RYAN EDMONDS
Workplace Counsel

An Employer's Guide to Gender Identity and Gender Expression in the Workplace

Ryan Edmonds
Ryan Edmonds Workplace Counsel

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Introduction[1]

When the Ontario legislature introduced "gender identity" and "gender expression" as protected grounds of discrimination under the Ontario *Human Rights Code*[2] in 2012, it drew attention to the rights of transgendered people in the workplace. Frequently overlooked, the issues that transgendered individuals face at work are both serious and systemic.

The purpose of this paper is to explore how employers can best respond to the needs of their transgendered employees. This will be done by (1) providing a background on the discrimination that transgendered people have historically faced at work; (2) exploring the legislative actions that governments have taken to respond to said discrimination; (3) canvassing case law to determine how adjudicators have dealt with these issues; (4) and finally, sharing insight on the best practices that employers can take to proactively respond to the needs of transgendered people in the workplace.

Transgenderism: A Background

On the spectrum of sexual diversity, transgenderism remains a widely misunderstood area. All transgendered people do not necessarily fit into a neat category for which one simple description could apply. Rather, the term "transgender" (or "trans") is generally used as an umbrella term to describe not only transsexuals, but also crossdressers, transgenderists, and others.[3]

The term "transsexual" is used to describe people who were identified at birth as one sex, but who identify themselves differently. Transsexuals may seek or undergo one or more medical treatments to align their bodies with their internally felt gender identity. In contrast, the term "transgenderist" describes a person whose life experience includes existing in more than one gender. This may include people who identify as transsexual, and people who describe themselves as being on a "gender spectrum" or as living outside the categories of "man" or "woman". Often transgenderists choose not to have sex reassignment surgery. The term "cross-

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[1] The author would like to thank Jennifer Ip, former articling student at Heenan Blaikie LLP, for her assistance in preparing this paper. This paper was previously presented at the Ontario Bar Association's "Gender Identity and Gender Expression in the Workplace" panel on November 11, 2013.

[2] RSO 1990, c. H-19 [Code].

[3] Policy on Discrimination and Harassment Because of Gender Identity (2000), online: Ontario Human Rights Commission < http://www.ohrc.on.ca/en/policy-discrimination-and-harassment-because-gender-identity>.

dresser" describes a member of one gender who dresses as a member of the opposite sex for emotional or sexual satisfaction. And lastly, the term "intersexual" describes a person who is born with underdeveloped or ambiguous sex organs, or sex organs of both genders. This term replaces the inappropriate term "hermaphrodite". Given the wide variety of subgroups that may possibly fall under the category of "transgender", it is no surprise that the general public has misconceptions and misunderstanding of these groups.

Despite these misconceptions, our society's awareness of sexual diversity continues to develop. As this occurs, it is likely that the number of openly transgendered and transsexual people in Canada will rise as people feel more comfortable being open with their gender identity. Although specific statistics regarding the number of transgendered and transsexual people in Canada are not generally available, a US study has estimated that about 1 in 24,000-37,000 men and 1 in 103,000-105,000 women identify themselves as transgendered.[4] However, it has also been suggested that the proportions are about the same among males and females.[5]

Although increasing awareness and acceptance of sexual diversity is on the rise, transgendered people are still highly vulnerable to discrimination, and in particular, discrimination in the workplace. According to a study from UCLA, up to 60% of transgendered people are estimated to be unemployed.[6] Of respondents who did report employment, shockingly upwards of 64% earned less than $25,000 USD per year.[7] Furthermore, 56% of respondents reported to have been fired from their jobs at least once, and upwards of 47% reported they were unlawfully denied further employment opportunities.[8]

Apart from facing systemic discrimination in the workplace, transgendered people have also been misunderstood by the medical community. As recently as 2012, the Diagnostic and

[4] M.V. Lee Badgett, Holding Lau & Brad Sears, "Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination" [unpublished, 2007], The Williams Institute of Sexual Orientation Law and Public Policy at UCLA School of Law, online: <http://williamsinstitute.law.ucla.edu/research/workplace/bias-in-the-workplace-consistent-evidence-of-sexual-orientation-and-gender-identity-discrimination/> [UCLA].
[5] L. Winfield & S. Speilman, *Straight Talk About Gays in the Workplace*, 2d ed. (New York: Harrington Park Press, 2001) at p.53.
[6] UCLA, *supra*.
[7] *Ibid*.
[8] *Ibid*.

