

BARGAINING FOR TRANSGENDER WORKERS' RIGHTS

This factsheet contains information about the rights of transgender people at work and suggests good practice for employers and workers.

INTRODUCTION

A transgender person is someone who has a deep conviction that their gender (whether they are a man or a woman) does not conform to the sex they were assigned at birth. Most transgender people wish to change their name and personal details and live as a member of the gender with which they identify. This may involve hormone therapy and surgery. The process is referred to as 'gender reassignment' or 'transitioning'.

Up until now, people have not been able to gain legal recognition for their reassigned gender in the United Kingdom. They have remained legally the sex recorded at birth, despite living in the opposite gender, and have been unable to get their birth certificate corrected. Although it has been possible to obtain some official documents in their new identity, including passport and driving license, the lack of legal recognition has meant people have had to disclose their gender history when applying for certain jobs or seeking insurance or pensions.

However, the Gender Recognition Act 2004, which came into force on 4 April 2005, means people can now apply for legal recognition for their acquired gender. The Act also includes measures to protect people's privacy (see below in section on Records and Confidentiality).

Many transgender workers face discrimination in the workplace, both when going through the process of gender reassignment and afterwards. Following the key employment test case *P v S and Cornwall County Council [1996] IRLR 347*, the government amended the Sex Discrimination Act 1975 to cover discrimination on grounds of gender reassignment in employment and vocational training.

UNISON POLICY

UNISON believes that transgender people have the right to equal treatment, protection from discrimination and full support from the union.

Transgender members have the right not to be discriminated against by UNISON policies, practices, members or officers. Allegations of discrimination will be taken very seriously.

UNISON's rule book states as one of its aims, "to seek to ensure equality of treatment and fair representation for all members and to work for the elimination of discrimination on grounds of race, gender, sexuality, gender identity, disability, age or creed".

There are only a small number of transgender people in the UK. Many representatives will not have previous experience of advising transgender members or bargaining for equality for transgender members. It is important that the advice given is in line with UNISON's approach.

UNISON is affiliated to Press for Change. Press for Change is the political lobbying and educational organisation campaigning for civil rights and liberties for all transgender people.

DEFINITIONS

Transgender person: a person whose perception of their own gender identity does not conform to the sex they were assigned at birth.

Transsexual person: legal/medical term for someone who lives (or wishes to live) permanently in their 'new' gender.

Gender identity: the gender a person identifies with. This is not necessarily the same as the sex they were assigned at birth.

Gender dysphoria: medical diagnosis of a consistent and overwhelming desire to live in the opposite gender to that assigned at birth.

Gender reassignment: the process of transitioning from the gender assigned at birth to the gender the person identifies with. This may involve medical and surgical procedures.

Legal sex: In the past in the UK, the legal sex of someone has been defined by their birth certificate and cannot be changed. The Gender Recognition Act 2004 means people can now apply to gain recognition of their change of gender for all legal purposes.

Gender Recognition Certificate: issued by Gender Recognition Panels – signify full legal rights in acquired gender and allow the issuing of a replacement birth certificate

The Sex Discrimination (Gender Reassignment) Regulations 1999

The Sex Discrimination (Gender Reassignment) Regulations 1999 amend the Sex Discrimination Act 1975 to make it clear that it is unlawful to discriminate on grounds of gender reassignment in employment and vocational training.

The Government has published an accompanying guide to the Regulations which includes good practice for employers and workers. It is not a code of practice and has no special legal status. Nevertheless it can be referred to in employment tribunals when taking a case.

Regulations Summary:

It is unlawful to discriminate against a person for the purpose of employment (recruitment, promotion; access to benefits; selection for redundancy; vocational training; etc) on the ground that the person intends to undergo gender reassignment; or is undergoing gender reassignment; or has at some stage in the past undergone gender reassignment.

Discrimination is defined in terms of the comparative treatment of a transgender person and the treatment of "other persons" for whom no gender reassignment grounds exist.

For example, to establish whether there has been less favourable treatment of someone undergoing gender reassignment in terms of time off, the absence allowed to them should be compared with absence which is due to sickness or injury of "other persons" for whom no gender reassignment grounds exist.

Branches should ensure that transgender people are treated as being of the gender in which they live. This should be the case whether or not they have been through medical reassignment or through the formal process of acquiring a Gender Recognition Certificate. Recognition of a change of gender for employment purposes should usually be from the point at which the person begins living in their new gender.

It is unacceptable to treat a person as belonging to neither one sex nor the other, either for a period of time or for life.

