



Gender identity in the workplace - what do the courts say?

By **Dónall Breen** - 26 September 2019

This article is part of our diversity series on 'Gender Identity in the Workplace'. To learn more about how to create inclusive policies and practices at work, [click here](#), or to read about what guidance is available, [click here](#).

There is surprisingly little case law on the topic despite the European Court of Justice (ECJ) deciding back in 1996 that the scope of sex equality extended to discrimination against transsexuals in *P v S and Cornwall County Council*:

- A UK trans woman was dismissed from her post after informing her employers that she was undergoing gender reassignment.
- She took her employers to the Employment Tribunal. The Tribunal agreed that she had been dismissed because of her gender reassignment, but was unable to rule that she had been discriminated against because (at that time) the Sex Discrimination Act offered little protection to transsexual people.
- The Tribunal asked the ECJ to decide whether European law precluded dismissal of a transsexual for a reason related to his or her gender reassignment. The ECJ ruled it did.
- The Tribunal was then able to rule in P's favour and P received compensation for discrimination.

It was the first piece of case law, anywhere in the world, which prevented discrimination in employment because someone is transsexual. In UK, the law was subsequently changed so that now transgender discrimination is explicitly unlawful under the provisions of the Equality Act 2010. Since 1996 there have only been a handful of decisions on the topic, with the only two key judgments in the last year.

In *Souza v Primark Stores Ltd.* an employer was found vicariously liable, and ordered to pay £47,000 in compensation, for the acts of

its employees in subjecting Ms de Souza to direct discrimination and harassment based on her gender reassignment. The claimant worked as a retail assistant and had been dressing as a woman for a number of years, going by the name 'Alexandra'. She was told she had to use her passport name for pay purposes (Alexander), but she could use whatever name she wished on her name badge. However, a number of incidents occurred over the following months:

- During her induction training, she was given a name badge with the name 'Alexander'. She spoke to HR, who did change the name on the badge, but made no record of the incident.
- On the day-to-day personnel system, her name was changed from 'Alexandra' to 'Alexander' and her title was altered from 'Miss' to 'Mr'.
- There were a series of derogatory remarks regarding her status as a trans woman e.g. that she had a 'man's voice'.
- One of her supervisors called her Alexander in front of colleagues and continued to do so even when corrected.
- When she once complained, she was told to calm down and return to her till and not say anything else about the incident.

In its remarks, the Employment Tribunal was critical of the employer's failure to have a proper system which protected employees' identity and maintained the confidentiality of transgender employees. The Tribunal concluded that only one or two people in HR and payroll should have been familiar with the employee's transgender status. They recommended that Primark adopt a written policy regarding transgender employees, which included how to maintain confidentiality if so desired by the employee. They also suggested that Primark alter the materials used in training to cover transgender discrimination.

The latest case hot off the press is *O'Donnell v Time Newspapers Ltd*: in which a trans woman lost her case of discrimination after being made redundant from the Scottish office of the newspaper.

- The claimant worked as a night editor but was made redundant after the office in Scotland was closed and she turned down an offer to relocate to London.
- After her redundancy, Ms O'Donnell sued her former employer for discrimination, harassment, victimisation and unfair dismissal, and claimed there was a toxic environment for trans people at the newspaper.
- After 19 days of hearings at the Employment Tribunal in Edinburgh, the judge cleared the Times of all the allegations against it.
- In the judgment, the Tribunal concluded the claimant's redundancy was not as a result of being a trans woman.
- It was found there was insufficient evidence of Ms O'Donnell's claims that there was a culture of discrimination and there was no evidence of dishonesty on the part of the paper's staff who gave evidence.

Finally, there was one other case that has been heard but at the time of writing there has been no published judgment. In this case a Christian doctor was sacked after saying he could not refer to "any 6ft tall bearded man as madam". The doctor told his employer that using transgender pronouns was "a ritual denial of an obvious truth". The doctor claims the Department for Work and Pensions discriminated against his religion by suspending him after he said he would not use gender pronouns for what he called someone's "chosen" sex. Although this case doesn't actually turn on transgender discrimination (the doctor is claiming he was fired on the basis of religion and belief), it demonstrates the tension between the various 'protected characteristics' and the judgment will (hopefully) be a helpful indicator in how employers can try and resolve these tensions in their own workplace.

Although the case law is limited in this area, it does provide some useful guidance for employers:

1. Equal opportunities policies should deal with transgender issues and discrimination;
2. Training of employees on transgender discrimination will help stop the problem before it starts;
3. Have procedures in place for your HR department if you do have a transgender person on your staff. Don't expect people will know what the right thing to do is;
4. Be calm and sensible if your company is accused of transgender discrimination. Investigate the issue and keep the employee informed of progress.

The fact there has only been two reported Tribunal decisions in this area may mask a larger issue looming. First, it doesn't reflect the innumerable cases that never make it to a hearing, especially on such a sensitive topic. Second, the past isn't always the best predictor of the future. The recent firestorm in the US about transgender/gender-neutral bathrooms shows that the issue may be gaining momentum. Perhaps the bulk of the cases are still to come.