



## LEGAL FOCUS



# Protecting transgender employees in the workplace: lessons from a UK case

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Transgender employees, usually a minority in the workplace, are likely to face adverse treatment such as discrimination, harassment, lack of recognition, and exclusion. A recent case in the UK Employment Tribunal, *AB v Royal Borough of Kingston Upon Thomas (UK Case)*, illustrates how an employer's failure to respond to an employee's gender reassignment appropriately can amount to discrimination under the Equality Act 2010 in the UK, resulting in liability for substantial compensatory damages. Although the UK Tribunal's decisions do not have a binding effect in Hong Kong courts and gender reassignment is not one of the protected attributes under the Hong Kong anti-discrimination ordinances, this case nevertheless provides useful guidance on anti-discrimination in the workplace for employers in Hong Kong.

### The UK Case

Ms. AB brought a discrimination claim against her employer on the grounds of gender reassignment. She alleged that she was treated less favourably by the employer because of her transition from male to female in July 2020. Ms. AB complained of various acts of discrimination including:

- Failure to update Ms. AB's details including name and gender in their internal system for almost 2 years (referred to as "deadnaming");
- Putting a post-it note on Ms. AB's locker with her dead name crossed out and her post-transition name written on which was in full view of everyone;

- Removal of Ms. AB from a number of works which had previously been part of her role prior to the gender reassignment;
- Demand for an apology from Ms. AB after she had raised a complaint of discrimination against her manager;
- Failure to investigate Ms. AB's grievance properly and delay in the process by adopting a dismissive attitude towards Ms. AB's allegation.

The UK Employment Tribunal ruled that the employer had discriminated against Ms. AB on the ground of gender reassignment in contravention of the Equality Act 2010. In reaching its decision, the Tribunal considered whether the alleged "less favourable treatment" towards Ms. AB was by reason of her protected characteristic of gender reassignment or simply unreasonable behaviour by the employer and had concluded the former.

Ms. AB was awarded £21,000 as compensation for injury to feelings (i.e. within the middle band of the Vento guidelines) together with £4,423 interest. In deciding to award the "middle band" as Ms. AB's compensation for injury to feelings, the Tribunal considered that the deadnaming was a contributory factor to Ms. AB's mental distress at the material times, taking into account the employer took almost 2 years to rectify the issue and the lack of apology from the employer about this.

## Lessons for employers in Hong Kong

Lesbian, gay, bisexual, transgender, and other sexual and gender minorities (LGBT+) employees often face discrimination, harassment, and stigma in the workplace. The UK Case serves as an important reminder for employers to take proactive steps to protect their LGBT+ employees in the workplace. Below are some suggestions of good practices for employers to start with:

- Formulating anti-discrimination, anti-harassment and DEI policies: Employers should have clear and comprehensive policies that prohibit discrimination and harassment based on protected attributes under the anti-discrimination ordinances in Hong Kong and promote diversity, equity, and inclusion (DEI) in the workplace. These policies should be communicated to the employee and regularly reviewed and updated to reflect the changing legal and social context.
- Dealing with complaints: Employers should establish proper and effective mechanisms for reporting, investigating, and resolving complaints of discrimination and harassment. These mechanisms should be made known to the employees and the investigation should be confidential, impartial, and timely. Adopt a fair and supportive approach to prevent any retaliation or victimization against the complainants.
- Staff training: Employers should provide regular trainings for employees on the requirements under the anti-discrimination ordinances in Hong Kong, how to prevent and address discrimination and harassment in the workplace, and how to foster a culture of DEI in the workplace.
- Seek better communication with the LGBT+ employees: Listening to the LGBT+ employees and finding out their needs and concerns may help fostering a safe and inclusive work environment. Their feedback may also help the employers to implement and monitor the anti-discrimination, anti-harassment and DEI policies effectively.

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### Implication of the UK Case in Hong Kong

Unlike the UK, there is currently no legislation which prohibits discrimination on the grounds of sexual orientation, gender identity (or reassignment) or intersex status in Hong Kong. However, a transgender person may be protected under the Disability Discrimination Ordinance (DDO).

The World Health Organisation redefined gender identity-related health in recent years replacing "transsexualism" and "gender identity disorder" with "gender incongruence". While "gender incongruence" has been removed from the "mental and behavioural disorders" classification, it may fall within the definition of "disability" under the DDO. The Equal Opportunities Commission has processed complaints by transgender persons under the DDO.

Under the DDO, it is unlawful to discriminate against an employee/job applicant because of their disability. There are two types of discrimination, direct and indirect:

- **Direct discrimination:** An employer is taken to have discriminated against an employee and/or job applicant on the ground of his disability if it treats him less favourably than it would treat those without a disability in the same or not materially different circumstances.
- **Indirect discrimination:** Indirect discrimination arises where a condition or requirement imposed by an employer applies to everyone equally but a smaller proportion of persons with a disability can comply than persons without a disability, the person suffers a detriment as a result and the condition or requirement is unjustifiable.

The DDO also prohibits unwelcome conduct towards a person because of their disability (i.e. disability harassment) by anyone who works in the same workplace including employers, employees, contract workers, principals, commission agents, partners, interns and volunteers.

Under the DDO, an employer will be vicariously liable for discriminatory acts by its employees and/or for harassment acts committed by its workplace participants, unless they can prove that they have taken reasonable steps to prevent it.

There are Court decisions in Hong Kong which upheld the rights and/or benefits of same sex couples and/or transgender persons in the past years, although not necessarily in the context of anti-discrimination. For example, in a recent landmark case of *Q, Tse Henry Edward v. Commissioner of Registration*, the Court of Final Appeal ruled in favour of two transgender men applicants, finding that the Government had unlawfully violated their constitutional rights under the Hong Kong Basic Law by refusing to change the gender identity on their identity cards unless they had undergone full sex reassignment surgery.

The Court held that the Government's policy was disproportionate, discriminatory, and violated the applicants' right to privacy and dignity. This demonstrates an increased recognition of the rights of LGBT+ individuals among the Hong Kong legal field.

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