



Transgender people at work

Introduction

The findings from the Human Rights Commission Inquiry into Discrimination Experienced by Transgender People in 2008, confirmed that trans 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 employment. A trans person has the right to be free of unlawful discrimination in the workplace.

This guide 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 and best practice advice for employers of trans employees who are transitioning or intending to transition.

Definitions

Sex – A person’s biological and physical makeup, 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 wherever they find themselves on the gender continuum). 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.

Trans People - People who refer to themselves, among other terms, as transsexual, male-to-female, female-to-male, transgender, whakawahine, fa’afafine or tangata ira tane.

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, Fakaleiti, 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.

Legal protections that 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 released 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. This means that trans people are protected under the Human Rights Act from discrimination on the grounds of gender identity.

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.

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; and
- 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 these 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 cannot pressure an employee to resign or create unfavourable working conditions in order to make that person 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.

An employer cannot change the terms and conditions of the employment agreement without the employees consent. 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 the terms and conditions, and should



provide a reasonable opportunity to the employee to voice their opinion and any concerns. The employer must also consider and respond to any concerns raised by the employee.

If the employee believes that the terms or conditions of their employment have been altered to their disadvantage by some unjustifiable action by the employer, they may raise a personal grievance under the Employment Relations Act. Furthermore, if an employer alters the terms and conditions of employment to the employees detriment, or affords 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.

There are some employment situations where it is lawful to treat people differently because of their sex. However, the Human Rights Act contains a general qualification, which states that 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.

Where it is legal for an employer to treat people differently because of their sex, the employer should treat a trans woman (MtF) the same as other women, and a trans man (FtM) the same as other men.

Lawful gender discrimination

In most cases an existing or prospective employer should not ask a potential employee if they are trans because in most employment situations gender identity has no bearing on the ability to perform a job.

There are some specific employment situations where it is legal to employ only a woman or a man for a particular position. In these situations, some trans people may need to provide evidence about their sex.

Some employment situations require an individual of a particular sex as a qualification for the role. These positions include:

- domestic employment in a private household
- counselling on highly personal matters such as sexual matters or the prevention of violence
- positions that need 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.

Under the Human Rights Act it is unlawful to ask questions of (or about) a job applicant that indicate an intention to discriminate on one of the grounds covered by the Act. If an employee considers that an employer has acted in this way, they may make a complaint under the Human Rights Act.



Previous names

Some jobs may require an applicant to pass credit, criminal or police checks before they can commence employment. If an employer requires a list of previous names from all applicants as part of the employment process, then an employer can ask the prospective employee to provide previous name details. Such details can only be used for a legitimate purpose, such as verifying identity for background checks that the position may require.

A prospective employer cannot require a potential employee 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.

Dismissal or refusal to hire

In most circumstances an employer cannot dismiss or refuse to hire someone just because they are trans. In some specific employment situations, an employer can lawfully treat job applicants or employees differently on the basis of sex (for example by having men-only and women-only positions).

A person's gender identity and expression is not a lifestyle choice, it is simply a part of who they are. A trans person is not being deceptive or dishonest if they do not disclose their gender identity. They are simply refraining from sharing very personal information, often because of fear that they will be discriminated against.

An employer cannot refuse to hire a trans person just because "they won't fit in" or unilaterally move them away from frontline work just because they 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.

Dismissing an employee just because they are trans, or pressuring them to resign by changing their working conditions may be grounds for a personal grievance under the Employment Relations Act (including for a new employee on a trial period of up to 90-days) or making a complaint under the Human Rights Act.

Unlawful discrimination

If an employee has been unlawfully discriminated against before they have commenced employment, they can make a complaint under the Human Rights Act to the Human Rights Commission.

If an employee has been unlawfully discriminated against after they commence employment, they may raise a personal grievance under the Employment Relations Act or make a complaint under the Human Rights Act; however they cannot pursue both.

Employment relationship problem resolution system

If an employment relationship problem arises it is important that the employee and employer talk to each other to discuss any issues and try to resolve the problem.

To help resolve the problem, the employee or employer may contact the Ministry of Business, Innovation & Employment Contact Centre on 0800 20 90 20. The Contact Centre provides information on employment issues.

If an employee believes they have a personal grievance, they must raise the grievance with their employer within 90 days of the action or the date they became aware of it, whichever is the later.

If the problem is not resolved, the parties may request mediation. Mediation is an informal



process where parties, with the assistance of a mediator, talk through the issues and reach a solution that they are both happy with. It is a free, fast and confidential service. The mediation services can be reached through the Ministry's Contact Centre.

If the problem is still not resolved, the dispute can be referred to the Employment Relations Authority for a decision. The Authority is an investigative body that looks into the facts and makes decisions based on merits of the case, not on legal technicalities. There is an application fee to pay when lodging an application with the Employment Relations Authority.

Please see the Further Information section of this guide for contact information.

