



HPMA North East & Cumbria Branch webinar

Managing gender identity in the workplace – an employer’s guide

30 March 2023



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Managing gender identity in the workplace – an employer's guide

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“They're excellent - they're very professional and very experienced.”

Chambers

Overview of webinar

- Legislation
 - Equality Act 2010
 - Gender Recognition Act 2004
- Types of discrimination
- Common Issues
- Protected beliefs and gender critical views

Legislation

Equality Act 2010 - protection

- Gender Reassignment is a protected characteristic
- *"A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex"*
- No medical involvement is required

Equality Act 2010 – potential gaps in protection

- Are non-traditional genders protected?
- *Taylor v Jaguar Land Rover Limited (ET)*
 - did non-binary/gender fluid (no fixed gender) claimant gain protection?
 - yes – spectrum moving away from birth sex (“...moving from point A but not necessarily ending up at point Z”)

Gender dysphoria / Gender Identity Disorder

- Trans not a disability but diagnosis of GD or GID may be if:
 - substantial and long-term adverse impact on ability to carry out normal day-to-day activities
- Intersex
 - may have qualifying conditions

Protection for intersex and non-binary

- Intersex
 - biological characteristics of both sexes
 - abnormality of sex chromosomes/hormonal imbalance
 - medical appearance at birth may be neither male/female
 - possibly protected under Equality Act but *may* identify as transgender

Gender Recognition Act 2004

- Legal recognition for acquired gender
- Gender Recognition Certificate
 - 2020 – 5,000 applications (100 refused) (out of c.20,000 trans in the UK)
- Applicant must have lived in acquired gender throughout preceding 2 years and intend to carry on
- No retrospective effect

Gender Recognition Act 2004 - consequences

- *(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes **for all purposes** the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).*
- *(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).*

Types of discrimination

Types of discrimination – direct discrimination

- Because of gender reassignment A treats B less favourably than A treats or would treat others
- Cannot be justified
- Expressly protected from direct discrimination in relation to absences from work because of reassignment

Types of discrimination – direct discrimination

- Examples
 - *Sheffield v Air Foyle Charter Airlines* [1997]
 - pilot not interviewed for job because trans
 - *Croft v Royal Mail Group plc* [2003]
 - Court of Appeal – employer had not directly discriminated against pre-operative male to female trans by refusing to allow access to female toilets
 - may no longer be good law as no medical intervention now required

Types of discrimination – association and perception

- Less favourable treatment
 - can be “because” of gender reassignment regardless of whether victim is going through gender reassignment
- Can be by association
- Can be perception (even if incorrect)

Types of discrimination – indirect discrimination

- A applies to B a **provision, criterion or practice (PCP)**
- B is trans
- A applies the PCP to all
- PCP puts or would put trans people to particular disadvantage (and puts B to it)
- A cannot justify the PCP
 - legitimate aim
 - proportionate means

Types of discrimination – harassment

- A engages in unwanted conduct related to gender reassignment
- Has purpose or effect of
 - violating B's dignity; or
 - creating intimidating, hostile, degrading, humiliating or offensive environment for B
- Take into account
 - B's perception
 - other circumstances
 - whether reasonable

Types of discrimination – harassment

- Examples

- *Lawrence v Wills* [2009]

- receptionist in massage sauna – meeting place for gay/bisexual men
 - male to female transition
 - employer insisted on her being called “Marc”
 - was harassment

- *Chapman v Chief Constable of Essex Police* [2013]

- male to trans woman
 - colleagues identified her as male over police radio
 - not harassment – not reasonable to feel harassed

Types of discrimination – victimisation

- A subjects B to detriment because B has done, intends to do or is suspected of doing (or intending to do):
 - bringing proceedings under the Equality Act
 - giving evidence/information in connection with proceedings
 - doing “any other thing” in connection with the Equality Act
 - alleging that the discriminator or any other person has contravened the Act
- Eg being disciplined after ET claim

Data protection issues

- Gender Reassignment
 - sensitive data under DPA 1988
 - only processed for certain specified reasons
- GRA 2004
 - criminal offence to disclose information to any other person regarding gender identity
- No obligation on employee to inform employer

Common Issues

Genuine Occupational Requirement

- Limited exception to direct discrimination protection
- Could have a requirement that an employee or prospective employee did not have the protected characteristic of gender reassignment
- EA 2010 Explanatory note – eg counsellor working with rape victims might have to be a woman and not a transexual person to avoid distress
- Government guidance
 - instances will be few
 - *“Very careful consideration should be given before applying a GOR. Such restrictions are rare and, if wrongly applied, unlawful.”* [“The Recruitment and Retention of transgender staff”]

Facilities

- Workplace (Health, Safety and Welfare) Regulations 1992
 - requires separate toilets, washing and changing facilities for men and women
 - caution because pre-dates trans protection
 - men/women not defined
- See Croft case but now old
- Government's *Recruitment and Retention* guidance
 - "...trans person should be free to select the facilities appropriate to the gender in which they present..."