Statistical Manual of Mental Disorders ("DSM") classified transgendered people as having a "gender identity disorder". This term had been highly criticized because it was seen as characterizing all transgendered people as mentally ill. In its newest edition, however, the DSM-V has now reclassified the term as "gender dysphoria". This change is said to reflect a new perspective on gender identity. While the old DSM-IV focused on "gender identity disorder" as the incongruity between a person's birth gender and the gender with which they identify, the new DSM-V seeks to emphasize the importance of *distress* about the incongruity in order for a diagnosis to be made.

The importance of this shift in DSM terminology is to recognize that a person experiencing an incongruity between birth gender and gender identity does not necessarily experience distress, and a person who is not distressed by their cross-gender identification should not be diagnosed with "gender dysphoria". As a result, gender nonconformity is no longer inherently considered a mental disorder. This approach is consistent with the layman view that transgenderism is more akin to a sexual orientation than a medical illness.

Legislative Changes: An Overview

Canada

On June 19, 2012, the Ontario government amended its *Human Rights Code* to add "gender identity" and "gender expression" as prohibited grounds of discrimination (amendments collectively known as "*Toby's Act*").[9] The purpose of *Toby's Act* was to offer explicit human rights protection to transgendered people in light of their socio-economic vulnerability. Prior to these amendments, transgendered and transsexual individuals had to file their claims under other grounds of discrimination, including sex, sexual orientation, and even disability.

Other provinces that have enacted similar legislation include Manitoba[10] and the Northwest Territories,[11] which have amended their human rights legislation to include express protection

[9] Bill 33, *Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression)*, SO 2012, c 7.
[10] *The Human Rights Code*, CCSM 1987, c H175 s 9(2)(g).
[11] *Human Rights Act*, SNWT 2002, c 18 s 5(1)

for "gender identity", and Nova Scotia,[12] which bans discrimination on the basis of both "gender identity" and "gender expression".

Federally, the government attempted to bring the *Canada Human Rights Act* (the "Act") in line with other provinces under Bill C-279,[13] which sought to add "gender identity" and "gender expression" to the *Act*'s prohibited grounds of discrimination. Although the addition of "gender identity" was fairly uncontroversial,[14] "gender expression" was highly criticized for being too vague and possibly redundant. Critics claimed that the potential scope of an undefined term such as "gender expression" left room to unintentionally grant human rights protection to groups and individuals beyond the transgendered community. As a result, the Standing Committee agreed to remove "gender expression" from the Bill. However in doing so, the Committee emphasized that this move should not be interpreted by adjudicators to mean that "gender expression" is not a prohibited ground of discrimination, but rather that it should be read in as an expressive element to the "gender identity" ground.

As of July 7, 2013, the Bill did not reach a final vote in the Senate before Parliament's summer recess. This setback means that the Bill will have to go before the Senate yet again this fall. Although disappointed, the Bill's sponsor, New Democrat MP Randall Garrison, is optimistic that the Bill will eventually pass. As of the writing of this paper, the Bill was reinstated from the previous session and is now in the First Reading before the Senate.

United States

Although laws have long prohibited discrimination based on "sex" in the United States, recent changes in some states have broadened this scope to include "gender identity" and "gender expression" as well.

[12] *Human Rights Act*, RSNS 1989, c 214 ss 5(1)(na), (nb).
[13] Bill C-279, *An Act to Amend the Canadian Human Rights Act and the Criminal Code (Gender Identity)*, 2nd Sess, 41st Parl, 2013, (first reading 16 October, 2013).
[14] With the exception of the proposed definition, as explored further in the paper.

