

Gender Recognition

In employment



Overview

The Gender Recognition Act 2004 came into effect on 4th April 2005. The Act provides, for the first time in UK law, full legal recognition of transsexual people in their acquired gender. The Act means that people who have taken decisive steps to live fully and permanently in their acquired gender are afforded all the same rights and responsibilities as apply to people born into that gender.

Previously, UK law treated transsexuals as belonging to the sex of their birth, regardless of the fact that individuals may have lived for many years in the opposite gender. Even where they had undergone complete gender reassignment treatment and surgical procedures, this did not change their position in law. However, in the case of *A v Chief Constable of West Yorkshire Police* [2004], the House of Lords finally ruled that UK law should recognise transsexuals as belonging to their acquired gender. The Act enables transsexual people to apply for 'gender recognition'. Following recognition, transsexual people have the right to marry in their acquired gender and obtain a new birth certificate stating their new sex.

Procedure

In order to qualify for full legal recognition in your acquired gender, you must apply to the Gender Recognition Panel, showing that you:

- Have or have had gender dysphoria or
- Have had gender reassignment surgery and
- Have lived in the acquired gender for two years prior to making the application
- Intend to live permanently in the acquired gender and
- That you are at least 18 years old.

Following a successful application, you will be issued with a Gender Recognition Certificate and afforded all the rights and responsibilities appropriate to your new gender, including access to state and occupational pensions, as well as employment rights. The certificate does not have a retrospective effect and these rights will only become effective as of the date of the certificate. This may have implications for your pension.

Pensions

Before the Gender Recognition Act came into force, the European Court of Justice made an important ruling regarding retirement ages. It said that it would be unlawful to require a male to female transsexual to reach the age of 65 to obtain benefits, rather than 60 as would be the case for a person born female. The Act does not specify how pensions should be calculated once you change your gender.

Generally speaking, you must be treated as though you have always been your new gender. Therefore once you have your Gender Recognition Certificate, you should be entitled to the pension of your acquired gender.

Sex discrimination

The Sex Discrimination Act 1975 (SDA) makes it unlawful for an employer to discriminate against an employee or job applicant on the grounds of that person's sex or gender reassignment, or because they are married or in a civil partnership. This applies equally to both men and women.

You are entitled to be treated in precisely the same way as other employees of your new gender. Importantly, this includes access to facilities, so it would be unlawful for your employer to insist that you do not use the facilities intended for people of your new gender or to give you your own, separate facilities. It is interesting to note that the new gender status may apply to individuals who have not undergone surgery nor intend to do so in the future but have obtained a Gender Recognition Certificate – so you could be protected from sex discrimination if you do not intend to undergo gender reassignment surgery or if you are going through the process of gender reassignment.

Lawful discrimination – The SDA contains very limited exceptions where it is lawful to discriminate. These include where the employer can show that a Genuine Occupational Qualification (GOQ) requires that the job is done by someone of a particular gender.

Once you have been issued with a Gender Recognition Certificate under the Gender Recognition Act 2004, it is unlawful to discriminate against you because of your new gender in the same way as it is unlawful to discriminate against anyone of that sex. This would mean that a female to male transsexual would only be lawfully discriminated against where it would also be lawful to discriminate against a man, such as restricting the job involving intimate body searching of women only to women applicants.

It is interesting to consider what may happen where an individual employed under a GOQ changes their gender and obtains a Gender Recognition Certificate. In these circumstances, it might be possible for an employer lawfully to dismiss the individual on the grounds that they no longer possess the GOQ of being a particular gender.

For more information on sex discrimination, see our factsheet 'Sex Discrimination – Sex Discrimination in employment and your legal rights', part of the Employment Law series.

Victimisation and harassment

The SDA also provides individuals with protection from victimisation for asserting a right or making a complaint about discrimination. Similarly, just as individuals suffering from harassment due to their sex, sexuality or race are afforded legal protection, the SDA protects transsexuals from harassment.

