

**Transgender Persons in the Workplace:
International Solutions for South Africa**

by

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ABSTRACT

This dissertation focuses on transgender persons and the accommodation and treatment of transgender persons in the workplace. Society has a broad understanding of transgender persons, who form part of a vulnerable group in society and in the workplace. This dissertation explains what a transgender is, showing that they have a gender identity that is different from his/her assigned sex at birth. A transgender then has to transition into their intended sex. This is done through sex re-assignment surgery or hormonal treatment.

The number of transgender persons throughout the world and in South Africa are on the rise. The transgender unit at the Groot Schuur Hospital in the Cape has limited resources and are now under great pressure.

In the workplace, transgender persons experience various problems such as being the target of homophobic jokes or having their property damaged. This dissertation will focus on four serious problems being: their accommodation, restroom facilities, same-sex harassment and dismissal.

It then looks at what is the current position in South African law and the viewpoint of the court regarding the protection and dismissals of transgender persons in the workplace.

It then provides solutions from foreign jurisdictions and companies to solve these problems which were mentioned above. These solutions should be implemented by the South African employer to prevent further problems from arising and to fully accommodate the transgender in the workplace.

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CHAPTER 1 - INTRODUCTION

1.1 Background and problem statement

We are more often hearing the term “Transgender”. We see transgender persons on our televisions, on the series that we follow, be it on Netflix or E! News¹ and from this we have a broad understanding of them, however, the majority of us have minimum knowledge on them and what they face or undergo on a daily basis let alone in the workplace.²

One’s employment is very important, thus labour law has been described as a “dimension of life” as it deals with work and how people engage in it. Work provides status and esteem to those who are engaged in it.³ It is said that the first object of transaction in an employment relationship is not a commodity, but it is the human being and one of the main goals of labour law is to fight for and ensure human dignity.⁴ From this we can clearly see that labour law has evolved. There is now an expansion of protection for employees and the Constitutional principles of equality, fairness and dignity are afforded to all involved.

In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁵, the Constitutional Court afforded a wide interpretation to the term “sexual orientation” and included transgender persons. From this case we see that the court accepted transgender persons and made provision for them.

South Africa has come a long way in dealing with the needs of transgender people and is considered as the most progressive country in the world, regarding this. However, although South Africa symbolises a democratic transition and the main focus has been on transforming away from our apartheid past, less attention or focus has been paid to the role of social movements in the transition process. Despite the Constitutional provisions and advancements in labour law protection, transgender persons not only suffer at the hands of society in general but also at their workplaces.

¹<https://www.thegayuk.com/best-transgender-movies-on-netflix> accessed (11-05-2018).

²<https://www.personneltoday.com/hr/six-ways-to-be-more-inclusive-of-transgender-people-in-the-workplace> accessed (12-05-2018).

³Van Niekerk et al *Law @ work* (2015) 3.

⁴Davidof et al *The idea of labour law* (2011) 44.

⁵*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).

They are marginalised in their workplace and this renders them very vulnerable to the response of their employers and co-workers.⁶ We look at very recent examples which show how transgender persons are not fully accepted.

We look at Caster Semenya, the 800m world champion. Semenya is not a transgender, however after every win the question is always asked, whether she really is a woman? Since her first race to date, she is still not fully accepted in both the athletic and social world. Semenya is now said to challenge the IAAF's latest female eligibility rules at the Court of Arbitration for Sports. The regulations are said to come into effect in November 2018 and would aim at regulating woman who produce testosterone naturally above five nanomoles per litre.⁷ It is evident that Semenya has been marginalised by society and we can see that transgender people fall within the same category and have the same stigma surrounding them as Semenya does.

We look at the news regarding Scarlett Johansson and her withdrawal from the movie "Rub & Tug" after she faced backlash by transgender actors as she wanted to take on the role of a transgender man. Johansson said that she withdrew due to ethical questions being asked regarding her casting. She said that "actors raised the issue that she is taking away acting opportunities from members of a marginalized community being the transgender community." She also said that "transgender actors are underrepresented and that L.G.B.T characters dropped 40 percent in 2017 since the previous year, with no representation of transgender characters in any major studio release."⁸

Another example is Felicity Huffman who acted in a movie called "Transamerica" and when interviewed she said, "I understand the sentiment that a trans actor should play a trans role and I think transgender people have been marginalized for a long time."⁹

If we look to the workplace, it is safe to say that females do not have it easy in breaking through the proverbial glass ceiling which is created by a predominately masculine world of work and there are various barriers, a female must break through when trying

⁶Smit and Viviers *Vulnerable employees* (2017) 50.

⁷<https://www.iol.co.za/sport/athletics/caster-semenya-to-challenge-the-iaafs-rules> accessed (15-10-2018).

⁸<https://www.nytimes.com/2018/movies/scarlett-johansson-rub-and-tug-transgender> accessed (16-10-2018).

⁹<https://www.huffingtonpost.com/2014/09/29/felicity-huffman-transgender> accessed (16-10-2018).

to enter the working world¹⁰. Similarly, a transgender has to break down various barriers when trying to enter the workplace and must find his/her voice and stand point going forward.

I am of the view that the transgender community is on the rise and I personally feel that more transgender people will “come out” thus creating uncertainty amongst employers and co-workers in the near future. As they “come out” employers and co-workers may not know how to approach, deal with, treat or accommodate them. The office set-up and facilities may also not be accommodating to the transgender. To date there is a limited number of transgender cases in South African labour law, thus making it an interesting topic to research as we can clearly see from the above examples that transgender persons are marginalised in various aspects of life, hence are vulnerable and marginalised in the working world as well. Stemming from this, the manner in which they treated by their employers and co-workers is of a great concern and results in them being unfairly discriminated in the workplace.

Flowing from the above problem statement this dissertation will firstly, examine and explain what a transgender is. Further this dissertation will look at the increase of the transgender community as well as the position of the transgender persons in the new world of work. It will deal with the main issues which are of utmost importance in order to assist, protect and accommodate the transgender in the workplace. It then focuses on four major problems that the transgender experiences in the workplace being: their accommodation, restroom facilities, same- sex harassment and dismissal.

This dissertation will then turn your focus to South African law, to see if our law is adequately protecting transgender persons or allowing them to be victims of discrimination in the workplace. Further it will look at the most recent legal developments and updates in South Africa regarding these various problems and will pose solutions (from foreign jurisdictions and companies) that should be implemented by South African employers, to prevent and solve problems experienced by transgender persons in the workplace, thus offering them a safe working environment and paving the road of equality in the workplace for future transgender people in employment.

¹⁰Smit “Labour law, the queen bee syndrome and workplace bullying a contribution to the shattering of at least one glass ceiling for female employees” 2016 *ILJ* 1-6.

Research questions

Q1 Are transgender persons in South Africa adequately accommodated in the workplace?

Q2 Does South African law offer sufficient protection and opportunities for transgender persons?

1.2 Research methodology

My primary research is analytical and comparative, investigating the current situation in the workplace for transgender employees and exploring the various difficulties that the transgender employee experiences at work. I further look at international standards and practices of more progressive countries in this regard i.e. The United Kingdom and India to pose solutions to the South African employer.

CHAPTER 2 - WHAT IS TRANSGENDER?

2.1 Introduction

Transgender people form a part of the LGBT movement which stands for: lesbian, gay, bisexual and transgender.¹¹ The term “Transgender” is an umbrella term, which covers in the broadest sense anyone whose identity or behaviour which falls outside of the stereotypical gender norms. The term includes transsexuals, intersexual, transvestites, transgenderists and those who identify themselves as “gender queer”.¹² A transgender has a gender identity being an internal, deeply felt sense of being male or female that is different from that of his or her assigned sex at birth. For example, a transgender girl is a girl whose assigned birth sex was male but who now understands herself to be a female.¹³

In order to understand transgender, one needs to look at the gender identity or the core gender of that person. This refers to a person’s psychological identification as being masculine or feminine. For most people their gender identity corresponds with their birth sex and their physical body characteristics. However, this is not the case for transgender persons. Transgender persons begin to understand or express their true gender identity at different stages of their lives and many transgender persons then go for medical treatments and surgeries to change their physical bodies in order to live more easily in the gender that matches their core self. The term “transition” is used to describe the process and the time period when a transgender person starts publicly living in line with his/her true gender identity. Transsexuals are people who completely transition from one sex to another and live their lives in their intended sex.¹⁴

Every person’s gender identity is not fixed as exclusively male or female as some people have a gender identity that is fluid and there are many people whose gender

¹¹<https://en.oxforddictionaries.com> definition lgbt accessed (13-08-2018).

¹²Edmonds “Breaking open the system: a multi-party analysis of gender transitions as an effective industrial relations process” 2011 *Windsor Review of Legal and Social Issues* 156.

¹³Marksamer, Spade and Arkles “A place of respect- a guide for group care facilities serving transgender and gender non-conforming youth” 2011 6.

¹⁴*Ibid* 9.

expression (their appearance, looks and behaviour) crosses genders or has aspects of that of both masculinity or femininity.¹⁵

2.2 Medical advancement, treatment and therapy

A notable change occurred in 2012 when, “gender identity disorder” was declassified as a mental disorder and rather categorized as “gender dysphoria” which is a recognised medical condition.¹⁶

This condition is identified, when a person’s psyche does not match their anatomy, and this condition can be characterised by the following conditions: A strong and persistent cross gender identification, which is the desire to be the other sex and the continuous or persistent discomfort about one’s birth sex or the sense of inappropriateness in the gender role of that sex. This medical condition can only be cured by undertaking a gradual transition from the assigned birth sex to the persons intended sex which is often called the target sex. Transsexuals spend a period of time, where they live all aspects of their lives as the target sex. During this time the transsexual will not only dress as the intended sex but will also alter his appearance through voice training and hormone replacement therapy to become as close as he or she can to the intended sex as possible.¹⁷

The World Professional Association for Transgender Health (WPATH) is a professional association of health care professionals who specialize in transgender health care. They perform sex re-assignment surgeries and transitions which is medically needed for many transgender people as it leads to: improved mental health, alleviated feelings of self-hate, success in employment and a reduced risk in suicide attempts. Medical experts agree that transition-related treatments for transgender persons are safe and effective. They have adopted a statement saying that these

¹⁵Marksamer, Spade and Arkles “A place of respect- a guide for group care facilities serving transgender and gender non-conforming youth” 2011 10.

¹⁶<https://www.medicaldaily.com/difference-between-transgender-and-transsexual> accessed (25-10-2018).