Gender Recognition Act 2004

The Gender Recognition Act creates a process by which people aged over eighteen can gain full legal recognition for the gender in which they live. Applications for gender recognition are considered by Gender Recognition Panels. Once a person receives a Gender Recognition Certificate, they are legally of that gender for every purpose and have all the rights and responsibilities associated with that gender.

Panels are first considering 'fast track applications' – for people who transitioned at least six years ago – and applications from people who have already had their acquired gender recognised in one of an approved list of countries and territories. Fast track and overseas applications may be made now at <http://www.grp.gov.uk>. Application packs for the standard process will be available in July 2005. Panels will start considering these in October 2005. To make a standard application, a person will need to show that they have been living in their new gender for at least two years.

Genuine Occupational Qualification

In the vast majority of cases, the gender of a worker is of no relevance to their ability to do their job. However the Gender Reassignment Regulations allowed an exception relating to gender reassignment which corresponds to the existing categories of the Sex Discrimination Act. Some specific posts are "exempted" under the Sex Discrimination Act 1975 as amended by the Sex Discrimination (Gender Reassignment) Regulations 1999 and may be lawfully restricted to people of a particular legal sex. Examples are where the work involves conducting intimate searches, or work in a private home where reasonable objection can be shown by the employer because, for example, intimate contact is involved.

The Sex Discrimination Act is being amended to make clear that the employer must act reasonably in claiming such an exemption for a post. For example, conducting intimate searches is unlikely to be a main part of any particular post - the employer must consider whether these tasks could not be carried out by someone else.

It is important to note that the exemptions only apply to people who have not gained legal recognition for their acquired gender.

Where a member intending to undergo gender reassignment is already employed in a single sex position or environment prior to a change of social gender, it is likely to be beneficial for the member, the employer and any service users if redeployment can be negotiated.

Branches should ensure that in these circumstances, options are discussed early on in order to come to a mutually satisfactory arrangement.

Indirect Discrimination

Because until now transgender people have been unable to change their legal sex, heterosexual transgender people have been unable to marry, since legally their partner is of the same sex.

This has resulted in indirect discrimination in a range of areas, for example paternity and childcare leave, passing on pension rights and insurance policies to partners or children, general employment related benefits such as membership of clubs and admissions to events.

Branches should ensure that transgender workers are treated as the gender they identify as, irrespective of legal sex. Transgender workers should have equal rights and equal access to benefits, including equal recognition of their partner and family.

But further, UNISON believes that no one should be discriminated against on grounds of gender or marital status. All should have equal rights and access to benefits, whether married or unmarried and whether their partner is of the opposite or same sex.

All contracts and agreements should be checked for possible discrimination.

Equal Opportunities Policies.

Equal opportunities policies that refer to discrimination on grounds of sex, can be considered automatically to include discrimination against transgender people, because of the Gender Reassignment Regulations to the Sex Discrimination Act. However, unless this is spelt out in the policies, the rights of transgender people remain invisible.

Branches should make sure that where equal opportunities policies refer to discrimination on grounds of sex they specifically include discrimination on grounds of gender identity and gender reassignment.

Other policies should be checked to ensure they adequately cover transgender workers, particularly those dealing with confidentiality, harassment, pensions and insurance.

Interviews

Branches should ensure that job adverts state that applications from transgender people are welcome.

However it should not be expected that applicants and interviewees would wish to disclose transgender status as many people consider it a very private matter. Many transgender people have experienced prejudice and harassment as a result of disclosure.

There is no obligation for a transgender person to disclose their status as a condition of employment. If they choose to disclose, this cannot be a reason for not offering employment and non disclosure or subsequent disclosure is not a ground for dismissal.

Records and Confidentiality

Branches should make sure that personnel records for transgender people do not refer to a previous name, and records made prior to a change of name are updated.

Because transgender people have not been able to gain legal recognition of their “new” gender in the past, it has been necessary for some records (eg relating to pensions and insurance) to include a reference to legal sex. Access to records showing the change of name and any other details associated with the individual’s transgender status, such as records of absence for medical treatment, should be restricted to appropriate staff who “need to know” for specific reasons. “Need to know” refers to those directly involved in the administration of a process, for example the personnel officer, or the person who authorises payments into a company pension scheme.

Breaches of confidentiality should be treated in a serious manner and may amount to harassment.

The Gender Recognition Act gives anyone applying for or holding a Gender Recognition Certificate particular privacy rights. It is a criminal offence to pass on information acquired 'in the course of official duties' about someone's gender recognition, without the consent of the individual affected. 'Official duties' includes employment, trade union representation or supply of business or professional services.

