



Doing Trans-Economic Justice: A Critique of Anti-Discrimination Laws and Inclusive Employment Policies

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Abstract

This article draws on our qualitative study of trans unemployment to introduce considerations of the relationship between trans unemployment and the demands for workers across economic sectors to perform affective labour as integral to industrial service relations. Affective dimensions of labour are often unspoken and unconscious, rendering it challenging for anti-discrimination laws to accommodate. We demonstrate the ways that recent cases grounded on unconscious bias open spaces for further consideration of the ways that trans employment discrimination rooted in demands for affective labour can be dealt with by anti-discrimination law.

Keywords: Transgender, unemployment, affective labour, anti-discrimination laws post-industrial economy, unconscious bias.

Résumé

Cet article s'appuie sur notre étude qualitative de l'employabilité et de la non-employabilité des trans pour introduire des considérations quant à la relation entre le chômage trans et les demandes pour les travailleurs de tous les secteurs économiques d'effectuer des tâches de travail affectives comme partie intégrante des relations de services industriels. Ces considérations permettent de soulever que les dimensions affectives du travail sont souvent tacites et inconscientes, ce qui complique l'adaptation de la législation antidiscriminatoire. Nous montrons comment des litiges récents fondés sur des préjugés inconscients ouvrent des espaces de réflexions approfondies par rapport aux moyens par lesquels la discrimination trans en matière d'emploi, qui trouve son origine dans les demandes de tâches de travail affectives, peut être traitée par la législation antidiscriminatoire.

Mots clés: Transgenres, chômage, travail affectif, législation antidiscriminatoire, économie post-industrielle, biais inconscient.

“No one is going to be able to come out and say to you, we’re not going to hire you because you’re trans, that’s never going to happen. What can happen *is the energy you feel from them.*”

Michelle Leard¹

Introduction

Unemployment and underemployment among trans populations is a significant issue in trans communities. The overrepresentation of trans people among the ranks of the un/deremployed has far reaching consequences, including under-housing and homelessness, compromised mental and physical health, and increased vulnerability to violence. In response to such compromised life chances, trans rights activists have advocated for gender identity and gender expression to be formally enshrined in Canadian anti-discrimination law provincially and federally. Following the lead of several provinces and territories, Bill C-16 was passed federally in 2017 establishing gender identity and gender expression as grounds for discrimination in the *Canadian Human Rights Act*² and hate crimes legislation.

Trans employment rights remain contentious. Achieving the formal recognition of gender identity and gender expression in anti-discrimination law and employment law, including “soft law” such as the Ontario Human Rights Commission Policy,³ is significant. Nevertheless, research indicates that many trans people, particularly trans women and trans people of colour, continue to experience employment precarity and economic vulnerability.⁴ The rates of trans un/deremployment in Ontario are higher than the provincial average.⁵ How can scholars, trans legal advocates, and employment policy advocates account for the disparities between anti-discrimination and employment laws recognizing gender identity and gender expression as protected grounds and trans people’s lived experiences of being marginalized within, or barred from the workplace?

This article attempts to account for this disparity by analyzing trans un/deremployment at the limits of anti-discrimination and employment rights law.

¹ David Burke, “Transgender and unemployed: Businesses shut doors to trans workers,” *CBC News*, August 30, 2016, <<http://www.cbc.ca/news/canada/nova-scotia/transgender-unemployed-business-jobs-discrimination-1.3740571>>.

² RSC 1985, c H-6.

³ Ontario Human Rights Commission, “Policy on preventing discrimination because of gender identity and gender expression,” (Toronto: Ontario Human Rights Commission, 2014).

⁴ Trans women are particularly precarious in the legal labour market and engage in sex work to supplement their low incomes as a result of un/deremployment, as well as to survive as outcasts from legal employment. The *criminalization* of sex work creates severe repercussions for those engaged in this industry, including endangering the lives of street-based workers, as well as hindering their chances of obtaining work within legal economic sectors should they have a criminal record. Please see Jonathan Eaton, “Transitions at work: Industrial relations responses to the emerging rights of transgender workers,” *Canadian Labour & Employment Law Journal* 11, no. 113 (2004): 118; Ryan Henry Edmonds, “Breaking open the system: A multi-party analysis of gender transitions as an effective industrial relations process,” *Windsor Review of Legal & Social Issues* 31, no. 155 (2011): 161; Viviane K. Namaste, *Sex Change, Social Change: Reflections on Identity, Institutions, and Imperialism*, 2nd ed. (Toronto: Women’s Press, 2011).

⁵ Greta Bauer and Ayden I. Scheim, 2015, “Transgender people in Ontario, Canada: Statistics from the Trans PULSE Project to Inform Human Rights Policy,” (London, ON: Trans Pulse), <<http://transpulseproject.ca/wp-content/uploads/2015/06/Trans-PULSE-Statistics-Relevant-for-Human-Rights-Policy-June-2015.pdf>>

Drawing from affect theory, trans political economy, and critical labour studies, our objective is to introduce the concept of immaterial, or affective, labour to highlight where anti-discrimination and employment laws potentially fall short in accounting for, and offering redress for, trans un/deremployment. Affect theory, and the key concept of immaterial labour in particular, emphasizes the unsayable—and often inarticulate—demands of workers’ bodies and personalities that influence employability. Hiring processes and on-the-job surveillance practices include exchanges that exceed words spoken or direct actions taken by managers, human resources, or co-workers. Contemporary employment relations exist as dynamic spaces wherein felt exchanges, or un/conscious embodied and sensory exchanges, charge the workplace as an “affective atmosphere.”⁶ Workers’ capacity to perform immaterial labour is often decided upon by, and through, such felt exchanges. Understanding the centrality of immaterial labour to the post-industrial labour economy garners a deeper comprehension of trans un/deremployment.

Immaterial labour is a concept coined by Maurizio Lazzarato⁷ and taken up by critical and feminist labour scholars such as Michael Hardt,⁸ Angela McRobbie,⁹ and Kathi Weeks.¹⁰ Influenced by their interventions in critical labour studies, we problematize the high rates of trans un/deremployment by contextualizing this phenomena within the broader framework of the post-industrial economy. Post-industrialism has shifted conditions of employability. There is an unspoken demand for workers to create positive feeling states for consumers—work that requires particular embodied appearances and personality traits. The perceived effectiveness of workers to produce goods and deliver services increasingly hinges on their capacity to engage in affective labour. In other words, one’s employability depends on whether employers believe workers will be able to use their bodies, personalities, and social acumen to cultivate feelings of confidence for their managers and safety amongst their co-workers, as well as feelings of satisfaction, happiness, and security for clients and customers. The capacity to perform this affective dimension of immaterial labour is a “soft skill” required of workers across economic sectors.

In this article, we suggest that trans people’s chances of securing employment depends on their potential employers’ unspoken and perhaps unconscious evaluation of their ability to perform immaterial labour. Ms. Leard’s statement (quoted in the epigraph) regarding the hiring process as an energetic and felt experience prompts consideration of current demands for particular bodily aesthetics and behaviours that exceed the limits of anti-discrimination law. Unarticulated expectations of embodied whiteness and/or racialized gender performance to produce

⁶ Ben Anderson, “Affective atmospheres,” *Emotion, Space and Society* 2, no. 2 (2009): 77–81. DOI: 10.1016/j.emospa.2009.08.005.

⁷ Maurizio Lazzarato, “Immaterial labour”, in *Radical Thought in Italy: A Potential Politics*, transl. P. Colilli and E. Emery, ed. Paul Virno and Michael Hardt (Minneapolis, MN: University of Minnesota Press, 1996).

⁸ Michael Hardt, “Affective labor,” *Boundary 2* 26, no. 2 (1999): 89–100.

⁹ Angela McRobbie, “Reflections on feminism, immaterial labour and the post-Fordist regime,” *New Formations* 70, no. 70 (2011).

¹⁰ Kathi Weeks. *The problem with work: Feminism, Marxism, antiwork politics, and postwork imaginaries* (Durham, NC: Duke University Press, 2011).

feeling states instilling managerial and consumer confidence exemplify the ways “trans repudiation”¹¹ is interwoven throughout hiring processes and job performance evaluations in ways not easily demonstrable. The non-verbal messages that non-passing men or women, genderqueers, and non-binary individuals receive—that their trans-ness renders them unemployable—is often communicated affectively via felt energy exchanges.

