

Gender Recognition

In Employment



Overview

The Gender Recognition Act 2004 provides full legal recognition of transsexual people in their acquired gender status. 'The Act' means that people who have taken decisive steps to change their gender role permanently are afforded all the same rights and responsibilities as other citizens in their new gender.

This Act enables transsexual people to establish, 'for all purposes' their 'new' gender status by obtaining a Gender Recognition Certificate ('GRC'). This gives transsexual people the right to marry according to their acquired gender status and, where their birth was originally registered in the UK, to obtain a new birth certificate.

Procedure for the Gender Recognition Certificate

In order to qualify for full legal recognition of your status in your post-transition gender, you must supply evidence to the Gender Recognition Panel, showing that you:

- Have or have had gender dysphoria; and
- Have lived in the new gender role for two years prior to making the application; and
- Intend to live permanently in the new gender role; and
- That you are at least 18 years old; and
- That you are not in a pre-existing marriage or civil partnership.

Pre-existing marriages or civil partnerships must be annulled before a GRC is awarded. If you are in such a relationship, but fulfil the other criteria, you may obtain an interim GRC; this interim GRC lapses after 6 months, during which time it may be used to annul the marriage or civil partnership.

Genital surgery is not a requirement in order to obtain a GRC. Following a successful application, you will be issued with a GRC and afforded all the rights and responsibilities appropriate to your new gender status, including access to state and occupational pensions, as well as employment rights. The certificate does not have retrospective effect and these rights will only become effective as of the date of the certificate.

"The key provisions of the Equality Act 2010 have been in force since 1st October 2010"



Discrimination

As of 1st October 2010, discrimination, victimisation and harassment of individuals because of gender reassignment will be prohibited by the Equality Act 2010 ('the Equality Act') both in employment and in the provision of goods, facilities, services and access to facilities. For acts prior to 1st October 2010 the Sex Discrimination Act 1975 ('SDA') applies.

The protected characteristic of gender reassignment applies 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.

You are protected from the moment that you disclose your intention to undergo gender reassignment.

You are also now protected if you are perceived to have had, or are undergoing, gender reassignment or you are associated with someone who has, or is undergoing, gender reassignment.

Direct discrimination - It is unlawful to treat a person less favourably because of gender reassignment. In order to succeed in a claim of direct discrimination, you must show:

- That you have been treated less favourably because of gender reassignment;
- That you can compare your treatment to someone (actual or hypothetical) with similar characteristics to yourself except for gender reassignment; and
- That you were subject to disadvantage as a result of that treatment.

There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious.

The Equality Act requires that 'like must be compared with like', so where, for example, a trans-man has been refused a job because of his gender reassignment, his comparator could be a non-transgender person who is in all other respects in the same position as him and was not refused the job. An individual can point to a hypothetical comparator.

If, for example a decision is made to dismiss, or not to recruit you or to provide services to you because you are transgender, or are perceived to be transgender, or have transgender friends, then the employer or service provider may be in breach of the Equality Act. It may also be unlawful for your employer or service provider to insist that you do not use the facilities intended for people of your new gender status or to give you your own, separate facilities.

Indirect discrimination – The Equality Act provides that a person also discriminates if an arrangement or feature associated with the employment or the provision of goods, facilities, services and access to facilities (technically known as a provision, criterion or practice ('PCP')) is applied or would be applied equally to all employees or persons, but it

- Puts or would put a transgender group at a particular disadvantage when compared with another group;
- Puts or would put you at that disadvantage; and
- Is not a proportionate means of achieving a legitimate aim.

The PCP must have been applied universally, for example a PCP requiring that all 'male' persons use the male-only designated toilets. Something like this could have a detrimental impact on a transgender member of staff. This definition extends to practices which tend to discriminate.

If an employer's or service provider's policies or practices disadvantage transgender persons in this way, they will be found to be unlawful unless the employer or service provider can show that there is a good business reason for the policies, and that they do not go any further than necessary.

Discriminatory practices which can be justified in this way are permitted. Many indirect discrimination claims turn on the question of whether the policies or practices are justifiable.

It is also unlawful to discriminate against a person on the grounds of sexual orientation, including where discrimination is based on the perceived, as opposed to actual sexual orientation characteristics.

For further information please see our factsheets 'Sexual Orientation Discrimination at Work' and 'Sexual Orientation Discrimination in Goods, Facilities and Services'.

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Victimisation

It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination under the Equality Act or previously under the Sex Discrimination Act for asserting a right. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a 'protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under the Equality Act or the SDA; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under the Equality Act or the SDA; or

- Doing anything in relation to the discriminator or any other person under or by reference to the Equality Act or the SDA; or
- Making allegations that the discriminator or any other person has committed an act which contravenes the Equality Act or the SDA. This would include raising a grievance or complaint of discrimination.

So for example, if you have made a complaint about transgender discrimination and are later treated unfavourably for doing so, you may be covered by the Equality Act or SDA. A protected act must be done in good faith.

Harassment

Harassment related to gender reassignment is a form of discrimination. It is defined as being:

- Unwanted conduct related to gender reassignment that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An essential characteristic of the behaviour is that it is unwanted. In considering the effect of the conduct, the Tribunal or Court will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

From 1st October 2010 under the Equality Act, employees who experience harassment related to gender reassignment at the hands of a third party in the course of employment can claim against the employer if it can be shown that (i) the employer knew that the employee had been subjected to harassment on more than 2 occasions and (ii) the employer failed to take reasonable action to prevent a further act of harassment by the same or another third party. Third parties can include customers or contractors.