¹⁷Edmonds “Breaking open the system: a multi-party analysis of gender transitions as an effective industrial relations process” 2011 *Windsor Review of Legal and Social Issues* 157-159.

treatments are not “experimental” or “cosmetic” but are a medical necessity for individuals who are appropriately evaluated.¹⁸

During transition, the physical appearance of the transgender will obviously change as they make use of hormonal treatment to change their body to look more like their true gender. Hormones are controlled substances and must be prescribed to them by the doctor. For a male to female transition, estrogen is used to feminize bodily characteristics, it increases breast size and stops hair growth. A female to male transgender will take testosterone. This will increase the growth of facial hair, lower the voice and increase sex drive.¹⁹

Taitz sums up transgender persons and the sex change procedure, he says that transsexualism is a disorder that is described as a life-long conviction. He argues that “there is no such phenomenon as a change of biological sex” and that a true sexual change is impossible. However, “people who suffer from the gender dysphoria syndrome may undergo relief from the condition. Sex change procedures both surgical and hormonal treatment which result in a biological male or female may be given the appearance and indeed the pastiche of the sexuality of a member of the opposite sex.” He says that “a transsexual is usually disgusted by his sexual organs which he may seek to conceal from himself and other people” as this identifies him with his birth sex. Transsexual males are known to amputate their genitalia as they believe that they are really a member of the opposite sex, imprisoned in the wrong body and this belief system is constant.²⁰

2.3 The increase of the transgender population

There is a profound cultural change which now pushes the boundaries of convention, and the support of minority groups and diversity has not only resulted in more acceptance but has also exposed the inequalities and exclusion of these groups of people. Take for example the United States, The U.S Supreme Court has legalised

¹⁸Marksamer, Spade and Arkles “A place of respect- a guide for group care facilities serving transgender and gender non-conforming youth” 2011 12.

¹⁹Goodrum “Gender identity 101 a transgender primer” 1998 54.

²⁰Taitz “Dismissal of an employee on account of a sex change-an unfair labour practice.”1989 *ILJ* 577-579.

same sex marriages, rainbow lights and flags illuminate the White House and former Olympic gold medallist Bruce Jenner became Caitlyn Jenner, posing on the cover of Vanity Fair has led to an increase in awareness.²¹ This trend can be seen throughout the world, where there is a clear increase in the emergence of transgender people.

It is difficult however to establish the precise number of transgender persons as information is limited, in part because official records, surveys, including the census, do not include data on gender identity. Most information comes from health clinics as this is where the transgender community seek health care either before or after their transition. It is also difficult to state the exact number of transgender's as there are different reports with different numbers. One figure showed that in 2011 there was 15 324 000 transgender persons around the world however, this number is a figure that is much larger than the clinic-based figures which is mostly used²².

In the United States of America, researchers have found that the number of transgender surgeries has increased fourfold from 2000-2014. This shows that transgender people are finding more acceptance in the world today. Dr. Schecter, who specialises in transgender surgeries, says he does about three hundred procedures a year now, where he performed only fifty back in 2000.²³

In Australia, psychiatrists and paediatricians are scrambling to treat lengthening waiting lists of children as young as six years old who are experiencing gender dysphoria. Dr. Telfer who is the leading specialist at Melbourne's Royal Children's Hospital says that "the numbers are enormous." From one patient in 2003, the hospital expects to see two hundred children this year.²⁴

In Hong Kong the government has recognised transgender persons for over 20 years and their government has provided public funding for its treatment through a specialist Gender Identity Clinic at the Queen Mary Hospital. Considering the clinics recordings, it is estimated that there are 3000 transgender persons in Hong Kong. Of those it is said that 50 have undergone gender reassignment surgery through the Gender

²¹<https://abcnews.go.com/entertainment/caitlyn-jenner-reflects-life-changed-transitioning-woman> accessed (03-03-2018).

²²<https://www.afr.com/lifestyle/health/evolution-race-and-the-rise-of-the-transgender-generation> accessed (02-07-2018).

²³<https://www.washingtonpost.com/news/to-your-health/wp/2018/02/28/transgender-surgeries-are-on-the-rise-says-first-study-of-its-kind> accessed (10-04-2018).

²⁴<https://www.theaustralian.com.au/life/weekend-australian-magazine/transgender-children-whats-behind-the-spike-in-numbers> accessed (03-07-2018).

Identity Clinic at the Queen Mary Hospital However, many more have undergone private surgery.²⁵

Here in South Africa there are no figures that have been published. However, there is a clear growth in the transgender population in the country as the transgender clinics at the University of Cape Town and The Steve Biko Academic Hospital in Pretoria have indicated that transition operations are been done.²⁶

The greatest challenge currently facing the Transgender Unit at the Groot Schuur Hospital in Cape Town, is the effect of limited resources on staffing. The surgical component is experiencing great pressure, with limited theatre time available. Provision is made for only 2-3 completed gender reassignment operations annually and the monthly referral rate is 3-4 clients. This leads to a surgical waiting time of 15-20 years. Public awareness of transgender issues is increasing therefore patients present earlier and the unit encounters a greater number of transgender patients.²⁷

Despite the difficulties, a significant number of transgender persons are found throughout the world and it can be safely stated that the incidence of transsexual people is a reality and not a rarity.²⁸

2.4 Conclusions

The term “Transgender” is a broad term covering various groups of persons. In order to understand who a transgender is, we need to look at the core identity and not the physical body characteristics or appearance of that person. In a recent development the “gender identity disorder” has now been recognised as a medical condition and this condition can be cured as the transgender transitions into his/her target sex.

²⁵Emertona “Time for change: a call for the legal recognition of transsexual and other transgender persons in Hong Kong” 2004 *Hong Kong Law Journal* 516.

²⁶McGregor “The legal emancipation of transsexual people: from living in closets during the dark ages to recognition of an altered sex and zero-tolerance for unfair discrimination in the 21st century” 2013 *Journal of Contemporary Roman-Dutch Law* 679-682.

²⁷Wilson et al “Transgender issues in South Africa, with particular reference to the Groot Schuur Hospital transgender unit” 2014 *SAMJ* 3.

²⁸McGregor “The legal emancipation of transsexual people: from living in closets during the dark ages to recognition of an altered sex and zero-tolerance for unfair discrimination in the 21st century” 2013 *Journal of Contemporary Roman-Dutch Law* 681.

It is now clear that throughout the world there is an increase in transgender awareness and even though we cannot say the exact number of transgender persons that exist we can look at information given to various medical clinics/hospitals where transgender persons undergo sex change procedures and medical treatments and from this information there is a clear indication that the transgender community is on the rise, both here in South Africa and throughout the world.

CHAPTER 3 - THE VARIOUS PROBLEMS THAT TRANSGENDER PERSONS EXPERIENCE IN THE WORKPLACE

3.1 Introduction

It is important to note that in the late 1990's marriage unions for same gender partners were not legally recognised anywhere in the world.²⁹ Any family set up that consisted of transgender partners were not accepted and were viewed and faced with intolerance. Same gender partners were not catered for by the law and the lack of regulations regarding this issue is said to have contributed immensely to the marginalisation of the transgender people which were seen as a vulnerable group.³⁰ Transgender people now have been accepted and various legislations have been promulgated to cater for them. However, despite these enactments, transgender people are subjected to prejudice. It is clear that the transgender persons are a minority group and are facing socio-economic and cultural injustice in various countries. They encounter discrimination, oppression and the intimidation due to their sexual orientation.³¹

While good progress is being made by employers in terms of lesbian, gay and bisexual equality, providing for transgender staff seems to still lag behind. Transgender persons are discriminated against in the area of employment, in both the private and public sectors they are not afforded the protection of their human rights.³² Employers are usually in a position to dictate the terms of employment to the employee and Kahn-Freud stated labour law was a way for the employee to counteract the inequality of this bargaining power.³³ The common law has long recognized the extreme vulnerability of employees who possess no other means of subsistence than to sell their labour power to owners of capital. Transgender persons therefore face a two-pronged vulnerability when undertaking a gender transition at work; not only are

²⁹Lee, Netshandama and Matshidze "Lesbian, gay, bisexual and transgender rights in South Africa: a struggle for equality." 2017 *Gender & Behaviour* 9031.

³⁰*Ibid* 9031.

³¹*Ibid* 9031.

³²*Ibid* 9032.

³³Van Niekerk et al *Law @ work* (2015) 10.

transgender persons vulnerable because of their status as “transgender”, but they are also vulnerable because of their status as “employees” as well.³⁴

In the workplace there are various problems that the transgender experiences and this can occur at any stage of employment such as the interviewing stage, hiring or even during employment. In a study done to prove that transgender persons are discriminated against in the workplace, it was found that transgender’s experience homophobic behaviour including: being the target of homophobic jokes, being asked unwelcome questions regarding their sexuality, being socially excluded and having their property damaged.³⁵ They experience increased levels of stress which can result in severe depression.³⁶ The incongruence between self-presentation and official identification regarding their identification cards which is central to accessing most services in the labour market is another problem they face.³⁷

Many transgender’s routinely face demotions, unfavourable working conditions and discrimination terminations for reasons that do not relate to their job performance but are based solely on the employer’s discomfort with transgender people.³⁸ In some extreme cases death results.³⁹

I have chosen to expand on the most serious and common problems that the transgender person faces, which will be discussed below.

3.2 The accommodation of transgender persons in the workplace

Transgender individuals, like all other employees need to function within an office or professional environment every day. In these environments not all of their employers

³⁴Edmonds “Breaking open the system: a multi-party analysis of gender transitions as an effective industrial relations process” 2011 *Windsor Review of Legal and Social Issues* 157-161.

³⁵Ekeberg and Tumber “Sexuality & transgender identity issues in employment.” 2004 *Geo. J Gender & L* 387.

³⁶Polders et al “Factors affecting vulnerability to depression among gay men and lesbian women in Gauteng, South Africa” 2008 *South African Journal of Psychology* 675.

³⁷Miles “I.D Cards as access: negotiating transgender (and Intersex) bodies into the Chilean legal system” 2013 *Wilson A.R* 63-64.

³⁸Ekeberg and Tumber “Sexuality & transgender identity issues in employment.” 2004 *Geo. J Gender & L* 387.

