

# APSCo Update on Legal & Compliance Issues

19 May 2022 **NEW**

## Gender critical beliefs and transgender employees

Last year the decision in [Forstater v CGD Europe and others](#) that Ms Forstater's gender critical belief was a philosophical belief which qualified for protection under the [Equality Act 2010](#) generated lots of press attention. Something which might have been lost in the reporting though was the fact that the Employment Appeal Tribunal (EAT) made it clear that it was not expressing any view of the merits of either side of the transgender debate. Although the decision may seem like a contentious one, it does not mean that trans persons do not have protection against discrimination and harassment, nor that those with gender-critical beliefs can "misgender" trans persons with impunity.

### Current litigation

The issue remains alive and well in 2022. The EAT recently heard an appeal in [Mackereth v Department for Work and Pensions](#) against an employment tribunal's decision that a Christian doctor's belief that God only created males and females and that a person can't choose their gender was incompatible with human dignity and conflicted with the fundamental rights of others. Interestingly, following the decision in *Mackereth* there was a conflicting tribunal view in [Higgs v Farmor's School](#) that a Christian employee's beliefs that gender cannot be fluid and that an individual cannot change their biological sex or gender were capable of being protected beliefs under the Equality Act. This has also been appealed so it will be interesting to see if a consensus is reached on whether such beliefs are capable of protection as was found in *Forstater*.

Meanwhile we haven't heard the last word on *Forstater*. As the preliminary question in that case of whether Ms Forstater's belief was protected has now been determined, it's down to the tribunal to decide whether her employer's actions amounted to discrimination against her (she was a visiting fellow of a not-for-profit think tank focussing on international development and her fellowship was not renewed).

So, while tribunals will be busy considering the legal ramifications of gender critical beliefs, what about the practicalities for employers who have transgender employees, or who need to provide support for those going through gender reassignment?

### Supporting transitioning employees

The first thing to note is that there's guidance out there to help! Back in 2015, the Government Equalities Office (GEO) published, ['The recruitment and retention of transgender staff – guidance for employers'](#). There's also an independent research report, ['Supporting trans employees in the workplace'](#) which was published by [Acas](#) in 2017 which provides some useful practical suggestions for employers.

Key issues for managers at an early stage of the transitioning process are to, first of all, listen, show support and discuss levels of confidentiality. Advice should always be taken from HR, and there should be an understanding that everyone is different; some may prefer to keep the matter as private as possible, and some may be planning a medical intervention, while others may prefer no intervention or surgery.

It will be essential to agree a plan of the steps to be taken before, during and after the employee's transition (there is a useful template included in the GEO guidance). The plan should be updated and developed, and

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review meetings should be scheduled at an agreed frequency. There should also be an agreement about where the plan and any meeting notes are kept, and who has access.

## Practical considerations

There will be a number of practical considerations to take into account.

### Timing

What will you need to change in relation to records and systems (for instance payroll, NI details, and photographs and biographies on the organisation's website or intranet)?

Communication with other employees will be important. The individual transitioning should be free to consider what they want, perhaps a verbal communication at a team meeting, an electronic communication or a more discrete one to one approach. You should ensure that colleagues can ask questions and managers should set a tone of inclusion and respect. Issues to cover with the individual's colleagues should include how to address them, how to support them, and how to deal with any questions that may come from outside the team without breaching confidentiality.

### Facilities

The trans person should be free to select the facilities appropriate to the gender in which they present. One potential solution is to offer gender-neutral toilets and changing facilities.

### Absences

If the individual is absent from work for medical reasons associated with the transition process, these absences should be recorded but not used in relation to any absence management process. You should also consider whether there is a need for short-term job changes, and how to communicate the information about the employee's gender transition with customers or clients.

### Records

Make sure that any agreement in relation to information and records has been fulfilled, and that old data doesn't emerge from HR systems to reveal the employee's previous gender identity. Once the employee has transitioned, they will then describe themselves as a man or woman, and you must make sure that you do the same.

Gender reassignment and any information relating to an individual's gender history will constitute special category data which can only be processed for certain specified reasons. It is a strict liability criminal offence for a person who has acquired in an official capacity protected information regarding an individual's gender identity, to disclose that information to any other person.

It's also worth noting that a trans person is not obliged to inform their employer of their gender change, although it may be that they will choose to do so in order to ensure that their gender history is clearly established to be protected information.

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## Pension and insurance arrangements

Financial services organisations will have systems in place to manage data stored about trans contributors, and you should ensure that any information is only shared on a "need to know" basis.

Just because an employee has transitioned it doesn't mean that they no longer require support. Sometimes transition results in personal or family relationships breaking down temporarily or permanently and you should be aware of this and make sure that the workplace can offer a place of stability during difficult times.

## Next steps - Managing transgender staff

- Develop a plan of steps to be taken before, during and after the employee's transition.
- Keep communicating and be flexible in your approach; adapt to the individual circumstances, don't make assumptions and listen to the employee.
- Consider the use of facilities such as toilets, showers and changing rooms.
- Talk to transitioning employees about how they want what is happening to them to be communicated to other staff members, customers and clients.
- Implement any necessary changes to employee records and systems and ensure that you are compliant with your data protection obligations.
- Discount any absence related to the transition process when operating any absence management process.
- Be prepared to continue offering support if needed once the transition process has ended.

Please contact [legalhelpdesk@apsco.org](mailto:legalhelpdesk@apsco.org) should you have further queries in relation to Transgender Awareness.

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