For example, California enacted Assembly Bill 887[15] in 2011 which made broad amendments to several statutes in order to expressly prohibit discrimination based on both "gender identity" and "gender expression", and in Massachusetts, *An Act Relative to Transgender Equal Rights*[16] took effect in 2012 which now prohibits discrimination on the basis of "gender identity" in employment, housing, credit, and education.

In Delaware, the *Gender Identity Nondiscrimination Act*[17] was enacted in 2013 which banned discrimination on the basis of "gender identity" in employment, places of public accommodation, housing, and public works contracting. The legislation is unique in that it does not require proof of any medical diagnosis. Rather, all that is required for the protections to be triggered is a consistent assertion of a particular gender identity. This law makes Delaware the seventeenth state, along with the District of Columbia, to enact laws prohibiting gender identity discrimination in the US.

Federally, the US Equal Employment Opportunity Commission ("EEOC"), the entity responsible for enforcing federal non-discrimination laws, has held that "discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore covered under Title VII of the *Civil Rights Act of 1964.*"[18] Therefore although "gender identity" is not explicitly spelled out as a prohibited ground of discrimination in federal legislation, the EEOC has read it in as an analogous ground.

"Gender Identity" vs. "Gender Expression"

One notable issue that has arisen in connection with the new grounds of discrimination is determining the difference between "gender identity" and "gender expression". As previously noted, critics have argued that the term "gender expression" is vague, overlaps with "gender identity", and potentially grants unintended human rights protection to individuals beyond the transgendered community.

[15] US, AB 887, *An act to amend Section 51 of the Civil Code*, 2011, Reg Sess, Cal, 2011 (enacted) [California].
[16] US, HB 3810, *An Act Relative to Transgender Equal Rights*, 2011, Reg Sess, Mass, 2011 [Massachusetts].
[17] US, SB 97, *An Act to Amend Titles 6, 9, 11, 18, 19, 25 and 29 of the Delaware Code Relating to Hate Crimes and Discrimination in Employment, Public Works Contracting, Housing, Equal Accommodations, and the Insurance Business on the Basis of Gender Identity*, 2013, Reg Sess, Del, 2013 [Delaware].
[18] US Equal Employment Opportunity Commission, online: < http://www.eeoc.gov/federal/otherprotections.cfm>.

In an attempt to address this issue, Bill C-279 (the "Bill") provided a definition for "gender identity", a unique departure from other Canadian jurisdictions that have chosen to leave the term undefined. More specifically, the Bill defined "gender identity" as:

> "[A]n individual's deeply felt internal and individual experience of gender, which may or may not correspond with the sex that the individual was assigned at birth"

This definition is based on the Yogyakarta Principles,[19] on international declaration relating to sexual orientation and gender identity. The principles were developed by a distinguished group of human rights experts, including a former UN High Commissioner for Human Rights, and were launched at the United Nations Human Rights Council in Geneva on March 26, 2007. Although it defined "gender identity", the Bill did not define "gender expression".

In its fact sheet on "human rights and gender identity and gender expression", the Ontario Human Rights Commission defines and distinguishes the two terms as follows:[20]

> "Gender identity" refers to each person's deeply felt internal and individual experience of gender. A person's gender identity may or may not correspond with their birth sex, and with social norms of "male" and "female". It includes an individual's personal sense of their body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, such as dress, speech and mannerisms.
>
> "Gender expression" refers to the external attributes, behaviour, appearance, dress, etc., by which a person expresses themselves and through which others perceive that person's gender.

In other words, "gender identity" relates to a person's *intrinsic* sense of self, especially with respect to their sense of being male or female, whereas "gender expression" relates to the *extrinsic* attributes that are socially perceived as being masculine or feminine. Therefore if "gender expression" protects how a person chooses to inform the world of one's gender, it may

[19] Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006, online: < http://www.yogyakartaprinciples.org/>.
[20] "Human Rights and gender identity and gender expression (fact sheet) (2012), online: Ontario Human Rights Commission: <http://www.ohrc.on.ca/en/human-rights-and-gender-identity-and-gender-expression-fact-sheet>.

include a person's choice of clothing, hairstyle, or gender-associated accessories, such as ties or jewelry.