This article falls outside strictly legal parameters. Our analysis is framed mainly by Trans Studies literatures, especially those at the nexus of trans subjectivities and political economy. We draw from Irving’s interview-based research with un/deremployed trans people in Ontario and British Columbia to consider the affective dimensions of employment relations.

Our argument is threefold: first, we argue that post-industrial demands for immaterial labour frames the workplace as an affective atmosphere. The workplace is charged with sensations, feelings, and perceptive exchanges between managers, co-workers, employees, and consumers. Framed by hegemonic logics of whiteness and cisnormativity, some bodies are deemed capable of producing positive feeling states while others evoke feelings of anger, disgust, fear, and anxiety. Second, we argue that many trans individuals, especially trans people of colour and/or trans women, whose appearances and behaviours are detected as gender non-conforming, remain un/deremployed largely due to the “dis-ease” they present to potential employers. The bodies, personalities, and behaviours of many trans women and trans people of colour are read as unable to engage in the immaterial labour required for businesses, public services, and non-profits to thrive in the post-industrial economy. As participants revealed frequently during interviews, detection of their trans identities and the resulting discomfort were not communicated to them explicitly. Participants could not conclude unequivocally that transphobia barred them from employment. Third, we assert that participants’ experiences applying for work or while transitioning at work often “shimmer[...] beyond the spoken”¹² as feeling-based knowledge. Such embodied experiences of post-industrial demands for immaterial labour and, subsequently, the workplace itself as affective atmosphere, push anti-discrimination law to its limits.

Our objective is not to grapple with whether demonstrating a human rights violation can account for the affective dimensions of trans un/deremployment. Indeed, there are employment discrimination cases that demonstrate legal efforts to recognize indirect, unconscious, and systemic discrimination and its harmful effects. Nonetheless, this is a legal arena where many questions remain. Nor is our purpose to offer solutions to address the limits of anti-discrimination law. Rather, we urge trans legal employment advocates to consider the significant contribution that the unspoken demands of the post-industrial economy for immaterial labour play in barring many trans people from the workplace.

¹¹ Christopher Shelley, *Transpeople: Repudiation, trauma, healing* (Toronto: University of Toronto Press, 2008).

¹² Melissa Gregg and Gregory J. Seigworth, *The affect theory reader* (Durham, NC: Duke University Press, 2010); Gregory J. Seigworth, “Capaciousness,” *Capacious: Journal for Emerging Affect Inquiry* 1, no. 1 (2017): i–v.

This article is divided into two sections. To frame our arguments concerning the unspoken demands of affective labour existing beyond the limits of anti-discrimination law, the first section begins with an explanation of how discrimination applications are presented. We will then offer examples of how the law attempts to account for adverse effect and systemic discrimination. While the law acknowledges that discrimination or prejudice may be unconscious, the often inarticulate demands of immaterial labour demonstrate the limits of the law. In the second section, we draw on evidence emerging from Irving's qualitative research to demonstrate the link between trans unemployment and the unspoken demands of the post-industrial economy for workers' immaterial labour. In doing so, we also demonstrate the way the workplace functions as an affective atmosphere charged with multiple perceptions concerning which employees are capable of setting service users, clients, and consumers at ease, pleasing them, and exciting and creating feelings of satisfaction among them versus bodies who conjure negative feelings.

Method

Between 2012 and 2017, Irving conducted forty-four semi-structured interviews with trans identified residents of urban areas in Ontario and British Columbia who were un/deremployed at the time of the interview. The interviews lasted forty-five minutes to an hour and a half, were transcribed verbatim, and were coded using NVIVO computer software.

The majority of participants identified as trans women ($N=25$) and trans men ($N=12$), while a few self-identified as transsexual, genderqueer, no gender, or two-spirit (all together $N=8$). Most participants identified as white ($N=27$), with Indigenous ($N=6$), mixed race ($N=3$), Asian ($N=2$), and Black ($N=1$) individuals also participating. Two participants wrote "Jewish" under race, and four participants declined to self-identify. The dominant age category among participants was forty to fifty-nine (52.27%), followed by twenty-six to thirty-nine (29.55%), sixteen to twenty-five (11.36%), and sixty to seventy-two (6.82%). Reflecting underemployment, 20.45% of participants held an undergraduate degree or community college certificate yet their work did not reflect their particular training and skill. A significant percentage of participants reported earning between \$10,000 and \$19,000 annually (32%) while 23% earned less than \$10,000 annually. Other income brackets included \$50,000 to \$79,000 (11%), \$36,000 to \$49,000 (11%), \$20,000 to \$35,000 (9%), \$80,000 to \$100,000 (2%), and \$100,000+ (9%).¹³ Participants preferring not to specify their incomes totalled 2%.

Participants were asked to narrate their labour history pre-, during, and post-transition, with the proviso that medical transition need not define one's transition. Additionally, participants were asked to identify trans specific workplace issues, as well as to reflect on why they believe that trans people are overrepresented among

¹³ Participants whose incomes were in the \$80–\$100K range were employed within the information technology (IT) industries and spoke to the precarity that accompanies such project-based work, as well as the tensions they experienced as trans professionals on the job.

the un/deremployed. Initially, Irving's interview questions were intended to pinpoint concrete issues concerning barriers to trans employment so businesses, non-profit organizations, and public sector employers could initiate policies and programs to foster trans-inclusive workplaces. He was confronted with having to grapple with the unconscious and indirect exchanges between trans people, their prospective or current/past employers, and co-workers.

A particular phenomena emerged throughout many of the transcripts—on repeated occasions, participants became speechless. Many participants' experiences of transphobia, trans misogyny, and racism during hiring interviews or on the job were not articulated and are not articulable; instead, their worth-lessness as employees was apparent to them (and often to Irving) somatically and emotionally. Participants often *sensed* that they were not selected for job interviews or hired because of their trans/gender identity, which, in some cases, intersected with their racialized bodies. Despite their feelings of being deemed inadequate for work, they could offer no tangible evidence to support this embodied knowledge. As one participant phrased it, many trans people could not “put their finger” on why it was that they were not competitive on the job market despite their education, training, and past work experience. On other occasions, trans participants spoke of standard statements offered by management—“you're not a good fit for the organization”—to justify cutting their hours, laying them off, or firing them. Certain participants recounted the extensive resources employers had invested in their job training, while others discussed the promotions and positive performance reviews they had received, only to be dismissed from the workplace during their gender transition or almost immediately afterwards. Participants could not say for certain whether their being cast from their workplace was related to their trans identification or experience. Accusing trans workers of not being a good fit for the organization may evade capture in the context of a discrimination proceeding, in spite of existing human rights protections. Trans workers may feel the repercussions of gender self-determination, but anti-discrimination laws and employment rights may not fully address the unspoken demands of post-industrial labour.

Section 1 – Demonstrable Grounds: Exploring Parameters of Anti-Discrimination Law

In Canada, trans citizens have long had rights protecting them against discrimination. For example, trans subjects facing employment discrimination could launch human rights complaints under the category of “sex” or “disability.”¹⁴ Nevertheless, some transgender activists have struggled for a trans-specific rights category—gender identity and gender expression—to be enshrined in provincial and federal human rights law. Beginning with the Northwest Territories in 2002

¹⁴ For instance, in both the *Montreuil v National Bank of Canada*, 2004 CHRT 7 and *Vanderputten v Seydaco Packaging Corp.*, 2012 HRTO 1977 [*“Vanderputten”*] decisions, the applicants were found to have been discriminated against on the basis of sex. Please see Samuel Singer, “Trans rights, gender identity and gender expression in Canada,” Canadian Human Rights Commission (2017): 2.

and concluding with Nunavut, the Yukon, and New Brunswick in 2017,¹⁵ all provinces and territories now include gender identity (and in some cases gender expression) as prohibited grounds of discrimination under their human rights laws.¹⁶ In 2017, Bill C-16 was passed, formalizing legal protection for gender identity and expression within the *Canadian Human Rights Act* and hate crimes legislation.¹⁷