For more information on victimisation and harassment, please see our factsheet 'Sex Discrimination – Sex Discrimination in employment and your legal rights', part of the Employment Law series.

Disability discrimination

Disability discrimination – If you are a transsexual you could be protected by the Disability Discrimination Act 1995 if you have been diagnosed as suffering from gender dysphoria (or a similar recognised gender identity disorder). The condition must be permanent, or likely to persist for more than 12 months and have a substantial adverse effect on your ability to carry out day-to-day activities. If, for example, a transsexual employee is dismissed because of long term absence on medical grounds whilst undergoing gender reassignment, it may be possible to claim disability discrimination. If you take time off work for gender reassignment surgery or treatment, you should be treated no less favourably than if you were taking sick leave.

For more information on disability discrimination, please see our factsheet '[Disability Discrimination – The Disability Discrimination Act 1995 & your legal rights](#)', part of the *Employment Law series*.

Questionnaires: getting the facts together

If you want to pursue a claim for sex or disability discrimination, you can serve a questionnaire on your employer any time before lodging a claim at an Employment Tribunal or within 21 days (or 28 days for disability discrimination) from the date proceedings were lodged. The questionnaire can be used to ask your employer useful questions relating to the complaint. If your employer fails to reply to the questionnaire, or makes evasive replies, the tribunal may draw an inference of unlawful discrimination.

Time limits

Most claims for discrimination will need to be brought in the employment tribunal within 3 months less one day of the treatment you are complaining about. Where that treatment amounts to a continuing course of conduct by your employer, the claim may be brought within three months less one day from the end of the conduct. Please note that in most cases, this time limit will no longer be extended where an internal grievance is lodged first as the rules relating to this have recently changed. You may also need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded from the ACAS website). This is aimed at assisting parties to resolve disputes within the workplace. If your claim is successful but the tribunal considers that you have failed to comply with the Code, your compensation could be reduced by up to 25%. (There are also penalties on the employer if they do not comply with the Code). Please note that the time limit for bringing a claim is not affected by compliance with the ACAS Code. If your claim relates to matters that happened before 6th April 2009, or if it relates to matters that occurred ongoing through 6th April 2009 and you have lodged a grievance or tribunal claim about it, then different rules may apply in relation to grievance procedures and time limits. These issues can be complicated and you should take prompt legal advice if you think you may have a claim.

Where you have been dismissed and your dismissal is potentially discriminatory, a claim must be brought in the employment tribunal within 3 months less one day of the date of dismissal. Please note that this time limit will no longer be extended even where an internal appeal procedure is ongoing as the rules relating to this have recently changed in relation to most cases.

(Where your employer has disciplined or dismissed you, or taken steps in compliance with the old statutory disciplinary procedures, prior to 6th April 2009 then the old rules will apply).

Again, you will also need to follow the ACAS Code of Practice or any compensation you are awarded could be reduced by up to 25%. (There are also penalties on the employer if they do not comply with the Code). Please note that the time limit for bringing a claim is not affected by compliance with the ACAS Code. Again, please note that time limits can be complicated and that you should take prompt legal advice if you think you may have a claim.

Remedies

If the tribunal finds that you have been unlawfully discriminated against, the tribunal may grant whichever of the following remedies it considers just and equitable:

- A declaration on the rights of the parties
- A recommendation that the employer take a particular course of action
- Re-engagement or reinstatement if the individual has been dismissed; and
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial employment, injury to feelings and in some cases injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by your employer's discrimination.


The legislation in practice


There are some aspects of the legislation that may seem disagreeable, such as the requirement to appear before a panel and the apparent need to 'medicalise' the individual, rather than accepting their status on a purely social level. As with any new legislation, the practical effectiveness of the new Act will depend on its interpretation by individuals, employers and, ultimately, by the courts. In all cases of dispute, it is advisable to seek legal advice at an early stage.

Contact Us

Please feel free to discuss your own position and concerns.
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This factsheet is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more details or information about the matters referred to in this factsheet please seek independent formal legal advice. This information was correct at time of going to press October 2009.