellinger*, paragraph 41, and *Goodwin* paragraph 90, that a permanent refusal to refuse that choice to someone presenting to the world as a woman could be an act of discrimination even if the person had not undergone the final surgical

intervention. However, I do not accept that a formerly male employee can, by presenting as female, necessarily and immediately assert the right to use female toilets. The status of transsexual does not automatically entitle the employee to be treated as a woman, with respect to toilet facilities. The right does not arise automatically but it is acquired by making progress in the procedure described by Lord Nicholls. The Tribunal has to make a judgment as to when the employee becomes a woman and entitled to the same facilities as other women though that judgment must have regard to the applicant's self-definition and cannot be determined by the views of other employees. The employee did not have less favourable treatment than a man, who could not claim to use the female toilets. The employee is not being treated less favourably than other women employees unless and until the employee can establish that she should be treated as a woman. The Court should have regard to the particular difficulties which arise with respect to toilet facilities, the obligation and the need for separate facilities for men and women, and the fact that acquiring the status of a transsexual does not carry with it the right to choose which toilets to use.

49. With respect to other facilities, the employee's self-definition may be a very important factor in determining the sex in which the employee is entitled to be treated. In the case of toilet facilities, for reasons given, it is less important and the employer is not bound by it when making a judgment as to when the change has occurred. 50. 51. For most purposes, section 2A of the 1975 Act permits a clear application. With respect to toilet facilities, there is a problem in that separate facilities for men and women have to be provided. Transsexuals are not a third sex. In any event, providing a third set of toilets for transsexuals would not solve the problem about which the applicant complains. She presents as a female and wishes to use the female toilets. The respondents submit that anatomically she is male and cannot complain if she is not permitted to use the female toilets. The applicant has reached a stage of gender reassignment at which the problems of recognition, analysed by Lord Nicholls in *Bellinger*, are difficult to solve and particularly with respect to toilet facilities, for reasons already given. The choice claimed is different from the choice of schools considered in *Birmingham* because toilet facilities are necessarily sexually based. Presentation as a female does not necessarily make the applicant a female entitled to use female toilet facilities. Such presentation does not enable her to claim sexual discrimination because she is not permitted to exercise a female's right to use the female lavatories (as a male's to use the male lavatories). Moreover, she is not discriminated against "on the ground" that she is undergoing gender reassignment. The toilet facilities are accepted to be adequate; it is the label they are given which is claimed to be unacceptable. Statute recognises the existence of a category of persons undergoing gender reassignment which includes the applicant, but that very recognition militates against her being entitled automatically to claim that, as well as being transsexual, she is a female entitled to all the choices which females have. It is in my judgment inherent in a situation in which two sets of facilities, male and female, are required and in which a category of persons changing from one sex to the other is recognised, that there must be a period during which the employer is entitled to make separate arrangements for those undergoing the change.

52. What those arrangements are must inevitably depend on the circumstances and both employer and employee must recognise the difficulties involved and act reasonably to overcome them. The employer must respect the dignity and freedom of the employee (P v S, paragraph 22) and must enable the employee “to live in dignity and worth” (Goodwin, paragraph 91). However, I see nothing unlawful, having regard to the stage reached by the applicant, that is the step of embarking on the “real life test” expected by doctors usually to last for two years, in requiring the use of separate facilities. 53. The moment at which a person in the applicant’s position is entitled to use female toilets depends on all the circumstances, including her conduct and that of the employers. The employers must take into account the stage reached in treatment, including the employee’s own assessment and presentation. They are entitled to take into account, though not to be governed by, the susceptibilities by other members of the workforce. She must not be treated less favourably than other employed transsexuals but that is not in issue in this case. Her complaint is that being treated less favourably than the female workforce requires prior determination of the question whether she is entitled to be treated as a female, an approach reinforced by the statutory recognition of the existence of transsexuals. 54. 55. 56. Applying that test to the facts set out by the Employment Tribunal, the respondents were not in my judgment guilty of direct discrimination against the applicant. While I do not agree with the test applied by the Employment Tribunal I agree with their conclusion and that of the EAT. In referring to the impossibility of the employer treating the applicant as all his other employees, the EAT appear to me to be following an approach similar to mine. I would accept the finding of fact of the Employment Tribunal that a claim to use the male toilets did not on the facts arise but, even if it did, a refusal would not, on the test I have adopted, have amounted to a breach of the Act. I accept the submission of Mr Rose that the measures taken by the employers were appropriate ones in the circumstances. They were entitled, for a period of time, to rely on the unisex disabled toilet as being a sufficient facility. They maintained a flexible approach and it was not unreasonable, in the circumstances, to decline to give a firm date, no later than the end of June, by which the applicant could use the female toilets. The applicant was away from work (apart from two days) from 26 January 1999 until 21 May 1999 and the June deadline was sought to be imposed within three days of her return. The real life test described in the document of the Gender Identity Clinic, put to the Court by Miss Rose as an agreed document, plainly contemplates a substantial period of time for a valid “real life test”, living full time in the chosen gender role, and the time had not come when the respondents were obliged to permit the applicant to use the female toilets. The approach of Mr Jones, during the relevant period, as found by the Employment Tribunal, was a responsible one and did not place the respondents in breach of the Act.. Stress has been placed before this Court on the possibility of a specific female toilet being assigned to the applicant rather than the unisex disabled toilet. Whether that would have improved the position is questionable. Its location may have made things easier for the applicant but it would not have solved the “labelling” problem and may indeed have highlighted it. It would not have been straightforward, as the Employment Tribunal found at paragraph 10. Moreover, the applicant had initially agreed with the low key approach and to using the