To establish a discrimination claim, a person must demonstrate three elements. First, they must show that they have a characteristic that is protected by one or more grounds under human rights legislation; second, they must establish that they experienced an adverse impact or treatment and; third, that the protected characteristic was a factor in the adverse treatment or impact.¹⁸ Once these elements have been established, it is up to the respondent to provide a credible non-discriminatory reason for the conduct or practice. If an explanation is provided, then “the burden of proof remains on the applicant to establish that the respondent’s evidence is false or a pretext.”¹⁹

Many human rights cases involving trans claimants demonstrate examples of egregious discriminatory conduct. One recent case involved a trans man being dragged out of a nightclub washroom, threatened, and physically assaulted by the club’s security guards.²⁰ The Human Rights Tribunal of Ontario (“HRTO”) found that the claimant had undoubtedly experienced adverse treatment as a result of his gender identity and ordered the club to pay \$15,000 in compensation.²¹

In another case, this time in the employment context, a trans woman experienced ongoing workplace harassment when she began to socially and physically transition at work.²² She was subject to name-calling (including “faggot” and “fruitcake”), demeaning comments (“what are you, a man or a woman?”), and offensive bulletin-board postings. Her employer had also refused to accommodate a shift change, which would have allowed her to avoid changing with her male colleagues who routinely harassed her because of her gender presentation. Furthermore, the employer later dismissed her, alleging that she was dealing with workplace issues in an aggressive manner. The HRTO concluded that the applicant had experienced workplace harassment and that her employer had failed to

¹⁵ Canadian AIDS Society, “Trans Rights Legislation,” 2017. <<https://www.cdn aids.ca/trans-rights-legislation-in-canada/>>.

¹⁶ *Human Rights Act*, SNWT 2002, c. 18; *The Saskatchewan Human Rights Code*, SS 1979, c. S-24.1; *The Human Rights Code*, CCSM, c H175; *Human Rights Code*, RSBC 1996, c 210; *Alberta Human Rights Act*, RSA 2000, c A-25.5; *Human Rights Code*, RSO 1990, c H.19; *Charter of Human Rights and Freedoms*, CQLR, c. C-12; *Human Rights Act*; RSPEI 1988, c H-12; *Human Rights Act*, RSNS 1989, c. 214; *Human Rights Act, 2010*, SNL 2010, c H-13.1; *Human Rights Act*, RSNB 2011, c 171; *Human Rights Act*, RSY 2002, c 116; *Human Rights Act*, SNU 2003, c 12.

¹⁷ Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code*, 2nd Sess, 42nd Parl, 2017, (assented to 19 June 2017).

¹⁸ *Moore v British Columbia (Education)*, 2012 SCC 61, at para 33; *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 SCR 591, at para 24; Halsbury’s Laws of Canada (online), Discrimination and Human Rights (2018 Reissue), (III.2.(2)) at HDH-51 “Overview” [“Halsbury’s”].

¹⁹ *Peel Law Association v Pieters*, 2013 ONCA 396 at para 74 [“Peel”].

²⁰ *Lewis v Sugar Daddy’s Nightclub*, 2016 HRTO 347 (CanLII).

²¹ *Ibid.*, at para 61 (the HRTO also ordered the club to provide human rights training, specifically on the issues of gender expression, gender identity, and sexual orientation, to its staff).

²² *Vanderputten*, supra note 14.

adequately investigate and respond to her allegations of discrimination, creating a poisoned work environment.²³ While the harassment was in itself discriminatory, the HRTO further found that the applicant's sex was a factor in her dismissal and that this too constituted discrimination.²⁴

Cases of clear direct discrimination, like those above, are relatively simple to prove because the adverse treatment is clearly linked to the applicant's gender identity and gender expression. In other cases, specifically where the discriminatory conduct is indirect or subtle, establishing a discrimination claim is more challenging.

In general, discrimination can be separated into three different forms: direct, adverse effect, and systemic.²⁵ Direct discrimination includes the most overt manifestations of "adverse distinction on the basis of [an] enumerated grounds of discrimination."²⁶ In the employment context, direct discrimination might be employment policies, workplace publications, or actions explicitly stating that trans individuals cannot be employed.

Adverse effect discrimination, otherwise referred to as indirect or constructive discrimination, occurs when seemingly neutral policies, rules, or actions have the effect of discriminating against an individual or group based on established protected grounds.²⁷ Whether there was a prejudicial or discriminatory intent is irrelevant.

Systemic discrimination refers to "long-standing stereotypes and value assumptions" that discriminate against individuals or groups regardless of intention.²⁸ While only "expressly prohibited by statute" in Manitoba and the Yukon, systemic discrimination has long been recognized by Canadian courts. The Supreme Court of Canada described systemic discrimination in the employment context as

discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job."²⁹

For trans workers, systemic discrimination can occur when worker recruitment activities, hiring processes, or promotion criteria are not designed to discriminate against gender identity or gender expression but, in effect, create barriers for or exclude trans people from employment altogether. Systemic discrimination, like adverse effect discrimination, is determined on its effects rather than on intentionality.³⁰ Systemic discrimination is perhaps particularly difficult to demonstrate, as it "emphasizes the most subtle forms of discrimination" stemming from historically-

²³ Ibid. at para 78.

²⁴ Ibid. at paras 83-84 (note that "gender identity" and "gender expression" were not yet protected grounds under the human rights code).

²⁵ Halsbury's, at HDH-48 "Forms of discrimination".

²⁶ Ibid., (III.2.(1)(a)) at HDH-46 "Overview."

²⁷ Ibid.; Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queens University Press, 2010), at 19 ["Sheppard"].

²⁸ Halsbury's, supra note 25.

²⁹ *CN v Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC) at 1139, [1987] 1 SCR 1114.

³⁰ Halsbury's, supra note 25, (III.2.(1)(b)) at HDH-48 "Forms of discrimination."

held prejudices and value assumptions that are substantially or entirely hidden and unconscious.³¹

The most difficult hurdle for the applicant may be establishing whether their gender identity or gender expression was a factor leading to their differential treatment. Certain established principles help in this analysis. Namely,

- the prohibited ground or grounds of discrimination need not be the sole or major factor leading to the discriminatory conduct;
- there is no need to show the respondent intended to discriminate;
- the prohibited ground or grounds need not be the cause or the reason for the respondent's discriminatory conduct; and
- direct evidence of discrimination is not necessary; discrimination will more often be proven by circumstantial evidence and inference.³²

Even if the threshold to establish a *prima facie* case of discrimination is low, applicants may still be unable to establish their claim. The available evidence must demonstrate that the claim is not merely "speculative."³³ Human rights legislation is

not designed to remedy all instances of differential treatment, poor service delivery or professional misconduct. The alleged treatment must be linked in a substantive way to a [protected] ground. The applicant must show **more than mere subjective suspicion** to establish a link between the respondent's alleged conduct and the grounds pleaded. There must be **at least some objective facts and circumstances** to support the theory linking the respondents' action with the [applicable legislation].³⁴

Even where the respondent provides no defence and does not participate in a proceeding, the burden of proof remains with the applicant. In *E.C. v Ready Employment Agency*,³⁵ a trans woman brought a claim against an employment agency for posting what she perceived as a discriminatory ad for a receptionist position on Kijiji. Notably, in this case, the respondent did not participate at all in the proceeding. The ad stated "Looking for responsible and reliable woman to fill receptionist position." This was in contrast to a previous posting, which had been posted for the same position a month prior and which said: "Looking for responsible and reliable *person* to fill receptionist position" (our emphasis). The applicant had not applied for the position, which had been removed before she had a chance to submit her application. Still, according to the applicant, the inclusion of the word "woman" made it clear that the employment agency intended to discriminate against her and anyone who was not female at birth.³⁶

³¹ *Pivot Legal Society v Downtown Vancouver Business Improvement Association and another* (No. 6), 2012 BCHRT 23 (CanLII) at para 574.

³² *Peel*, supra note 19 at para 111.

³³ *Francescutti v City of Vancouver*, 2017 BCCA 242 at para 58; *Villella v Brampton (City)*, 2011 HRTO 1085, at para 10.

³⁴ *Villella* [our emphasis].

³⁵ 2016 HRTO 1630 (CanLII) ["EC"].

³⁶ *Ibid.* at para 17.