Beyond human rights legislation, many collective agreements in unionized workplaces contain anti-discrimination provisions. As a limitation on management rights, these provisions require that the employer's workplace rules be fair and reasonable. Given the dearth of case law on "gender expression" as a protected ground of discrimination, employers should be mindful of this case law when considering what the scope of "gender expression" may entail.

For example, arbitrators have struck down workplace rules on the basis of reasonableness that prohibited males from having longer than collar-length hair,[21] males from wearing earrings[22] or facial jewelry in general,[23] and from having or not having facial hair.[24] While in the past an employer could justify such policies based on evidence of customer preferences,[25] in modern times, arbitrators have been less willing to accept this explanation when the policy is based on sex discrimination and sex stereotyping.[26] While not as a direct analogy to "gender expression" as a prohibited ground under human rights law, the rationale underlying this shift among arbitrators is nonetheless telling and may influence adjudicators' interpretation of the new ground going forward.

The Evolution of Caselaw

The Early Years

In one of the earliest Canadian cases to consider the issue, it was found that the protected ground of "sex" under Quebec's *Charter of Human Rights and Freedoms*[27] includes not only the state of being male or female, but also the process of transformation that is part of transsexualism.

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[21] *Empress Hotel* (1992), 31 L.A.C. (4th) 402 (McEwen).
[22] *Co-op Centre Ltd.* (1990), 17 L.A.C. (4th) 186 (Collier). The arbitrator not only claimed the prohibition on allowing men to wear earrings were unreasonable, but that it was also discriminatory as well.
[23] *West Lincoln Memorial Hospital* (2004), 126 L.A.C. (4th) 52 (Luborsky).
[24] *Waterloo (Regional Municipality) Police Services Board* (1999), 85 L.A.C. (4th) 227 (Knopf). Note that this was a blanket ban and was grieved on grounds unrelated to religious discrimination.
[25] See e.g. *Canadian Freightways Ltd*. (1995), 49 L.A.C. (4th) 328 (Korbin), where a survey of customer preferences was used to justify banning male office staff from wearing shorts.
[26] See e.g. *Thrifty (Canada) Ltd.* (2001), 100 L.A.C. (4th) 162 (Larson).
[27] RSQ, c C-12.

In *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Maison des jeunes À-Ma-Baie Inc. (No. 2)*,[28] M.L., the complainant was an outreach worker who provided information and emotional support to at-risk youth in the community. Since spring 1991, M.L. had undergone a sex change and was living for several months as a woman in all aspects of her life, except at work. In 1992, M.L. informed her employer of her sex change and her wish to be known by a female first name and to work as a woman. The employer subsequently terminated M.L.'s contract, claiming that the "transsexuality problem [would] make it impossible to do his job", as "the condition" would somehow be transmitted to the street youths themselves.

The Tribunal found that M.L.'s transsexualism and sex change process influenced the employer's decision to dismiss and refuse to rehire her again, and as such, there was sufficient evidence demonstrating sex-based discrimination. As a result, the Tribunal ordered the employer to pay $4,000 in moral injuries, which included violation of dignity and humiliation resulting from the dismissal and subsequent refusal to rehire the complainant. The employer was also ordered to pay $1,750 in material damages for lost wages.

In the British Columbia case of *Ferris v. O.T.E.U., Local 15*,[29] the complainant employee suffered discrimination from both her union and her employer. The complainant who was biologically male had worked for the employer for nineteen years, and had been living as a woman since 1975. She had begun hormone treatment that same year but had not undergone sex reassignment surgery. An issue arose in the workplace when a co-worker complained that "a man was using the woman's washroom".[30] Both the union and the employer treated this complaint as legitimate and acted together in conspiring to remove the complainant from the workplace.

In particular, the union engaged in the following actions: (1) it held secret meetings about the complainant under the guise of "accommodation"; (2) designated the shop steward who had initially filed the washroom complaint to represent the complainant in her meeting with the

[28] (1998), 33 CHRR D/263 (Que. HR Trib.).
[29] [1999] BCHRTD No. 55.
[30] *Ibid* at para. 25.

employer; (3) failed to file a harassment grievance against the employer; and (4) failed to fully present the employer's accommodation proposals to the complainant. As a result of this treatment, the complainant relapsed into mental illness and was unable to work.

