

GENDER REASSIGNMENT AND THE WORLD OF WORK: A COMPARATIVE PERSPECTIVE ON THE INTERSECTION BETWEEN TRANSGENDERISM, TRANSSEXUALITY AND APPEARANCE DISCRIMINATION IN THE SOUTH AFRICAN EMPLOYMENT ARENA

DM Smit

Blur LLB LLM (cum laude) LLD

*Senior lecturer, Department of Mercantile Law
University of the Free State, Bloemfontein*

D Viviers

LLB (cum laude) LLM (cum laude)

*Part time Lecturer, Department of Mercantile Law
and Centre for Labour Law
University of the Free State, Bloemfontein*

SUMMARY

The media hype in 2015 surrounding the former Olympic athlete Bruce Jenner's gender transition to become "Caitlyn" has put renewed focus on the issue of trans-individuals and gender reassignment. Unlike Caitlyn, however, many transsexual individuals need to function within and face an office environment every day, where employers and co-workers are not necessarily accommodating or tolerant. Workplace discrimination against transsexual employees, based on their altering or altered appearance due to gender reassignment, is a prevalent concern in places of employment across the globe, and South Africa is no exception. Employers and co-workers' subconscious appearance preferences seem to filter into employment decisions, policies and practices, causing trans-employees to suffer severe prejudice. Against the backdrop of case law and legislative developments in foreign jurisdictions as well as locally, this article assesses the formal protection afforded to trans-employees in South African workplaces. It is argued that, apart from the existing protection against sex-based and gender-based unfair discrimination, trans-employees should also be explicitly afforded formal protection against unfair discrimination on the ground of appearance before, during and after gender reassignment. The study concludes with concrete proposals to remedy the situation and contributes to a more tolerant and effective employment realm, irrespective of appearance.

“People changed lots of other personal things all the time. They dyed their hair and dieted themselves to near death. They took steroids to build muscles and got breast implants and nose jobs so they’d resemble their favourite movie stars. They changed names and majors and jobs and husbands and wives. They changed religions and political parties. They moved across the country or the world – even changed nationalities. Why was gender the one sacred thing we weren’t supposed to change? Who made that rule?”

Ellen Wittlinger¹

1 INTRODUCTION

The legal consideration of appearance prejudice in employment has gained considerable momentum in recent years, despite having been a problem for many decades. Several foreign jurisdictions have introduced legislation to deal with this issue, and the prevalence of discrimination claims on this ground has increased significantly. South Africa, however, has not yet followed suit in enacting legislation or adopting other measures to govern this problem, in spite of the fact that more and more cases involving elements of appearance discrimination make their way to the steps of the judiciary. Appearance prejudice in the workplace incorporates several categories, including prejudice based on physical attractiveness, height, dress, grooming, weight as well as transgender appearance.

This study is particularly concerned with the latter category mentioned above, namely the discrimination experienced by transgender,² transsexual³ and transvestite⁴ employees in their places of work. For the purposes of this article, these groups will be referred to as “trans-employees” or “trans-appearance individuals in employment”.

In recent years, law and literature of various jurisdictions across the world have appeared to be moving towards increased protection for trans-employees in the workplace, and it has been suggested that this will continue and gain momentum in the future.⁵ Therefore, this article aims to contribute to the growing body of knowledge on the subject by first providing an analysis of the United States’ and the European Union’s approach to the protection of the rights of transgender employees in the workplace. Against this backdrop, the focus then shifts to the South African context to establish the legal position on, and suggest legal measures to appropriately govern,

¹ <http://www.goodreads.com/quotes/tag/transgender> (accessed 2014-08-04).

² “Of, relating to, or being a person (as a transsexual or transvestite) who identifies with or expresses a gender identity that differs from the one which corresponds to the person’s sex at birth.” <http://www.merriam-webster.com/dictionary/transgender> (accessed 2014-05-31).

³ “A person who strongly identifies with the opposite sex and may seek to live as a member of this sex especially by undergoing surgery and hormone therapy to obtain the necessary physical appearance (as by changing the external sex organs).” <http://www.merriam-webster.com/dictionary/transsexual> (accessed 2014-05-31).

⁴ “A person and especially a male who adopts the dress and often the behaviour typical of the opposite sex especially for purposes of emotional or sexual gratification.” <http://www.merriam-webster.com/dictionary/transvestite> (accessed 2014-05-31).

⁵ Juarez and Williams “Courts now are Respecting Transgender Rights” 2013 *National LJ* 13.

the issue of workplace discrimination based on trans-appearance in the South African employment realm.

To set the scene, however, the following section more closely examines the concept of trans-appearance and the prejudice suffered because of it both in and outside the workplace.

2 UNDERSTANDING TRANS-APPEARANCE AND PREJUDICE

Transsexuality is not a new occurrence, but has been present in societies throughout history.⁶ Although it certainly is no longer the case today, transsexuals were historically often “afforded an exalted status” in their societies.⁷ The Gallae, who were transsexuals in ancient Rome, castrated themselves upon making a decision about which gender they were, and placed their genitalia in the doorway of a worthy citizen, who would consider it as an honour and a sign of good fortune. Certain Native American cultures recognised transsexuals and afforded them a special and honoured status in their societies.

In considering “trans-appearance”, it is important to first distinguish between sex and gender. The former refers to the biological element in terms of which individuals are defined as either male or female, depending on their reproductive organs.⁸ The latter, on the other hand, refers to the psychological, social and cultural element that can be described as the state of being female or male.⁹ In this regard, the following has been noted:¹⁰

“When the constructed status of gender is theorized as radically independent of sex, gender itself becomes a free-floating artifice, with the consequence that *man* and *masculine* might just as easily signify a female body as a male one, and *woman* and *feminine* a male body as easily as a female one.”

