

# Transgendered people's rights at work

A UNISON BRIEFING

[www.unison.org.uk](http://www.unison.org.uk)

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UNISON  
the public service union

## **Transgendered people at work**

This briefing informs branches about the rights of transgendered people at work and suggests good practice for employers and employees.

### **Introduction**

A transgendered person is someone who changes his or her name and personal details and lives as a member of the sex opposite to that recorded at birth. The majority of transgendered people also undergo medical treatment, which can include hormone therapy and re-constructive surgery.

The current position in the United Kingdom is that a person remains throughout their life legally of the sex recorded at birth. For transgendered people this means that their legal status cannot be amended to reflect their current identity, despite medical treatment and/or a change of social gender. Practically this means that it is not possible to alter his or her birth certificate. It is possible however to obtain other official documents in the new identity, for example passport, driving license and National Insurance number.

Following the key employment test case *P v S and Cornwall County Council [1996] IRLR 347* (appendix 2), this anomaly is for the most part irrelevant for the purposes of employment. The government has now amended the Sex Discrimination Act 1975 to cover gender reassignment.

The amendments are a measure to prevent discrimination against transgendered people on the grounds of sex in pay and treatment in employment and vocational training. Employers who breach the Sex Discrimination Act 1975 in respect of discrimination on gender reassignment grounds will be liable in the same manner they would, for example, for discrimination against a woman on grounds of sex.

## UNISON policy

UNISON believes that transgendered people have the right to equal treatment and protection from discrimination at work.

Transgendered people also have the right not to be discriminated against by UNISON, or by its organs, members, or officers. Allegations of discrimination of this nature will be taken very seriously.

The UNISON 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, disability, age or creed'.

*P v S and Cornwall County Council* is the key case establishing the rights at work of transgendered people. Following P's case, increasing numbers of UNISON members have contacted UNISON either locally or nationally for support and advice. It is important that the advice given is in line with the approach of UNISON.

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 transgendered people. UNISON campaigns alongside Press for Change for full equality under the law for transgendered people, including the right to an amended birth certificate to reflect their new gender.

### DEFINITIONS

**Legal sex:** *the legal sex of someone is currently defined by their birth certificate and even if, for example, a person born a man becomes a woman that person is legally classed as a man.*

**Social gender:** *the social gender of someone is defined by that person. For example, a person born a man but who lives and identifies as a woman, will socially class themselves as a woman.*

## Sex Discrimination

### (Gender Reassignment) Regulations 1999

Following the ruling in *P v S and Cornwall County Council* the Government

introduced Regulations in May 1999 which means that employers will not be able to lawfully discriminate against transgendered people at work.

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

The Department for Education and Employment has published an accompanying guide to the regulations which suggests some aspects of good practice for employers and employees. It is not a code of practice and has no special legal status. Nevertheless it can be referred to in employment tribunals where appropriate.

The guidelines published by the Department for Education and Employment should be understood as applying to all areas covered by the provisions of the Sex Discrimination Act as amended by the Sex Discrimination (Gender Reassignment) Regulations 1999.

### Summary of 1999 regulations

- It is unlawful to discriminate against a person for the purpose of employment (recruitment, promotion, access to benefits, selection for redundancy, and vocational training etc) on the ground that the person intends to undergo gender reassignment, or is undergoing gender reassignment or has undergone gender reassignment.
- Discrimination is defined in terms of the comparative treatment of a transgendered person and the treatment of "other persons" for whom no gender reassignment grounds exist
- In order to establish whether there has been less favourable treatment, the absence allowed to a person undergoing gender reassignment should be compared with absence which is due to sickness or injury of "other persons" for whom no gender reassignment grounds exist
- It may not be unlawful to discriminate on grounds of gender reassignment where a persons' sex is a general occupational qualification.

### **Genuine occupational qualification**

In the vast majority of cases, the gender of an employee is of no relevance to their ability to do their job. However the Regulations establish 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 are only open to a single sex. This covers situations such as where the job involves the holder conducting intimate searches in accordance with statutory powers such as the Police and Criminal Evidence Act; or where the job involves the holder working in a private home and reasonable objection can be shown by the employer because of, for example, intimate contact which may be involved. With this qualification in mind, branches should ensure that transgendered people are treated as being of the gender they identify with rather than their legal sex. The point of change of social gender is generally the appropriate marker for status in the “new” gender. It is unacceptable to treat a person as belonging to neither one sex nor the other for employment purposes, either for a period of time or for life.

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 transgendered people remain legally of the sex recorded at birth, it means heterosexual transgendered people who would otherwise marry their partners are unable to do so, since legally their partner is of the same sex. This may result 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 transgendered employees should be treated as being, for the purposes of employment, of the gender they identify as, ignoring legal sex. This would enable employers to offer equal rights to their partners and families. UNISON Policy is that no one should be discriminated against, 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, which refer to discrimination on grounds of sex, can now be considered automatically to include discrimination on grounds of gender reassignment.

