



LGBT+ History Month

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26th February 2021

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By **Paul Quain** - 26 February 2021

Spoiler Alert: Minor spoiler for *"It's A Sin"*!

This month is national [LGBT+ History Month](#) and we thought it was a good time to look back and take stock of where society is in relation to LGBT+ issues.

Some of you may have watched (or are watching) *"It's A Sin"*, a hard-hitting drama written by Russell T Davies, with a great 80s soundtrack reminding us of what it was like when we first heard about AIDS in the 1980s. It doesn't pull any punches and many of the portrayals fit in well with my own recollection of the time.

From an employment lawyer's perspective, employment law itself was only just beginning to come out of the closet and start to be an area of law in its own right in the 80's.

In the 1980s most LGBT+ workers kept their status hidden. Partly because there were few role models around for the LGBT+ community, but also because there simply was no legal protection for sexual orientation.

You could be fired for being LGBT+, and people were (as seen in one episode of *"It's a sin"*).

That all seems a very long time ago now and a world which is alien to many young people today. What many do not know is that before we were able to argue that people were protected from discrimination on the grounds of their sexual orientation or gender identity, lawyers did try (with some success) to say that discrimination on the grounds of sexual orientation was the same as discrimination on the grounds of sex. It was often an uphill struggle for lawyers making this argument, though.

Sex discrimination in very simple terms is about less favourable treatment because of a person's sex. The argument used by LGBT+ employees in these cases went along the lines *"I am a man. I am being treated less favourably because my partner is a man. If I was a woman and my partner was a man I would not be treated like this. I am therefore treated less favourably than a woman"* and 'Hey Presto', you have a case for sex discrimination.

I am reminded of three cases in particular from this earlier era (well, the mid 90s), which explored how the law of sex discrimination may in fact cover gender identity and sexual orientation cases. These were all landmark cases (even if they were not all resounding victories for LGBT+ rights) which affected the development of case law and legislation alike.

These were *P v S and Cornwall County Council*, *Grant v South West Trains* and *Smith v Gardner Merchant*.

P v S and Cornwall County Council (1996)

P v S and Cornwall County Council was the first case of its kind to extend existing sex discrimination legislation to protect trans people against discrimination, despite gender identity not being a protected characteristic under the law at the time.

P was a trans woman who was dismissed from her post after telling her employers she was undergoing gender reassignment. The original tribunal in the UK thought she had been dismissed because of her gender reassignment but did not feel able to say this was sex discrimination, because a trans man would also have been dismissed. The European Court of Justice held that the EU's Equal Treatment Directive (which applied to EU members, of which the UK was one at the time) was an expression of a fundamental principle of equality and therefore did preclude dismissal for a reason related to gender reassignment. This was ground-breaking and progressive stuff!

Grant v South West Trains (1998)

A few years later, another case made it to the European Court of Justice and was hoped to be another victory for LGBT+ rights. It was not to be, however.

Lisa Grant worked for South West Trains and was entitled to free travel as a benefit. Her contract said that this benefit was extended to "one common law opposite sex spouse of staff". This was subject to a declaration that a meaningful relationship had existed for at least two years. Ms Grant's partner was a woman and they had been together for over two years. South West Trains refused to grant Ms Grant's partner the travel benefit on the ground that for unmarried persons travel concessions could be granted only for a partner of the opposite sex.

The Court found that the concession would have been refused to a male employee cohabiting with a male partner. The rule could not therefore be taken as discrimination based directly on sex because it applied in the same way to female and male workers. The creative arguments in *P v S* were rejected.

The Court then considered whether European law requires that stable relationships between two persons of the same sex be treated by employers as equivalent to marriages or to stable relationships outside marriage between persons of opposite sex. The Court answered this question in the negative. The matter was not subject to any European law and national laws of Member States were divergent on this issue.

Lastly the Court considered whether discrimination based on sexual orientation could be treated as discrimination based on sex (which is prohibited under EU law). The Court ruled that discrimination based on sexual orientation was not a form of sex discrimination, so was not prohibited by EU law.

The decision was somewhat surprising as the Advocate General (a court official who gives a preliminary opinion on a case and whose opinion is generally followed by the full Court) considered that sex discrimination law could be used to support prohibiting discrimination on sexual orientation.