Gender is partly constructed based on society’s perception of the physical differences between the male and female sexes, particularly dress codes, speech patterns and manner of walking.¹¹

“Transgender” is an umbrella term for “individuals whose identity and/or gender expression does not reflect the societal gender norms associated

⁶ Visser and Picarra “Victor, Victoria or V? A Constitutional Perspective on Transsexuality and Transgenderism” 2012 28 *SAJHR* 506 515.

⁷ *Ibid.*

⁸ <http://www.oxforddictionaries.com/definition/english/sex> (accessed 2014-07-14).

⁹ <http://www.oxforddictionaries.com/definition/english/gender> (accessed 2014-07-14).

¹⁰ Dietert and Dentice “Gender Identity Issues and Workplace Discrimination: The Transgender Experience” 2009 14 *Journal of Workplace Rights* 121 127, with reference to Butler.

¹¹ It is said that from birth until death, various social structures govern who people are and what life roles they are supposed to perform, based on whether the individual is born male or female. In terms of this societal construction, people identify, perceive and categorise individuals in society as either male or female, which in effect limits and excludes acceptance of gender identities that do not comply with this norm. Consequently, society perceives being male or female as mutually exclusive gender identities. See Visser and Picarra 2012 28 *SAJHR* 508; and Dietert and Dentice 2009 *Journal of Workplace Rights* 122.

with the sex assigned at birth".¹² Transgender individuals may self-identify and express their gender in different ways, depending on the individual concerned.¹³ Expert evidence in *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*,¹⁴ indicated that it was an "immutable state" and that no true transsexual could be "persuaded, bullied, drugged, analysed, shamed, ridiculed or electrically shocked into the acceptance of his physique".¹⁵ In most medical circles, the expert witness in *Ehlers* added: the only remedy or treatment for transsexuality was to alter the individual's body to reflect his or her psychological state,¹⁶ a process that has been dubbed "gender reassignment". Gender reassignment has been described as follows:¹⁷

"A medical procedure available to individuals who suffer from a medically recognised psychological condition in which they believe that their physical characteristics should be those of the opposite sex. This procedure is irreversible, and includes both surgery and hormonal treatment to achieve a match between the person's physical sex characteristics and their psychological gender profile."

Not all transgender individuals will or wish to undergo gender reassignment, however.¹⁸ The reconstructing of the body to display the individual's gender identity may or may not be part of a specific person's transition process.¹⁹ The decision to alter the body forms part of the particular individual's gender expression.²⁰ It is estimated that only about 15% of transsexual individuals actually undergo gender reassignment surgery.²¹ And as the sexual identity or orientation of transgender individuals may also vary from one individual to the next, this contradicts the common misconception that a homosexual individual will, for example, automatically become heterosexual after having undergone gender reassignment.²²

Transsexual individuals suffer severe levels of prejudice and discrimination, as well as isolation, harassment, ridicule, marginalisation and humiliation in their everyday lives, including in the employment realm.²³ Where trans-employees elect to align their physique with their gender identities and undergo transition in the workplace, this process may include changing a male name to a female name, or *vice versa*; being addressed by means of the appropriate pronouns, wearing appropriate clothing, and taking the relevant hormones. Their transition and changing appearance render these employees particularly vulnerable to the response of their employers

¹² Dietert and Dentice 2009 14 *Journal of Workplace Rights* 122.

¹³ *Ibid.*

¹⁴ (2010) 31 *ILJ* 2383 (LC).

¹⁵ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 4.

¹⁶ *Ibid.*

¹⁷ Grant "The Protection of Employees from Discrimination in the Context of Gender Reassignment" 2011 23 *SA Merc LJ* 82 82, with reference to Taitz.

¹⁸ Dietert and Dentice 2009 14 *Journal of Workplace Rights* 122.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Juarez and Williams 2013 *National LJ* 3.

²² These individuals may identify as bisexual, heterosexual or homosexual. See Dietert and Dentice 2009 14 *Journal of Workplace Rights* 122.

²³ McGregor "Transsexualism in the Workplace" 2013 *2nd Annual International Conference on Law, Conference and Public Policy* 201 201.

and co-workers.²⁴ If the employer and/or colleagues handle a transition poorly, this could result in a divided workforce, a low morale and a hostile work environment.²⁵

This hostility often takes the form of discrimination and inequality, and may be due to the fact that many employers and employees are “trans-phobic”, and arguably do not fully understand these trans-employees.²⁶ Although their experiences of discrimination and inequality are often dismissed as simply being “oversensitive”, reports show that trans-individuals suffer high levels of victimisation, as well as verbal abuse and sexual assault.²⁷ One study revealed that trans-employees experience three primary issues in the workplace, which most often result in discrimination against them. These issues are the employee’s so-called “coming out” in the workplace, the lack of support received from the employer and fellow-employees, and the importance of the trans-employee being acknowledged through the proper pronouns and chosen names during and after the appearance transition and change.²⁸

However, it is not only their appearance that causes trans-employees to suffer discrimination in the workplace. Discrimination against them is often also based on two other grounds, namely sexual orientation and disability. The former refers to the suffering of discrimination because they are incorrectly perceived to be of a particular sexual orientation, such as gay, lesbian or bisexual.²⁹ As mentioned above, sexual orientation is not definitively linked with gender identity and, as such, these employees experience amplified discrimination based on a stereotype that may or may not hold true for that specific individual. Transsexual individuals have also been identified as suffering from gender dysphoria,³⁰ which in fact amounts to a mental impairment.³¹ Therefore, it can be argued that such individuals may be “disabled” in the employment context, provided that they meet the rest of the requirements for disability. If these trans-employees can indeed be regarded as people with disabilities, this will of course also open up possibilities for their reasonable accommodation.

A study revealed that trans-employees experienced verbal abuse and sometimes even physical violence, as well as discrimination in hiring,

²⁴ Jones “Trans Dressing in the Workplace” 2013 32 *Equality, Diversity and Inclusion: An International Journal* 503 504.

²⁵ Juarez and Williams 2013 *National LJ* 2.