*Branches should ensure that where equal opportunities policies refer to discrimination on grounds of sex they should also include discrimination on grounds of gender reassignment. This will comply with the case of P v S and Cornwall County Council.*

Other policies should be checked to ensure they would adequately cover a transgendered person, particularly those dealing with confidentiality, harassment, pensions and insurance.

### **Interviews**

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

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

There is no obligation for a transgendered person to disclose their status as a condition of employment. If they choose to disclose, this is not in itself a reason for not offering employment and non disclosure or subsequent disclosure is not a ground for dismissal. Any questions relating to gender, for example on monitoring forms, should ask for “gender” and not “sex”.

### **Records and confidentiality**

*Branches should ensure that current personnel records for transgendered people should not*

*refer to a previous name, and records made prior to a change of name should be updated.*

Because of the legal status of transgendered people, it may be necessary for some records (e.g with regard to pensions and insurance) to retain a reference to legal sex. Access to records showing the change of name and any other details associated with the individual's transgendered 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 the same serious manner as disclosure of personal details of any other member of staff.

Transgendered people in employment may choose voluntarily to disclose at a secondary level, for example, answering an equal opportunities questionnaire, or asking for support from the union. Again strict confidentiality should be observed.

### **Redeployment and retirement**

An employee undergoing gender reassignment may ask to be redeployed or retired. Any course of action should be decided according to the wishes of the member concerned.

In large companies and organisations, a decision to redeploy may be accommodated relatively easily, especially if the employee 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 members 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 members choice does not become grounds for dismissal or retirement. If redeployment does take place, it is best timed to coincide with the change of social 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 employees who accept early retirement.

### **Harassment**

Employers are obliged to support and protect all employees from harassment by other members of the workforce and members of the public. Harassment against transgendered 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 reassignment.*

### **Single sex facilities**

The employer and employee 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 employee's "new" sex may, for example, be the point at which the individual begins to present permanently in the gender to which they identify. It is not acceptable to insist for the long term on transgendered employees using separate facilities, for example a disabled toilet. Transgendered employees 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. Similarly a transgendered employee should be granted access to "men only" or "women only" areas according to the gender in which they present permanently.

*Branches should ensure that any arrangements are satisfactory for both the member and the gender being adopted. 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 which affect transgendered people.

### **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, transgendered people can only be regarded as the sex recorded at birth. For example, those born before April 1955 can only claim state pension at the age appropriate to this, ie male to female transgendered person at age 65 and female to male transgendered person at 60.

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

### **Benefits in kind**

Employers registering staff for corporate insurance and benefit policies are advised to inform their underwriters if they know of a transgendered employee's status. Some insurers automatically invalidate a policy if a person's transgendered status is not disclosed.

Branches should ensure that the employer gains prior written consent from the employee before disclosing the information.

Where an employee is unaware of an employee's transgendered status, the obligation to disclose falls upon the employee, who could also be held liable in the event of an incident for which no valid insurance cover existed.

### **The individual case—agreeing a process**

An important factor for a member in transition from one sex to the other is how this is to be handled in the workplace and 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 social gender
- What time off will be required for medical 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 transgendered 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

### **Communicating news to other employees or service users**

There is no general need or obligation to inform colleagues, service users and the public that an employee is undergoing gender reassignment. Such information is necessary only where the relationship with someone who knew the person prior to the change of status 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 transgendered people and specific information to enable people to understand the situation of the particular person involved. At the point of change of social gender, it is common for transgendered 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 ensure that management:

- Include sufficient information to convey the facts and satisfy people's curiosity
- Do not to go into too much detail
- Respect the wishes of the transgendered 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 how colleagues might seek further information
- Remember to include the name the transgendered person wishes to be known by in their new gender role

## **Medical treatment during employment**

### **Time required**

Transgendered 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 reconstructive surgery. The time required for this will vary greatly, from one week to around 12 weeks, depending on the nature of the surgery undertaken.

Branches should ensure adequate time off is given distinct from other “sickness leave”. Employees 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 medical process of gender reassignment**

Diagnosis of transgendered 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 followed by hormone therapy and typically after around 6 months the physical appearance of the individual will begin to change. If an individual had not yet changed social gender they will be expected to start to do so at around this stage, though they may maintain their usual gender role at work for rather longer. An employee can continue to work throughout this period

At some point over the next few months, the individual will start to live full time as a member of their “new” sex, and their name and other records will be formally changed. This is the point of change of social gender, after which they should for employment purposes be treated as belonging to their “new” sex. The individual may proceed to reconstructive 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 employee who is undergoing gender reassignment, working reduced hours, having reduced duties or the possibility of relocation. Some employers may try to dismiss employees for lack of capability and it must therefore be emphasised to the employer that lack of capability as a ground for dismissal is not appropriate in these circumstances.