³⁹Lee, Netshandama and Matshidze “Lesbian, gay, bisexual and transgender rights in South Africa: a struggle for equality.” 2017 *Gender & Behaviour* 9032.

and co-workers are tolerant and accepting of them and their differences. Discrimination in the workplace based on a transgender changing their appearance due to gender reassignment, is a massive concern globally and South Africa is no exception. The outward look or appearance of the transgender employees effects their employer and co-worker's subconscious thoughts, and this also filters into employment decisions, policies and actions causing the transgender person to be marginalised or discriminated against.⁴⁰

From birth to death, social structures tell us who we are and what roles we are expected to play based on whether we are male or female. Gender is a concept linked to self-identity and others acceptance. It is very common that one dresses according to their gender. Sex is a biological classification and gender has been termed "social sex" being the outward display of sexual biology, orientation and characteristics. This include visual cues such as the manner of walking, dress and gesture positioning. Gender messages are sent on a daily basis and these gestures build up a standard stereotype of a specific gender. However, a debate or questions come into play with such gender classification.⁴¹

Transgender attorney, Dylan Vade challenged this view.⁴² He says that instead of focusing on the two genders we should have a "gender galaxy" which will include more complex identities such as the transgender people. He also then challenged the view that gender is merely cultural and said that this is harmful to the transgender community. He says that if we see sex as biology and gender as a social construct, then we make sex more important and more real than the transgender people's self-identity.⁴³

Social norms dictate that a person's appearance is very important in the workplace. It is found that people are more successful at obtaining employment than their less attractive counterparts and it was found that the well-dressed employees enjoy greater employment prospects and growth. A basic part of attractiveness is the presentation

⁴⁰Smit & Viviers "Gender reassignment and the world of work: a comparative perspective on the intersection between transgenderism, trans-sexuality and appearance discrimination in the South African employment arena" 2016 *Obiter* 247.

⁴¹Dietert "Gender identity issues and workplace discrimination: the transgender experience" 2009 *Journal of Workplace Rights* 121.

⁴²Harwood "Dressed for success? gendered appearance discrimination in the workplace" 2007 *Wellington Law Review* 583.

⁴³*Ibid* 583-584.

of a coherent gender, meaning that a person who carries out their gender well and demonstrates attributes that are approved of in a man or woman has an edge in the workplace.⁴⁴

Both men and woman are judged on their appearance, yet those who do not meet either masculine or feminine norms or expectations face obstacles being: inferiority in the traditional gender hierarchy and they are regarded as an “other” who does not perform or meet the expectations of either gender adequately. Sex and gender hierarchies and consequent discrimination are realities. In New Zealand it was cited that the most significant structural discrimination was suffered by transgender persons and lesbians. In the 2005 Annual Report, employment discrimination constituted 29.5 percent of all the complaints (by far the largest site of discrimination). It is those who fall on the lower levels of the gender hierarchy, such as the transgender’s that require the most protection in the employment.⁴⁵

The problem arises where the trans employee chooses to align their physique with their gender identity and undergo a transition in the workplace. The transition and changing appearance make these employees very vulnerable to the response of their employers. If the employer handles the transition poorly it could lead to an aggressive and hostile work environment.⁴⁶

There is a lack of support in the workplace for transgender employees who undergo the transitioning phase. For a female to male transgender it will include wearing male clothing to work and taking testosterone. When this occurs, the transgender person has to deal with reactions and comments from their co-workers and management.⁴⁷

Let’s take a look at a few documented examples.

When Stewart began his transition, his manager did not support him. Stewart quit and said that he was left on a silver platter as his manager was not understanding. He spoke to the people at Human Resources and told them about the transition and they said that he can no longer work there as the changes are too obvious and are causing

⁴⁴Harwood “Dressed for success? gendered appearance discrimination in the workplace” 2007 *Wellington Law Review* 585.

⁴⁵*Ibid* 587.

⁴⁶Smit & Viviers “Gender reassignment and the world of work: a comparative perspective on the intersection between transgenderism, trans-sexuality and appearance discrimination in the South African employment arena” 2016 *Obiter* 250.

⁴⁷Dietert “Gender identity issues and workplace discrimination: the transgender experience” 2009 *Journal of Workplace Rights* 131.

problems so tomorrow will be his last day. Stewart's manager's actions show how individuals are dealt with in the workplace when deviating from the gender norms. The process of transitioning goes against these norms and Stewart's case shows us that it can lead to transgender persons quitting their jobs.⁴⁸

For transgender persons who begin the transition and then remain in the same job, there is a fear that they might lose their job. George was concerned that his transition at work might jeopardise his employment status. George works for a Fortune 500 company and he says that it was one of those things that you actually have to plan. You cannot just come into work one day and say that you are now a man. He spoke to Human Resources but due to his boss having a busy schedule he did not have enough time to make him aware of it and the only question he asked his boss is if he was going to let him keep his job. For both Stewart and George, the transition in the workplace was a massive factor which could impact whether they would remain in the employ of their company or not.⁴⁹

For transgender persons it is of importance that their employers and co-workers call them by their correct name and make use of the correct pronouns such as "he" and "him" if it is a female to male transition. By referring to that person correctly shows that they have been accepted and affirms the persons chosen gender. Some transgender people recalled that their employers disrespected their requests to be called by the correct pronoun and thus ignoring or denying their existence.⁵⁰

We examine a few employee experiences to get a sense of current prejudice. Monty, a female to male transgender said he had problems with his employer as the employer still used female pronouns when referring to him. Monty said that his boss was just being lazy and that it frustrated him. He also said that he lacked the assertiveness to correct his boss every time.⁵¹

Daniel said that being incorrectly addressed was embarrassing and irritating as his production manager would do so in front of customers. He said that the production manager targets him, and he then gets questions from the customers. When Daniel

⁴⁸Dietert "Gender identity issues and workplace discrimination: the transgender experience" 2009 *Journal of Workplace Rights* 131.

⁴⁹*Ibid* 133-134.

⁵⁰*Ibid* 134-135.

⁵¹*Ibid* 135.

does complain to the business owner about the production manager, the owner says things along the lines of “Hello, you know that he is a he. Please address him as that! We don’t want to confuse our customers about these things, so let’s just get with the program and go!” From this it is difficult to see whether the owner was sincere or whether he just did not want to confuse his customers.⁵²

We look at the story of Michelle Montreuil’s employment history which shows a strong line of discrimination at work. For ten years Pierre Montreuil (his birth name) taught legal studies at a college in Quebec City. He had degrees in civil law, common law, a master’s in business administration and wrote many textbooks. In 1997 he was forced to negotiate the terms of his resignation or his employment contract would be terminated on disciplinary grounds. This is a result in students and faculty members complaining about him for his embarrassing behaviour. He was in the process of transitioning and in order to ease into his new preferred life, he would change from male to female clothing four times a day. Students saw him at the shopping centre where he was dressed as a woman and then wanted him to be removed from the college.⁵³

Montreuil took his severance package and moved to Montreal where he used the name “Michele” and began living as a woman. Michele then applied for a call centre position with a bank. In her interview she was honest about her personal life and qualifications, and she was confident as the interviewer gave her positive comments. The interviewer however instructed the bank’s human resource team not to hire her saying it would be “too risky”.⁵⁴

The interviewers felt that Michele only wanted this job to make a human right statement and denied her of the job. The Canadian Human Rights Tribunal awarded her damages as she did experience discrimination. However, before her case was heard she was denied further employment by the Canadian Armed Forces.⁵⁵ The position was a fixed-term complaints officer with the Forces Grievances Board. The posting read that most of the positions required a bilingual proficiency but that some were unilingual to which Michele complied with. She passed a written test, went for an

⁵²Dietert “Gender identity issues and workplace discrimination: the transgender experience” 2009 *Journal of Workplace Rights* 131.136.

⁵³Montreuil c. Colidge Francois-Xavier-Garneau, (2003) J.T.D.P.Q.

⁵⁴*Montreuil v National Bank of Canada* 2004 CHR.D.

⁵⁵*Montreuil v Canada (Canadian Forces)* 2007 CHR.

interview and was deemed qualified for a unilingual French position. She was told she would be notified once there was a position available. She waited for two years and then demanded staffing disclosure from the Board. The disclosure revealed that fifteen complaints officers had been hired to which nine were unilingual English and two were bilingual. Michele was advised that she would never be hired as there was simply not enough French language work available, she then filed a human rights complaint. The Human Rights Tribunal found that the board's actions did not make any sense and that they should not have advertised a job that was not needed. They also noted that her transgender status did contribute to her denial of employment and as a result she was awarded damages for her mental anguish.

3.3 Restroom facilities

Every person needs to make use of a restroom. For transgender persons this right of access is often held hostage by thoughtless authorities. As a result of restroom discrimination, transgender persons often suffer health problems and face violence or harassment. Restroom inequality is one of the greatest barriers in America to full integration for the transgender community. It is common for a transgender person to be forced to make use of a restroom that is inconsistent with his or her true gender identity, which is regarded as restroom discrimination.⁵⁶ The uneasiness associated with transgender restroom usage highlights a legal resistance to the gender usage and by extension, a gender driven jurisprudence.⁵⁷

This practice constitutes discrimination as it ignores the real element of a transgender person's identity. In 2002 a survey showed that nearly 50 percent of transgender people reported harassment or assault in a restroom. As a result of this, many transgender persons now avoid restrooms in public places (including the workplace) and develop health problems as a result. A respondent said that she spends many hours avoiding public restrooms and as a result stated, "I have damaged my bladder

⁵⁶Levi and Redman "The cross-dressing case for bathroom equality." 2010 *Seattle U. L* 133.

⁵⁷Weinberg "Transgender bathroom usage: a privileging of biology and physical difference in the law." 2009 *J. Gender L & Soc* 148.

and put pressure on my kidneys.” This problem was a daily one and I would often have to think how much I drank during the day.⁵⁸

Transgender persons are forced out of employment because they are denied access to the restrooms. In *Goins v West*⁵⁹, a transgender plaintiff states that she faced constructive termination as her employer refused to allow her to use the female restroom. Restroom discrimination can be terrifying. Feinberg, a transgender activist writes that transgender people live in a constant threat of violence. We have to worry about what restroom to use whilst our bladders are aching. We are forced to consider if we will be dragged out of the restroom and arrested while our bladders still ache. She concludes by saying that human beings must still use a toilet.⁶⁰

Feinberg describes the violence that transgender people face in the restroom: "If I go into the women's restroom, am I prepared for the shouting and shaming? Will someone call security or the police? If I use the men's room, am I willing to fight my way out? Am I really ready for the violence and fighting that could ensue?" The harassment and violence from civilians is bad, but police or security brutality is even worse. The police officials or security often then harass or abuse transgender people regardless of which restroom they use. The harassment intensifies as transgender persons are called “sexual predators” when using the restroom of the opposite sex and this often results in charges for public indecency.⁶¹

In the case of *Etsitty v Utah*⁶², Etsitty was fired from where she worked as a bus driver for several months. The termination came after she revealed to her employer that she is a transsexual. The employer then told her that she is being fired as they could not determine which restroom she could use. The employer argued that woman have legitimate concerns about privacy and safety and do not want to share restrooms with men. The employer also argued that it needs to maintain a safe environment for its customers and by allowing men into a women’s restroom, does not create a safe environment and is not professional. The employer said that it had a legitimate reason

⁵⁸Levi and Redman “The cross-dressing case for bathroom equality.” 2010 *Seattle U. L* 136.