²⁶ McGregor 2013 *2nd Annual International Conference on Law, Conference and Public Policy* 202.

²⁷ McGregor 2013 *2nd Annual International Conference on Law, Conference and Public Policy* 202–203.

²⁸ Dietert and Dentice 2009 14 *Journal of Workplace Rights* 123.

²⁹ Harris “Employment Discrimination Protections for Transgender People in California” 2002 *The Legal Aid Society-Employment Law Center* 1 4.

³⁰ A recognised medical condition, sufferers of which do not internally feel to be of the gender that their bodies reflect. See Whittle “Employment Discrimination and Transsexual People” <http://www.gires.org.uk/assets/employment-dis-full-paper.pdf> (accessed 2014-02-17); American Psychiatric Association “Gender Dysphoria” <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf> (accessed 2014-02-17).

³¹ Harris 2002 *The Legal Aid Society-Employment Law Center* 5.

promotion, remuneration and employment benefits.³² A survey revealed that 33% of trans-employees were dismissed by their employer after their transition, while 29% left their employment because of conditions relating to their transition.³³ Another study indicated that 20% of trans-employees lost their employment because they were transgender, while 39% were not employed and 17% were denied a promotion on this ground.³⁴ Trans-employees also experience high levels of harassment in the workplace (in addition to other discrimination), which is confirmed by the results of a survey that stated that, at the time of transition, 38% of these employees experienced harassment, while 13% experienced it on a daily basis, and 25% still experienced it after a change in jobs.³⁵ A practical example is the discrimination they suffer in terms of restrooms and ablution facilities. Public restrooms serve as an authority of demarcation, as they force individuals to present themselves as either male or female.³⁶ When trans-employees enter a public restroom, they must be able to “present themselves” and “function appropriately” in order to avoid scrutiny, prejudice and discrimination.³⁷

Understandably, these various forms of prejudice and discrimination often affect the physical and psychological health of these individuals.³⁸

3 TRANS-APPEARANCE IN EMPLOYMENT – AN INTERNATIONAL PERSPECTIVE

3.1 The International Labour Organisation

In 2013, the Director-General of the International Labour Organisation (ILO) issued a statement on the organisation’s efforts to eradicate employment discrimination against trans-employees.³⁹ The statement reinforced that the ILO had been and continued to be the primary vehicle to advance human rights in employment, and affirmed its commitment to achieve workplaces free from all forms of discrimination, including discrimination based on gender identity.⁴⁰ The statement indicated that while significant progress had been made to advance the rights of trans-employees, these individuals still faced discrimination and harassment in the workplace.⁴¹

³² Whittle <http://www.gires.org.uk/assets/employment-dis-full-paper.pdf> (accessed 2014-02-17).

³³ *Ibid.*

³⁴ Herman and Cooper “The Cost of Employment Discrimination Against Transgender Residents of Massachusetts” 2011 *The Williams Institute, UCLA School of Law* 1 1.

³⁵ Whittle <http://www.gires.org.uk/assets/employment-dis-full-paper.pdf> (accessed 2014-02-17).

³⁶ Dietert and Dentice 2009 14 *Journal of Workplace Rights* 128.

³⁷ *Ibid.*

³⁸ McGregor 2013 *2nd Annual International Conference on Law, Conference and Public Policy* 201.

³⁹ Ryder “ILO Director-General’s Statement on International Day Against Homophobia and Transphobia” http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_213528/lang--en/index.htm (accessed 2014-07-22).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

In the same year, the ILO published a report by the governing body of the International Labour Office, which recognised that transgender rights were nothing new in the international labour arena, but had recently been receiving increased attention, including at various United Nations forums.⁴² The report stated that trans-employees regularly experienced discrimination and harassment; legislation to grant them protection was often non-existent, and where legislation did exist, it was often poorly implemented.⁴³ The report further indicated that, in the workplace, women who were perceived to be more masculine and men who were perceived to be more feminine in their behaviour and appearance, were often stigmatised and discriminated against because of their perceived sexual orientation.⁴⁴ Transgender employees also appeared to experience the most severe forms of discrimination in the workplace, and were more vulnerable to bullying and harassment also.⁴⁵

3 2 The United States of America

No federal law in the United States of America (USA) expressly grants protection to transgender employees in the workplace.⁴⁶ Although Congress has on multiple occasions considered proposed legislation to grant such federal protection, based on gender identity, it has never been enacted.⁴⁷ This lack of a federal law that grants protection to trans-employees does not necessarily leave such employees destitute, however, since they could bring a sex-based discrimination claim under Title VII or, in appropriate circumstances, even a sexual orientation-based or disability-discrimination claim.⁴⁸

There may not be a federal law, but 17 states and at least 150 cities in the USA have included gender identity or gender expression in their employment anti-discrimination statutes.⁴⁹ Many employers have also taken progressive steps and included transgender protections in their employment policies and handbooks.⁵⁰ For this reason, Burns and Krehely argue that the logical next step would be for Congress to enact a federal law that protects trans-employees from discrimination in the workplace, in order to ensure that all persons – and not only those in the states, cities or workplaces who have introduced protective measures – are treated fairly in employment and are

⁴² ILO “Discrimination at Work on the Basis of Sexual Orientation and Gender Identity: Results of Pilot Research” <http://www.ilo.org/gb/decisions/GB319-decision/lang--en/index.htm> (accessed 2014-08-24) 1.

⁴³ ILO <http://www.ilo.org/gb/decisions/GB319-decision/lang--en/index.htm> (accessed 2014-08-24) 2.

⁴⁴ *Ibid.*

⁴⁵ ILO <http://www.ilo.org/gb/decisions/GB319-decision/lang--en/index.htm> (accessed 2014-08-24) 3.

⁴⁶ Juarez and Williams 2013 *National LJ*; and Make the Road New York “Transgender need not Apply: A Report on Gender Identity Job Discrimination” 2010 *Cornell University ILR School* 1 5.

