

## Employee undergoing a sex change – is it any of the employer’s business?

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In *Atkins v Datacentrix (Pty) Ltd* the applicant ('the employee') was offered a position of IT technician by the respondent ('the employer'), which he accepted. After accepting the offer, but before his first day of work, the employee informed the employer that he was in the process of undergoing a 'gender-reassignment process' (sex change) from male to female. The employer subsequently terminated his contract of employment, arguing that the employee had omitted to mention this fact during the interview process, which it believed constituted a serious case of misrepresentation and which amounted to dishonesty. The employee claimed that he had been automatically unfairly dismissed and unfairly discriminated against.

Before the court the employer argued that this was a case of an (ordinary) unfair dismissal. The reason for the dismissal was not related to the employee's intended sex change, but rather his failure to disclose a material fact.

The court held that the LRA's definition of an employee did not distinguish between males and females. A transsexual who therefore underwent a sex change would continue to remain an employee and the prohibition against unfair discrimination would also still exist. That the employee had been dismissed was not in dispute. What was in dispute was the true reason for the dismissal. Section 187 placed the evidential burden on the employee to produce evidence which was sufficient to raise a credible possibility that an automatically unfair dismissal had taken place. The impression that the employer wanted to give the court was that, if the employee had disclosed that he intended to undergo the operation, he would not have been dismissed.

The court did not accept this. The court held that the only inference that could be drawn from the facts placed before it was that the employer would have not employed the employee in the first place had he disclosed this fact. The court held that it was not clear why the employer contented that the employee had been dishonest when the employee in fact never had a legal duty to inform the employer of his intention to undergo a sex change. It was clear from the facts before the court that the dominant reason for the employee's dismissal was that the employer had not been happy with the employee's intended sex change. The employer had therefore failed to show that the reason for the dismissal was not automatically unfair.

The court held that it had to send out a message to employers, who still had some issues with sex changes operations, that such conduct would not be tolerated. In the result, the dismissal was declared automatically unfair and it was held that the employer had unlawfully discriminated against the employee, with costs. The court held that it was just and equitable to order the employer to pay the employee compensation in the amount of R100 000.00.

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