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## Employment &amp; Labour - South Africa

## Protection for transgender employees

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All employees and applicants for employment are protected against unfair discrimination on several grounds, one of which is gender. A recent Labour Court case<sup>(1)</sup> shows how such protection applies to a transgender applicant for employment.

The company, Datacentrix, interviewed Mr Atkins for a position as an IT technician. It was impressed with his credentials and offered him the job. While he was working out his notice with his employer, Atkins advised Datacentrix that he was planning to undergo a sex-change operation. The company withdrew its offer of employment, claiming that Atkins should have disclosed this information in interview. The company stated that he had been dishonest and that this was the reason for the dismissal, not his plan to change gender.

Atkins took the case to the Labour Court, claiming unfair dismissal on the grounds that the company had discriminated against him on the basis of gender. The court gave its judgment in December 2009. The court accepted that Atkins was transsexual, which is a recognized psychological condition where people perceive themselves as members of the opposite sex. The remedy is surgery to align the person's body with his or her psychological gender.

The judge did not accept the company's argument that it had dismissed Atkins for dishonesty. It was clear that the reason for the dismissal was the disclosure of his plan to undergo a sex change. The court stated that this constituted discrimination on the basis of gender. Such discrimination is prohibited by both the Labour Relations Act 1995 and the Employment Equity Act 1997. The company had argued that Atkins was obliged to disclose his proposed sex change in interview. The judge found that he had no such duty.

The judge was inclined to award Atkins substantial damages to make an example of his case, but as Atkins had remained in the employ of his previous company, he suffered little loss. He was therefore awarded five months' salary in compensation. Had Atkins been able to prove further losses, he may have received more.

Employers must be aware that employees are protected by the Constitution against unfair discrimination on listed or arbitrary grounds. Ignoring such protection can lead to damages claims.

## Endnotes

(1) *Atkins v Datacentrix (Pty) Ltd*, as yet unreported.

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