

Introduction

The findings from the Human Rights Commission Transgender Inquiry confirmed that trans¹ people face significant discrimination in day to day life. The majority of submissions to the inquiry that described some form of discrimination focused on the area of employment².

In order to reduce discrimination and marginalisation experienced by trans people in the workplace, the Department of Labour has developed this fact sheet.

This fact sheet is designed to provide information about legal and employment rights, as well as different workplace issues that trans people may encounter in their working lives.

The Department of Labour has developed another factsheet aimed at employers of trans people, which provides information about legal and employment rights of trans employees, as well as best practice advice for employers of trans employees who are transitioning or intending to transition.

Can an employer ask me if I am trans?

In most cases your existing or prospective employer should not ask you if you are trans, because in most employment situations, your gender identity has no bearing on your ability to perform the job.

There are some employment situations where it is lawful to treat people differently because of their sex. In some situations, for reasons of authenticity, being of a particular sex is a genuine occupational qualification for the position or employment.

There are also other situations where different treatment on the basis of a person's sex is permitted.³ However, an employer cannot treat people differently because of their sex if the employer is able to adjust some of the duties of the position (without unreasonable disruption to the employer's activities) so that some other employee carries out the particular duties in question.

¹ 'Trans' is a generic term that includes people who refer to themselves, among other terms, as transsexual, male-to-female, female-to-male, transgender, whakawahine, fa'afafine and tangata ira tane.

² Human Rights Commission *"To Be Who I Am – Report of the Inquiry into Discrimination Experienced by Transgender People"*, <http://www.hrc.co.nz/transgenderinquiry>

³ Such as: domestic employment in a private household; counselling on highly personal matters such as sexual matters or the prevention of violence; situations where the position needs to be held by one sex to preserve reasonable standards of privacy; and situations where the nature or location of the employment makes it impracticable for the employee not to live in premises provided by the employer and it is not reasonable for the employer to provide separate sleeping accommodation or premises for each sex.

Can an employer ask me about previous names?

If an employer requires a list of previous names from all applicants as part of the employment process, then an employer can ask you to provide previous name details. Such details can only be used for a legitimate purpose, such as verifying identity.

A prospective employer cannot ask you to provide previous name details, if such information is not required from other applicants. This may be grounds for a complaint of discrimination on the basis of sex under the Human Rights Act.

Can an employer dismiss or refuse to hire me because I am trans?

In most circumstances an employer cannot dismiss or refuse to hire you just because you are trans. In some specific circumstances,⁴ an employer can lawfully treat job applicants or employees differently on the basis of sex. However, an employer cannot treat people differently because of their sex if the employer is able to adjust some of the duties of the position (without unreasonable disruption to the employer's activities) so that some other employee carries out the duties in question.

An employer cannot refuse to hire you just because you "won't fit in" or unilaterally move you away from frontline work just because you are trans. This may provide grounds for a complaint of discrimination on the basis of sex under the Human Rights Act or, in the case of an employee, a personal grievance under the Employment Relations Act.

If you are dismissed just because you are trans, or forced to resign, or if your working conditions are specifically altered in order to force you to resign, you may raise a personal grievance under the Employment Relations Act or make a complaint under the Human Rights Act.

What legal protections apply to trans people?

The Human Rights Act 1993 prohibits discrimination on the grounds of sex. The same prohibition is also in the Employment Relations Act 2000. A Crown Law opinion issued in 2006, citing decisions by Canadian, United Kingdom and European courts, found that the prohibition of discrimination on the grounds of sex in the Human Rights Act, includes a prohibition of discrimination on the grounds of gender identity. However, there are some employment situations where it is lawful to treat people differently because of their sex.

The Human Rights Act applies to almost all aspects of employment including job advertisements, application forms, interviews and job offers. It also applies to unpaid workers and independent contractors.

⁴ See footnote 3.

Discrimination in employment can involve:

- refusal or failure to offer an employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion or transfer as other employees with the same or similar qualifications, experience or skills working in the same or similar circumstances
- dismissal or detriment by the employer or employer's representative in circumstances in which other employees doing the same kind of work are not, or would not be, treated in such a way
- retirement or being made to retire or resign by the employer.

The Employment Relations Act contains several provisions that apply when an employment relationship has been established. One of which is a duty of good faith, which includes employers and employees being responsive and communicative. Both employers and employees have an obligation to communicate openly and try to deal with any issues that affect their employment relationship.

An employer may not pressure you to resign or create unfavourable working conditions in order to make you resign. This is known as a “constructive dismissal” and may be the basis for raising a personal grievance under the Employment Relations Act. It may also be the basis for making a complaint under the Human Rights Act if the employer’s actions involved unlawful discrimination against you.

An employer cannot change the terms and conditions of your employment agreement without your consent, unless there are genuine reasons to do so. If an employer wishes to change the terms and conditions of employment, they must act in good faith and follow a fair process. The employer should demonstrate that there is a genuine reason, such as a business reason, for altering your terms and conditions, and should give you a reasonable opportunity to voice your opinion and any concerns. The employer must also consider and respond to any concerns you raise.

