STEPHENSON HARWOOD

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A substantive review of the landmark decision in *Taylor v Jaguar Land Rover Limited* and the protection it provides for those who identify as non-binary and gender fluid under the Equality Act 2010

Adam Cooke, of Stephenson Harwood, and Oscar Davies, of Lamb Chambers, outline the recent judgment of *Taylor v Jaguar Land Rover* on the inclusion of non-binary and gender fluid gender identities under the Equality Act 2010, the judgment's implications, and what practical steps can be taken to ensure that workplaces are compliant.

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Pronouns: He/Him/His

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Pronouns: They/Them/Theirs or He/Him/His

Background and decision

In September 2020, the Employment Tribunal ruled in *Taylor v Jaguar Land Rover Limited* that the definition of gender reassignment under section 7 Equality Act 2010 ("**EA 2010**") covers employees who identify as non-binary and gender fluid. The Claimant, Ms Taylor, successfully claimed direct discrimination, harassment and victimisation on the grounds of gender reassignment.

Ms Taylor had worked at Jaguar Land Rover ("**JLR**") for 20 years as an engineer. She had previously presented as male but in 2017 began identifying as gender fluid, from which time she started to dress in women's clothing. In light of this, she began to be subjected to insults and abusive jokes at work. Ms Taylor suffered limited to no support from managerial teams regarding her transition in the workplace and the insults and abusive jokes she was experiencing. Further, Ms Taylor experienced difficulties with the use of toilet facilities. She brought claims of harassment, direct discrimination, and victimisation on the ground of gender reassignment as well as constructive dismissal. JLR argued that gender fluid/non-binary did not fall within the definition of gender reassignment under s.7.

In an oral judgment, the tribunal unanimously upheld Ms Taylor's claims. It held it was "*clear … that gender is a spectrum*" and that it is "*beyond any doubt*" that Ms Taylor fell within the definition of s7 and therefore JLR's defence was dismissed. The full reasoning of the judgment has now been released, which we will go on to dissect.

Gender Identity

> *"A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex."*

S.7(1) Equality Act 2010

Prior to this decision, the above wording was somewhat open to a stricter interpretation that an individual will only gain this protection if they make, or propose to make, a change from either male to female, or female to male.

In light of the above, this decision is so important to those who identify within the 'Trans' umbrella for a number of reasons. Ms Taylor identified as being gender fluid, and as such, still identified under the umbrella of 'Trans'. Terminology within the 'Trans' umbrella is varied and constantly shifting as understanding, perceptions and awareness improve, as well as individuals shaping the language that best describes their gender identity. In much of the commentary released in the aftermath of the Employment Tribunal's decision, the terms gender fluid and non-binary have been used as interchangeable terms.

Non-binary is an umbrella term that refers to people who feel their gender cannot be defined within the margins of gender binary. Instead, they understand their gender in a way that goes beyond simply identifying as either a man or woman. Gender fluid is someone who moves between two or more gender identities and considers their gender identity mutable, as the Claimant self-identified in this case.

Non-binary gender identity is just one term used to describe individuals who may experience a gender identity that is neither exclusively woman nor man or is in between or beyond both genders. Non-binary individuals may identify as gender fluid, agender (without gender), genderqueer, or something else entirely. This landmark decision will protect those individuals too.

Gender identity is also different from gender expression. While gender identity is an internal, deeply-rooted sense of self, gender expression is how a person externally expresses their gender identity. It's important to note that gender expression is how they present themselves, perhaps through their choice of clothes or pronouns, and it may or may not correspond to a person's gender identity.

Commentary

In this decision it is striking that whilst a number of policies apparently existed at JLR, including an Equal Opportunities Policy and a Dignity at Work Procedure, none of the managers or HR knew that they existed [9]. This is a prime example of how having a policy in place cannot, in and of itself, absolve an employer of liability when related grievances arise. Employees must know that it exists (if one does exist) and it must be followed. Similarly, responsibility cannot fall to individual employees if there is no infrastructure in place to follow [226].