The Tribunal found that the complainant had established a *prima facie* case of discrimination based on both "sex" and "disability", and ordered the union to pay the complainant damages of $1,000.80 for lost wages and $5,000 in compensation for injury to the complainant's dignity, feelings and self-respect. This amount seems disproportionately small not only given the serious emotional and economic harm experienced by the complainant, but also in light of the Tribunal's recognition of the unique vulnerability of transgendered and transsexual people in the workplace:

> "I accept that transgendered people are particularly vulnerable to discrimination. They often bear the brunt of our society's misunderstanding and ignorance about gender identity. In the context of the workplace, washroom use issues are often contentious and, in the absence of knowledge, sensitivity and respect for all concerned, can inflict a great deal of emotional harm on the transgendered person."[31]

New Millennium

Cases from this period showed an incremental approach to workplace rights for transgendered people, where adjudicators not only made important advances but also set clear boundaries on same.

In *Montreuil v. National Bank of Canada*,[32] the Canadian Human Rights Tribunal found that the bank had unlawfully discriminated against a transgender complainant because it had refused to offer her a call centre job. Prior to applying for this position, the complainant had earned a Master's degree in business administration, practiced law, worked as a management consultant and had also taught numerous courses at the University of Québec and several colleges. The complainant applied for an entry-level position based on the belief that she would advance quickly to a higher position in the bank because of her experience as a lawyer and her qualifications in the banking and securities field.

[31] *Ibid* at para 16.
[32] [2004] CHRD No. 4 (QL).

In choosing not to hire her, the Bank claimed that the complainant was overqualified and had only wanted the position as a way to campaign for the rights of transgendered people. On this basis, the Tribunal found that the complainant's transsexualism was a factor in the employer's hiring decision, and as such, constituted unlawful discrimination. Notably, although the Tribunal accepted that the Bank's representatives did not intend to discriminate against the complainant, it relied on settled law that "intent to discriminate was not a necessary pre-condition to finding of discrimination".[33]

Despite the progress made in *Montreuil*, the appellate court decision in *Nixon v. Vancouver Rape Relief Society* (which remains the highest level decision on the topic) set clear boundaries on the expansion of transgendered rights.

In *Nixon v. Vancouver Rape Relief Society*,[34] a post-operative male to female transsexual was denied the opportunity to volunteer with the Vancouver Rape Relief Society (the "Society") because she had been born a man. The Society restricted its volunteer counselors exclusively to women based on the belief that clients would not accept males as peer confidants. This requirement did not allow transsexuals or people who had not been a woman since birth to volunteer.

The complainant responded to an advertisement asking for volunteers who wished to be trained as peer counselors for victims of male violence. The complainant had been born physically male, but had undergone a sex change procedure and her birth certificate showed her as female. After an initial screening interview, the complainant attended her first evening of training where she was immediately identified by one of the facilitators as not having been born a woman. After the complainant confirmed that she had not been a woman since birth, she was asked to leave the training group and was excluded from acting as one of its volunteer counselors.

The Tribunal held that the Society discriminated against the complainant. In making a formal distinction between the complainant and other women based on a personal characteristic, the

[33] *Ibid* at para 72.
[34] 2002 BCHRT 1.

Society had "failed to take into account [the complainant's] already disadvantaged position within Canadian society as a member of a group that has been marginalized."[35] Furthermore, the Society made assumptions about the complainant, not based on her individual capabilities or life experiences, but rather based on the fact that they believed the complainant was "not a woman so far as they were concerned."[36] Notably, the Tribunal also found that the Society had not established that being born a woman was a "*bona fide* occupational requirement" for the position, nor had they met their obligation to accommodate up to the point of undue hardship. As a remedy, the Tribunal ordered the Society to stop denying transsexual women the opportunity to participate in their training program and awarded the complainant $7,500 for injury to her dignity, feelings and self-respect.