⁵⁹*Goins v West* 2001 N.W 635.

⁶⁰Levi and Redman “The cross-dressing case for bathroom equality.” 2010 *Seattle U. L* 136-137.

⁶¹*Ibid* 137.

⁶²*Etsitty v Utah Transit Authority* 2007 10th Circuit Court 502.

to be concerned that woman may be upset or frightened by a biological male with male genitalia using the women's restroom.⁶³

An analysis of transgender restroom usage regarding employment discrimination shows that many of the workplace disputes that arise involve an employer imposing unreasonable demands on a transgender. The employer imposes unreasonable medical documentation requirements in an aim to preclude a transgender from using a restroom that they choose. In America the congress has not addressed this issue adequately and they should provide appropriate restroom facilities for those who have already transitioned and those who are undergoing the transition.⁶⁴

In *Johnson v Fresh Mark*⁶⁵, the court reasoned that the employer's basis for firing Selena Johnson, a male to female transgender, was appropriate because of complaints that a male was using the women's restroom. This case shows that the anti-discrimination law does not cover all the aspects of discriminatory conduct and that it truly undermines the legislation. Employers who use the "restroom excuse" creates several medical obstacles to permit a transgender person to use a particular restroom. First the individual, a person who wishes to have gender reassignment surgery must undergo a lengthy process of hormone therapy and appear as the opposite gender before a doctor considers performing the surgery. As a result of this, these individuals cannot provide medical documentation during this interim period and are forced to present themselves as one gender but have to make use of the restroom of the opposite gender. Secondly, the cost of the reassignment surgery is very expensive, and this may cause the transgender to refrain from the procedure. This makes those who are indeed transgender, but simply cannot afford the surgery, to use the restroom of the gender opposite from the gender in which he or she is presenting themselves in public.⁶⁶

In the case of *Ferris v OTEU*⁶⁷, Ferris was discriminated against by her union and her employer. Ferris was a male to female transsexual and had nineteen years of service

⁶³Levi and Redman "The cross-dressing case for bathroom equality." 2010 *Seattle U. L* 144.

⁶⁴Weinberg "Transgender bathroom usage: a privileging of biology and physical difference in the law." 2009 *J. Gender L & Soc* 148-149.

⁶⁵*Johnson v Fresh Mark Inc.* 2003 N.D Ohio 337.

⁶⁶Weinberg "Transgender bathroom usage: a privileging of biology and physical difference in the law." 2009 *J. Gender L & Soc* 150.

⁶⁷*Ferris v Office and Technical Employees Union* 1999 BCHRT 55.

with her employer. She was employed as a taxi driver and then as a taxi dispatcher. At work she had already presented herself as a woman and she believed that the people around her believed that she was a woman. However, someone complained that a man was using a woman's restroom and said that Ferris was the perpetrator. Following this, the union conspired with the employer to have Ferris removed from the workplace and held secret meetings about her. The union eventually dismissed her and refused to assist or communicate with her. The union said that the restroom complaint was well founded and Ferris who was absent from work due to shock, evidenced unequivocal abandonment from her job.

The British Columbia Human Rights Tribunal disagreed and held that the unions conduct had departed so far from even a minimal standard of responsibility of a union to its members that it suggests that Ferris' transsexualism was a factor in the union's treatment to its members. Despite Ferris losing her job and was rendered unemployable due to her mental state and anguish she was only awarded USD 6000 in compensation. This case shows how Ferris was isolated and discriminated against.

An examination on the restroom segregation regarding the transgender community show that there is an inconsistent application of biology used to divide the restrooms. The fact that transgender persons are excluded from using the correct restroom shows that there is a problem with the jurisprudence and the Jim Crow laws are often cited for the unjustified separation of public facilities.⁶⁸

3.4 Same-sex harassment

The Labour Appeal Court in the Motsamai case⁶⁹ has characterised sexual harassment as "the most heinous misconduct that plagues a workplace." We look at the *Simmers v Campbell Scientific Africa (Pty) Ltd* case⁷⁰, where Simmers, a male manager of Campbell Scientific Africa (Pty) Ltd (CSA) and Ms Markides, a contractor to CSA travelled to Botswana in order to assess a location to install equipment for a client. They stood in a parking lot one night and Simmers asked Ms Markides "Do you

⁶⁸Weinberg "Transgender bathroom usage: a privileging of biology and physical difference in the law." 2009 *J. Gender L & Soc* 151.

⁶⁹*Motsamai v Everite Building Products (Pty) Ltd* 2011 2 BLLR (LAC).

⁷⁰*Simmers v Campbell Scientific Africa (Pty) Ltd* 2014 8 BLLR (LC).

want a lover tonight?" Ms Markides told Simmers that she was not interested and that she had a boyfriend. Simmers then suggested that the two of them "do something". Ms Markides then told Simmers that she is going to bed and Simmers then asked her if she wanted to go to his room? To which she refused. Simmers then repeated his offer to be Ms. Markide's lover and said that if she changed her mind, then she should join him in his bedroom during the night however, Ms Markides did not change her mind.

When the MD of the company came to hear of this, he sent Ms Markides an apology to which she accepted but stated that she found Simmers conduct highly unprofessional and mentioned that it was his "personal misconduct".

The commissioner held that even through this incident did not occur at the workplace, the sexual harassment charges are still relevant and Simmers conduct was found to constitute sexual harassment and it was noted that Simmers did not deny the fact that he made the advances. The commissioner said that Simmers was aware or should have been aware that his remarks were unwelcoming and thus would constitute sexual harassment. Simmers was then dismissed.

Simmers then took the matter on review to the Labour Court who found that there was no power imbalance and no co-working relationship between the parties. The Labour Court also said that the parties were not co-workers and it was unlikely that they will work together again as Ms Markides moved to Australia. The court then looked at the words "Do you want a lover tonight?" and looked at if this question constitutes sexual harassment or sexual attention. The court then said that Simmers verbal advances were inappropriate but did not cross the line from a single incident of an unreciprocated sexual advance to sexual harassment and that it did not lead to a hostile working environment. The court was of the view that Simmers should be reinstated.

McGregor disagrees with the court findings and says that even though Simmers conduct "constituted mere sexual attention" it was also "inappropriate". She then says that inappropriate sexual conduct does in fact constitute sexual harassment.⁷¹ This case shows us how easy it is to commit an act, that of sexual harassment and this is between heterosexuals. If it is so easy to do so it will be even easier to commit an act

⁷¹McGregor "Do you want a lover tonight? Does this question constitute sexual harassment?" 2016 *THRHR* 335.

of sexual harassment on a transgender person, as they are already marginalised and victimised in the workplace.

In many instances, sexual harassment by definition was a heterosexual concept (most commonly a male would be accused of harassing a female) leaving many homosexual claimants without recourse as the harassment they faced was perpetrated by a person of their own sex. Transgender plaintiffs who are harassed by their seniors or co-workers are frequently categorized by the court inconsistently with their gender identity, so for example a male to female transgender who now presented as a woman but has a penis would be classified as a male. This then allowed the court to make the decision that this was same sex harassment which was understood to be outside of the courts understanding.⁷²

The courts understanding on same sex harassment has now developed. In the case of *Meritor Savings Bank v Finson*⁷³, the U.S Supreme Court held for the first time that discrimination based on sex that then creates a hostile work environment is unlawful. The court rejected that the harassment must be linked to an economic quid pro quo in order to be actionable. In the *Meritor* case, a female employee alleged harassment by a male supervisor. The courts differed on how to apply the law to situations where the plaintiff and the alleged harasser were of the same sex. Some courts said that workplace harassment is always actionable while the other courts said that these claims are actionable only if the plaintiff can prove that the harasser is a homosexual.

*Oncale v Sundowner Offshore Services*⁷⁴, dealt with men working on an oil-platform. One of them was subjected to brutal sex-related conduct by some of his male co-workers. A male co-worker also assaulted him in a sexual manner and threatened him with rape. He then informed management of what had happened, and management took no action. Oncale then pursued legal action. The Supreme Court addressed this issue unanimously holding that same sex sexual harassment claims are actionable as long as the plaintiff can prove that the harassment was "because of sex". The plaintiff must also prove that the harassment was severe and created a hostile working environment. Oncale offered examples that could be considered in determining

⁷²Ekeberg and Tumber "Sexuality & transgender identity issues in employment." 2004 *Geo. J Gender & L* 395.

⁷³*Meritor Savings Bank v Finson* 1986 U.S 57.

⁷⁴*Oncale v Sundowner Offshore Services* 1998 U.S 75.

whether the same sex harassment was “because of sex” being: the harasser was homosexual and therefore motivated by sexual desire, or proof that the harasser generally treated members of the plaintiff’s sex with hostility, thus creating an environment in which the plaintiff could no longer work.⁷⁵

In the case of *LaDay v Catalyst Technology*⁷⁶, Mr. LaDay was employed by Catalyst as a reactor technician. In March 1998 he alleged that during his first week on the job, he was inappropriately touched on his buttocks by Willie Craft, his male supervisor. Mr LaDay was upset and informed his colleagues of this. His supervisor was angry with him for telling his colleagues and then spat tobacco juice on his hard hat and when Mr LaDay confronted him about this, his manager spat on him again saying “That’s what I think of you.” At the workers compensation hearing Mr LaDay was very distressed about this and claimed that his supervisor was able to get other employees to talk bad about him. Mr LaDay then resigned from Catalyst in June 1998 as he felt that he was unable to trust those who he worked with. His mother testified that after the incident Mr LaDay continued to be very upset and was “haunted” by the incident. He started drinking heavily and lost weight. Eventually Mr LaDay started thinking about committing suicide.

In 1998 Mr LaDay sought treatment from a clinical psychologist and the doctor diagnosed him with a major depressive disorder and an anxiety disorder. The doctor said that Mr LaDay was disabled and unable to work however his condition did improve and that his depression and suicidal condition resulted from Mr. Crafts actions.

3.5 Dismissal

Throughout the world, transgender persons face the problem of dismissal. Employers simply dismiss them on the basis of them undergoing a transition. In the United States, the case of *Grossman v Bernard’s Township Board of Education*⁷⁷ supports this. In this case a biological male was employed as an elementary school music teacher for many years. When he was 50 years, he underwent a sex change procedure and as a

⁷⁵Ekeberg and Tumber “Sexuality & transgender identity issues in employment.” 2004 *Geo. J Gender & L* 396-397.

⁷⁶*LaDay v Catalyst Technology* 2001 Louisiana Appeal Court 818.