Recruitment

- Disclosure – criminal offence to reveal information about application for GRC or existence of GRC
- Pre-employment health checks
 - should not be asked about gender history
- Vetting
 - ID – Flexibility around whether passport/birth certificate
 - DBS – can confidentially disclose all previous names without being disclosed to employer

Protected beliefs and gender critical views

The Issue

- Clash of protection
- European Convention on Human Rights
 - Art 8 – Right to respect for private and family life
 - Art 9 – Freedom of thought, conscience and religion
 - Art 10 – Freedom of expression
- Cases on religious beliefs vs sexual orientation (*Page, Ngole*)
- S.10 EA
 - religion or belief – protected characteristic

Forstater v CGD Europe and ors

- CGDE – not for profit think tank on international development
- F was visiting fellow and a consultant
- Contract ended on 31 December 2018
- F claimed was ended for her comments on social media
 - sex is a material reality not to be conflated with gender/gender identity
- Complaints from colleagues
- F claimed gender-critical views constituted protected “philosophical beliefs” under s.10 of the Equality Act
- Preliminary hearing – ET determined beliefs did not amount to protected beliefs

*Forstater v CGD
Europe and ors*

- ET applied tests in *Grainger*
 - (i) the belief must be genuinely held;
 - (ii) it must be a belief and not an opinion or viewpoint based on the present state of information available;
 - (iii) it must be a belief as to a weighty and substantial aspect of human life and behaviour;
 - (iv) it must attain a certain level of cogency, seriousness, cohesion and importance; and
 - **(v) it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others**
- ET found beliefs satisfied all save for (v)
- Found F's beliefs were "absolutist"

*Forstater v CGD
Europe and ors*

- EAT upheld F's appeal
- ET had misapplied *Grainger (v)* test
- Only excluded is akin to Nazism or totalitarianism
- F's beliefs were widely shared and did not seek to destroy rights of trans persons
- F's belief that sex is real and immutable is consistent with law
- Therefore belief was protected
- EAT made clear not taking a view on trans debates nor encourage "misgendering" et al

*Forstater v CGD
Europe and ors*

- EAT sent back to the ET
- ET
 - F had suffered direct discrimination and victimisation
 - Her tweets and how she had manifested her gender critical beliefs had a significant influence on the decision not to renew her fellowship
 - Had she manifested her beliefs in an inappropriate manner?
 - Held that she had not

Mackereth v DWP [2022] EAT 99

- Dr M applied to work as health and disabilities assessor (HAD) at DWP
- On induction course (May 2018) – an HDA asked course leader how to refer to someone who was transgender and was told to use chosen title (as well as name)
- Dr M said would use name but not chosen pronoun as inconsistent with Christian beliefs
- Was suspended then dismissed on 27 June 2018

Mackereth v DWP [2022] EAT 99

Claims

- Claims brought for direct discrimination, harassment and indirect discrimination relying upon protected characteristic of religion or belief
- Belief in the trust of the bible and/or lack of belief in “transgenderism” and “gender fluidity”

ET Decision

- Not protected beliefs
 - Did not meet the *Grainger* tests (not worthy of respect in a democratic society and not conflict with the fundamental rights of others)
- Even if they were claim failed – purpose of the questions was not to violate his dignity or create an adverse environment nor did they (objectively) have that effect
- Reason for treatment was that DWP wanted service users to be treated in a certain way and would have done the same to anyone who refused to comply with the policy (not about his beliefs)
- Indirect discrimination – was a proportionate means of achieving a legitimate aim

Mackereth v DWP [2022] EAT 99

EAT Decision

- Dismissed the appeal
- ET was wrong about *Grainger* test
- Agreed with the decision in *Forstater*
 - Will be protected as long as it does not destroy the rights of others (causing offence is not enough)
- Lack of belief can be protected
- ET had been entitled not to uphold the claim however
- Repeated that it is possible, in theory, to separate the holding of a belief from its manifestation

Mackereth v DWP [2022] EAT 99

- This case (and the *Forstater*) case show how difficult it can be to manage conflicts between protected characteristics in the workplace
- In the *Page* case the Court of Appeal focused on the need for a service provider to have values/standards which encourage (or at least do not discourage) service users from using them. Public manifestation of certain beliefs can have that effect and so may be a proportionate means to dismiss those who express them publicly
- Connection between what the employer does (eg provider specialist health services) and how the manifestation of certain beliefs can conflict with this

Any questions?



Contact

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