The HRTO reiterated that “every person has a right to equal treatment with respect to employment without discrimination because of ... sex, ... gender identity, [and] gender expression,” and that, pursuant to Ontario’s *Human Rights Code* (the “Code”), this right “is infringed where an invitation to apply for employment [...] directly or indirectly classifies or indicates qualification by a prohibited ground of discrimination.”³⁷ It accepted that the applicant had a protected characteristic under the *Code* and that, as a trans woman, she fell “under the protected grounds of sex, gender identity, and/or gender expression.”³⁸ It also recognized that transgendered women are “a historically disadvantaged group.”³⁹ However, the HRTO dismissed the claim because it could not find that the applicant experienced adverse treatment by the respondent. It explained, “The ad was looking for a ‘woman’ and the applicant self-identifies as a woman. While I understand her concern that she may not be accepted as a woman by some, the non-acceptance may occur when a person meets the applicant. There was no meeting in this situation.”⁴⁰

This decision illustrates the limits of human rights protections in areas where there is no clear instance of discriminatory conduct and where a person cannot prove that they experienced discrimination. This decision is helpful to keep in mind when trying to understand the subtleties with which trans people may be excluded from the workforce. In this situation, the applicant explained that she did not have a chance to apply for the position before it was taken down, but it is plausible that, having read the posting as discriminatory, the applicant was put off from applying. While it is impossible to know what her motivations were, when read in the context of Irving’s interviews, it is understandable. We must begin to consider how the experiential realities of trans people inform and reinforce the message that they are not wanted within the broader context of post-industrial labour relations.

Even if the applicant successfully establishes a *prima facie* case of discrimination, the analysis does not necessarily end there. If the respondent provides a defense and can call evidence demonstrating that their actions were non-discriminatory, the applicant is again put in a position to prove that the respondent’s justification is false. In cases where the discriminatory conduct is not direct or overt, this is difficult to do. As the Ontario Court of Appeal pointed out, “[t]he question whether a prohibited ground is a factor in the adverse treatment is a difficult one for the applicant. Respondents are uniquely positioned to know why they refused an application for a job or asked a person for identification.”⁴¹

For instance, if a job applicant believes a potential employer did not hire them for discriminatory reasons, the employer could argue that the candidate was not qualified to rebut the discrimination claim.⁴²

³⁷ Ibid. at paras 21-22.

³⁸ Ibid. at para 26.

³⁹ Ibid. at para 26.

⁴⁰ Ibid. at para 27.

⁴¹ *Peel*, supra note 19 at para 72.

⁴² *Biddle v Lifelabs LP*, 2017 HRTO 488 (CanLII) at para 43.

Where there is no direct evidence of discrimination, a human rights tribunal must draw reasonable inferences based on the circumstantial evidence before it.⁴³ It is common for applicants to rely on circumstantial evidence to prove their case. The HRTTO has itself said that,

It is not at all unusual that cases alleging discrimination in relation to a hiring decision proceed on the basis of circumstantial evidence, as applicants generally are not privy to the discussions held by the persons who made the hiring decision and as it is not uncommon that unstated and sometimes even unconscious biases may affect a hiring decision.⁴⁴

Some examples of circumstantial evidence could include, among other things, statistical evidence,⁴⁵ time sheets,⁴⁶ and research papers.⁴⁷

In *Montreuil v National Bank of Canada*,⁴⁸ the applicant had the benefit of favourable circumstantial evidence; the respondent's explanation itself betrayed a hidden bias behind its decision not to hire the applicant. Montreuil argued that the bank had not hired her for a customer service job because she is a trans woman. In its defence, the bank argued that Montreuil was not hired because 1) she was overqualified; 2) her attitude was not that of a person who wishes to serve the public, but was rather one of a person who is self-centred and condescending; and 3) that her real motive for applying was to use the position to promote the rights of transgendered persons.⁴⁹ The Canadian Human Rights Tribunal ("CHRT") found the bank's explanation to be pretextual, revealing a prejudicial bias against the applicant. During her interview, Montreuil had made comments about the progress of minority groups and stated that she was a persistent person who was prepared to "break down doors." It is from these comments that the interviewers concluded that Montreuil's genuine motive for applying was to promote transgender rights.⁵⁰ According to the CHRT, the bank's rationale effectively treated the candidate's transgender status as a factor in its decision not to hire her. Similar non-trans job applicants would not have been denied the same employment opportunity based on an assumption that they would use their employment to promote the advancement of their minority rights.⁵¹

In addition to the literal recognition of trans discrimination, the tribunal's recognition of unconscious prejudicial motives presents possibilities for further critical legal analysis of the connections between the unspoken criteria required to perform affective labour and trans employment discrimination. Here, the bank

⁴³ *Shaw v Phipps*, 2010 ONSC 3884 at paras 75-77; aff'd 2012 ONCA 155; *Weinberg v Ombudsperson of BC*, 2019 BCHRT 226 (CanLII) at para 39.

⁴⁴ *Blakely v Queen's University*, 2012 HRTO 1177 (CanLII) at para 40; *Gazankas v Red Lake (Municipality)*, 2013 HRTO 198 (CanLII) at para 17.

⁴⁵ *Canada (Human Rights Commission) v Canada (Department of National Health and Welfare)*, 1998 CanLII 7740 (FC) at paras 19-21; see also *Blake v. Minister of Correctional Services (1984)*, 5 C.H.R.R. D/2417 (Ont.).

⁴⁶ *Driessens v Doctor Parviz Najmeddini Veterinary Professional Corporation*, 2020 HRTO 5 (CanLII), at para 35.

⁴⁷ *BK v Ponies R Us*, 2020 HRTO 161 (CanLII), at paras 39-40.

⁴⁸ *Montreuil*, supra note 14.

⁴⁹ *Ibid.* at para 56.

⁵⁰ *Ibid.* at para 62.

⁵¹ *Ibid.* at para 67.

reads Montreuil's behaviour during the interview as not demonstrative of a desire to serve the public. This is a clear example of the ways workers' bodies and attitudes are closely scrutinized to ensure they can engage in the affective labour necessary to set clients and customers at ease.

As demonstrated in section two of this article, Irving's participants' narratives express uncertainties and embodied perceptions of their being excluded from the workplace or marginalized within it because they do not appear, sound, or act as an individual capable of producing the positive feeling states in consumers that are an integral part of business success in post-industrial society.

Section 2 – Dis-Ease and Disruption: Non-Conforming Individuals and Affective Labour

The nature of work in the Global North changed significantly during the 1970s as corporations shifted manufacturing efforts, or industrial production, primarily to the global South. Post-industrialism is defined as the “development of relations of service”⁵² spanning across economic sectors including professional employment, public services, as well as restaurant and hospitality services. In other words, “capitalism is less about producing goods and services than about reproducing hospitable forms of life (e.g., bodies...desires, fantasies...)”.⁵³ The workplace becomes a “social factory” demanding affective labour. A form of immaterial labour, affective labour exploits workers' bodies and souls (i.e., their appearances, personalities, and behaviours) to instill excitement, satisfaction, security and other positive feelings among consumers.⁵⁴ Producer-consumer/client relations, as well as the cultivation of dynamic and productive workplace atmospheres, expands beyond commodity production and service delivery towards harnessing pre-cognitive impulses, drives, and embodied emotions.⁵⁵ Employability, or one's perceived capacity to achieve success on the job, involves the unspoken yet present demand for immaterial labour in what is termed “emotional capitalism.”⁵⁶

To secure employment, an individual's education, training, and job experience (i.e., “hard skills”) must increasingly be coupled with physical attributes and personality traits guaranteed to put customers at ease. Irving's interviews with un/deremployed trans people attest to the ways that assessments of workers' appearances and behaviours are often unspoken; nonetheless, participants commonly felt it was not random that they were assessed as not being a “good fit” at work. Employment relations constitute an “affective atmosphere” whereby demands for immaterial labour often exist as “ill defined indefinite something [s]” exceeding capture via rational explanations⁵⁷ and representation.⁵⁸ One trans

⁵² Lazzarato, “Immaterial Labour,” 8.

⁵³ Ibid.

⁵⁴ Ibid., 2; Hardt, “Affective labor”; Illouz, *Cold intimacies: The making of emotional capitalism* (MA: Polity Press, 2007).