## **Checklist**

### **Negotiating points**

Where equal opportunities exist, branches should ensure they refer to discrimination on grounds of sex and on grounds of gender reassignment

Raise all issues in this guide with your employer and negotiate the following:

- Staff are trained and informed about the rights of transgendered people and that harassment and discriminatory behaviour will not be tolerated
- That clear procedures exist for members undergoing transition
- That transgendered people are advised of the legal implication of their status in regard to pensions and other benefits

### **Branch checklist**

- Branches should ensure that members are clearly informed that discrimination on grounds of sex or gender will not be tolerated by the union at any level
- Training and information provided to those who have a role in advising and representing members

## Appendix 1 - Definitions

<b>Gender identity</b>	The gender a person identifies with. It does not necessarily conform with a persons legal sex
<b>Sex</b>	Biologically based and can't be changed legally under current UK law
<b>Sexuality</b>	That part of a persons identity which encompasses their experience of sexual attraction and activity
<b>Sexual orientation</b>	The identification of an individual on the basis of whether he or she is sexually attracted to people of the other sex or same sex or both sexes.
<b>Transsexual</b>	A person who feels a consistent and overwhelming desire to 'transition' and fulfil their life as a member of the opposite gender. This term is generally owned by 'medicine' as it implies surgery has taken place. This term does not imply any sexual orientation
<b>Transgendered</b>	The term transgendered encompasses a wide spectrum, from people who use gendered clothing in order to resemble the sex they feel they belong to, to those who undergo medical treatment to achieve a physical change in their sex. This term does not imply any sexual orientation
<b>Transvestite</b>	A person who dressed in the clothing of the opposite sex. Generally these persons do not alter their body. This term does not imply any sexual orientation
<b>Gender reassignment</b>	Medical process which may include hormones and surgery with the aim of transitioning into the opposite gender

## Appendix 2 - Case Law:

The key case *Corbett v Corbett* [1970] 2WLR 1306 HC established that for the purposes of marriage an individual could not alter their gender from that which was declared at birth.

The most important case to date is *P v S and Cornwall County Council* [1996] IRLR 347.

### **P v S and Cornwall County Council**

P was employed from 1 April 1991 as the general manager of a unit of an educational establishment, operated by the County Council. The respondent S was the head of the establishment. The applicant was taken on as a male employee, but in April 1992 she informed S that she proposed to undergo gender reassignment. This would include the one year period in which a patient planning to undergo an operation for gender reassignment lives in the proposed gender.

During the summer, P took sick leave for initial surgical treatment. However at the beginning of September, she was given three months notice of dismissal. She was not permitted to return from sick leave in her female gender role.

P complained that she had been discriminated against on grounds of sex. An industrial tribunal did not accept the employers submission that the true reason for dismissal was redundancy. The tribunal held that the reason was P's proposal to undergo gender reassignment. The tribunal took the view that the UK Sex Discrimination Act did not apply in these circumstances, in that "within the provisions of the domestic legislation woman means a female and man means a male".

However the tribunal considered that the wording of the European Union Equal Treatment Directive could be wider on this point than the Sex Discrimination Act. The case was referred to the European Court of Justice who found that discrimination on grounds of a gender reassignment contravened the EC Equal Treatment Directive which states that there is to be "no discrimination whatsoever on grounds of sex, either directly or indirectly", article 2(1).

### **Chessington World of Adventure Ltd v R [1997] IRLR 556**

Following dismissal by her employers following gender reassignment, R took her case to an employment tribunal, complaining of discrimination on grounds of sex.

The tribunal found that R has been subjected to continued harassment because of her transgender status. The tribunal applied the decision of the European Court of Justice in the case of *P v S and Cornwall County Council* and held that the discrimination for reasons related to gender reassignment breaches the Sex Discrimination Act 1975.

The employers appealed. The principle issue at stake was whether the Sex Discrimination Act 1975 could be interpreted in accordance with the decision of the European Court in *P v S and Cornwall County Council*, where the complainant relies upon unfavourable treatment following notice of intention to undergo gender reassignment.

*The appeals tribunal ruled that the Sex Discrimination Act 1975 could be interpreted in accordance with the decision of the European Court (in P v S and Cornwall County Council) and therefore dismissed the employers appeal.*

### **Contacts**

General information and assistance relating to employment rights of transgendered people:

#### **Press for Change**

BM Network, London WC1N 3XX

Email: [letters@pfc.org.uk](mailto:letters@pfc.org.uk)

Website: [www.pfc.org.uk](http://www.pfc.org.uk)

Press for change is a political lobbying and educational organisation which campaigns to achieve equal rights and liberties for all transgendered people in the UK through legislation and social change. UNISON is affiliated.

Support for transgendered women:

#### **Gender Trust** (registered charity No. 803607)

BM Gentrust London WC1N 3XX

Email: [gentrust@mistral.co.uk](mailto:gentrust@mistral.co.uk)

Website: [www3.mistral.co.uk/gentrust/](http://www3.mistral.co.uk/gentrust/)

Support for transgendered men:

#### **FTM Network**

BM Network, London WC1N 3XX

Website: [ourworld.compuserve.com/homepages/ftmnet/](http://ourworld.compuserve.com/homepages/ftmnet/)

#### **Equal Opportunities Commission**

Overseas House, Quay Street, Manchester M3 3HN

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