⁴⁷ Juarez and Williams 2013 *National LJ*.

⁴⁸ Harris 2002 *The Legal Aid Society-Employment Law Center* 2.

⁴⁹ Juarez and Williams 2013 *National LJ*.

⁵⁰ *Ibid.*

judged, based on their skills, qualifications and quality of their work, and not their gender identity.⁵¹

An example of a work environment in the USA where trans-employees and their appearance are not tolerated is the military.⁵² Trans-employees are barred from joining the military before gender reassignment (if this intention is known), and cannot enlist after transition due to their physical and “genital abnormality”.⁵³ They are also not considered to be psychologically or socially suited for military service due to their need for sophisticated and continued medical care.⁵⁴

A review of United States case law in this regard indicates a shift towards recognising the plight of trans-employees and the appearance issues they face in the workplace. In the case of *Macy v Holder, NO.*,⁵⁵ the Equal Employment Opportunity Commission (EEOC) held that complaints, based on gender identity, transgender status and sex change, were possible under Title VII of the Civil Rights Act, and thus applied to the employment domain as well.⁵⁶ Similarly, in *Schwenk v Hartford*,⁵⁷ the court held that discrimination against an individual because of his or her failure to act like a man or a woman was a form of sex discrimination and was outlawed under Title VII and, consequently, prohibited in the workplace.⁵⁸

The form of gender stereotyping mentioned above has been applied in several cases to extend protection to transsexual people.⁵⁹ These include:⁶⁰

- *Rosa v Park West Bank and Trust Co*,⁶¹ where a biologically male plaintiff was deprived of the prospect to apply for a loan because he was not dressed in masculine clothing;⁶²
- *Rentos v OCE-Office Systems*,⁶³ where the court refused to dismiss the claim of a transsexual female that she had been discriminated against based on her sex;⁶⁴
- *Doe v Brockton Sch. Comm*,⁶⁵ where a court declined to dismiss a transsexual individual's request for an order to permit her to wear clothing typically worn by teenage girls;⁶⁶ and

⁵¹ Burns and Krehely “Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment” 2011 *Center for American Progress* 1 1.

⁵² Green “Transsexual Legal Rights in the United States and the United Kingdom: Employment, Medical Treatment, and Civil Status” 2010 39 *Archives of Sexual Behaviour* 153 155.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ 0120120821 2012 WL 1435995 EEOC April 2012.

⁵⁶ Juarez and Williams 2013 *National LJ*.

⁵⁷ 204 F.3d 1187 9th Cir. 2000.

⁵⁸ *Schwenk v Hartford supra* 1205; and Harris 2002 *The Legal Aid Society-Employment Law Center* 2–3.

⁵⁹ Harris 2002 *The Legal Aid Society-Employment Law Center* 3.

⁶⁰ Harris 2002 *The Legal Aid Society-Employment Law Center* 3–4.

⁶¹ 214 F.3d 213 1st Cir. 2000.

⁶² *Rosa v Park West Bank and Trust Co supra* 214.

⁶³ 1996 U.S. Dist. LEXIS 19060 S.D.N.Y. 1996.

⁶⁴ *Rentos v OCE-Office Systems supra* 27.

⁶⁵ No. 2000-J-638 Mass. App. 2000.

- *Enriquez v West Jersey Health Systems*,⁶⁷ where the court held that a prohibition on sex discrimination protected transsexual employees also.⁶⁸

In the case of *Doe v Belleville*,⁶⁹ the following ruling by the court had a significant bearing on trans-appearance in the workplace:

“Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles.”⁷⁰

The court explained that this meant that a male individual who was harassed because he had a soft voice, a slight physique or long hair, or because he exhibited masculinity in a manner different from what his co-workers believed a male should look like and behave, was harassed because of his sex.⁷¹ In *Lie v Sky Publishing Corporation*,⁷² the court held that a male-to-female transsexual could maintain a claim of unlawful discrimination, based on sex, sexual orientation, disability and retaliation.⁷³ The court in *Tronetti v TLC Healthnet Lakeshore Hospital*,⁷⁴ decided that a transsexual individual could maintain an action for alleged employment discrimination based on the employer’s perceptions of male- and female-gender roles and the employee’s inability to “act like a man”.⁷⁵ And in *Fishbaugh v Brevard County Sheriff’s Department*,⁷⁶ it was held that a transsexual employee had a valid claim for discrimination on the basis of transsexuality rather than sex itself.⁷⁷

It is apparent, therefore, that these cases distinguish the position of trans-employees as an explicit ground of discrimination in employment.

3 3 The European Union

In 2013, the European Union (EU) Council of Ministers for Foreign Affairs approved the Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex Persons.⁷⁸ The

⁶⁶ *Doe v Brockton Sch. Comm* supra 3.

⁶⁷ 2001 N.J. Super. LEXIS 283 N.J. Super. 2001.

⁶⁸ *Enriquez V West Jersey Health Systems* supra 380.

⁶⁹ 119 F.3d 563 7th Cir. 1997.

⁷⁰ *Doe v Belleville* supra 580; and Harris 2002 *The Legal Aid Society-Employment Law Center* 4.

⁷¹ *Doe v Belleville* supra 581; and Harris 2002 *The Legal Aid Society-Employment Law Center* 4.

⁷² 15 Mass. L. Rptr. 412 2002 WL 31492397 Mass. Super. Ct. 2002.

⁷³ *Lie v Sky Publishing Corporation* supra 1–8; and Bolmarcich “Recent Cases Offer Employment Discrimination Protection to Transgender People” http://www.semme.com/publications_archive/labor_employment/pdf/employment-discrimination-protection-transgender.pdf (accessed 2014-02-17).

⁷⁴ 2003 WL 22757935 W.D.N.Y. 2003.

