



EMPLOYMENT TRIBUNALS

Claimants: Mrs B Hutchinson & others

Respondent: County Durham and Darlington NHS Foundation Trust

At: Newcastle Employment Tribunal (hybrid hearing)

Before: Employment Judge Sweeney
Denise Newey
Malcolm Brain

PRESS SUMMARY

Note: this summary is provided to help in understanding the Tribunal's decision. It does not form part of the judgment. The full judgment of the Employment Tribunal is the only authoritative document.

1. A group of female nurses who work in the Day Surgery Unit ('DSU') at Darlington Memorial Hospital ('DMH') brought the following legal claims against their employer, County Durham and Darlington NHS Foundation Trust:
 - 1.1. Harassment related to sex and/or gender reassignment (26 Equality Act 2010).
 - 1.2. Victimation (section 27 Equality Act 2010)
 - 1.3. Indirect sex discrimination (section 19 Equality Act 2010).
2. The claims concerned the operation by the Trust of two policies:
 - 2.1. A Uniform Appearance and Dress Code Policy ('Uniform policy') and
 - 2.2. A Transition in the Workplace policy ('TIW policy'), which permitted transgender staff to use the changing room that corresponds to their affirmed gender and required staff who did not wish to share the gender specific facilities with a transgender colleague to use alternative facilities.
3. Under the **Uniform policy** those staff who wear uniforms are not permitted to wear them to work or on leaving work, even for the purposes of taking breaks. Therefore, they must change into and out of uniform on Trust premises (para 47 of the reasons). To facilitate this, the Trust provides staff with changing facilities: a male changing room and a female changing room. Under the **TIW policy**, a transgender member of staff had the right to use the changing room specific to/that corresponded to the transgender employee's affirmed gender. The policy also

provided that those who did not wish to share the gender specific changing facilities should use alternative facilities (paras 54-63). No such alternative facilities existed (para 182).

4. One of the Trust's employees, Rose Henderson, a biological male who identifies as female and who has the protected characteristic of gender reassignment, was permitted to use the female changing room in accordance with the **TIW policy** from **2019** (para 37). The claimants raised concerns with management about the use by their transgender colleague in **2023**. These concerns were raised informally at first (paras 65-71) and later formally in **April 2024** (para 124).
5. They claimed that, by permitting their colleague access to the female changing room and by requiring them to share the room with a biological male trans woman, the Trust, through senior management, subjected them to harassment related to sex and/or gender reassignment or perceived gender reassignment within the meaning of section 26 Equality Act 2010. They also claimed that other conduct of management subjected them to harassment or amounted to victimisation within the meaning of section 27 of the Equality Act. In broad terms, this related to the handling of their concerns by management, and things that had been said and letters that had been written to the claimants by management.
6. The claimants also claimed that by accessing the changing room and by behaving in a certain way inside and outside the changing room, Rose too subjected them to harassment related to sex and/or gender reassignment or perceived gender reassignment or victimised within the meaning of section 27 for which the Trust was liable.
7. Finally, the claimants claimed that the Trust subjected them to indirect sex discrimination by (1) giving staff access to single-sex changing rooms based on self-declared gender identity and (2) prioritising the rights of transgender employees to access changing facilities based on their self-declared gender identity over other employees' right not to have to change in front of a member of the opposite sex. Each of these two things are referred to as a 'practice, criterion or provision' ('**PCPs**'). They contended that the Trust's **PCPs** put women to a particular disadvantage when compared to men, the disadvantage being that women are more likely to suffer fear, distress and/or humiliation caused by being compelled to undress in front of a member of the opposite biological sex. Each of the claimants contended that they were in fact put at that disadvantage by the **PCPs**. They further contended that the **PCPs** were not a proportionate means of achieving a legitimate aim.
8. The Trust denied that either the managers or Rose Henderson had harassed or victimised the claimants. As regards the complaint of indirect sex discrimination, it admitted that it gave staff access to single-sex changing facilities based on their self-declared gender identity. However, it denied that it prioritised the rights of transgender employees to access changing facilities based on their self-declared gender identity over other employees' right not to have to change in front of a

member of the opposite sex. As regards the first of those **PCPs**, the Trust contended that in applying it to the claimants, it acted proportionately in achieving three legitimate aims:

- (1) The aim of sensitively balancing the competing rights of its employees in the workplace.
- (2) The aim of respecting the gender identity of all its employees.
- (3) The aim of adhering to relevant legislation and guidance/advice in relation to provision of single-sex facilities.

Outcome

9. The Employment Tribunal concluded that Rose Henderson had not personally engaged in conduct that amounted to harassment within the definition of section 26 and had not victimised the claimants. The Tribunal also rejected the claim that the Trust had victimised the claimants.

10. The Tribunal upheld parts of the complaint of harassment against the Trust, namely:

- (1) The Trust subjected the claimants to harassment related to sex and gender reassignment by permitting the Claimants' biological male, trans woman colleague to use the female changing room and requiring the Claimants to share that changing room without providing suitable alternative facilities (paras 357-361).
- (2) The Trust subjected the claimants to harassment related to sex and gender reassignment by not taking seriously and declining to address the Claimants' concerns regarding the use of the female changing room by a biological male, trans woman colleague. This included referring to the need for the claimants to be educated on trans rights and to broaden their mindsets (paras 140 – 147), the later provision of inadequate and unsuitable changing facilities for those who objected to sharing the female changing room with that colleague (paras 182-187; paras 385-390).
- (3) The above conduct had the effect of violating the dignity of the Claimants and creating a hostile, intimidating, humiliating and degrading environment for them (paras 363-382; 393-396).

11. The Tribunal also upheld the complaint of indirect sex discrimination, in that:

- (1) The Trust applied the two **PCPs** (paras 274-278; 401-402).
- (2) The PCPs put women at a particular disadvantage when compared to men, in that women are more likely than men to experience feelings or apprehensions of, fear, distress and/or humiliation by, in effect, being required to change their clothes in front of a member of the opposite sex. The Claimants were all put to that disadvantage (paras 257-273; 408-424)
- (3) The Tribunal concluded that, by permitting a biological male, trans woman to use the female changing room, the Trust was in breach of the Workplace

(Health, Safety and Welfare) Regulations 1992 (paras 309; 370-373; 381; 430-436, 440) and had infringed the claimants' right to respect for private life under article 8 of the European Convention on Human Rights. The Trust was unable to show that the **PCPs** were a proportionate means of achieving its aims (paras 425-446).