Human Rights Commission disputes resolution service

The Human Rights Commission provides a dispute resolution service to reach fair and effective resolutions at the earliest possible opportunity. The dispute resolution process is private and confidential to those involved. This means that statements made as part of mediation cannot be used for any other purpose. The process is impartial and considers both sides of the dispute. You do not need legal representation when you take part in this process, but you have the right to legal advice if you choose. A mediator will assist throughout the process by giving information about the Human Rights Act, examples of relevant settlements and possible solutions.

If mediation doesn't resolve the dispute, you may take the dispute to the Director of the Office of Human Rights Proceedings or directly to the Human Rights Review Tribunal.

For more information please contact the Human Rights Commission on 0800 4 YOUR RIGHTS (0800 496 877), email:

infoline@hrc.co.nz, or on their website www.hrc.co.nz.

Transitioning at work

Gender transitioning is a unique and personal experience. It is important that the employer and employee meet and discuss what steps, if any, the employer should take. The employee may wish to bring a union delegate or other person along for support.

Employees should discuss with their employer what steps they 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 the employer and employee are able to agree in advance on how to manage any employment issues around the employee's 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 discuss a possible timeline including any dates when the employee would like to be:

- known by their new name;
- referred to by new pronouns;
- able to adopt a workplace dress code matching their gender identity;
- able to use facilities such as restrooms and changing rooms matching their gender identity; and
- able to take time off work for medical treatment relating to their transition, if necessary.

It is important that the employer sets a good example to other employees and is supportive and reassuring during the employee's transition. This will help the employee to carry on with their job as usual.



Name and Records

The employer should ask what name and pronoun the employee wishes to use. If the employee wishes to formally change these details in the workplace, the employer should have clear procedures for such details to be changed on all workplace records (e.g. identification cards, email, phone lists, payroll), including any past records.

Dress Code

The employee should be able to adopt the style of dress that matches their full-time gender presentation and gender identity, and this should be similar to people of the same gender performing the same work. The employer should avoid having a dress code that is based on gender stereotypes and should enforce any dress code consistently.

Use of the Facilities

The use of facilities that match their gender identity is particularly important for trans people. It is part of the 'Real Life Experience' that is taken into account when health professionals assess whether someone is ready to medically transition. An employee should be able to use facilities that match their 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 (and may be more comfortable for a trans person early in their transition), a trans employee should not be excluded from using the appropriate single sex toilet.

If a trans employee prefers to use a single sex toilet, an employer may wish to include this in the agreed action plan, including a process for informing other staff. It may help to affirm that all staff, including trans employees, have the right to expect privacy and safety when using these facilities.

Medical

Not all trans people will transition medically, or through surgery. The immediate medical needs of an employee who is intending to transition are most likely to be for counselling appointments or to see a medical specialist. Any leave should be treated by the employer the same as any other medically necessary appointments for any other employees. 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 and each subsequent 12 month period.

Providing a Reference

If an employer has been asked to give a reference for a trans employee, they should refer to them by their new name and pronoun. Unless the employee allows the employer to do so, the employer must not disclose the employee's previous name or that they are trans. If a question that relates to any previous names of the employee is asked, the employer should verify that such information is required for all other applicants and will be used for a legitimate purpose. If the employer is satisfied that such information is sought for a legitimate purpose, it is good practice for the employer to only confirm the old name if asked directly, and not to disclose it voluntarily.

Transitioning and other employees

The employer should discuss with the employee how to inform other employees. The transitioning employee should decide how much and what information other employees will be told. It is important that other employees are informed of the situation and the employer's expectations of them.



Properly informing other employees will not only dispel any misunderstandings or rumour, but will also discourage or prevent inappropriate behaviour, such as harassment or bullying, from other employees. Employers have a legal responsibility to ensure that employees are not subject to stress through workplace bullying.

If an employee has any concerns, it is important that the employer resolves them fairly and quickly. The employer should emphasise that any workplace policies relating to trans employees are not special rights or privileges. The employer should explain that such policies ensure that all employees are treated with respect, and are not subject to harassment or discrimination, regardless of sex, age, ethnicity or gender identity or sexual orientation.

Concerns from customers

In most cases customers will not consider interacting with a trans employee to be an issue, and may not even notice. If a customer raises concerns, the employer should assure them that the employee is a valuable member of their staff and that their gender identity or expression has absolutely no bearing on their ability to perform the job.

Further information

Ministry of Business, Innovation & Employment

- For enquiries about employment, pay, holidays and leave call the Contact Centre on 0800 20 90 20
- Or visit the Employment Relations webpages www.employment.govt.nz/er

Employment Relations Authority

- www.era.govt.nz

Human Rights Commission

- Infoline 0800 496 877
- Action and Resources on the Transgender
- Inquiry www.hrc.co.nz/transgenderinquiry
- Getting a Job: A-Z Pre-Employment Guidelines www.hrc.co.nz/employmentguidelines

New Zealand Council of Trade Unions

- CTU Out @ Work Network www.union.org.nz/outatwork

Business New Zealand

- www.businessnz.org.nz

Agender New Zealand

- www.agender.org.nz

EEO Trust

- www.eeotrust.org.nz