⁵⁵ Hardt, “Affective labour”.

⁵⁶ Illouz, *Cold Intimacies*...

⁵⁷ Anderson “Affective atmospheres,” 78.

⁵⁸ Illouz, *Cold intimacies*.

woman exclaimed she “couldn’t put her finger on” the dynamics occurring during job interviews.

Unlike the clarity and certainty with which participants detailed incidents of transphobic discrimination (e.g., being the only employee made to hang a sign on the washroom door when occupying it) and transphobic violence (e.g., physical and sexual assault⁵⁹), sensate experiences of employment marginalization and exclusion are signalled in the transcripts by bodily gestures, such as participants’ voices trailing off, their nervous laughter, dropping their eyes, shifting their weight nervously in their seats, and fidgeting. As L. A. Mazzei asserts, scholars working with oppressed communities must not consider silence “as lack, absence or negation” but rather as “the relevant speech act ‘spoken’ beneath the surface, in the interstices, around the corners of our ordinary perceptual frames enabling a more careful reading (listening)...even when we are not speaking.”⁶⁰ It is vital that the often inexpressible feelings that unemployed trans participants “speak as voiced with avoidance, deferral, diversions, and pauses”⁶¹ be “granted a hearing” to grasp more fully why many employers feel they are unemployable.

Felt Exclusions

When participants addressed applying for work, their experiences coincided with scholarship that applies affect theory to post-industrial labour relations. A trans woman stated:

I’ve been applying for jobs for years now. I have not gotten another job since I’ve got this one which I got when I was still presenting as male [...] so six years. [...] I’ve gotten interviews, but somebody else has always gotten the job, whether it is internal or external. It is always difficult to tell whether it is related to being trans or not.

A Chinese-Canadian woman articulates similar felt experiences when she submitted her materials to a casting agency. She exclaims that:

they don’t return my calls. They don’t return my emails. I don’t know if I should press any further and ask them “is it because you think I am trans?” “Is it because of my female features that you see in my picture?” I really don’t know how to [...] approach it because then it would put their backs against the wall and make them look bad. So you really don’t want to do that. So, I really don’t know.

Another trans woman shares her difficulties obtaining work:

So I had a healthcare background [...] and I got honours in my class. Why I still don’t have a job today, I’ll never know [...] I would still look for work and I would go to places and there would be openings but I never got the job. [...] a couple of my friends who worked in a couple of places that I’ve applied

⁵⁹ See Dan Irving, “Escaping neurotic justice: Learning from a trans* male survivor of workplace violence,” in *We resist: Defending the good in hostile times*, ed. Cynthia Levine-Rasky and Lisa Kowalchuk (Montreal: McGill-Queen’s University Press, 2020).

⁶⁰ Lisa A. Mazzei, “Toward a problematic of silence in action research,” *Educational Action Research* 15, no. 4 (2007): 632.

⁶¹ *Ibid.*, 634.

told me that I didn't get the job because of who I was. They, again, couldn't prove it because it's hard to prove.

This participant recounts a conversation where she asked her friend for her insight into why she remains unable to obtain a nursing job:

she said to me, "well you know, people don't want to catch—I'm okay—but there's people that, you know, they don't want you taking care of their parents or their siblings because they, their siblings or their parents might catch your disease." Like what disease? What disease? I don't have a disease, I'm just the same as everybody else, right? [...] And so again, you can't prove it.

The quotes above offer an entry point for understanding where high rates of trans un/deremployment meet the limits of anti-discrimination law. As section one of this article demonstrates, the burden of proof is placed on trans applicants to establish that discrimination occurred; however, some barriers to trans employment cannot be proven. When the three trans women cited above address aspects of their job-seeking efforts, an analysis applying affect theory pushes beyond listening to the speaking subject⁶² towards considering communication that takes non-verbal and often non-conscious forms in excess of what are recognized commonly as social relations between individuals.⁶³

Participants' experiences suggest that the workplace is an affective atmosphere. In other words, the workplace and post-industrial labour relations are environments framed by intersecting systemic power relations. The air is charged with multiple daily psycho-social exchanges and interactions. The three trans women quoted above are struck by the incongruence between the positive attention their application materials garner among potential employers and the continuing rejection they face following job interviews. These participants highlight "the ill defined indefinite something[s]"⁶⁴ occurring during hiring processes that exceed capture by rational explanation. "Capacious and rangy,"⁶⁵ these nonverbal bodily exchanges often leave traces shrouded in ambiguity—something is occurring but participants cannot say for certain what they are experiencing.

Gender identity and expression are ever present throughout participants' job-seeking experiences. Two women explain how the credentials listed on their resume piqued the interest of potential employers enough to schedule an interview, denoting that the employers ranked these women ahead of other applicants and seemed confident that their hard skills boded well for success on the job. Participants point to unspoken phenomena occurring during the job interview as a face-to-face encounter. These job seekers are not naive and know that employers can detect their "trans-ness" or what often reads in cisnormative society as gender nonconformity. Such femininity is often embodied alongside physical features (e.g., robust stature, sharper facial features, visible beard lines), deeper vocal registers, and more forthright and assertive behaviours commonly read as masculine. One

⁶² Lisa Blackman and Couze Venn, "Affect," *Body and Society* 16, no. 1 (2010), 8.

⁶³ *Ibid.*, 18; Seigworth, "Capaciousness," iii.

⁶⁴ Anderson, "Affective atmospheres," 78.

⁶⁵ Seigworth, "Capaciousness," ii.

older woman framed the spectre of gender expression more crudely: employers often see "...a guy in a dress."

Job interviews are social, physical, and psychological encounters and, as such, are sites of affective exchange. Participants cannot identify concrete dimensions of energetic moments occurring during job interviews and they are correct—gut feelings concerning the connection between visible gender alterity, the negative affects this sparks in employers, and decisions not to hire them—are “hard to prove.” Nonetheless, as affect theorists assert, these energetically charged moments and the ways they are felt (i.e., anger, fear, anxiety) are “public feelings.”⁶⁶ The disease, or vulnerability, discomfort, wonderment, that arises when visibly trans individuals meet potential employers “exceeds emotions.”⁶⁷ The “ugly feelings”⁶⁸ that emerge and are transmitted between bodies attending interviews as in-person meetings cannot be reduced to trans job seekers’ individual insecurities or transphobia on the part of individual employers.

The centrality of immaterial labour enriches our comprehension of hiring processes as a social interaction scaffolded by public feelings that influence decisions on which bodies can be “capture[d]”⁶⁹ to create positive emotive states for consumers. New management strategies “‘put into value’ potentials of the ‘self’ which had not been used so far.”⁷⁰ Mediated by systemic power relations, such as heteropatriarchy, naturalizing the sex/gender binary, as well as structural racism that privileges whiteness, employers “read surface signals of demeanor, dress, and language as snapshots of underlying qualities they are seeking or...characteristics they are careful to avoid.”⁷¹ Participants’ confusion concerning the disconnect between their educational and experiential qualifications and their continual un/deremployment is addressed when evaluating how employability hinges on what is predominantly understood as attractive bodies and a stylized demeanor that act “as a proxy for qualifications.”⁷² Participants’ accounts of their experiences beg the question of which norms deem particular bodies as non-conforming and trigger discomfort, fear, or anger prompting employers to refuse to recognize such unruly bodies as employable.

The sex/gender binary system shapes dominant approaches to employability. According to this dualistic logic, there are only two legitimate sexes (i.e., male or female) and genders (i.e., masculine or feminine). Biological essentialism shapes the dominant knowledge of sex. Sex is defined mainly by chromosomes; therefore, it is regarded as immutable. There is a direct correlation between birth-assigned sex

⁶⁶ Ann Cvetkovich, *Depression: A public feeling* (Durham, NC: Duke University Press, 2012).

⁶⁷ Susan McManus, “Hope, fear, and the politics of affective agency,” *Theory and Event* 14, no. 4 (2011): 2.

⁶⁸ Sianne Ngai, *Ugly feelings*, (Cambridge, MA: Harvard University Press, 2005).

⁶⁹ Claire Hemmings, “Invoking affect: Cultural theory and the ontological turn,” *Cultural Studies* 19, no. 5 (2005): 562.