disabled toilet for a time. The approach by way of the designated female toilet approach was not pursued by her, or on her behalf, and Mr Jones, who took an active part in discussions from a comparatively early stage, was not made aware of it. Section 41 57. The Employment Tribunal found that there were acts of discrimination by employees but that the respondents had a statutory defence. It is submitted by Miss Rose that, on the evidence, the respondents did not establish the defence provided, under section 41(3) of the 1975 Act, that they took such steps as were reasonably practicable to prevent the employees from doing in the course of their employment acts of that description. It is submitted that the Employment Tribunal misapplied the statutory test. Reliance is placed on the decision of the EAT, Burton J presiding, in *Canniffe v East Riding of Yorkshire Council* [2000] IRLR

555. Burton J stated, at paragraph 14: “We are satisfied that the proper approach is: (1) to identify whether the respondent took any steps at all to prevent the employee, for whom it is vicariously liable, from doing the act or acts complained of in the course of his employment; (2) having identified what steps, if any, they took to consider whether there were any further acts, that they could have taken, which were reasonably practicable. The question as to whether the doing of any such acts would in fact have been successful in preventing the acts of discrimination in question may be worth addressing, and may be interesting to address, but are not determinative either way. On the one hand, the employer, if he takes steps which are reasonably practicable, will not be inculpated if those steps are not successful; indeed, the matter would not be before the court if the steps had been successful, and so the whole availability of the defence suggests the necessity that someone will have committed the act of discrimination, notwithstanding the taking of reasonable steps; but on the other hand, the employer will not be exculpated if it has not taken reasonable steps simply because if he had taken those reasonable steps they would not have led anywhere or achieved anything or in fact prevented anything from occurring.” 58. The Employment Tribunal were in error, it is submitted, in having regard to the effect, or lack of effect, of possible measures rather than considering whether those measures were reasonably practicable. It is also submitted that the finding of fact on this issue was perverse. 59. The Employment Tribunal, having set out the issue, continued: Two main points given by the applicant for saying the “55. respondent did not do everything reasonably practicable was that the respondent did not amend its harassment policy to refer to transsexuals and did not become involved in an education programme to explain to the rest of the workforce what was involved in a transsexual transition. We do not consider that either action would have had more than at most a marginal effect on the employees, who were causing the applicant the type of harassment suggested. On several occasions throughout the process the respondent drew attention to its harassment policy and particularly during the week when the applicant returned to work as a woman. The managers certainly understood that the policy related to acts against the applicant. We heard no evidence to suggest that any employees were under any misapprehension that harassment of the applicant was unacceptable to the respondent. Similarly whilst education of the workforce would have been useful for an understanding of the processes the applicant was going through, it is unlikely that it would have had any