A claim can also be brought if harassment occurs because of an association with a transgender person, or if someone is perceived to be transgender.

Post-termination discrimination

Once an employee has left, the employer may still be liable if it discriminates against the ex-employee because they are transgender (or because they have done a protected act) and the discriminatory act arises out of and is closely connected to the former employment relationship.

For example, if an employer refuses to write a reference for a former member of staff because that person is transgender, this would be unlawful.

Occupational requirements

'The Act' contains very limited exceptions where it is lawful to discriminate. These include where the employer can show that an Occupational Requirement (OR) requires that the job is done by someone of a particular gender (for example, a rape crisis centre might be able to justify not employing a trans-woman). 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 status in the same way as it is unlawful to discriminate against anyone else of that gender. This would mean that a trans-man (female to male transsexual person) 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.

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.

Equality Act 2010

The key provisions of the Equality Act 2010 have been in force since 1st October 2010.

Under the Equality Act, transsexual employees are afforded special protection for time-off for gender reassignment treatments. You should be treated no less favourably than if you were taking sick leave.

Disability Discrimination provisions under the Equality Act may also be relevant under certain circumstances.

For more information on disability discrimination, see our factsheets 'Disability Discrimination' and 'Access All Areas'.

Questionnaires: getting the facts together

If you want to pursue a claim for discrimination on the grounds of gender status, you can serve a questionnaire on your employer or service provider any time before lodging a claim at an Employment Tribunal/Court or within 28 days from the date proceedings were lodged. The questionnaire can be used to ask your employer or service provider useful questions relating to the complaint. If your employer or the service provider fails to reply to the questionnaire promptly or at all, or gives evasive replies, this may amount to victimisation and the Employment Tribunal or Court may also draw an inference of unlawful discrimination.

Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, the acts provide that the Claimant is required to establish clear facts which could enable the Tribunal or Court to conclude that discrimination has occurred. It is then for the Respondent/Defendant to provide evidence for the reason why the Claimant was treated in that way. In the absence of an adequate non-gender status based explanation from the Respondent/Defendant, the Employment Tribunal or Court must draw an inference of discrimination.

Where an employer has failed to comply with relevant statutory Codes of Practice, the Employment Tribunal may also draw inferences from this failure. For example, an employer may have failed to follow the Codes of Practice in relation to the way in which they have investigated the employee's grievance or recruited an individual to a post.

Remedies

If the Employment Tribunal finds that you have been unlawfully discriminated against, it 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 succeeded in an unfair dismissal claim; 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.

In addition to being able to grant a declaration on the rights of the parties, an award for injury to feelings and compensation for losses arising from the discrimination, the Court may grant any other equitable remedies such as an injunction forcing a service provider to comply with the Equality Act.

Time limits and the correct legislation

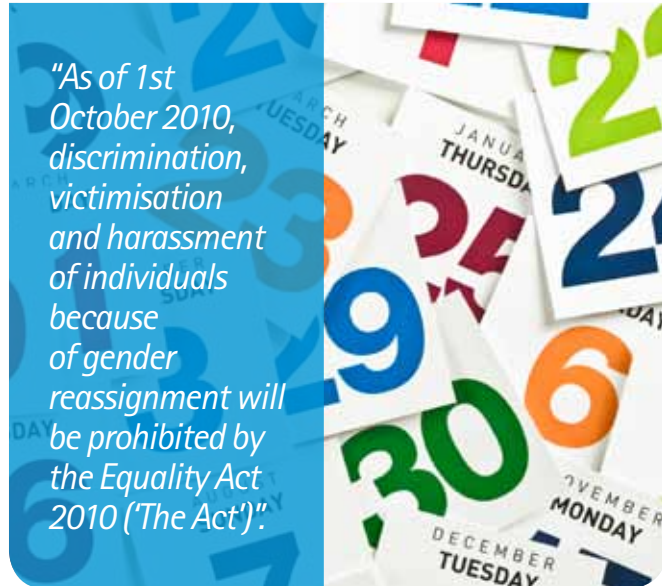
Most employment claims will need to be brought in the Employment Tribunal within three months less one day of the treatment you are complaining about. Where that treatment amounts to a continuing course of conduct by your employer, the claim may be brought within three months less one day from the end of the conduct. In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend the time limits if it is just and equitable to do so. However, this power should not be relied on.

You will 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 unreasonably 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.

Claims in respect of the provision of goods, facilities, services and access to facilities should be made in the County Court within six months less a day of the treatment you are complaining about. As with employment claims, where there is a continuing course of conduct by the service provider, the claim may be brought within six months less a day from the end of the conduct.


If all or part of your claim arose before 1st October 2010, you should bring claims under the SDA. The Equality Act will be used in all cases where the claim arose after 1st October 2010 in its entirety. Where the discrimination occurs prior to and after 1st October 2010 please seek advice as your claims may need to be brought under both the SDA and the Equality Act if the continuing act is not clear. You should seek legal advice if you are unsure about which legislation applies to your claims.




Contact Us

Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:

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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 formal legal advice. This information was correct at time of going to press October 2010.