The Tribunal's decision was overturned on judicial review by the Supreme Court of British Columbia.[37] The Court held that the Tribunal erred in its application of the *Code's* group rights exemption. In particular, it ruled that s. 41 of the BC *Human Rights Code*[38] allowed a non-profit organization to show preferential treatment to members of identifiable groups in order to promote the interests of those groups, provided there was a rational connection between the preference and the organization's purpose. Therefore the Society was entitled to exclude the complainant, as well as other males, from becoming volunteer counselors based on the *bona fide* belief that its identifiable group of abused women required female-by-birth-only counselors. Troublingly, the Court also held that the Tribunal erred in finding that the exclusion had caused an objective impact on the complainant's human dignity.[39]

The British Columbia Court of Appeal dismissed the complainant's appeal.[40] The Court held that although the Society discriminated against the complainant, s. 41 of the BC *Code* permitted the Society to hire only women if there was a rational connection between this preference and the Society's work and purpose (which it accepted there was). Despite this outcome, the Court

[35] *Ibid* at para 144.
[36] *Ibid*.
[37] *Vancouver Rape Relief Society v. Nixon*, 2003 BCSC 1936, 128 ACWS (3d) 135.
[38] *Human Rights Code*, RSBC 1996 c 210.
[39] *Ibid* at para 161.
[40] *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601.

ended its decision with thoughtful commentary on what it claimed was the harsh but inevitable need for an incremental approach to developing transgendered rights:

> "Sex reassignment has only been medically possible for the last 35 years or so. The earliest work – it was first published in 1974 – I know of on the emotional implications is Conundrum by Jan Morris, an author of great distinction. Indeed, as James Morris, it was he who first sent forth to the world of 1953 the news that Hillary and Tensing had conquered Mt. Everest.
>
> But it takes many years for society in general to adjust itself to radical developments in the human condition.
>
> To force people, especially those in an organization such as [the Society], which has its own radical agenda, to associate with those who for some reason deeply offend their own avowed principles, can lead not to acceptance or at least toleration, but, if not to hatred, at least to animosity."[41]

Therefore while rejecting the right of a transgendered woman to volunteer at a rape relief shelter, the Court recognized the inevitability of further development and progress in this area as awareness and acceptance of transgender issues increases within society.

Modern Era

Case law from recent years has shown a matured understanding from adjudicators regarding gender identity in the workplace. While this has led to a meaningful increase in damages for injury to human dignity, it has also led adjudicators to reduce those damages when the employee is found blameworthy for the workplace conflict at issue.

For example, in *Vanderputten v. Seydaco Packaging Corp.*,[42] the complainant began transition from living as a man to living as a woman after five years of employment. Although the complainant would not have gender reassignment surgery for several years, she had begun hormone therapy which triggered a number of physical changes, including the development of breasts. While the employer outwardly supported the complainant's transition, it refused to treat her as a woman until her sex reassignment surgery was complete. In the meantime, the employer refused to allow the complainant to use the women's change room, and also did not intervene

[41] *Ibid* at para 81-82.
[42] 2012 HRTO 1977.

when she reported harassment from supervisors and co-workers. The complainant was eventually terminated.

The Tribunal held that employer discriminated against the complainant on the basis of "sex" when it insisted that she be treated in the same manner as men until her transition was fully complete. Although the new grounds of "gender identity" and "gender expression" had yet to come into force at the time of the Tribunal's decision, it noted that "the insistence that a person be treated in accordance with the gender assigned at birth for all employment purposes is discrimination because it fails to treat that person in accordance with their lived and felt gender identity."[43]

Given the employer's failure to explore any options for accommodation and its refusal to investigate the complainant's claims of harassment, the Tribunal awarded $21,000 in damages for injury to dignity, feelings, and self-respect. Notably, this amount represented a reduction from the $25,000 sought by the complainant, as the Tribunal accepted that she had, in part, contributed to the poisoned work environment of which she complained. These damages were also in addition to an award for eight months' lost wages, which similarly took the complainant's lengthy discipline record into account. In making these reductions, the Tribunal stressed that the misconduct at issue was unrelated to the complainant's protected status.