⁷⁵ *Tronetti v TLC Healthnet Lakeshore Hospital* supra 4; and Bolmarcich http://www.semme.com/publications_archive/labor_employment/pdf/employment-discrimination-protection-transgender.pdf (accessed 2014-02-17).

⁷⁶ FCHR Order No. 04-103 FI. Comm. Human Rel. 2004.

⁷⁷ *Fishbaugh v Brevard County Sheriff’s Department* supra 1; Bolmarcich http://www.semme.com/publications_archive/labor_employment/pdf/employment-discrimination-protection-transgender.pdf (accessed 2014-02-17).

⁷⁸ Annicchino “The New Guidelines on Freedom of Religion and LGBTI Rights in the External Action of the European Union” 2013 6 *European Human Rights LR* 624 624.

adoption of this document has been described as a significant and pertinent human rights development in the EU's new foreign policy, the goal of which is to brand the EU as a "global force for human rights".⁷⁹ Although the recognition of human rights in the EU is a complex legal and political process, forums such as the European Court of Justice (ECJ) have made significant positive contributions in this regard.⁸⁰ The new guidelines recognise that transgender persons have the same human rights as other individuals who should receive protection, and that no new rights are created for them.⁸¹ Transgender persons are also identified as a vulnerable group, since they face widespread discrimination and violations of their human rights.⁸² A particular focus of these guidelines is the promotion of equality and non-discrimination against transgender individuals, although the specific measures to be taken in terms of the guidelines are described according to the various international jurisdictions.⁸³

It is also acknowledged, that while these guidelines are a positive step towards the protection of human rights for transgender individuals in the EU, it remains difficult to identify a common trend in how these issues are addressed in the various EU member states, who each has its own laws and views on the issue.⁸⁴

However, having said that, case law and legislative developments reveal that particularly the United Kingdom and Ireland seem to have made positive progress in extending recognition and protection to this vulnerable group, especially over the last decade. *Goodwin v The United Kingdom*⁸⁵ involved a transsexual employee who had experienced severe discrimination and harassment in the workplace, which had reached alarming proportions, such as co-workers holding her down, peeping under her skirt (allegedly to examine her genital organs) and touching her breasts.⁸⁶ The employee was eventually dismissed from her employment due to "ill health", although it was widely believed to have been as a result of her transsexuality.⁸⁷ In the wake of the *Goodwin* case, the United Kingdom's Gender Recognition Act of 2004 was promulgated; this act still applies today.⁸⁸ It provides for the establishment of panels to decide whether a post-operative transsexual's altered sex should be recognised by law.⁸⁹ A pre-operative transsexual is, however, not necessarily denied recognition in terms of the act, unless the individual is married.⁹⁰ In addition, the position of trans-employees in the British military service differs from that in the USA, with the UK military

⁷⁹ Annicchino 2013 6 *European Human Rights LR* 625.

⁸⁰ Although EU guidelines do not have binding force; they are political commitments and instructions on how to address situations where human rights violations may occur. Annicchino 2013 6 *European Human Rights LR* 625.

⁸¹ Annicchino 2013 6 *European Human Rights LR* 627.

⁸² *Ibid.*

⁸³ Annicchino 2013 6 *European Human Rights LR* 629.

⁸⁴ *Ibid.*

⁸⁵ (1996) 22 EHRR 123.

⁸⁶ *Goodwin v The United Kingdom supra* 2.

⁸⁷ *Ibid.*

⁸⁸ Visser and Picarra 2012 28 *SAJHR* 519.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

indeed accommodating transgendered persons.⁹¹ Individuals who undergo gender reassignment are also allowed to remain in service.⁹²

Fellow EU member state Ireland in 2013 proposed a Gender Recognition Bill, which was subsequently passed in mid-July 2015. This law will in effect establish a statutory system for the recognition and regulation of gender identity.⁹³ It came about because many transgender persons' enjoyment of vital services, such as access to employment, was restricted because of their gender identity.⁹⁴ Another factor which certainly would have spurred the drafting of this legislation was the Irish High Court's ruling after the *Goodwin* judgment mentioned above that the lack of procedures to address gender identity in Ireland violated its obligations under article 8 of the European Convention on Human Rights.⁹⁵ According to Dunne, the new legislation is long overdue and represents a positive attempt to fill the gaps in Irish law, as well as an effort to recognise the dignity and equality of transgender individuals.⁹⁶

4 THE LEGAL POSITION ON TRANS-APPEARANCE IN THE SOUTH AFRICAN WORKPLACE

In South Africa, both section 9(3) of the Constitution of the Republic of South Africa, 1996 and section 6(1) of the Employment Equity Act 55 of 1998 prohibit discrimination based on sex, gender and sexual orientation. Although the various "trans"-categories are not mentioned explicitly, the members of these groups have sought and received protection on these grounds, as the judicial precedents below will indicate.

The acceptance of the transgender and transsexual phenomenon has led to the accommodation of these persons in terms of the Births and Deaths Registration Act 51 of 1992 and the Alteration of Sex Description and Sex Status Act 49 of 2003, which allows persons to alter their assigned sex for all legal purposes.⁹⁷ Visser and Picarra describe the latter act as being sensitive to the notion that the protected grounds of sex, gender and sexual orientation are in fact all dimensions of human dignity.⁹⁸ The Alteration of Sex Description and Sex Status Act is particularly relevant in the employment context, because it will affect trans-employees who wish transition and to undergo gender reassignment. As such employees will have a legal right to alter their sex under this act, it may affect official documents completed in a job application process, as well as those held by a current employer. Furthermore, the fact that a trans-employee's

⁹¹ Green 2010 39 *Archives of Sexual Behaviour* 155.

⁹² *Ibid.*

⁹³ Dunne "The Physician's Statement Model in Ireland's Gender Recognition Bill 2013" 2014 1 *European Human Rights LR* 1 1.

⁹⁴ *Ibid.*

⁹⁵ Dunne 2014 1 *European Human Rights LR* 2.