UNISON representatives must be scrupulous in protecting the confidentiality of all transgender members. Some transgender members may be out at work about their gender history. This is their decision only. Being out to one person or small group of people does not necessarily mean a person wants to be out to everybody. Union records must be kept up to date and old records which refer to a previous name/gender must be destroyed (or if they must be kept and cannot be updated, their security ensured).

Redeployment and retirement

A worker undergoing gender reassignment may ask to be redeployed or retired. Any course of action should be decided according to the wishes of that member.

In large organisations, a decision to redeploy may be accommodated relatively easily, especially if the worker is able to move to another site or area. In smaller companies it may be less easy so it is important that the member feels able to stay in their current post and feels in control of decisions being made. For example, if the member does not want to stay in their current post due to harassment or lack of support from colleagues, then these problems must be addressed.

Branches should ensure that an inability to accommodate the member's choice does not become grounds for dismissal or retirement. If redeployment does take place, it may be best for it to coincide with the change of gender, so that the member starts their new post in their new gender role.

Negotiated retirement packages should be equivalent to those offered to other workers who accept early retirement.

Harassment

Employers are obliged to support and protect *all* workers from harassment by other members of the workforce and members of the public. Harassment against transgender people should be dealt with in the same way as discrimination against any other person and should incur the same penalties. Branches should ensure the harassment policy includes gender identity and gender reassignment.

Single Sex Facilities

A transgender worker should have access to "men only" or "women only" areas according to the gender in which they live permanently. The employer and worker should agree the point at which the use of facilities such as changing rooms and toilets should change from one sex to the other. An appropriate marker for using the facilities of the worker's "new" gender may be the point at which the person begins to live permanently in the gender with which they identify. It is not acceptable to insist for the long term on transgender workers using separate facilities, for example a disabled toilet. Transgender workers are entitled to expect support from their employers, including any necessary discussions and explanations with other members of the workforce or members of the public. It is the employer's responsibility to manage their attitudes.

If these practicalities are mismanaged it can cause bad feeling and hostility between colleagues.

Dress Codes

Branches should ensure employers allow flexibility in dress codes to accommodate the process of transition from one sex to the other.

Benefits at work

There are particular issues around benefits that have affected transgender people because they have previously been unable to gain full legal recognition of their “new” gender. They will continue to affect people who do not apply for gender recognition, for whatever reason.

Pensions

Everyone born after April 1955 now receives state pension at 65. Women born before 1950 can claim state pension at 60. For state pension purposes, transgender people have - until now - been regarded as the sex recorded at birth. For example, those born before April 1955 have only been able to claim state pension at the age appropriate to this, ie male to female transgender person at age 65 and female to male transgender person at 60.

Branches should ensure that employers keep confidential the reason for the individual's apparently early or late retirement.

Gender Recognition Certificates bring full gender recognition for pensions and other state benefits.

Corporate Insurance and Benefits Policies

Employers registering workers for corporate insurance and benefits policies are advised to ask their underwriters if they are required to provide information about any transgender worker's status. Some insurers automatically invalidate a policy if the transgender status of a person without a Gender Recognition Certificate is not disclosed.

Branches should ensure that the employer gains prior written consent from such a worker before disclosing information, and that the information is provided in confidence. If the employer is unaware of the workers transgender status, the obligation to disclose this passes to the worker.

The Individual Case – agreeing a process

An important factor for a member in transition from one gender to the other is how this is to be handled in the workplace - particularly that any process is agreed with them. Issues which should be considered include:

- Whether the member wants to stay in their current post or be redeployed
- The expected time scale of any medical and surgical procedures
- The expected point or phase of change of name, personal details and gender
- What time off will be required for treatment and/or possible side effects from any medication
- Whether the member wishes to inform line managers, colleagues and service users themselves, or would prefer this to be done for them
- What amendments will be required to records and systems
- Whether a transgender person is adequately covered by existing policy on issues such as confidentiality, harassment and insurance and if not, how these will be amended
- Whether training or briefing of colleagues or service users will be necessary and at what point and by whom this will be carried out

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Communicating news to other workers or service users

There is no general need or obligation to inform colleagues, service users and the public that a worker is undergoing gender reassignment. Such information is necessary only where the relationship with someone who knew the person prior to the change is to continue. It is usually good practice for employers to take responsibility for informing those who need to know but the wishes of the individual should be given priority.

Education should take place on two levels, general information about transgender people and specific information to enable people to understand the situation of the particular person involved. At the point of change of gender, it is common for transgender people to take a short time off work and return in their new name and gender role. This is often used as an opportunity to brief the appropriate people. In all cases, the legal obligations of management should be explained and the unacceptability of harassment made clear.