⁷⁷*Grossman v Bernard’s Township Board of Education* 1978 U.S 897.

result of this, was dismissed from his position. After the transition, the plaintiff stated she had been discriminated against by her employer. The court held that the plaintiff was dismissed by the school not because of her status as a female but because of her sex change from male to female. The plaintiff then argued that she had a constitutional right to equal protection however, the court went against this argument and said due to the sex change the plaintiff was unable to properly fulfil her role as a teacher and that the incapacity was sufficient grounds to dismiss her. The court said that while she may have been able to perform her duties, her presence posed a danger to the psychological harm of her students.⁷⁸

Josh being another example, is a female to male transgender. He moved to Chicago and worked as a waiter at a pizza restaurant. He used his birth name "Shannon" at work and he passed as a male however he had a lack of facial hair and this led to him answering embarrassing questions from customers. One night four loud and intoxicated customers came in to the restaurant and shouted, "Hey faggot, come here and get us some drinks." Josh requested that another waiter serve them however, his employer said that he must as he was the only server on duty. Each of the customers referred to Josh as "a faggot" when they ordered, and one customer who was physically larger than Josh grabbed him by his collar and pushed him on the table. Josh then punched him in his face. The intoxicated customer then shouted "That faggot punched me. I am going to kill him!". His employer shouted, "That is not a faggot, it is a girl." Josh was then fired the next day and when he asked for reasons for the dismissal, the manager said that the way Josh looked and acted upset and confused the customers because they could not figure out what he was.⁷⁹

We look into the police system in the United Kingdom and it is not surprising that studies on gender relations and gender discrimination on woman in policing have developed the way they have. More emphasis is placed on men in the police force meaning that feminist activists have been marginalised in policing studies.⁸⁰

⁷⁸Taitz "Dismissal of an employee on account of a sex change-an unfair labour practice."1989 *ILJ* 577-579.

⁷⁹Lloyd "Defining the human: are transgender people strangers to the law" 2005 *Berkeley J. Gender L. & Just.* 151.

⁸⁰Little, Stephens and Whittle "The praxis and politics of policing: problems facing transgender people" 2002 *Queensland U. Tech. L. & Just. J.* 229.

The main problem that arises in the police force concerning transgender people is that the job concerns conducting intimate searches pursuant to legislation. The Sex Discrimination Regulations 1999 inserted Section 7B (2)(a) which states that the job involves the holder of the job being liable to be called upon to perform intimate physical searches pursuant to statutory powers. Presumably this is intended to allow the police service to not employ, continue to employ or dismiss transgender people. This section is broad and allows employers to exclude transgender people before, during or after their gender reassignment surgery. This section seeks to prevent the transgender employees from conducting physical searches on people hence discriminating against them and treating them as if they belong to a “third sex”.⁸¹

3.6 Conclusions

Even though legislation has been enforced to assist transgender persons, they are clearly still subject to prejudice based on their sexual orientation. Being employed is expected to give all employees satisfaction as they earn a salary, supposedly giving them a sense of belonging and affording them dignity. However, the manner in which transgender persons are mistreated and disrespected at work, strips them completely of this dignity. Transgender persons experience abuse and various other problems in the workplace from, the facilities which do not adequately accommodate them, to the attitudes and actions of their employers and co-workers. It is clear that in today’s world of work, the transgender employee is a victim of discrimination in the workplace.

⁸¹Little, Stephens and Whittle “The praxis and politics of policing: problems facing transgender people” 2002 *Queensland U. Tech. L. & Just. J.* 233.

CHAPTER 4 - PROTECTION UNDER SOUTH AFRICAN LAW THAT IS AVAILABLE TO TRANSGENDER PERSONS IN THE WORKPLACE

4.1 Introduction

The issues that transgender persons face are more than challenges or problems that arise only in the workplace, office or employment relationship. They are problems that breach their fundamental human rights.⁸² In South Africa, we are afforded protection under the Constitution, which recognises the diversity of the country⁸³ and South Africa is the only country in Africa to offer constitutional protection against discrimination based on sex, gender and sexual orientation.⁸⁴

Section 9 of the Constitution⁸⁵ states that everyone is equal before the law and has the right to equal protection of the law. It further affirms that the state and no person may unfairly discriminate against another, either directly or indirectly based on race, gender, sex, sexual orientation, belief or disability. Section 10⁸⁶ deals with human dignity and states that everyone has inherent dignity and the right to have their dignity respected.

Section 12⁸⁷ states that everyone has the right to freedom and security of the person including, not to be deprived of freedom without just cause, to be free from all forms of violence from either private or public sources and not to be treated in a cruel or in an inhuman manner. It says that every person has the right to bodily and psychological integrity and to be in control over their body. Section 14⁸⁸ affords the right of privacy

⁸²Jugroop, Esterhuizen, Walton and Guthrie "Laws and policies affecting transgender persons in Southern Africa" 2016 38.

⁸³McGregor "The legal emancipation of transsexual people: from living in closets during the dark ages to recognition of an altered sex and zero-tolerance for unfair discrimination in the 21st century: Atkins v. Datacentrix (Pty) Ltd (2010), 4 BLLR 35 (LC); Ehlers v. Bohler Uddeholm Africa (Pty) Ltd. (2010), JOL 26216 (LC)" 2013 *Journal of Contemporary Roman-Dutch Law* 681.

⁸⁴Jugroop, Esterhuizen, Walton and Guthrie "Laws and policies affecting transgender persons in Southern Africa" 2016 38.

⁸⁵S9 of The Constitution of the Republic of South Africa 1996.

⁸⁶S10 of The Constitution.

⁸⁷S12 of The Constitution.

⁸⁸S14 of The Constitution.

to everyone. Section 16⁸⁹ says that everyone has the right to freedom of expression including the right of artistic creativity and freedom of scientific research and these rights do not extend to enticement of violence or advocacy of hatred that is based on race or gender.

Section 27⁹⁰ states that everyone has the right to have access to health care services including reproductive health care and social security.

The Promotion of Equality and Prevention of Unfair Discrimination Act⁹¹ was enacted to give effect to section 9 of the Constitution. Especially to prevent discrimination and harassment. This Act defines “sex” to include intersex. Section 6⁹² states that “neither the State nor any person may unfairly discriminate against any person.” Section 8⁹³ prohibits unfair discrimination on the grounds of gender and Section 11⁹⁴ states that “no person may subject any person to harassment.” The Act defines “harassment” to mean: “Unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to- (a) sex, gender or sexual orientation.”

Transgender persons can apply to have their sex changed from that stated on their birth certificate.⁹⁵ This can be done by making use of the Alteration of Sex Description and Sex Status Act⁹⁶. The Act states that any person whose sexual characteristics have been altered by surgical or medical treatment or any person who is intersexed may apply to the Home Affairs to change their sex description on his or her birth certificate. Under this Act it is not compulsory for a person to have had a gender reassignment surgery, hormonal treatment is sufficient.

⁸⁹S16 of The Constitution.

⁹⁰S27 of The Constitution.

⁹¹The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁹²S6 of The Promotion of Equality and Prevention of Unfair Discrimination Act.

⁹³S8 of The Promotion of Equality and Prevention of Unfair Discrimination Act.

⁹⁴S11 of The Promotion of Equality and Prevention of Unfair Discrimination Act.

⁹⁵Jugroop, Esterhuizen, Walton and Guthrie “Laws and policies affecting transgender persons in Southern Africa” 2016 39.

⁹⁶The Alteration of Sex Description and Sex Status Act 49 of 2003.

4.2 Workplace rights

The entrenchment of labour rights is a unique feature of the South African Constitution⁹⁷. Section 23 of the Constitution⁹⁸ states that everyone has the right to fair labour practices. The right to equality cannot preclude employers from drawing distinctions between employees or groups of employees or from treating them differently. The courts have distinguished between conduct that is “mere differentiation” (this is different treatment that is allowed) and “unfair discrimination” (which is not allowed). Discrimination should not be equated with prejudice. The Labour Court held that prejudice occurs when people are not treated as individuals or when characteristics are assigned to people which then lead to generalised assumptions about the people. It is not necessary to show intent to discriminate in order to establish discrimination. Intent will be relevant when looking at the applicable remedy.⁹⁹

The principal statutory protection against discrimination in the workplace is created in the Employment Equity Act (EEA)¹⁰⁰, its purpose is to promote equal opportunity and fair treatment in employment by eliminating unfair discrimination.¹⁰¹ The EEA prohibits unfair discrimination in employment and it applies to all employers irrespective of the size of the business. Under the act the term “employee” includes applicants for employment. The act creates an obligation to promote equality by eliminating unfair discrimination on the basis of specified and other grounds. Section 6¹⁰² states that no person may unfairly discriminate directly or indirectly, against an employee in any employment policy on one or more grounds, including race, sex, pregnancy, colour, sexual orientation, disability, birth or any arbitrary ground. Employment policy includes: recruitment procedures, advertising, selection criteria, job grading, job assignments, the working environment, training, promotion, demotion, transfer and dismissal. This demonstrating that the legislature casts a wide net and affords protection to the employees in various aspects of employment.¹⁰³

⁹⁷Curry and De Waal *The Bill of Rights Handbook* (2016) 473.

⁹⁸S23 of the Constitution.

⁹⁹Van Niekerk et al *Law @ work* (2015) 119.

¹⁰⁰The Employment Equity Amended Act 47 of 2013.

¹⁰¹Van Niekerk et al *Law @ work* (2015) 124.

¹⁰²S6 of The Employment Equity Amended Act.

¹⁰³Dupper “Providing indirect discrimination in employment: a South African view” 2000 *ILJ* 759.

The EEA regards harassment as a form of unfair discrimination and prohibits it.¹⁰⁴ Harassment involves unwanted or unsolicited attention based on someone's personal characteristics.¹⁰⁵

The EEA also aims to prohibit sexual harassment in the workplace. Sexual harassment comprises a wide range of conduct being: physical conduct, non-verbal conduct and verbal conduct. This includes sexual assault, rape, making unwelcome innuendos, suggestions and hints, sexual advances, sex related jokes and unwanted gestures.¹⁰⁶

The existence of discrimination must be determined objectively, looking at the facts of each case. Following the decision in *Harkson v Lane*¹⁰⁷, the South African courts have tended to break down the inquiry of unfair discrimination into two stages. Firstly, has discrimination taken place? If the answer is yes, then the courts look at whether the discrimination was "unfair"¹⁰⁸

Certain grounds for dismissal are recognised as "automatically unfair" dismissals, meaning that if a dismissal is found to be based on this ground, it cannot be justified. There are various forms of "automatically unfair dismissal" however I will be focusing on any form of unfair discrimination "on any arbitrary ground" as mentioned above. Section 187(1)(f)¹⁰⁹ says that an employer may not dismiss an employee for any "arbitrary reason" including but not limited to race, gender, sex, social origin, sexual origin. The EEA then adds to this list by adding the grounds of birth and HIV status. It also says that harassment on any listed ground will be deemed to be unfair discrimination.¹¹⁰

¹⁰⁴Van Niekerk et al *Law @ work* (2015) 126.