⁷⁰ Alexandra Rau, “‘Psychopolitics’ at work: The subjective turn in labour and the question of feminization,” *Equality, Diversity and Inclusion* 32, no. 6 (2013): 604.

⁷¹ Katherine S. Newman, *No shame in my game: The working poor in the inner city* (New York: Vintage Books, 1999), 75; Rau, “‘Psychopolitics’ at work,” 604-605.

⁷² Kristin Schilt, *Just one of the guys? Transgender men and the persistence of gender inequality* (Chicago: University of Chicago Press 2010), 91.

and social expectations concerning one's gender expression. Males are to appear and behave according to what is accepted as masculine whereas females are to be feminine.

Trans bodies are suspect, given this governing binary framework. The sex-/gender binary normalizes cissexual and/or cisgender individuals, or those whose gender identity corresponds to their birth assigned sex and/or gender. Trans bodies are deemed monstrous because they destabilize naturalized discourses of sex and gender.⁷³

The negative feelings that non-passing trans people trigger in others and the frequent result of casting trans people from social spaces, such as the workplace, are best understood as “trans repudiation,” not transphobia.⁷⁴ Trans people are not denied employment because individual managers have an irrational fear of visible, audible, or behavioural gender nonconformity. Trans repudiation can result from fears or aggravation that stem from transgressing sex/gender binary logic. If trans people cannot perform the necessary immaterial labour to quell the sensed suspicion and anxiety of potential employers, repudiation can occur through silent means—they will no longer be considered competitive for the position.

Affective exchanges on the job

Other participants shared similar feelings about trans oppression, highlighting the workplace as a space composed of embodied exchanges of energy—intensities that “pass body to body; resonances that circulate and sometimes stick to bodies and worlds...”⁷⁵ A trans man describes two “embodied exchanges” between himself and his manager. The first occurred during an LGBT awareness training for employees. He recalls: “They handed him a pamphlet. I am sitting next to him and he was ashamed to even look at the thing!” Regarding the second incident, he explains that: “Our change room at the hospital is, ah, for all surgeons, residents, cleaners, anyone who is a male. I am very careful the way I change when I am at my locker. And, my manager, you’ve never seen anyone change so quick. At least if he has got a hang-up, he doesn’t go there.”

Like other participants, the man quoted above senses his manager's discomfort when confronted with trans identities and embodiment. Understanding employment relations and the workplace as an affective atmosphere refutes the notion that bodies are “bounded essences” by illuminating the permeability of bodies and environments⁷⁶ and their co-constitutive relationship—bodies, subjects, and environs both affect and can be affected.⁷⁷ Both the workshop and the change room are

⁷³ Susan Stryker, “My words to Victor Frankenstein above the village of Chamounix: Performing transgender rage.” *GLQ: A Journal of Lesbian and Gay Studies* 1, no. 3 (1994).

⁷⁴ Shelley, *Transpeople*.

⁷⁵ Gregg and Seigworth, *The affect theory reader*, 1; Sara Ahmed, “Affective economies,” *Social Text* 22, no. 2 (2004): 117–39.

⁷⁶ Gregg and Seigworth, 12; John Andrews, “Depression today, or new maladies of the economy,” *Social Text* 27, no. 2 (2009), 168.

⁷⁷ Brian Massumi, *Politics of affect* (Cambridge: Polity Press, 2015), 50; Patricia Ticineto Clough, “Introduction,” in *The Affective Turn*, ed. Patricia Ticineto Clough with Jean Halley (Durham, NC: Duke University Press, 2007), 2.

charged environments where interpersonal dynamics between this particular trans man, his manager, and others in the workplace are framed by cisnormativity and post-industrial demands for immaterial labour. Shame is not solely a private emotion; rather, it exists in excess of both men.

We cannot say for certain that this manager felt ashamed when confronted with literature concerning LGBT identities and oppression, nor whether the speed at which he dresses is due to a “hang-up” he has with his employee’s gender identity and its embodiment. Nevertheless, the feelings this participant shares demonstrate the ways that affects circulate between and amongst bodies⁷⁸ and—perhaps more important to understanding why trans people are often cast from the workplace—affects “stick” to particular bodies. Shame sticks to many trans bodies and, subsequently, many trans job seekers and employees are stuck because of it (i.e., immobilized in the workplace or kept outside of it).

Immaterial Labour and Co-worker Relations

Demands for immaterial labour extend beyond worker–consumer relations to include dynamics between co-workers. Popular buzzwords such as “emotional intelligence” and “workplace teams” suggest the imperative that employees work with each other to create a productive environment. Participants often described co-workers’ negative reactions to their gender expression. Some participants detailed direct acts of harassment and violence while others highlighted more subtle ways coworkers expressed their fears and anxieties. Some individuals dealt with difference through making—what they consider to be—positive overtures towards their trans co-worker. One trans man shared that: “Staff will come up to me and say they have a lesbian sister or cousin. They don’t know how to talk about it. They accept me the way they would accept a mascot. I get that feeling.” In other instances, co-workers tolerated working with trans people but would marginalize them. A trans woman who worked as a police officer explains: “everyone kind of kept me at a distance. It was very stressful.” Distancing also involves exclusion from socializing outside of work. One trans man was not alone when he expressed: “I’m not invited to things but they’re pretty decent.”

Employers evaluate employees on their ability to contribute to positive co-worker dynamics. Trans workers are scrutinized for their ability to set others at ease. Some participants empathized with the “hassle[s]” that visible trans employees create for management because such visibility can “disrupt” others.

Such empathy for management speaks to the relational dynamics shaping the workplace as an atmosphere where bodies affect and are affected. Trans-ness affects many cisgender individuals—it is experienced as remarkable, distracting, and warranting their attention. Trans workers can be affected negatively by such microaggressions or “understated, emotional experiences.”⁷⁹ The trans man quoted above felt like a mascot—a jovial crowd pleaser who is not on the team.

⁷⁸ Ahmed, “Affective economies.”

⁷⁹ Collins et al. “The problem of transgender marginalization and exclusion: Critical actions for human resource development,” *Human Resource Development Review* 14, no. 2 (2015), 217; Sonny Nordmarken, “Microaggressions,” *TSQ: Transgender Studies Quarterly* 1, no. 1–2 (2014): 129–34.

The other two participants also feel sidelined by co-workers distancing themselves at work or excluding them from social time outside working hours. Cis employees' grappling with gender identity and expression can signal elevated anxiety or discomfort, which can detract from job performance or create fissures in workplace teams. Given that heteropatriarchy hinges on cisnormativity, trans employees may be felt—but not necessarily outright acknowledged—to be hindering the cultivation of a productive environment at work. Such exchanges do not go unrecognized by trans workers; yet within the parameters of anti-discrimination law and employment law, it is often difficult to produce direct evidence.

Immaterial Labour, Trans Worker and Management Relations

The workplace as an affective atmosphere also includes unconscious communications between trans workers and management. One woman discussed how transition renders workers vulnerable to workplace job/gender surveillance. She explains that:

as trans people, we are not on a level playing field [...] I feel that way now in the context of my own job because of [...] everything that I am dealing with and everything I am going through. There have been a couple of times [...] where my performance has been called into question even though I have been a very stable and productive employee for more than a decade. I have been spoken to as if there are doubts about my ability to carry out my duties [...] it's made me very nervous. I have actually broken down in tears a couple times because I felt that perhaps I am in danger of losing this job, which really would be a complete disaster for me and so that leaves me feeling rather... unprotected.

Accentuating the workplace as an affective atmosphere emphasizes the unconscious transactions interweaving between bodies, thereby imploding the binary between imagined (i.e., the feeling of being watched or evaluated based on gender rather than job performance) and real incidents of discrimination. Space is cleared to consider “microperceptions”⁸⁰ or the unspeakable shocks of affect that are often felt before they are known.⁸¹

Getting Fired

Employment becomes increasingly precarious for many trans people during, or shortly following, their transition. One woman of colour explains:

I have gone through fifteen different jobs in the last fifteen or twenty years of my career and employers always come up to me and say “you are not the right fit” and I never understand what they meant by “right fit for the job.” And that's how they terminate me [...] And then they would try to drum up some lame excuse about work performance [...] It could be their fears.

