



Current Legal Protections for Transgender Employees

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There are certainly times – rare sunny days and, more frequently, grey, rainy mornings – when we’d all rather not be at work. Yet, few of us would deny that, while providing an important stream of income, work is also integral to the wellbeing and dignity of the individual and can contribute greatly to a person’s sense of purpose and belonging.

It is deeply troubling, therefore, to witness the extent to which trans people experience workplace discrimination and harassment. International research reveals disproportionately high levels of unemployment and underemployment amongst trans people, often triggered by gender transition. Many trans people have reported losing their jobs, being demoted, or having to change jobs due to gender transition. Such precarity around employment is all the more pronounced given the costs associated with gender reassignment and access to health insurance, both of which require a regular income source.

In work, trans people experience high levels of harassment, abuse and discrimination. Notably, the *Engendered Penalties* study (2007) highlighted that work was the top sphere of life in which people undergoing gender reassignment experienced discrimination and harassment. In the same study, 42% of those who had not transitioned reported that they had not done so due to concerns around employment.

How has Irish law responded to this phenomenon? Notably the Constitution implicitly protects the right to earn a livelihood without unfair discrimination on grounds of sex (*Murtagh Properties v Cleary* (1973)). The Employment Equality Act 1998, moreover, makes it unlawful to discriminate in employment on nine named grounds, including gender. The Unfair Dismissals Act 1977 allows a person to sue where dismissed from work for reasons that are not objectively reasonable or fair.

While gender identity is not explicitly addressed in either Act, it is clear that a person who is treated differently in employment on account of gender

reassignment is protected by EU law. The European Court of Justice in *P v S and Cornwall County Council* (1996) ruled that workplace discrimination against people who are transitioning or have transitioned gender is deemed to be unlawful under EU laws targeting gender discrimination. The Court noted that gender discrimination arose not only where people are treated differently because they were of one sex rather than the other, but also where people suffer discrimination "...arising...from the gender reassignment of the person concerned." The court thus concluded that:

"Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard."

The Court has extended this ruling to discrimination in the context of pension entitlements. It is also unlawful, moreover, when supplying goods or services to discriminate against those who are undergoing or have undergone gender reassignment.

Because European Union Law prevails over Irish law, the gender ground in the 1998 Act must be read as applying to people who are planning to undergo or have undergone gender reassignment. It is arguable also that dismissal on the grounds of gender reassignment would be treated as 'unfair' for the purpose of the 1977 Act. What this means is that a person who is transitioning or has transitioned cannot suffer adverse consequences at work because of this fact. In principle, this should also mean that anti-harassment measures will apply to people who are transitioning or who have transitioned.

"It is also possible to claim that a transgender person has been discriminated against on grounds of disability as well as gender if the employer does not make reasonable efforts to facilitate and support the person's transition to their preferred gender, including allowing the employee to dress as and be treated as member of the preferred gender in the workplace. The net effect is that the employer is required to make reasonable efforts to allow the transgender employee to make as smooth a transition as is reasonably possible. In *Hannon v First Direct Logistics* (2011) the Equality Tribunal ruled that a transgender woman who was transitioning from male to female was entitled to "a workplace that recognised her right to dress and be identified as a female." The employer's general failure to facilitate her transition was found to breach the Employment Equality Acts on both the grounds of gender and disability."

Nonetheless, a number of deficiencies remain.

First, the protection currently afforded by EU law applies only to those who have undergone or are contemplating gender reassignment. This excludes a category of transgender people who do not wish to transition, but who nonetheless experience discrimination on the basis of their gender expression or perceived 'transgression' of gender norms. Some commentators have suggested that there is scope in EU law to extend protection to these categories, though as the law currently stands, protection applies only in relation to gender reassignment.

Even in relation to those who are transitioning or have transitioned, there is no clear guidance on what, for this purpose, constitutes 'gender reassignment'. Does it require, for instance, that a party has undergone surgical or hormonal intervention? All of the litigants in the EU cases were post-operative, though notably the court made no reference to their surgical status. It is possible that the EU courts would take a broad view of what constitutes 'gender reassignment', such that it might include those who have not undergone medical intervention. Notably, the Equality Act 2010 in England and Wales affords protection on the ground of gender reassignment in a manner that appears not to require a physiological change of gender attributes. Nonetheless, there is at least some doubt as to whether the scope of legal protection in Irish law extends beyond those who have taken some medical steps to change their physical sex.

Finally, although some protection is offered by EU law, the protection is *not explicitly addressed* in Irish legislation. Public and civil society bodies have done an excellent job highlighting the implicit protections for people who are transitioning or who have transitioned. Yet, while there are significant advantages in being embraced by the gender ground (which attracts very robust protection), a key difficulty with Irish legislation is that it does not explicitly name even gender reassignment as a protected ground. While the gender ground must be read as including gender reassignment, this is not explicitly evident from a review of the legislation: one needs to look to EU case law to realise the scope of protection. As such, the risk arises that the existing protection for trans people – limited as it is – will be consigned to a footnote in discussions of gender equality.

It is thus vital that equality legislation is amended to embrace comprehensively the full scope of gender identity and gender expression. While there are certainly advantages in affording such protection under the broad umbrella of 'gender', it is essential also that protection for all trans people is *explicitly* offered and explicitly named in Irish equality legislation. This would serve as a powerful signal to employers, fellow employees and providers of goods and services that trans people are entitled to be treated with dignity, collegiality and respect in the workplace and in society generally.

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