¹⁰⁵Van der Walt "Employment equity" 1997 *ISSN* 32.

¹⁰⁶Van Niekerk et al *Law @ work* (2015) 128.

¹⁰⁷*Harkson v Lane* 1998 1 SA 300 (CC).

¹⁰⁸Du Toit et al *Labour relations law: a comprehensive guide* (2015) 660.

¹⁰⁹S187 (1)(f) of The Labour Relations Act.

¹¹⁰Du Toit et al *Labour relations law: a comprehensive guide* (2015) 437-438.

4.3 Case law

We look at two recent cases to show us what is the courts stand point regarding transgender persons in the workplace and unfair discrimination of them. In the case of *Christine Ehlers v Bohler Uddeholm Africa (Pty) Ltd*¹¹¹, the applicant, being a transsexual, brought an application for an automatic unfair dismissal dispute to the court in terms of S187(1)(f) of the Labour Relations Act (LRA). The applicant sought re-instatement and damages under the LRA and compensation and damages under the EEA. The respondent denied that that the applicant's dismissal was an automatically unfair one and said that the dismissal was based on an operational decision.

The applicant was born as a male, however had a strong sense that she was in the wrong body and this caused her to be different. As a child she suffered, and her father did not accept this change in sexual orientation and therefore totally rejected her. Her entire family saw her as an alien. When she was five years old, she attempted to cut off her penis. Upon matriculation she was inducted to the army. Being in a masculine environment, she attempted to commit suicide. She was admitted to the hospital in the military and while she was at this hospital, the diagnosis of male to female transsexualism was made for the very first time.

In 1989 she worked for the respondent for three months. She was based in Johannesburg but was then transferred to Cape Town, where a plant was threatened with closure. She turned this position around and excelled in her work. She worked there until 1996, when she resigned.

The applicant consulted Dr Levinson on 30 August 2007 and thereafter on a regular basis. Dr Levinson was a qualified psychiatrist and has been in practise for the last 50 years. He specialised as a sexologist and clarifies sexual issues. He concluded that the applicant was a male to a female transsexual. He diagnosed her with suffering from transsexualism, a gender dysphoria syndrome. As a result, the applicant wanted to undergo a sex change procedure (being surgical and hormonal treatment). However, before she could be operated on she was required to cross-dress and function as a woman in every way for two years.

¹¹¹*Ehlers v Bohler Uddeholm Africa (Pty) Ltd* 2010 JOL 26216 (LC).

In 2007 the applicant approached the branch manager of the respondent Mr. de Wet as she wanted the respondent to re-employ her as a sales representative in the sale of steel. They discussed the position of a freelance sales representative. She would have to approach new customers and expand the company base, she was earning 10% of the gross product of sales, she had to pay for her own petrol, medical aid, pension and cellophane account. The applicant then accepted this position. She worked with a few members in this department, and all co-workers showed the applicant mutual respect. The applicant's sex was questioned, and she responded that she is a transgender.

She became a permanent employee in January 2008 and enjoyed the benefits that go with this; her duties remained the same to which she fulfilled. In January 2008, de Wet asked her to clear the warehouse, she did this by April 2008 and received accolades from the warehouse staff for her work. During this time, she still consulted with Dr. Levinson, who told Dr. Lades to remove her testicles on 2 February 2008. The applicant said that her testicles were removed in September 2008 allowing her female hormones to develop. The applicant also has adequate breast development. The applicant told de Wet about the sex change in April 2008, de Wet had no problem with this but told the applicant to wear male clothes when consulting with her clients to which she agreed.

In June 2008 an incident took place at a warehouse braai Natasha, a co-worker asked the applicant to move her vehicle. The applicant refused but after de Wet asked her to, she did. de Wet testified that the applicant called Natasha a 'bitch'. In response to this Natasha sent two texts to the applicant reading "I will never have respect for a low class and wannaB woman." and "shame 4 u will neva B DAT lol." As a result of this, a grievance took place on 26 June 2008, both the applicant and Natasha were issued with verbal warnings, the applicant was not given reasons as to why she received a verbal warning but did not challenge it. The applicant's employment relationship then took strain and became difficult with everyone in the office.

In November 2008, the applicant was informed by a customer that Natasha called her an 'it'. The applicant wanted to sue Natasha. Natasha told Fatima what had happened. According to the applicant, Fatima told her that she is immoral and called her other names. The applicant then lodged a grievance against Fatima on 7 November 2008

saying that she is experiencing gender discrimination going against her freedom to change from a man to woman, at work. The grievance hearing took place on 20 November 2008 and 1 December 2008. All of the other employees said that the applicant was the cause of the tension in the department as she was moody. de Wall chaired this hearing and asked his wife to perform tests on the applicant and all other employees, the applicant also underwent a psychometric test. de Waals report found that there was serious conflict in the workplace which led to the first grievance and that the applicant's position, was for a male and that she had already had distinct female features. de Waal found that the applicant's change to female were complete and that her position should be changed to the free-lance sales position and her conditions of employment should revert to the same before she was appointed as a permanent sales representative. de Waal said that she should not be in contact with internal employees except management.

On 22 January 2009 the respondent sent the applicant a letter regarding her future employment relationship. She attended the enquiry, chaired by de Waal. The applicant furnished de Waal with a copy of her I.D which showed that her name had changed from Chris to Christine and a letter from Dr. Levinson stating that she had to wear woman's clothing. The applicant denied that she said that she would consider the position of sales representative if she was dismissed first. The respondent's version is that she said she would first be declared redundant and would thereafter consider the position of the sales representative. de Waal said that the respondent declared that the position and employment relationship between the applicant and the respondent is redundant and granted her severance pay and statutory money.

The applicant appealed her dismissal on the grounds of gender discrimination. The appeal was chaired by the respondent's attorney, Du Toit who dismissed the appeal as he could not find any grounds of gender discrimination.

After dismissal, the applicant's life fell apart. She was suicidal. She could not have her major operation where her penis would be removed, and a vagina created, which would have made her a complete woman. She did not find alternative employment and she believes she has done nothing wrong and wants her job back. The dismissal caused her pain and suffering, by now the surgery would be completed and she would have fitted into the woman's world. According to Dr. Levinson the text messages she

received were discriminatory and many other companies would have accepted her if she came to work in woman's clothing.

The court had to decide what the true reason for the applicant's dismissal was. The court also had to determine if the applicant should be re-instated and paid damages in terms of S193(3) of the LRA and compensation and damages in terms of S50 of the EEA. The court found that the dismissal was based on the gender reassignment procedure and that she was dismissed despite her having the necessary skill and qualifications to perform her work, for the capacity in which she was employed. The respondent's reasons for terminating the employment are not valid and contravened S187 of the LRA, thus constituting an automatically unfair dismissal in that it is direct discrimination against her as a person because of her gender, sex and opinion.

The court relied on S9 of the Constitution which provides that everyone is equal before the law and no person can unfairly discriminate directly or indirectly against anyone on one or more grounds of race, sex, gender, pregnancy, sexual orientation, conscience and belief. The LRA and EEA were drafted to give effect to this clause in the Constitution.

The court dealt with the claim in terms of the LRA. S187(1)(f) says that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against the employee on any arbitrary ground including but not limited to: race, gender, sex and sexual orientation.

The court looked at the evidence before it, de Waal testified that the applicant resigned and when he was asked why he did not state the resignation in the dismissal letter, he responded saying he had used a pro-forma letter. He said if he stated she resigned then she would not have received severance pay and claim unemployment insurance. The court said that there is no substance to the respondent's contentions that the applicant resigned. The applicant did not resign but was dismissed hence the appeal on the grounds of gender discrimination. The court said that they had no evidence that showed that the sales department were dysfunctional as a result of conflict. The applicant lodged a grievance, but the outcome of the grievance was still not given to her. The court said that it is clear from Du Toit's evidence that the respondent would suffer financial harm if the applicant acted in a manner in which she wanted to. Du Toit said that the respondent had to protect its image in a predominantly male orientated

steel industry and it is not acceptable to the customers if she was dressed as a female because she did not appear like a female. It was required by the psychiatrist that the applicant be allowed to act out her female role and this will impact the respondent's relationship with its customers and the respondent had to stop her from living out her threats before it harms the company.

The court said we live in a Constitutional democracy and that it is appalling that there was an agreement where the applicant would wear male clothes when seeing customers, this reminds the court of the apartheid era where certain jobs were reserved for white males only. The court said that the sex change operation would not affect the applicant's competency and now she is dismissed as this might offend some backward customers.

The court concluded that the reason of the dismissal was a result that she is a transsexual who was in the process of undergoing a sex change. She had to be stopped before she could harm the company and if it was not for the sex change her services would not have been terminated. The court made the following order: The dismissal was automatically unfair in terms of S187(1)(f) of the LRA as it unfairly discriminated her on the grounds of her sex and gender, the respondent must reinstate the applicant from date of dismissal to the same position that she held before the dismissal. The applicants claim for compensation and damages in terms of the LRA and EEA were dismissed. The respondent must take steps to prevent this discrimination to other employees and must report to the court within three months to state the steps taken and the respondent must apologise to the applicant in writing.

In the case of *Atkins v Datacentrix (Pty) Ltd*¹¹², the applicant was offered employment by the respondent after a successful interview. He accepted the offer on 27 August 2006. He then told the respondent that he wanted to undergo a gender re-assignment process from male to female. He was informed that the HR Department would revert to him regarding this issue.

On 30 August 2006, the applicant received a letter from the respondent which was signed by van Wyk. The letter stated that "At no time during the interview did you divulge to us that you are in the process of gender-reclassification and only chose to

¹¹²*Atkins v Datacentrix (Pty) Ltd* 2010 4 BLLR 35 (LC).

do so after you accepted the offer. We regard this omission as a serious case of misrepresentation which constitutes dishonesty. We confirm that your services will no longer be required.”

On 12 October 2006, the applicant referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), the CCMA stated that the dispute is an automatically unfair dismissal dispute and must be referred to the Labour Court. The respondent was of the view that the dismissal was a dismissal in terms of S188(1)(a) of the LRA and that the court does not have jurisdiction to adjudicate the dispute and denied any claim of discriminatory treatment. In terms of the contractual principles of common law there is a duty on a prospective employee to disclose relevant information to his future employer. The respondent also stated that there must be a causal connection between the dismissal and the alleged discrimination, the respondent denied that there was this casual connection. The respondent said the applicant was not dismissed for wanting to undergo a gender reassignment surgery but for failing to disclose this, which was important and material.