⁸⁰ Massumi, *Politics of affect*, 53-54.

⁸¹ Carla Freeman, *High tech and high heels in the global economy: Women, work, and pink-collar identities in the Caribbean* (Durham, NC: Duke University Press, 2000), 3.

These experiences create space to analyze connections between trans un/deremployment, immaterial labour, and the workplace as a site of energetic exchange. Workers are silently evaluated vis-a-vis skin colour, weight, stance, and style to ensure profitable worker–consumer interactions.⁸² The participant’s claim that managers’ fears have resulted in her having lost multiple jobs is not unsubstantiated. Trans workers’ capability to maintain their employment hinges on their ability to look, sound, and act in ways that contribute to productive co-worker relations and customer satisfaction. What is detected or felt as gender transgression does not sit well because, as explained by a work–life psychologist, “we are narrowing down what is perceived as ‘normal.’ This may pertain to looks, weight, or behaviour: “That you are just too much.”⁸³

Whiteness, Racialized Trans/Gender and Immaterial Labour

Race—including whiteness—is inseparable from gender identity and expression.⁸⁴ Public feelings attached to race—including whiteness—charge post-industrial workplace environments as trans job seekers’ and employees’ capacities to perform affective labour are unconsciously evaluated. In Canada, whiteness is a racial category that affords structural advantages and social privilege to individuals and communities recognized as white. Furthermore, whiteness functions as a moral code of conduct implying purity and upstanding character. In Western liberal democracy, whiteness operates through silences⁸⁵ because white as a race disappears under the cover of the individual or universal human. Likewise, whiteness functions as an unspoken code of conduct wherein discourses of white superiority often elude detection.

Most participants declared their race as “white” or “Caucasian” on the demographics form and were silent about race when discussing their challenges with securing employment or at work. Nevertheless, whiteness informs participants’ feelings that their outward expressions of their gender identities is *the* visible moniker of difference setting them apart as non-normative, non-compliant and, therefore, not the right fit for the job. White trans women participants, for example, believe their failure to appear and act within the confines of normative femininity deems them disruptive. When whiteness is considered alongside unspoken demands for immaterial labour,⁸⁶ trans femininity often renders these white women disruptive and incapable of setting others at ease. Additionally, what is interpreted as moral failure vis-a-vis whiteness and gender ambiguity “can create

⁸² Newman, *No shame in my game*, 155; Kathryn Haynes, “Body beautiful? Gender, identity and the body in professional services firms,” *Gender, Work and Organization* 19, no. 5 (2012): 489–507.

⁸³ Christina Garsten and Kerstin Jacobsson, “Sorting people in and out: The plasticity of the categories of employability, work capacity and disability as technologies of government,” *Ephemera: Theory and Politics in Organization* 13, no. 4 (2013): 842.

⁸⁴ Himani Bannerji, “In the matter of ‘X’: Building ‘race’ into sexual harassment,” in *Thinking through: Essays on feminism, Marxism and anti-racism* (Toronto: Women’s Press, 1995).

⁸⁵ Lisa A. Mazzei, “Inhabited silences: In pursuit of a muffled subtext,” *Qualitative Inquiry* 9, no. 3 (2003): 362; Desmond Cole, *The skin we’re in: A year of Black resistance and power* (Canada: Doubleday Canada, 2020).

⁸⁶ Beverly Skeggs, “Imagining personhood differently: Person value and autonomist working class value practices,” *The Sociological Review* 59, no. 3 (2011): 496–513.

an interactional breakdown, generating anxiety, concern, and even anger”⁸⁷ between trans job seekers, co-workers, management, and customers.

Racialized gender is ever present for trans participants of colour when sharing their experiences as job seekers and employees. People of colour’s bodies are exoticized, fetishized, and devalued in white supremacist Canadian society, which is demonstrated by the higher rates of un/deremployment among racialized people.⁸⁸ A trans man of colour and a recent refugee claimant at the time of his interview provides space for considering post-industrial work relations as psycho-social, or affective exchanges. He states: “[w]hat I found is that employers—they are very skeptical about foreigners [...] I don’t know.” Transitioning adds another layer of skepticism to the already devalued racialized body. Against the backdrop of whiteness, workers of colour often feel pressure to perform beyond the expected requirements for the job. One participant shared that he tried to compensate for his racialized gender identity by obtaining training certificates and other evidence of training and excellence within his field. Education, training, and proficiency do not preclude employers’ affective assessments of racialized workers’ capacity to produce positive feeling states for clientele rooted in whiteness and cisgenderism.

Amassing credentials is not the only way people of colour challenge systemic racism in employment. People of colour often seek to temper racism through affective labour performance. A black trans male participant speaks to challenging anti-black racism which is rife in Canadian society.⁸⁹ He explains:

I love Maya Angelou [...] one time [...] she did a poetry reading [...] about how people of colour, especially black people, put on a smile. We’re smiling, we’re smiling, we’re smiling. It’s a mask though because we know very well how precarious situations are for us. [...] How people hold our jobs in their hands. So you just smile and you have to let so many micro-aggressions go. [A]s a trans man of colour, personally, I know that I have let things go in that realm [employment] [...] There is only so far that you can let things go before it starts to get underneath the skin.

Policing black lives often occurs through institutional practices and interpersonal interactions.⁹⁰ Black men are frequently refused employment because their physical appearance is viewed as “too risky” for employers’ bottom lines.⁹¹ This participant’s emphasis on putting on a smile speaks to the affective negotiations mediating employment relations. The smile is a learned behaviour to convince employers of his compliance, friendliness, and ability to produce gratifying feelings amongst customers.

⁸⁷ Laurel Westbrook and Kristen Schilt, “Doing gender, determining gender: Transgender people, gender panics, and the maintenance of the sex/gender/sexuality system,” *Gender & Society* 28, no. 1 (2014): 35.

⁸⁸ Cecil Foster, “Canadian Blackness and identity,” in *Blackness and Modernity: The Colour of Humanity and the Quest for Freedom* (Montreal: McGill Queen’s University Press, 2007), 434.

⁸⁹ Desmond Cole, *The skin we’re in*; Robyn Maynard, *Policing Black lives in Canada: State violence in Canada from slavery to present* (Halifax: Fernwood Publishing, 2017); Delores Mullings et al., “Canada the great white north where anti-Black racism thrives: Kicking down the doors and exposing the realities,” *Phylon* 53, no.1 (2016).

⁹⁰ Maynard, *Policing Black lives in Canada*.

⁹¹ Newman, *No shame in my game*, 6, 55.

This participant also highlights how the smile, as part of a wider field of energetic transmission defining post-industrial labour relations, impacts people of colour physically and psychologically. Performing happiness, team spirit, and steadfastness in the face of racist and cisgendered microaggressions and indirect interpersonal dynamics is damaging to this participant and other economically precarious individuals. The demands for post-industrial workers to do so—and the toll that such economic demands for affective service delivery have on racialized trans individuals—meets anti-discrimination law at its limits.

Resources and Ways Forward

Human rights legislation offers necessary protections against discrimination, but it will not, in itself, correct systemic inequalities that contribute to trans un/deremployment. While it is outside the scope of this paper to offer specific solutions, we would highlight that there are quasi-judicial resources available that identify specific employment issues faced by trans people and offer concrete steps on how to prevent them.

One of the most comprehensive examples of such a resource is the Ontario Human Rights Commission's ("OHRC") *Policy On Preventing Discrimination Because of Gender Identity and Gender Expression* (2014) (the "Policy").⁹² While this document and others like it⁹³ do not have the same legal force as legislation, they provide guidance on how to interpret provisions of existing human rights legislation.⁹⁴ Adjudicators look to these documents when determining whether the action in question is discriminatory. In some instances, it is even mandatory for the adjudicator to consider them. In Ontario, the *Human Rights Code* provides that the HRTO *must* consider the OHRC policies if a party or an intervenor in a proceeding requests it.⁹⁵

For many trans workers, the tribunal process is difficult to navigate and a last resort solution. Guidelines and policies, on the other hand, allow parties to become informed and, ideally, take proactive measures to prevent discrimination from occurring in the first place.⁹⁶ At the very least, these documents serve as educational tools for organizations, service providers, and employers. In particular, they offer insights on how employers can meet their duty to accommodate trans workers,

⁹² Ontario Human Rights Commission, "Policy."