If you believe that the terms or conditions of your employment have been altered to your disadvantage by some unjustifiable action by the employer, you may raise a personal grievance under the Employment Relations Act. Furthermore, if an employer alters the terms and conditions of your employment to your detriment, or affords you less favourable terms and conditions as a result of discrimination, this may be grounds for a complaint under the Human Rights Act, or a personal grievance under the Employment Relations Act.

Transitioning at work

If you are intending to transition at work you should meet with your employer to discuss how to best manage any employment issues around your transition. You may wish to ask a union delegate or someone else to come along and support you in this meeting. You should discuss with your employer what steps you are intending to take within the workplace and what this means for other staff and

possibly clients. It is good practice to develop these steps into a written action plan, so that you and your employer are able to agree in advance on how to manage the employment aspects of your transition. It might include identifying what information is relevant (and that personal medical details do not fall into that category), who needs to be told, and how and when they will be informed. It can be useful to set out a timeline including any dates when you will start using a new name, wearing work clothes that better match your gender identity and using the workplace facilities such as restrooms that are appropriate to your gender identity.

Name and Records

Your employer should ask you what name and pronoun you wish to use. If you wish to formally change these details in the workplace, your employer should have clear procedures for such details to be changed on all workplace records, including any past records.

Dress Code

You should have the ability to dress to match your full time gender expression and gender identity, which should be similar to people of the same gender performing the same work. Your employer should avoid having a dress code that is based on gender stereotypes and should enforce any dress code consistently.

Use of the Facilities

You should be able to use facilities that match your gender identity, for example: trans women should be able to use a women's toilet, and trans men should be able to use a men's toilet. While a unisex toilet is a positive way to ensure facilities are inclusive, you should not be excluded from using the appropriate single sex toilet.

Medical

Any leave that you request for medical reasons should be treated by your employer the same as any other medically necessary appointments for any other employee. There may be special provisions in an employment agreement that clarify sickness or medical leave, or access to an Employee Assistance Programme. By law, after six months with an employer, an employee is entitled to five days' paid sick leave during the next 12 months of employment.

Providing a Reference

You can ask your employer to give you a reference. Your employer should refer to you by your new name and pronouns. Unless you give permission for your employer to do so, your employer must not disclose your previous name or that you are trans. If a question is asked that relates to any previous names, the employer should verify that such information is required for all other applicants and is used for a legitimate purpose. If your employer is satisfied that such

information is sought for a legitimate purpose, it is good practice for the employer to only confirm your old name if asked directly, and not to disclose it voluntarily.

Definitions

Sex – A person's biological make-up, defined usually as either 'male' or 'female' and including indeterminate sex.

Gender – The social and cultural construction of what it means to be a man or a woman, including roles, expectations and behaviour.

Gender Identity – A person's internal, deeply felt sense of being male or female (or something other or in between). A person's gender identity may or may not correspond with their sex.

Gender Expression – How someone expresses their sense of masculinity and/or femininity externally.

Transgender – A person whose gender identity is different from their physical sex at birth.

Transsexual - A person who has changed, or is in the process of changing, their physical sex to conform to their gender identity.

Transitioning - Steps taken by trans people to live in their gender identity. These often involve medical treatment to change one's sex through hormone therapy and may involve gender reassignment/realignment surgeries.

FtM/trans man – Female to Male – someone born with a female body who has a male gender identity.

MtF/trans woman – Male to Female – someone born with a male body who has a female gender identity.

Fa'afafine, Fakaleti, Akava'ine, Mahu, Vaka sa lewa lewa, Rae rae, Fafafine – Pasifika terms describing someone born with a male body who does not have a male gender identity and often, but not always, lives as a woman. These terms are best understood within their cultural context.

Whakawahine – a Maori term describing someone born with a male body who has a female gender identity.

Tangata ira tane – a Maori term describing someone born with a female body who has a male gender identity.

Further information

Department of Labour Contact Centre – 0800 20 90 20 – For general enquiries about employment, pay, holidays and leave.

- Employment Relations website – www.ers.dol.dovt.nz

Human Rights Commission InfoLine – 0800 496 877 – For general enquiries.

- Action and Resources on the Transgender Inquiry
www.hrc.co.nz/transgenderinquiry
- A-Z of Pre-Employment Guide -
http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/31-Jul-2008_21-34-42_A-Z_Pre-employment_Guide.pdf

New Zealand Council of Trade Unions - <http://union.org.nz/>

- CTU Out @ Work network - <http://union.org.nz/outatwork>

Business New Zealand - <http://www.businessnz.org.nz/>

EEO Trust - <http://www.eeotrust.org.nz/>

Disclaimer

The content of this document covers common problems. It will not answer every question and should not be used as a substitute for legislation or legal advice.

The Department of Labour takes no responsibility for the results of any actions taken on the basis of this information, or for any errors or omissions.