The court looked at S9 of the Constitution. The court said that the LRA states who an employee is and that it does not distinguish between males and females. A transsexual who undergoes a gender reassignment surgery would continue to remain an employee. The court said that the only inference that can be drawn is that the respondent would not have employed the applicant initially had he disclosed his true intentions. The court said that there was no legal duty on the applicant to have disclosed his intentions, he is working in the I.T industry where the issue of sex is not of importance. The court further held that an automatically unfair dismissal has taken place and that the respondent did not show that the reason for the dismissal was not automatically unfair in terms of S187 of the LRA. The applicant was discriminated on both his sex and gender. The respondent must pay the applicant R100,000 compensation for the automatically unfair dismissal and the respondent must take steps to prevent this same discrimination from occurring and report back to the court within three months.

4.4 Conclusions

The South African Constitution is well written, granting basic rights to its citizens and thereafter making sure that these rights are fully protected. Our labour legislation stems from our Constitution and works toward preventing unfair treatment and discrimination in the workplace. Employers cannot treat their employees differently based on their sexual orientation as this is then unfair discrimination.

We consider the two recent cases mentioned above, and from this we can clearly see that the court's stand point regarding the unfair treatment/ discrimination of transgender employees. In both cases the courts give effect to and promote S9 of the Constitution, being the equality clause, and they go so far as to state that the manner in which the transgender employee is treated reminds them of the apartheid era. This clearly shows that the courts are there to promote inclusiveness, accommodation and fair treatment of the transgender employees, just as it is written in our legislation.

CHAPTER 5 - FOREIGN SOLUTIONS AND LESSONS IN ACCOMODATING TRANSGENDER PERSONS IN THE WORKPLACE

5.1 Introduction

Various countries have implemented processes to include the transgender employee. We look to India where thousands of LGBT people are coming out the closet in the corporate world. India has emerged as one of the most rapidly developing economies globally and now Indian companies have to compete with global companies. This includes competing in the marketing place and competing to attract the best talent for the marketplace meaning that they also attract people from the LGBT community. In India the LGBT community have recently become bolder and NGO's are calling for greater equality for people from this community. This influence is now being felt in the Indian workplace too. As the environment is heightened by competition for talent and upward pressure on wages so companies doing business in India risk losing out if they do not start updating their diversity policies and showing a greater inclusiveness of the LGBT people. Companies who are not on the forefront of this change will risk losing top talent to companies who openly welcome employees regardless of their gender identity.¹¹³

The Indian government have now taken measures to recognise the sexual minorities in India, and have created a unique identification plan, where they will issue unique identity numbers to all Indians which now includes "transgender" along with male and female options in the identification column. Their Identity care will also include a column for "others" under gender showing that the transgender community are been afforded more protection in India.¹¹⁴

¹¹³Pathak and Sawhney "Hiring, retaining and protecting lesbian, gay, bisexual and transgender (LGBT) talent in different parts of the world" 2014 *Industrial Relations Law* 4.

¹¹⁴*Ibid* 4-7.

5.2 Ways to fully accommodate transgender persons in the workplace

In the case of *Price Waterhouse v Hopkins*¹¹⁵, it is said that progress was made for the transgender persons when the Supreme Court recognized that the plaintiff, Hopkins rights were violated when she was denied promotion to partnership at her accounting firm. The court said that the partnership decision was based on stereotypical notions of how a woman should act. The plaintiff in this case was described as being too “macho” or “harsh”. One colleague stated that her chances of making partner would increase if she walked more like a female, dressed more femininely, wore make up and have her hair styled. Hopkins was denied partnership and was discriminated against not because she was a woman but because she was a woman who did not exhibit the stereotypical characteristics expected of members from her sex.

The court clarified the position regarding sex stereotyping stating that, with regards to sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming that they matched their stereotype associated with their group. The court said that gender played a motivating part in an employment decision. From this case it is clear that the term “sex” encompasses more than just anatomy. It includes one’s physical appearance, language and behaviour. If a plaintiff exhibits feminine characteristics or has a feminine physical appearance and if either ground is used as a reason for an adverse employment action, then their rights would be violated. Under this case it is clear that transgender persons should be protected against discrimination, because of “sex”.¹¹⁶

With regards to the dress-code there are various options that can be implemented in the workplace. Companies in Europe are making use of a gender-neutral dress code to include their transgender staff. Dress codes and uniforms should be gender-neutral and applied consistently across the organisation. If the employer specifies that employees must wear certain clothes, then they should not specify for which gender.

¹¹⁵*Price Waterhouse v Hopkins* 1989 U.S 228.

¹¹⁶Dunson “Sex, gender & transgender: the present and future of employment discrimination Law” 2001 *Bekerley J Emp & Lab* 475-478.

The policy should read that “Staff may choose between wearing a skirt or suit trousers” rather than “Women may wear a skirt or suit trousers”.¹¹⁷

A transgender employee employed at Metropolitan Housing Trust stated that “Metropolitan does not have a dress code that restricts employees clothing or appearance on the basis of gender.” Transgender and gender non-conforming employees have the right to comply with company dress codes in a manner consistent with their gender identity or gender expression. The Code of Conduct explains dress code expectations within the business.”¹¹⁸

Employers are now allowing flexibility in their dress code to all staff regardless of their gender identity or expression, for example in hair length, jewellery and make up. All staff should be able to choose a uniform which they feel is most appropriate and be empowered by the organisation to wear it. If an employee is transitioning, a new appropriate uniform should be made available to them in good time and the company’s internal systems should support these changes.¹¹⁹

Employers who hire transgender persons are motivated by the fact that a good employee will create an increase in earnings for the company. Some employers now have adopted the Branch Rickey approach to assist in integration. Under this approach top management such as the owner ensures that it is understood throughout the levels of the company that the transgender employee will continue to work whilst transitioning or will be kept on after the transition. Top management then makes it clear that disruptions from co-workers and supervisors will not be tolerated. Top management then sets up workshops to explain what is going on, quash discriminatory acts and sends policy-enforcing memos to all in the company.¹²⁰

Due to this method, the dress-code is not a problem at these companies. The transgender dresses in the attire of the transitioned gender and appears freely just like

¹¹⁷Peters “Trans inclusive policies & benefits: how to ensure your policies are trans inclusive” 2009 2-3.

¹¹⁸*Ibid* 3.

¹¹⁹*Ibid* 3.

¹²⁰Frye “The international bill of gender rights vs the cider house rules: transgenders struggles with the courts over what clothing they are allowed, which restroom they are allowed to use on the job, their right to marry and the very definition of their sex” 2000 *WM. & Mary J. Women & L* 179.

every other employee. The employer then can make use of a written dress-code policy which will deal with the following topics:¹²¹

Dress code away from the work environment; If the person is transgendered and exhibits gender variant dressing whilst off the job, then he/she should not lose his/her job on that basis alone. If the gender variant behaviour comes to the knowledge of the employer whilst off the job, then a policy should be put in writing to safeguard that person's job. The policy will read along the lines of: "The policy for transgendered people does not allow the employer to restrict the employer's manner of dressing while the employee is away from the job site."¹²²

Dress code for full time and transitioning transgender people: The transgendered employee who informs management in a timely manner of his/her plans to transition and seeks a fixed agreement rather than a half-hearted one. The employer and employee can draw up a timetable that is reasonable for both parties and that works towards a long-term goal of consistent transgender presentation. The following policy guideline will apply to a full-time transgender: "The company dress-code policy for transgender employees does not allow the employer to prevent an employee who has announced his or her intention to transition to the employer from transitioning to his or her long-term goal of a consistent, change of gender presentation in manner of dress."¹²³

5.3 Pronouns

The California Guide for Municipalities relating to transgender persons states that the city employees are not required to believe in, approve of or accept an individual's right to be transgender. However, they must show respect and use the transitioning employees new name and pronouns. The guide states that it is insensitive to refer to someone by the incorrect pronoun. If a co-worker is transitioning and an employee is not certain as to which pronouns to use, then the employee must respectfully ask the

¹²¹*Ibid* 180.

¹²¹Frye "The international bill of gender rights vs the cider house rules: transgenders struggles with the courts over what clothing they are allowed, which restroom they are allowed to use on the job, their right to marry and the very definition of their sex" 2000 *WM. & Mary J. Women & L* 180-181.

¹²²*Ibid* 180.

¹²³*Ibid* 181-182.

transitioning co-worker what name they now use and which pronouns they should use when speaking to them.¹²⁴

5.4 Solutions to the restroom facilities

Matt Nardella, an architect in Chicago says that he can plan restrooms which can be used in the office to make all people including transgender persons feel safe. He says that full length doors should be used as they offer a self-contained experience and more privacy. He says that if these doors are built with wood or tiles it will be less expensive for the company. He says that the trans people want to do their make up or adjust their clothes and they do not want to do this in public, so he will install a mirror within the stall to provide them with this option but common mirrors in shared spaces should still remain.

He says that building designers should create areas where people can wait to access the stall an example will be to create a powder room but for all genders. The waiting area will become a place where the public can gather which makes it safer as there are more eyes on that space. It also creates an incentive to make these waiting rooms a more well-designed area as you are not just putting up a toilet, but you are now wanting people (especially the transgender person) to have a good experience.

The unisex restroom should be advertised as the pants and skirt divide has long fell out of date. Graphic designers have created icons what show gender inclusivity including a figure with pants on the one side and a skirt on the other with the words written “All Gender Restroom” on the top of it. Sam Killerman, a graphic designer and author has created what he calls an inclusive, way to identify a sign for gender-neutral restrooms. It is an image of a toilet. It is so simple, but it says a lot by saying so little.

Restrooms are not normally given prime position in the building plan, which then leads to safety concerns. Nadella says that the restrooms are usually built in the back corner of the building. No one is there to see or monitor them. He says they should be integrated into the rest of the buildings public space.¹²⁵

¹²⁴Foster “Transgender in the Workplace: A Guide For Municipalities” 2017 12.

¹²⁵<https://qz.com/933704/how-to-design-transgender-friendly-bathrooms-that-make-people-of-all-genders-feel-safe> accessed (06-08-2018).