Nevertheless, the case did have a happy ending out of court: South West Trains (despite winning) backed down and provide the benefits to Ms Grant's partner. EU countries shortly afterwards enacted a Directive which prohibited sexual orientation discrimination in its own right.

Smith v Gardner Merchant (1998)

The Claimant in *Smith v Gardner Merchant* was a gay man who worked as a barman for the Coliseum in London (then the Globe Theatre). He alleged that a female colleague harassed him saying that he had diseases and should be put on an island. There was an allegation that she also hit him. He complained about this treatment, whereupon she said that he was being aggressive towards her. Some of his colleagues said he flaunted his sexuality and that he was unpopular and he was dismissed. No findings of fact were ever made about what actually happened as the case went all the way to the Court of Appeal to determine the legal issue of whether Mr Smith was protected against discrimination on the basis of his sexuality.

The case turned on whether sexual orientation discrimination was actually a form of sex discrimination. Whilst the three (male) judges were initially sceptical they were largely won around by the advocacy for the Claimant (Laura Cox QC who became Mrs Justice Cox, who led a Parliamentary enquiry into bullying and harassment of House of Commons staff in 2018).

The case quoted from the following passage by legal academic, Robert Wintemute* puts the point as follows:

"If a man wanting to be a nurse challenged a rule that only women could be nurses and only men could be doctors, his comparator would not be a woman wanting to be a doctor. He would reply: "I don't want to be a doctor. I want to be a nurse. You have changed both my sex and my choice of job. Change only my sex and compare with a woman wanting to be a nurse." Similarly, a man with a male partner compared with a woman with a female partner would reply: "My partner is male not female. You have changed both my sex and the sex of my partner. Change only my sex and compare me with a woman with a male partner." If the sex of the man is changed, but the sex of his male partner is held constant, the man's comparator is a woman with a male partner and the direct sex discrimination is clear. If the sexes of both the man and his partner are changed, the man's comparator becomes a woman with a female partner and the direct sex discrimination disappears with a wave of the magician's wand."

This line of argument has been used in some of the cases taking place in the USA with some effectiveness.

While the Court of Appeal allowed the appeal, they did not fully accept the argument (hampered as it was by the European Court of Justice's unhelpful decision a few months earlier in *Grant v South West Trains*), but instead found that a lesbian would quite possibly have not been treated in the same way, so the case was sent back to the employment tribunal.

In a strange twist of fate, no-one turned up to the final hearing, so the case was dismissed! Nevertheless, the airing of the arguments in the UK's 2nd highest court was an important step in the visibility of LGBT+ rights in UK courts.

These three cases demonstrate the herculean efforts that were needed to get the square pegs of LGBT+ rights into the round hole of discrimination on the grounds of sex. Ultimately, they led to specific legalisation which prohibited discrimination on the basis of sexual orientation, as well as legislation for trans rights.

While this fight for LGBT+ rights ultimately led to legislation in the UK, the arguments used in these 3 cases have gone on to find new life in other jurisdictions. In 2020, the US Supreme Court gave a major victory for LGBT+ rights in the *Bostock* case, finding that the federal prohibition on sex discrimination concept was broad enough to prohibit discrimination because of sexual orientation or gender identity.

The battles to get protection for trans people, to get protection from discrimination on the grounds of sexual orientation, as well as achieving equal marriage, were long and far from straightforward. It seems strange now, but it was not unusual even in the mid-90s within the LGBT+ community for the view to be expressed that society was not ready for "gay marriage" and probably would not be so for a further 50 years. In the end, when change came it happened relatively quickly!

Whilst these legal battles were going on, something happened to how LGBT+ issues were viewed by the public. There appeared to be a sea change. Representations of gay characters on TV became more mainstream. Ireland and Australia eventually voted in

referendums to legalise gay marriage.

Something changed and the world of these three cases suddenly became history! There is certainly a lot more to be achieved in protecting LGBT+ rights (particularly the rights of trans people) in law so I have to wonder: what will people think of 2021 in 50 years' time?

*From an article entitled "Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes" [1977] 60 Modern Law Review 334.