Aggravated damages were awarded for, it seems, two main reasons:

1. The egregious way Ms Taylor was treated when subjected to serious harassment, and the "*wanton disregard*" for the gravity of Ms Taylor's situation [127] [131] [132] [141];
2. The insensitive approach taken by JLR in defending the case. For example, the line of questioning by JLR's counsel suggested that Ms Taylor could have left immediately (rather than wait out her notice period) if her treatment was so bad [121] [149].

There was also the issue of pathologising Ms Taylor's gender. Her repeated referrals to Occupational Health were not necessarily helpful in this situation. Paired with comments from colleagues such as her being "not normal" [22], Ms Taylor was subjected to a culture of "othering" and pathologising of her gender identity. There is now a clear movement in the law and more broadly away from such an approach [174] and this should be avoided by employers.

Further, when Ms Taylor was told repeatedly to use the disabled toilets, this was clearly not appropriate advice. EJ Hughes explained: "*Firstly, telling a transitioning person to use the disabled toilets is, at the very least, potentially offensive to them because it suggests that their protected characteristic equates to a disability. Secondly, disabled toilets are for disabled people to use and should not be used by other people.*" [22].

This goes to show that if there are time scales for ensuring there is a gender neutral (*cf* disabled) toilet at work, these must be stuck to. A disabled toilet may be an appropriate interim measure, but only for a short space of time while a more permanent non-disabled gender neutral option is made available. If an issue drifts indeterminately, these types of situations are likely to arise.

In this case, the sad result is that Ms Taylor's mental health took a significant hit due to the acts and omissions of her employer. Her experience and harassment were repeatedly trivialised, even when her employer was informed that at points she suffered with severe depression and suicidal ideation [92].

The judgment critical of JLR's conduct, both during Ms Taylor's employment and the following:

"It will be abundantly clear from our findings of fact that the Claimant was not supported properly, and

that no action was taken to afford her protection from being exposed to serious harassment. The consequence was that her mental health seriously deteriorated. The Respondent was in a position to take action, and failed to do so. It is not necessary to elaborate further. The facts speak for themselves." [214]

EJ Hughes gave a word of warning that can and should be considered by all employers:

> *"We thought it astounding that there was nothing in the way of proper support, training and enforcement on diversity and equality until the Claimant raised the issue in 2017, bearing in mind how long the legislation has been in force. We had not seen a wholesale failure in an organisation of this size in our collective experience as an industrial jury. This case came about as a result of the culture of the organisation. The culture is not aligned to the Respondent's policies, agreements, or statements of intent. This is a lesson that has to be learnt at the highest level. It is a systemic failure and demonstrates that the Respondent values its employees' ability to perform their key roles far more than their personal welfare and wellbeing. We were pleased that the Respondent sent some of its senior managers to hear our oral reasons, and we are hopeful that this will lead to meaningful change."* [227]

The case is a good example of how *not* to deal with non-binary/gender fluid people. For example, an employer stating that someone must 'name names' in order to deal with harassment is not advisable. Singling out individual perpetrators will rarely be helpful for any party, and it must not be a smokescreen behind which employers and members of their HR teams can hide behind. Instead, the employer could issue a notice to all employees highlighting serious concern at the highest level that incidents have been reported of people being subjected to unacceptable harassment due to protected characteristics [61]. In this way, the need to identify individual perpetrators can be circumvented.

Implications of the judgement on the law and beyond

Taking a step back, this judgment comes at a critical time when the proposals for reform of the Gender Recognition Act 2004 ("**GRA**") have recently been rejected. Whilst the GRA allows for applications to be made for a gender recognition certificate (with arguably stringent requirements) and therefore serves a different function to the EA 2010, those with varied gender identities may feel encouraged that they should now be protected from discrimination in the workplace. Whilst it is often asked whether the EA 2010 is still 'fit for purpose' (or, indeed, if it ever was), it would seem that in this instance, the Tribunal was able to allow it to evolve suitably to fit into today's understandings of what gender is/is not: *"We thought it was very clear that Parliament intended gender reassignment to be a spectrum moving away from birth sex, and that a person could be at any point on that spectrum. That would be so, whether they described themselves as "non-binary" i.e. not at point A or point Z, "gender fluid" i.e. at different places between point A and point Z at different times, or "transitioning" i.e. moving from point A, but not necessarily ending at point Z, where A and Z are biological sex."* [178]