⁹⁶ Dunne 2014 1 *European Human Rights LR* 4.

⁹⁷ This legal framework, however, only allows for persons to legally change their sex if they have undergone gender reassignment surgery and treatments. See Visser and Picarra 2012 *SAJHR* 507.

⁹⁸ Visser and Picarra 2012 28 *SAJHR* 524.

appearance will change while at work, and that such employee will legally become a member of the opposite sex, may affect relations with the employer and co-workers.

4 1 *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁹⁹

The Constitutional Court in this case appears to have interpreted “sexual orientation” to include transsexuals.¹⁰⁰ The court articulated this view as follows:¹⁰¹

“The concept ‘sexual orientation’ as used in section 9(3) of the 1996 Constitution must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to the orientation of persons who are bi-sexual, or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex.”

McGregor found this position to be debatable, as the concepts of gender identity and transgender identity differ from the notion of sexual orientation.¹⁰² Nevertheless, the statement did reflect the Constitutional Court’s willingness to grant protection to transsexual persons.

4 2 *Atkins v Datacentrix (Pty) Ltd*¹⁰³

In this case, a prospective employee was offered an employment position after a successful job interview, which he accepted, and then proceeded to inform the employer that he intended undergoing a gender reassignment procedure from male to female.¹⁰⁴ The employer was “not impressed” by this disclosure and terminated the contract of employment, as the employee had failed to divulge this during the interview process.¹⁰⁵ The employer argued that this omission amounted to serious misrepresentation, and viewed the employee’s actions as a repudiation of the contract of employment.¹⁰⁶ The employee instituted an unfair discrimination claim against the employer¹⁰⁷ and alleged that the employer had discriminated against him on the basis of his sex, gender and/or sexual orientation.¹⁰⁸

The court determined that the primary reason for the employee’s dismissal was that the employer was “not happy” that the employee wished

⁹⁹ 1999 (1) SA 6 (CC).

¹⁰⁰ McGregor 2013 *2nd Annual International Conference on Law, Conference and Public Policy* 205, with reference to *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* 21.

¹⁰¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* 21.

¹⁰² McGregor 2013 *2nd Annual International Conference on Law, Conference and Public Policy* 205.

¹⁰³ (2010) 4 *BLLR* 351 (LC).

¹⁰⁴ *Atkins v Datacentrix (Pty) Ltd supra* par 1.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Atkins v Datacentrix (Pty) Ltd supra* par 5.

to undergo gender reassignment, and dismissed him for that reason.¹⁰⁹ The court further held that once an employee underwent gender reassignment, the employee continued to be an employee and to enjoy the protection afforded by the Labour Relations Act 66 of 1995, the Employment Equity Act and the Constitution.¹¹⁰ In making it clear that such an employee would not consequently become any less of a human being,¹¹¹ the court wanted to “send out a message” to employers who still harboured prejudice in relation to gender reassignment, stressing that such conduct would not be tolerated or indulged at all.¹¹² It also stated that the employer was completely insensitive to the situation and circumstances of the employee, and that discrimination on this and other grounds was “painful and ... an attack on a person’s dignity as a human being”.¹¹³ The court consequently ruled that the employee’s dismissal was automatically unfair, and that the employer had discriminated against the employee on the basis of sex and gender.¹¹⁴ It also ordered the employer to take steps to prevent such discrimination from recurring and to apologise to the employee in writing.¹¹⁵

This case managed to establish that neither appearance nor the alteration thereof makes an employee any less a human being, or renders an employee of a lower or no status in the workplace. Therefore, the male-to-female alteration of an employee’s physical appearance (or *vice versa*) does not qualify as a legitimate reason for terminating the person’s employment. The matter also served to caution employers to have regard for employees’ personal circumstances, emphasising that discrimination, based on altered/altering appearance (or gender reassignment), constitutes a painful assault on employees’ inherent human dignity.

4 3 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*¹¹⁶

This matter involved an employee at an engineering firm who was born a biological male, but wished to transition to female.¹¹⁷ The intention to undergo gender reassignment was not kept from the employer, who indicated no problem with it.¹¹⁸ Although the transition was under way and the employee’s testicles had already been removed, the employer requested the employee to wear male clothes when consulting with clients, which the employee agreed to do.¹¹⁹ The employee gradually started acquiring more feminine features: She developed breasts and her nails and hair grew

¹⁰⁹ *Atkins v Datacentrix (Pty) Ltd supra* par 18.

¹¹⁰ *Atkins v Datacentrix (Pty) Ltd supra* par 19.

¹¹¹ *Ibid.*

¹¹² *Atkins v Datacentrix (Pty) Ltd supra* par 20.

¹¹³ It was further held that times had changed, that employees no longer had to live in closets, and that people’s personal views on transgender and transsexual individuals had to remain their own personal views, and not become a reason to discriminate against such persons or terminate their employment. *Atkins v Datacentrix (Pty) Ltd supra* par 20.

¹¹⁴ *Atkins v Datacentrix (Pty) Ltd supra* par 24.

¹¹⁵ *Ibid.*

¹¹⁶ *Supra.*

¹¹⁷ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 3.

¹¹⁸ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 5.