Guidance for Employers

General Guidance

The above-noted cases illustrate the importance of procedure, communication, policy enactment, and training to avoid unnecessary conflict and potential discrimination on the basis of gender identity and gender expression in the workplace. Because issues relating to transgenderism and transsexualism are relatively rare in Canadian workplaces, some employers and unions may be prone to a knee-jerk reaction. This is precisely the type of response that prudent and progressive employers should strive to avoid.

[43] *Ibid* at para 66.

For example, employers should reassess the need for gender-based distinctions in the workplace and consider whether there is truly any legitimate purpose served by making such distinctions. In terms of administrative record-keeping for instance, employers should consider adding an "other" option when gender information is requested. This is especially appropriate given that some transgendered people do not identify with any particular gender at all.

Similarly with respect to dress codes, employers should move on from policies which stipulate appropriate dress for each gender to a more gender-neutral position. In particular, employers should avoid dress codes that prescribe gender stereotypes, such as requiring men to wear ties and women to wear skirts. As discussed earlier, because some dress codes have already been struck down by arbitrators in unionized workplaces on the basis of sex stereotyping, it is likely that a similar result could occur in the human rights context under the new ground of "gender expression". As a result, employers should implement gender neutral policies which simply require employees to dress "professionally" for the workplace. Whether or not an employee's given attire is considered "professional" would then be judged on, for example, whether a skirt was too short, instead of whether a skirt should have been worn at all.

Finally, employers should consider proactively adopting a gender transition policy, regardless of whether there is a present need for one. There are a number of benefits to acting proactively this way. For one, ensuring that all employees are informed of the gender transition policy may help facilitate discussion and feedback about the steps involved in the transition process, the options available to transitioning employees, and the hardships faced by transgendered people in general. Ideally, training on this policy would coincide with sensitivity training on issues relating to gender identity in the workplace. More importantly, however, proactively implementing such a policy will send an important signal to closeted-but-transgendered employees that a welcoming workplace awaits them.

Pre-transition and Transition Guidance

While the previous section related to the needs of transgendered employees generally, the needs of employees prior to and during transition are particularly unique.

To start, employers should not require medical documentation in order for an employee's gender identity to be accommodated. As discussed earlier, not only has the DSM-V moved away from seeing gender identity as a medical disorder, but the layman and more dignified approach considers it akin to sexual orientation for which no such proof is required. Accordingly, the employee's consistent assertion of self-identification should be the sole measure of their gender.[44] While it is legitimate to request documentation if the employee's gender transition reaches the point of needing time off work for medical procedures, such a request from the outset is unnecessary.

With respect to actually planning the transition, employers should generally defer to the transgendered employee on how they see the transition unfolding in the workplace. For example, some employees may want their transition to be kept confidential until their transition is "complete", whereas others may want to start appearing at work as their new gender on a gradual basis. In either case, there is no "right" answer, but rather only what the transitioning employee feels most comfortable with. That being said, while it is not appropriate for an employer to dictate how a transgendered employee should "come out" at work, that employee's preferences are constrained by the limits of undue hardship. Though cases have yet to shed light on this, given the legislature's intent of remedying the systemic discrimination faced by transgendered persons, it is likely that the Tribunal would heavily scrutinize any claims of undue hardship made in connection with the gender transition process. Further, and as seen from arbitral case law regarding personal appearance, "customer preference" is no defence to sex stereotyping.

Finally, employers assisting an employee with a gender transition should also be aware of the needs that person may have which are not covered by OHIP or more extended health plans. These needs may include certain drugs, counseling, hair pieces, electrolysis, custom shoes, and other procedures intended to bring the transgendered person's appearance in line with their

[44] Large organizations such as the Toronto District School Board and the Law Society of Upper Canada advocate this approach. See e.g. Toronto District School Board, "TDSB Guidelines for the Accommodation of Transgender and Gender Non-Conforming Students and Staff" (2011), online: <http://www.tdsb.on.ca/wwwdocuments/programs/gender_based_violence_prevention__gbvp_/docs/FINAL%20TDSB%20Transgender%20Accommodation.pdf> [TDSB], and Law Society of Upper Canada, "Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment" (2013), online: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147487143> [LSUC].

gender identity. While certain employers have rolled out supplemental benefit programs which address these needs, strictly speaking, an employer is not obligated to assume these costs. That being said, there are still cost-effective ways for an employer to assist a transitioning employee during this time, such as providing interest-free loans or salary advances to help pay for these needs.