Branches should work with management on this process. It will be important to:

- Include sufficient information to convey the facts and satisfy people's curiosity
- Not go into too much detail
- Respect the wishes of the transgender person and their right to medical confidentiality in terms of discussing detailed personal aspects
- Pitch the information at a level and style appropriate to the audience involved
- Include details of how colleagues might seek further information
- Remember to include the name the person wishes to be known by in their new gender

Medical Treatment During Employment

Time Required

Transgender people who decide to undergo medical and surgical procedures relating to gender reassignment may require some time off work. Assessment by a qualified professional may take several months or years and appointments may involve the individual travelling long distances, and so are likely to be a day in duration each time. Following this stage there is typically a period of one or more years before the individual is accepted for surgery. The time required for this will vary greatly, from one week to around 12 weeks, depending on the nature of the surgery.

Branches should ensure adequate time off is given distinct from other "sickness leave". Workers undergoing gender reassignment would be entitled to the same sickness absence and pay as other staff but may require additional leave which may have to be specifically negotiated.

The process of gender reassignment

Diagnosis of transgender people is carried out by a specialist in this area and may take a matter of months or a period of years. Preliminary diagnosis is usually followed by hormone therapy and typically after around 6 months the person's physical appearance will begin to change. If the person has not yet started living in their new gender, they will be expected to start at around this stage. However, they may remain in their usual gender role at work for rather longer. People can continue to work throughout this period.

At some point over the next few months, the person will start to live full time as a member of their "new" gender, and their name and other records will be formally changed. From this point they should be treated as belonging to their "new" gender for employment purposes. The individual may proceed to surgery after one or two years of hormone therapy.

Capability procedures

Employers may need to be aware of the possibility of side effects from medication which may adversely effect work performance. Branches should meet with employers to discuss the possibility of the worker who is undergoing gender reassignment working reduced hours, having reduced duties or the possibility of relocation. Some employers may try to dismiss workers for lack of capability; it must be emphasised to the employer that lack of capability as a ground for dismissal is not appropriate in these circumstances.

Checklist of Negotiating Points

Branches should negotiate with employers to ensure:

- gender identity and gender reassignment are included in equal opportunities policy and practice and there is well publicised compliance with the gender reassignment regulations
- staff are trained and informed about transgender people - that harassment and discriminatory behaviour will not be tolerated
- there are clear procedures for members undergoing transition
- workers undergoing gender reassignment have paid leave from work for specialist medical appointments and for surgery
- all records are kept up to date, old records destroyed and confidentiality is practised scrupulously
- transgender people who have not acquired Gender Recognition Certificates are advised of the legal implication of their status re-pensions and other benefits.

Branch checklist

Branches should ensure

- all members are clearly informed that discrimination on grounds of gender identity and gender reassignment will not be tolerated by the union at any level
- training and information is provided to those who have a role in advising and representing members
- union records are kept up to date, old records destroyed and the highest levels of confidentiality ensured
- transgender members are given information about support groups, including our own self-organised groups.

WORKING TOGETHER

If UNISON has a picture of agreements on transgender workers rights across the country we can spread best practice in different sectors and regions. If you negotiate an agreement please send a copy to the Bargaining Support Group, 1, Mabledon Place, London, WC1H 9AJ, or e-mail bsg@unison.co.uk.

FURTHER INFORMATION

Information, practical advice and examples of good agreements are available on the UNISON Bargaining Zone – www.unison.org.uk/bargaining/zone.

Press for Change - www.pfc.org.uk - political lobbying and educational organisation which campaigns to achieve equal rights and liberties for all transgender people in the UK through legislation and social change. UNISON is affiliated.

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BM Network, London WC1N 3XX
letters@pfc.org.uk

Information on the Gender Recognition Act and Gender Recognition Panels including 'Frequently asked questions' and application forms for gender recognition www.grp.gov.uk

Gender Trust – www.gendertrust.org.uk - support for transgender women and men
PO Box 3192, Brighton BN1 3WR
Phone: 07000 790347
info@gendertrust.org.uk

FTM Network - www.ftm.org.uk - Support for transgender men.
BM Network, London WC1N 3XX

For help when you need it, call UNISON*direct*, UNISON's information and advice phone line service for members on 0845 355 0845 (voice) or 0800 0 967 968 (minicom) between 6 am and midnight, Monday to Friday and 9 am to 4 pm on Saturday.

Your Comments

UNISON welcomes comments on this Factsheet. Please either write to or email us:

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Website: www.unison.org.uk/bargaining