5.5 A recent advancement in South Africa regarding the restroom facilities

A recent advancement in South Africa regarding the restroom scenario is that a transgender woman who was prevented from accessing female toilets at work has won the right for her case to be heard at the CCMA. Andre Taylor from Gugulethu said she was traumatised when Human Resources told her to stop using the toilets. This is transgender discrimination. Taylor said she was told to be a man when she identified as female by Merchants SA, a Dimension Data company. She said that the company misgendered her. She said that the HR told her that her female colleagues complained and asked her what genitals does she have? Does she have a penis or a vagina? Taylor said the incident left her having suicidal thoughts. The company dismissed the allegations at the CCMA however the case is still underway.¹²⁶

5.6 Ways to prevent sexual harassment

We can look to the United Kingdom's legislation in a manner to prevent sexual harassment of transgender persons. The Scottish (Aggravation by Prejudice) Offences Act states that where a person prejudices another person due to him/her having a transgender identity, or where the offence is aggravated by prejudice relating to transgender identity or if the offence is motivated by malice towards the person having a transgender identity. Then the court must state on conviction that the offence was aggravated by prejudice relating to transgender identity, record the conviction in a manner that shows that the offence is so aggravated and must take the aggravation into account when they determine the sentencing. The court must then state regarding the sentence, that it is different from that of which the court would have normally

¹²⁶<https://www.enca.com/south-africa/transgender-woman-wins-ccma-case-over-use-of-female-toilets> accessed (08-08-2018).

imposed if the offence was not aggravated.¹²⁷ This would act as a measure of preventing sexual harassment of the transgender persons as a person will receive a harsher sentence for the offence that they have committed and will be mindful of this before committing an offence.

China have adopted the ILO Convention No. 155 which deals with discrimination in the workplace, it provides that an employer has the responsibility to create a work environment that is free of sexual harassment. Regulations in the Sichuan province states that the employer must take measures to check sexual harassment in the workplace it then further states that in the case of sexual harassment in the workplace, if the employer is at fault it will bear the civil compensation responsibility in line with the law.¹²⁸

We look at what some multinationals are doing to prevent sexual harassment in the workplace today. Management of General Electric (GE) think that if they face a sexual harassment suit, it will result in a loss for them as they will have to pay a larger amount of money and spend more time on the suit. In the U.S a sexual harassment law suit will cost a company tens of millions of dollars. If a company loses the sexual harassment suit its corporate image will be damaged which will have an even bigger impact on the company. GE now take steps to prevent sexual harassment in the workplace and to provide its employees with a safe working environment. Their implementation of a plan to prevent sexual harassment has yielded sound effects¹²⁹.

GE prints brochures of all the relevant procedures and processes and hands it to every employee, they provide the employees with relevant training and encourage them to file complaints. Their management also have to attend training, and this is seen as a routine practice. This training teaches all how to prevent sexual harassment and create a mindset that prevention of sexual harassment is essential to ensure equal access to employment for both males and females.¹³⁰

To encourage and facilitate complaints, the company stipulates that supervisors and superiors of the company should accept any complaint. When receiving a sexual

¹²⁷The Offences (Aggravation by Prejudice) Scotland Act 2009.

¹²⁸Beijing Zhongze Women's Legal Consultation and Service Center- Women Watch China "A guide on prevention of sexual harassment in the workplace." 2010 13.

¹²⁹*Ibid* 15.

¹³⁰*Ibid* 14.

harassment complaint, the staff must do an investigation on a timely manner and inform the complainant of the conclusion. If it was found that harassment did take place then without delay the company will punish the harasser be it through a warning, salary cut, transfer, demotion or dismissal.¹³¹

Trade unions also have a role to play and obligations to fulfil in order to prevent sexual harassment. The union together with the leadership of the company should build an internal mechanism to prevent sexual harassment. The union should openly discuss sexual harassment with both male and females, help members learn the nature and scope of sexual harassment, set up a committee to help investigate sexual harassment in the workplace and inform top management of complaints and they can create policies that address any sexual harassment in the workplace and procedures to address the problems.¹³²

5.7 Ways to prevent dismissal and impart knowledge to the employer

As previously mentioned, many transgender employees are dismissed as the employer does not have sufficient knowledge on them and who they are. Various steps can be implemented to resolve this. In India IBM have initiated a mentoring project where staff who are transgender are paired with a “straight” senior employee to discuss issues varying from their sexuality to their career advancements. This project shows respect to the inclusiveness of their employees. This programme also creates awareness among all employees who do not easily understand the LGBT community and issues that they face.¹³³

Employers need to create an inclusive policy. Employers themselves should reach out to trans employees who are qualified for the job and by implementing these types of policies the company will go from exclusion to inclusion. The transgender law centre has created a model transgender employment policy that strives to make workplaces more inclusive. This sample policy indicates that the company will not tolerate any

¹³¹Beijing Zhongze Women’s Legal Consultation and Service Center- Women Watch China “A guide on prevention of sexual harrasment in the workplace.” 2010 15.

¹³²*Ibid* 15-16.

¹³³Pathak and Sawhney “Hiring, retaining and protecting lesbian, gay, bisexual and transgender (LGBT) talent in different parts of the world” 2014 *Industrial Relations Law* 2.

discrimination based on sex or gender identity. Further the policy touched on names and pronouns to be used for trans employees. Companies should abide by these types of policies.¹³⁴

Besides creating these policies, companies should also institute higher education and guidance classes for all members of staff (from ground level staff to top management) that will teach them what a transgender is and how to handle the situations regarding them.¹³⁵ Human Resources can also support trans employees who are undergoing a transition and also legally protect the company by having an understanding of anti-discrimination laws and by keeping an eye on developing case law. HR must ensure that these protections are incorporated into the organisations policies and practices.¹³⁶

5.8 Conclusions

The international market is now more competitive than ever. Progressive countries and businesses now see this and understand that they need to hire the best employee for the job, regardless of race, colour, religion or sexual orientation. Accordingly, acts of discrimination on the LGBT community especially the transgender employee is vigorously rejected.

The world is advancing, technology is advancing, people are advancing, it is the progression of life. International companies understand this and have taken the necessary steps to advance their business and accommodate their transgender employee. In view of this, the solutions which I have posed are very simply ones; such as building the restroom for the transgender employee in an area that is busy and safe as to the back corner of the office, or creating projects/policies where the transgender employee can sit down and chat to the “straight” employer and educate them on what exactly is happening to and with them, thus creating a working environment that is inclusive.

¹³⁴Crawford “Americas finally beginning to talk about it-transgender rights in the workplace” 2016 *Bus. L.J.* 75-77.

¹³⁵*Ibid* 77-78.

¹³⁶<https://www.shrm.org/resourcesandtools/toolsandsamples/toolkits/pages/managinggendertransitionintheworkplace.aspx> (accessed 23-08-18).

These modest solutions can make a massive change and will be a major advancement for the transgender employee. Once implemented all employees will perform more efficiently resulting in an increase in company profit. South African employers need to take a serious look at and implement the above solutions as this will prevent many problems in the workplace going forward.

CHAPTER 6 - CONCLUSIONS AND RECOMMENDATIONS

It is clear from the above research, that the transgender population is on the rise. This means that more of the transgender community will be seeking employment or experiencing situations in the workplace, if already employed. We look at India where competition is on the rise and companies in India are trading with other international companies. In order for this to happen successfully, Indian employers need to employ the most skilled or knowledgeable employees and many of these employees come from the transgender community. So, it is either the companies adapt their policies to include the transgender employee or simply lose out on business.

It is my view that coming out of an apartheid regime which was filled with discrimination and separation. South Africa's Constitution and various legislations adequately and sufficiently deal with the principles of equality, inclusiveness and they cover discrimination well. We look at the South African case law provided, I feel that the court took a strong view on this issue when they stated that we now have developed and grown as a country and it is appalling that the employer requested the female employee to wear male clothes while meeting customers. The court also stated that if the customers could not accept the transgender employee then they are "backward customers."

The transgender in employment is a relatively new concept in our labour law. It is a very unique situation and not all of the employers and co-workers will be accepting of this to which I believe is normal however, I feel that employers and co-workers should still remain respectful of the transgender employees decisions. Companies internal policies, procedures and guidelines must still be developed to cater and accommodate for the transgender, but I do not feel that this is a major issue as it can easily be done.

With regards to the problems that the transgender persons experience in the workplace, it is the most common problems that cause such a negative effect on the transgender employee. I feel that going forward in an attempt to prevent and solve these problems, the South African employer must look to what the international companies are implementing. These solutions do not have to be copied exactly but

can be used as a starting point and then adapted to accommodate the South African transgender employees needs more fully.

Yes, it might be a shock to the system of co-workers when someone you have been working with for ten years now suddenly comes to work dressed as the opposite sex and now has developed breasts and makes it publicly known to the office staff that they want to remove their penis. I feel the steps to inclusivity and accommodation will be a lengthy process, it will not occur over night, but if the South African employer now makes use of the gender-neutral dress code then over time, the way a transgender employee dresses to work will not be a shock to the system to others any more as co-workers will get used to the idea of a change of dress code.

The restroom issue is a massive one in America. Transgender employees are now experiencing medical problems as they refrain from using the restroom. By implementing Matt Nardelli's ideas on creating a unisex restroom this issue can be solved in its entirety. We have unisex bathrooms in our houses so unisex restrooms in the office should not be anything strange or new. I feel that South African employers can clearly see the extent of this problem by looking at the Americans and should implement this as they will prevent this problem from arising. Restrooms should be built in a centralised area of the office, where people can see it, thus creating a safe place for all and not just for transgender person. By doing this sexual harassment will also be prevented.

With regards to same-sex harassment or sexual harassment of the transgender employee, I feel that this does not only occur to the transgender employee but to many employees in the workplace. Here I strongly feel that South African employers need to take steps to prevent harassment from occurring. This is the primary goal, prevention. Brochures can be given out to employees and training seminars can be hosted on a regular basis. However, if harassment does occur, then strong disciplinary action needs to take place against the harasser. If it is a minor offence for example a sexual harassment joke that would not result in dismissal, then I feel a salary cut should be implemented by South African employers and not just a verbal or a written warning as this will aid in not allowing this event to re-occur. Our trade unions also need to be used more, they can arrange meetings and, in these meetings, talk on ways to prevent sexual harassment.

With regards to the dismissal of a transgender employee. I strongly feel that employers are dismissing them on the basis that they are uneducated and do not know how to deal with transgender staff or they are scared that further problems will arise, and they will be held liable to the transgender staff. Here South African employers need to start educating all in the workplace (including themselves) from the most senior employee to the lowest on what is a transgender, what they are going through, how to deal with them and teach them that they need to show them respect in the work environment. The policy where a trans employee is paired with a “straight” employer or co-worker will work brilliantly in South Africa as people are uneducated on this topic and it will open the eyes of many to see what difficulties they go through especially in the workplace.

These policies should be implemented as it will not only help accommodate the transgender person, but it will also teach and train others who have no knowledge on transgender people. It will work for some and when that happens, it is a step in the right direction as they will be more understanding of the trans employee and this is what the goal is. For some it will not work, and they will not be willing to accept the transgender and the various new policies, to which I fully understand and accept however, in these situations then all the employer can do is request that the employee be respectful to the transgender employees as they also have human rights and rights in the workplace.

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