Post-Transition

An employer's duty to accommodate does not end after a transgendered employee starts appearing in the workplace in accordance with their gender identity. Rather, an employer must take steps to ensure that the employee's gender identity is respected and the employment relationship retains long-term viability.

First and foremost, the issue of washroom and/or change room usage must be addressed. Although some employers have handled this in the past by providing transgendered employees with a private washroom (often the "handicap" washroom), it is possible that this may no longer suffice. Indeed, given the recent legislative movement to formally recognize discrimination against transgendered people, employers may now be subject to a higher standard of accommodation.

As an example of what types of accommodation might be appropriate, the Toronto District School Board's policy on washroom access anticipates the range of options an employee might prefer:

> "Employees have the right to use a washroom that corresponds to their gender identity, regardless of their sex assigned at birth. Requiring employees to 'prove' their gender (by requiring a doctor's letter, identity documents, etc.) is not acceptable. The employee's self-identification is the sole measure of their gender. Where possible, schools will also provide an easily accessible all-gender single stall washroom for use by any employee who desires increased privacy, regardless of the underlying reason. However, use of an all-gender single stall washroom should always be a matter of choice for an employee. No individual should be compelled to use one due to continuing harassment in a gender appropriate facility. If possible, the provision of more than one all-gender washroom is encouraged."[45]

[45] TDSB, *supra*, p. 11.

Similarly, the Law Society of Upper Canada's model policy for law firms on LGBT inclusion states that:

> "Washroom and other Gender-Specific Facilities – The Firm respects the needs of those who identify as transgender regarding the use of washrooms and gender-specific facilities. It is that person's right to use a washroom that is in accordance with their gender identity and presentation."[46]

In the event a situation emerges where a transgendered employee's use of washroom or change room facilities conflicts with the sensitivities or religious views of others, an employer should remember that there is no "hierarchy" of human rights. Rather, just as each person's rights and dignity must be equally respected, affected persons are entitled only to reasonable accommodation. Thus, by its namesake, accommodation in the event of conflicting rights will necessarily be imperfect. In these situations, an employer must strive to ensure that any inconvenience is equally distributed, and that its efforts in this regard are well documented.

Once an employee chooses to appear in the workplace in accordance with their gender identity, an employer must ensure that same is formally recognized. Actions an employer can take include updating a person's name and gender on all internal documents within the organization, such as personnel and administrative records. An employee should also be given the unfettered ability to represent their new "self" to external parties as well through updated email signatures, business cards, and so forth. Lastly, managers and supervisors should swiftly correct any instances of incorrect name or pronoun usage they encounter with respect to the employee, and should not hesitate to discipline for same if the misuse is found to be more than a mere oversight.

Conclusion

With the addition of "gender expression" and "gender identity" as prohibited grounds of discrimination under the *Human Rights Code*, the Ontario legislature has joined other governments in shining a spotlight on the oft-overlooked needs of transgendered people. Now more than ever, employers need to be aware of how their gender-related policies and practices

[46] LSUC, *supra*, p. 20.

may impact their transgendered employees. By proactively responding to the needs of these individuals, employers will thwart claims of discrimination and build a respectful workplace that is welcoming for everyone.

About the Author

Ryan Edmonds is the owner of Ryan Edmonds Workplace Counsel, a law firm that provides employment, human rights, and workplace investigation services to both employers and employees. Ryan is active in the community. He was a founding Director of Out on Bay Street and is currently a section executive of the Ontario Bar Association's Sexual Orientation and Gender Identity Committee.

Ryan can be reached at 647.361.8228 or Ryan@TorontoWorkplaceCounsel.com.

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