¹¹⁹ At this point, although the employee still had a penis, she was for all intents and purposes a woman. See *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 5.

longer.¹²⁰ She also legally changed her name and provided her employer with a letter from her psychiatrist stating that she had to wear female clothing.¹²¹ During the transition process, the employee experienced clashes with co-workers, which centred on issues relating to her gender and gender reassignment process.¹²² The employee was later dismissed, as the employer declared her position redundant.¹²³ The employee brought an unfair discrimination claim against the employer on the basis of gender and/or sex and/or sexual orientation.¹²⁴

The court found it “appalling” that the employer, in South Africa’s constitutional democracy, had expected the employee to agree to wear male clothes when consulting with clients,¹²⁵ describing the employer’s justification – namely that the engineering profession was largely male-dominated, which would have caused the employee to be treated unfavourably if she had consulted in female clothes – as “reminiscent of the dark ages”.¹²⁶ The court further held that, as the employee was employed in a profession where a sex change would not affect her capability and competence in the workplace, she remained an employee despite her gender reassignment.¹²⁷ In fact, she excelled professionally and was regarded as “the best”.¹²⁸

Stressing that unfair workplace discrimination should not be tolerated; that it was ugly and evil, and should be rooted out from the employment realm,¹²⁹ the court held that this case clearly illustrated what discrimination targets had to endure in the workplace on a daily basis, and that, despite the country’s numerous anti-discrimination laws, discrimination in employment still seemed to be alive and well.¹³⁰ It concluded that if the employee were not a transsexual who was undergoing gender reassignment, she would not have been dismissed.¹³¹ The employee’s dismissal was consequently found automatically unfair, and that the employee unfairly discriminated against her based on her sex and gender.¹³² A finding in favour of the employer, the court argued, would have sent a message that South African judicial forums would not come to the aid of employees subjected to such discriminatory circumstances.¹³³

In its ruling, the Labour Court managed to cover quite a lot of ground. By holding that the employee excelled at her job and that there was therefore no reason why her gender reassignment would affect her competence as an employee, the court established that employees’ appearance or gender

¹²⁰ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 6.

¹²¹ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 10.

¹²² *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 6 and 7.

¹²³ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 10.

¹²⁴ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 19.

¹²⁵ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 35.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 45.

¹²⁹ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 44.

¹³⁰ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 45.

¹³¹ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 36.

¹³² *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 37 and 51.

¹³³ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd supra* par 44.

need not affect their ability to perform or diminish their competence in the workplace. In fact, in most positions, applicants' appearance is arguably an irrelevant criterion in an employer's decision-making process. Moreover, apart from the court's clear stance on the alteration of an employee's physical appearance in the workplace, it also addressed issues surrounding grooming and manner of dress. The message is clear: Employers should be wary of attempting to regulate employees' dressing practices if such regulation is out of keeping with a constitutionally and statutorily protected right of the employee, including gender, sex, sexual orientation, dignity and equality. In the same vein, the court argued that it was unacceptable in a constitutional democracy to still believe that certain appearance standards, such as manner of dress, rigidly reflect sex and gender stereotypes. Another important consideration presented by this case is the Labour Court's remark that unfair discrimination, no doubt also including appearance-based discrimination, seems to be very much alive in the modern South African workplace, despite the provisions of our anti-discrimination laws and the Constitution. Through this ruling, however, the Labour Court in effect confirmed that unfair discrimination would not be tolerated and that the court would come to the aid of those who fall prey to it.¹³⁴

Authors and commentators have taken diverse lessons from the case law discussed above. According to Venter, with particular reference to *Ehlers*, the lesson is that employers should encourage employees to tolerate one another's differences and not to treat colleagues differently simply because they have different characteristics, as well as that employers are ultimately responsible to prevent unfair discrimination in the workplace.¹³⁵ Grant echoes this in stating that all the cases mentioned above represent a warning to employers to rid the workplace of unfair discrimination and prejudice.¹³⁶ She adds that these cases call on employers to seriously consider the manner in which employees are treated at work, and to separate their own, personal views, prejudices and stereotypes from their employment decisions, policies and practices.¹³⁷ To McGregor, these cases indicate that many South African workplaces still contain discriminatory policies and practices, even though employers have had many years to eradicate these.¹³⁸ More than two decades of constitutional democracy down the line, taking active steps to eradicate unfair discrimination and working towards the attainment of equality and diversity in employment, is not a nice-to-have, but indeed imperative.¹³⁹ McGregor further argues that the case law seems to suggest that employers may not fully understand the position of trans-employees or how to deal with transsexuality, and perhaps do not yet comprehend the need to distinguish these characteristics from the employee's ability to perform his or her job.¹⁴⁰ This merely emphasises that employers should engage in fair differential and discriminatory treatment

¹³⁴ Venter "Transsexualism in the Workplace" 2010 10 *Without Prejudice* 52 54.

¹³⁵ *Ibid.*

¹³⁶ Grant 2011 23 *SA Merc LJ* 87.

¹³⁷ *Ibid.*

¹³⁸ McGregor 2013 *2nd Annual International Conference on Law, Conference and Public Policy* 210.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

only if such treatment relates to the inherent requirements of the position in question, and not merely on the basis of transgender employees' appearance.

5 THE POSSIBILITY OF PROTECTING TRANS-EMPLOYEES FROM UNFAIR APPEARANCE-BASED DISCRIMINATION – THE WHY AND THE HOW

The primary rationale for formally protecting trans-employees from discrimination, based on their appearance, is their frequent exposure to various forms of unfair treatment in the workplace, such as alienation, marginalisation, stigma, harassment, ridicule, labelling, stereotyping, humiliation, discrimination and prejudice.¹⁴¹ One study revealed that 90% of trans-employees experienced discrimination and harassment in the workplace,¹⁴² while the case law discussed in the previous section clearly indicated the severe levels of appearance-based discrimination suffered by trans-employees at the hands of their employers and co-workers. Discrimination against trans-employees has been directly linked with job instability, unemployment, poverty rates and a wage gap amongst workers.¹⁴³ Research has also illustrated time and time again that this form of discrimination diminishes productivity in the workplace, job satisfaction, and the physiological and psychological health of employees.¹⁴⁴ Employers' continuous failure to curb these discriminatory practices in the workplace, despite being legally obligated to do so, is shocking¹⁴⁵ and perpetuates patterns of disadvantage for these employees.