significant effect on those who found it difficult to come to terms with the fact that the applicant, who had been a man, was now a woman. 56. The steps which the respondent did take was that when the applicant indicated she wished to be known as a woman and to be dealt with as a woman, they met with her and agreed that that should be the case. All her records, so far as the respondent was concerned, were changed in the way she wanted. The workforce was told that she was now to be seen as a woman and addressed as a woman, both when she first started living as a woman and when she changed her name to Sarah Croft. The respondent stressed its harassment policy to the workforce on a number of occasions. That referred to sex and sexual orientation and in our view the workforce could not have been in any doubt that a transsexual was covered by that expression, even though transsexualism has a more defined meaning. The respondent deliberately used a low-key approach in order to avoid problems, which to some extent were seen as inevitable. Apart from the point of principle over use of the toilets, the applicant's approach was very much the same. She was fully aware of the harassment policy, which was repeated to her whenever she indicated she had a problem. She did not wish to take action against named individuals, because she felt that could be counter productive. Her wish, like the respondents, was that in time people would come to accept the factual position. On the only occasion when the applicant did name people to Mrs Parker, even though that was an informal comment, action was taken and the people spoken to did not harass the applicant any further. 57. The delays in the case largely relate to the issue of which toilets the applicant could use and were not related to the harassment questions. The reasons for those delays are varied. It clearly did not help that this was an issue which the local management required input from the area in the form of Mr Jones, who himself required input from headquarter advisers and the legal department. The fact that Mr Jones did not know the respondent had received a report from the applicant's doctor and was, as a result, pursuing the need to obtain information from the doctor and the applicant's desire not to give that information contributed to the delay. The fact that the applicant was away from work for a long time in 1999 also was a contributory factor. There was undoubtedly ambiguity in a number of Mr Jones' letters and his failure to talk directly to the applicant and hers to contact him directly added to the delay in resolving the problems, particularly of the use of the toilets. Whilst with the benefit of hindsight there are alternative actions which could have been taken, we consider the steps taken by the respondent were reasonably practicable to prevent the acts of harassment, which is the act of discrimination by the employees. Accordingly we are satisfied that the respondent is not liable for those acts of its employees." 60. Reference was thus made to the two complaints on behalf of the applicant, first, the failure by the respondents to amend their harassment policy and, secondly, failure to become involved in an educational programme. While the Tribunal go on to refer to the effect, or lack of effect, of the alleged failures, they do set out in detail the measures taken by the respondents and put them in the context of the situation existing. 61. The Tribunal did in my judgment make the correct assessment under section 41(3), that is, to consider whether the employers took such steps as were reasonably practicable to prevent employees from doing harassing acts, though the statutory test was not stated with precision. The

conclusion that the defence was made out was in my judgment justified in the circumstances. I agree that a consideration of the likely effect, or lack of effect, of any action it is submitted the employers should have taken is not the sole criterion by which that action is to be judged in this context. In considering whether an action is reasonably practicable, within the meaning of the subsection, it is however permissible to take into account the extent of the difference, if any, which the action is likely to make. The concept of reasonable practicability is well known to the law and it does entitle the employer in this context to consider whether the time, effort and expense of the suggested measures are disproportionate to the result likely to be achieved. The Tribunal were entitled to conclude that, at each stage, the respondents did take such steps as were reasonably practicable to prevent the acts complained of.

62. Miss Rose submits that once there were steps which the Tribunal found could have been taken it was no defence to claim that taking them would have had at most a marginal effect. Secondly, there was no evidence to support the conclusion that the effect would have been at most marginal. The evidence, including that of Mr Gaunt, to which we have been referred, entitled the Tribunal to make the finding they did and the lack of significant effect which they found the proposed steps would have had was a factor relevant to the reasonable practicability test. 63. If Burton J was adopting a different approach in Canniffe, I respectfully disagree. In the concluding part of paragraph 14 of his judgment, however, the part relied on by the applicant, Burton J does twice refer to “reasonable steps”. In considering what steps are reasonable in the circumstances, it is legitimate to consider the effect they are likely to have. Steps which require time, trouble and expense, and which may be counterproductive given an agreed low-key approach, may not be reasonable steps if, on an assessment, they are likely to achieve little or nothing. Requirement of medical information 64. 65. There were misunderstandings about the respondents’ requests for medical information and that was unfortunate. In fact, the information sought, as is accepted on behalf of the applicant, was only as to the applicant’s external anatomical appearance and whether she had undergone gender reassignment surgery. The claim that the request for information was discriminatory runs in parallel with, and falls with, the submission that the question of the applicant’s anatomical sex was irrelevant and that it was the gender she presented which was the only consideration. In my judgment, anatomical sex was a factor relevant to the decisions the respondents had to make and the request for information was relevant to the decision-maker’s task. It was not discriminatory. Circumstances could arise in which any employee might reasonably be asked for proof of anatomical sex. The Employment Tribunal found (paragraph 59): “The only information that was passed on by the doctors to the management was information which the applicant, on her own case, had already provided and was content to provide ie that she was undergoing hormone treatment and had not yet undergone surgery.” I agree with both Tribunals that neither the request for medical information nor the way in which the request was handled provide the basis for a discrimination claim. Constructive dismissal 66. It follows from the above that there was no conduct by the respondents which, upon her resignation, gave rise