Counsel for the Claimant, Robin White, kindly provided us with the specific comment:

> *"The judgment establishes, at first instance, that non-binary and gender fluid people are included within the protection of the protected characteristic of gender reassignment in a way that can't be ignored. The employment world is going to have to respond to this judgment, including in their policies, or they risk having a finding made against them. Also it means that in this area I don't think the government can ignore needs of non-binary and gender fluid people. The case is therefore a wake up call to any business that does not take account of diversity and inclusion".*

Ms White went on to say that "*the effect of the judgment is to reveal that Jaguar Land Rover were not taking any steps in any area of diversity and inclusion of any note, and that you cannot get away with that in 21st century.*" In the same breath, Ms White added that *"The events recorded in this decision occurred in 2017 and 2018. I understand that Jaguar Land Rover has responded already publicly to their treatment of the claimant. They have taken steps to put themselves on the right road in terms of diversity and inclusion. For them as a company and for their employees and workers, I wish them well on that journey".*

The judgment also serves as a warning that industries or professions that are more 'traditional' cannot be somehow exempt from having to get rid of discrimination in the workplace. There is less and less tolerance for comments/'banter' concerning gender identity, and employers should be mindful that employees – of all levels – do not go beyond what is professional when commenting on others and, critically, what is legally permissible. The

ramifications of such comments on the individual can be catastrophic and, as in the JLR's case, similarly negative for the employer.

What this means for our clients and practical steps to be taken

Society's continued development on its outlook on gender and how that is categorised is an area of the law that is now undergoing rapid development and in this instance, we are seeing the law developing in response to societal change.

For businesses, it is important that employment practices are not only updated in line with today's standards around equality and inclusion but are also actively brought to the attention of their workforce, with consistent and substantive training provided. The Judge's comments and award of aggravated damages (which are seldom awarded, and only where the behaviour of one party is aggressive, malicious or oppressive) are particularly noteworthy given JLR was found to have produced diversity and inclusion policies, but had not taken any active steps to bring them to their workforce's attention.

Businesses will need to ensure that their HR departments are trained and prepared for any individual that may approach them to discuss their gender identity and any associated transition within the workplace. It should not be the job of an individual LGBT+ employee to train their HR representatives in equality and diversity; it is not their burden.

Where an employee has advised that they identify on the non-binary spectrum, it is important to take the time to understand as much as possible about the employee's situation. Confusion can arise from misunderstanding about terminology and the consequent misuse of terms, which can, in turn, lead to reduced confidence in management.

In terms of educating the wider workforce, here are some specific steps employers can take to demonstrate best practice:

- Diversity and inclusion training of staff at all levels – if there is a staff member who identifies as a gender which is different to that assigned to them at birth and/or on the non-binary spectrum, speak with them to see whether they would like to be involved in devising some elements of this training;
- Review anti-bullying policies to ensure they are fit for purpose;
- Have Equality and Diversity committees that are, in themselves, intersectional and diverse;
- Ensure there are robust equal opportunities and specific gender identity policies – these should utilise a supportive and flexible approach;
- Look out for and seek to avoid more subtle forms of discrimination by employees – such as subconscious or unconscious bias;
- If there are issues with a non-binary/gender fluid employee, referring them to Occupational Health is not necessarily the best way to deal with things (this deals with consequences rather than the potential harassment/discrimination they are facing);
- If there are people in your workforce who are less well versed on these issues, now is the time to (i) ensure they are trained and (ii) ensure they do not voice unhelpful opinions (like "*not normal*") that may ostracise non-binary/gender fluid individuals;
- Ensure that a gender neutral pronoun is an option for employees to use;
- Review how data is managed – speak with the relevant employees to plan how their information should be updated;
- Assess any practical or logistical barriers – for example, is there a need for gender neutral toilets (the fact that JLR had not carried out an analysis was raised by the Claimant in her claim and accepted as discriminatory by the Tribunal)?
- Are employees required to wear uniforms – and, if so, is there a gender neutral option?
- Explore having bespoke training delivered to both your HR team and wider workforce through organisations such as Global Butterflies.

Adam and Oscar can help advise on any of the above-mentioned issues, including drafting compliant policies, redrafting existing policies, and pursuing or defending claims.

Key contacts

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