One of the reasons why trans-employees face such severe degrees of discrimination in the workplace is that their employers and co-workers may not understand their positions or circumstances, as McGregor suggested. Therefore, a second motivation for the protection of such employees is that a formal prohibition on discriminating against them, based on their appearance both during and after the transition process, will force employers to think carefully about these employees' circumstances, which may lead employers to embrace their employees' diversity and keep prejudices relating to employees' appearance (both during and after gender reassignment) to themselves.¹⁴⁶ Unless employers are nudged by way of statute or regulation to take positive action in this regard, trans-employees will continue to be labelled as "undesirable", "outsiders" and "freaks", similar to the way in which persons from different racial groups were viewed in the past.¹⁴⁷ Similarly, such a prohibition may also serve to educate fellow employees on the

¹⁴¹ McGregor 2013 *2nd Annual International Conference on Law, Conference and Public Policy* 201.

¹⁴² Burns and Krehely 2011 *Center for American Progress* 1.

¹⁴³ Burns and Krehely 2011 *Center for American Progress* 3.

¹⁴⁴ *Ibid.*

¹⁴⁵ Whittle <http://www.gires.org.uk/assets/employment-dis-full-paper.pdf> (accessed 2014-02-17).

¹⁴⁶ McGregor 2013 *2nd Annual International Conference on Law, Conference and Public Policy* 211.

¹⁴⁷ Whittle <http://www.gires.org.uk/assets/employment-dis-full-paper.pdf> (accessed 2014-02-17).

transition process and why and how the appearance of the individual will change. In this way, the transition process could be an interactive one, helping all relevant parties to understand the circumstances involved.¹⁴⁸ This could also assist in dealing with any potential awkwardness around trans-employees,¹⁴⁹ such as that relating to the use of restrooms and ablution facilities in the workplace.

A third rationale for formally protecting trans-employees from discrimination, based on their appearance, is that their physical characteristics and manner of dress are completely unrelated to their ability to perform the inherent requirements of a job.¹⁵⁰ This argument was strongly supported by the Labour Court in *Atkins* and *Ehlers*. Burns and Krehely agree that far too many trans-employees go to work every day afraid of being dismissed from their jobs due to factors that have no bearing on their job performance whatsoever.¹⁵¹

But what should this formal protection be like? It is important to note at this stage that trans-employees who are unfairly discriminated against in the workplace do have legal recourse under the protected grounds of sex and gender, as illustrated in *Ehlers* and *Atkins*. However, while it is true that such discrimination primarily infringes upon these employees' rights not be discriminated against on the basis of their sex and gender in terms of section 9(3) of the Constitution and section 6(1) of the Employment Equity Act, discrimination against them during and after the transition process amounts to appearance discrimination also, as they are discriminated against, based on their (altered) physical features and their (altered) manner of grooming and dress. And as the court in *Atkins* clearly indicated that discrimination against a trans-employee, based on appearance, both before and after transition, amounted to an assault on the individual's dignity as a human being,¹⁵² it is argued that this will indeed also comply with the test for unfair discrimination. In view of this, the Employment Equity Act may be the most appropriate vehicle to grant trans-employees protection against appearance-based discrimination, particularly also since it aims to give effect to the constitutional right to equality and to eradicate unfair discrimination in South African workplaces. Such protection may be explicitly afforded by adding "personal appearance" – or "physical characteristics" for a more restrictive option – to the prohibited grounds of unfair discrimination, contained in section 6(1) of the Employment Equity Act.

Although the primary option for regulating this employment problem is legislative reform, a further suggestion would be the development of a set of guidelines, definitions and tests relating to the status of appearance-based discrimination in South African labour law, including discrimination against trans-employees. This could serve as a significant resource for the judiciary to deal with such matters if and when disputes arise and may aid the South African Department of Labour, employers and employees in understanding

¹⁴⁸ Juarez and Williams 2013 *National LJ*.

¹⁴⁹ Whittle <http://www.gires.org.uk/assets/employment-dis-full-paper.pdf> (accessed 2014-02-17).

¹⁵⁰ Burns and Krehely 2011 *Center for American Progress* 2.

¹⁵¹ Burns and Krehely 2011 *Center for American Progress* 4.

¹⁵² *Atkins v Datacentrix (Pty) Ltd supra* par 20.

the nature and scope of the problem. In addition, the drafting of a code of good practice for the South African labour arena may be considered, while employers should also be encouraged to adopt workplace policies that explicitly prohibit appearance-based discrimination against transsexual employees in the workplace, both before, during and after gender reassignment.

6 CONCLUSION

The legislative reform that has taken place in the abovementioned jurisdictions in order to legally recognise the gender reassignment and altered sex and appearance of trans-individuals, clearly indicates that such persons are in need of legal recognition and protection. The laws promulgated in these jurisdictions aim to extend this protection and recognition to this group, legitimising their plight. The case law from the various jurisdictions clearly points to trans-employees' extreme vulnerability to appearance-based discrimination in the workplace, particularly during the transition process as well as thereafter, when their physical appearance, manner of grooming and dress have changed.

The indications by the South African Labour Court in *Atkins and Ehlers* – namely that unfair discrimination in the employment realm should not be tolerated, that employees do not lose their status as employees or statutory protection simply because their appearance has changed, and that the alteration of physical appearance and manner of dress is not a legitimate ground for employers to discriminate against employees – can be seen as positive steps in the battle against appearance discrimination in the South African employment realm. However, realistically speaking, these cases also demonstrate how a hostile work environment can ensue from a trans-employee's changing appearance in the workplace, and that this evidently still occurs in South Africa's constitutional democracy, more than 20 years since the promulgation of the country's myriad of anti-discrimination laws. The prevalence of trans-individuals in the workplace, and the prejudice they suffer there because of their physical features and manner of dress, cannot be denied.

A formal prohibition on appearance discrimination in employment, it is argued, will enable trans-employees to bring an unfair discrimination claim on this ground when their employers treat them in an unjustifiable manner. Ultimately, that would advance the pursuit to safeguard and promote the rights to dignity, equality and equal opportunity of every employee in the workplace and contribute to a more tolerant and effective employment realm, irrespective of appearance.