to a constructive dismissal. 67. I would dismiss the appeal. Lord Justice Jonathan Parker: 68. I agree that this appeal should be dismissed, for the reasons which My Lord has given. 69. The instant case provides a clear illustration of the difficulties to which the application of the statutory test of discrimination on grounds of gender reassignment in section 2A of the 1975 Act gives rise where (a) the applicant is a person who “is undergoing” (as opposed to a person who “has undergone”) “gender reassignment”, and (b) the discrimination complained of relates to access to facilities which the employer is required by law to segregate as between men and women. 70. Section 2A(1) provides (so far as material for present purposes) that ‘A’ discriminates against ‘B’: “.... if he treats B less favourably than he treats other persons on the ground that B is undergoing gender reassignment”. 71. 72. The application of this provision to the facts of the instant case raises three questions. The first is: Who are the “other persons” with whose treatment the applicant’s treatment is to be compared? In other words: Who are the comparators? The second question is whether the respondent has treated the applicant “less favourably” than it has treated the comparators. The third question is whether it has done so on the ground that the applicant is undergoing gender reassignment. In the instant case the third question answers itself. As to the first question, Mr Rose QC’s primary submission is that it is necessary to determine to which sex the applicant belongs, since the proper comparators are other employees of the respondent who are also members of that sex. I agree with My Lord that that submission is to be rejected. In the context of access to lavatory facilities, which are necessarily segregated on grounds of sex, such an approach seems to me to make little sense where, as in the instant case, the applicant is undergoing gender reassignment. It seems to me to ignore the fact that that process of gender reassignment has begun. 73. 74. 75. 76. At the other extreme, like My Lord I would also reject Miss Rose’s primary submission that, as from the very commencement of the ‘real life test’, the applicant was entitled to be treated by the respondent as being female. Such an approach seems to me to ignore the fact that the process of gender reassignment has not yet been completed. In my judgment the true comparators in the circumstances of the instant case are employees of the respondent (whether male or female) who are not persons to whom section 2A applies: that is to say, employees of either sex who are not transsexual. I turn, then, to the second question. To answer this question it is first necessary to identify the respect or respects in which the respondent’s treatment of the applicant differed from its treatment of those of its employees who are not transsexual. The difference in treatment in the instant case lies in the fact that the applicant was prohibited, on a temporary basis, from having access to lavatory facilities provided for female employees, and was required to use the unisex facilities provided for disabled employees. (The fact that she was also refused access to male facilities is, in my judgment, an irrelevance given that, as the applicant accepts, she no longer had any wish to use the male facilities.) The final step, in answering the second question, is to determine whether the identified difference in treatment is such as to lead to the conclusion that the respondent treated the appellant “less favourably” than it treated employees who are not transsexual. I agree with My Lord, for the reasons he has given, that it does not. I am quite unable to see how the requirement that for the time being the applicant use the disabled

facilities, rather than the female facilities, could be said to constitute less favourable treatment of the applicant for the purposes of section 2A(1). On the contrary, it seems to me that it provided an admirably practical solution to what the respondent rightly recognised, and rightly treated, as a delicate issue requiring a low-key and sensitive approach. Lord Justice Keene: 77. I agree with both judgments. Order; Appeal dismissed; the appellant to pay 50 per cent of the respondent's costs of the appeal on a standard basis, to be subject to a detailed assessment if not agreed. (Order does not form part of the approved judgment)

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