⁹³ See also: Manitoba Human Rights Commission, "Discrimination based on gender identity: Your rights, your responsibilities," A guideline developed under the Human Rights Code (Winnipeg: MHRC, October 2016); New Brunswick Human Rights Commission, "Guideline on Gender Identity or Expression," (Fredericton: NBHRC, May 2017); Québec, Commission des droits de la personne et des droits de la jeunesse, "Recruter sans discriminer : Cahier 1 - L'offre d'emploi" (Montréal: CDPDJ, November 2019); Québec, Commission des droits de la personne et des droits de la jeunesse, "Recruter sans discriminer : Cahier 2 - Le formulaire de demande d'emploi" (Montréal: CDPDJ, November 2019); Québec, Commission des droits de la personne et des droits de la jeunesse, "Recruter sans discriminer : Cahier 3 - L'entrevue d'embauche" (Montréal: CDPDJ, November 2019).

⁹⁴ *Human Rights Code*, RSO 1990, c H.19, s 30.

⁹⁵ *Ibid.*, ss 45.5(1)(2) [our emphasis].

⁹⁶ Ontario Human Rights Commission, "Policy," 33.

reminding them that trans inclusivity is “a shared responsibility.”⁹⁷ For instance, the *Policy* includes a checklist for employers to assist them in making the workplace a productive space where trans workers can feel valued and respected.⁹⁸ It also discusses clear ways that transphobia or bias may arise during the course of routine hiring procedures and human resource administration. Guidelines and policies provide basic and foundational information on trans issues in the workplace, potentially relieving trans workers from having to educate employers themselves.

The *Policy* opens spaces for more in-depth discussions concerning affective labour and trans unemployment. As a guideline, it provides evidence of the ways that systemic oppression is being practiced and can potentially influence employers, tribunals, and courts. The OHRC explains that: “There are widespread stereotypes about trans people in society that often go unquestioned. These include wrong ideas that trans people are “abnormal” or “unnatural,” that they are “frauds,” deceptive and or misrepresent themselves.”⁹⁹ The OHRC challenges the individualistic nature of discriminatory beliefs such as the ones mentioned above by explaining where such negative knowledge stems from: “The notion that there are two and only two genders is one of the most basic ideas in our binary Western way of thinking. *Transgender people challenge our very understanding of the world.* And we make them pay the cost of *our confusion* by their suffering.”¹⁰⁰ The OHRC raises issues of public embodied feeling states when they assert that the “[f]alse and harmful stereotypes are *rooted in fear* and uninformed attitudes.”¹⁰¹ The fear that cisgender people experience can culminate in “transphobia,” defined as “the aversion to, fear or hatred of trans people and communities.”¹⁰² The OHRC advances that this aversion—or feelings of disgust, revulsion, and horror—functions “like other prejudices.” Transphobia “is based on stereotypes that are used to justify discrimination, harassment and violence toward trans people” precisely “because of their gender identity or expression.”¹⁰³

Concrete definitions of gender identity and expression, as well as discussion of practical issues that arise routinely in the workplace, such as human resources and ID, privacy issues, washroom and change room spaces, can have positive impacts on rendering workplaces trans inclusive. The un/deremployed trans people with whom Irving spoke often recalled incidents of explicit discrimination at work. One trans male refugee was asked to produce papers documenting his legal right to live and work in Canada. Two participants, one employed within the non-profit sector and the other with law enforcement, spoke of watching training videos with transmisogynist content. In both videos, trans women were portrayed as “men in

⁹⁷ Ibid., 4, 23. (Employers, organisations, unions, and service providers have a legal obligation to accommodate the needs of people because of their gender identity or gender expression, unless it would cause undue hardship. Undue hardship is the “reasonable limit” to how far the employer or service provider has to go to accommodate the worker’s needs. Certain limits might include high costs or health or safety concerns.)

⁹⁸ Ibid., 58.

⁹⁹ Ontario Human Rights Commission, “Policy,” 9.

¹⁰⁰ Ibid., 8.

¹⁰¹ Ibid., 9 (our emphasis).

¹⁰² Ibid.

¹⁰³ Ibid.

dresses”—inauthentic and hyperfeminine failures—who solicited mockery and laughter from their co-workers. Other trans women experienced humiliation when transphobic jokes (e.g., guess which woman is “really” a man) were circulated through email. One trans woman spoke of being required to hang signs on the washroom door to indicate when she was in the washroom despite it having multiple locking stalls. Another woman shared that her manager suggested she ride the elevator down to the bottom floor of the eleven-storey office building when she needed to use the washroom. A trans man reported that his employer requested that a chaperone escort him to the washroom. All of these incidents are avoidable; pointing them out as problematic is at least a step in rendering them visible and articulable.

Other experiences shared by participants pointed to the significance of examining the interconnections between gender oppression, unconscious bias, and the demands for workers within the post-industrial service economy to demonstrate their ability to engage in affective labour. In fact, some participants expressed an understanding of the systemic logics underpinning trans employment precarity. When asked to explain why he thought rates of unemployment and underemployment are so high, one trans man expressed it thus: “we don’t fit the mold. [...] *even if employers aren’t overtly hostile to trans people*, we don’t fit what they would see as the model employee or what they think would be able to integrate with everyone. [...] difference is really easy to see and it can be easy to kind of pass over because ‘oh, it is just, they wouldn’t fit in’ or...” A trans woman explains that employers: “see the appearance of the trans individual and depending on how far they are along or if they’re ever wanting to transition, they won’t hire. *They are not meaning to be prejudiced* but they look at the package and say, ‘I don’t need the hassles.’”

Assessing employability depends significantly on judgments of physical appearance, auditory cues that gesture towards normal, and behaviours given the primacy placed on affective labour within contemporary post-industrial service relations. The italicized portions of the quotes in the preceding paragraph raise the spectre of unsayable and inarticulable aspects of workplace governance. While it may be tempting to dismiss the law as a field heralding rationality and concrete demonstrable evidence as incapable of intervening in affective dimensions of employment precarity, there are instances that demonstrate potential for further inquiry and intervention into the affective dimensions that exist beneath and motivate discrimination against, harassment of, and violence towards trans people.

Conclusion

Trans people’s sensate knowledge experienced while trying to obtain and maintain employment within the post-industrial society creates opportunities to enrich anti-discrimination and employment rights law. While unable to put their finger on the nature of the economic injustice done to them, un/deremployed trans participants’ hunches, suspicions, and embodied gestures alert us to unspoken demands for immaterial labour and the ways that such unsayable demands frame the contemporary workplaces across economic sectors as affective atmospheres. An economic regime based on service relations and post-industrialism produces employability

predicated on the worker's capacity to engage in the kind of affective labour that makes clients and customers feel good. The experiences shared by un/deremployed trans participants illuminate the ways that unconscious determinations of who is fit to perform such immaterial labour is mediated by the sex/gender binary, cisnormativity, whiteness, and racism. Visible, auditory, and behavioural signs of gender nonconformity create states of dis-ease among some managers, co-workers, and consumers; therefore, such unruly bodies are indirectly deemed worth-less in the workplace.

Human rights legislation has sought to protect trans and gender non-confirming people by explicitly including "gender identity" and "gender expression" as protected grounds against discrimination. These protections include the right to employment. While Canadian courts and tribunals recognize that discrimination can occur in subtle and even unconscious ways, it is not always easy for applicants to prove discrimination occurred. Many trans people are still excluded from the workplace, and it is incumbent on legal practitioners and scholars to consider the limits of existing human rights protections in an effort to address this inequity. One way, as we have highlighted, is to provide concrete steps employers can take to make their hiring practices and workplaces more trans inclusive. Quasi-legal documents can provide guidelines for doing so, the OHRC's *Policy* being an example of such an initiative. Considerations of affective labour are relatively new to the arena of employment discrimination and are based on immaterial evidence that pushes the limits of anti-discrimination law but is not an insurmountable challenge. Such challenges warrant future efforts to think through the affective dimensions of un/deremployment for the sake of trans economic justice, because "there is probably no better feeling for a person fundamentally changing the way the world sees them than to receive affirmation from their employer that their presence, voice and contributions at work continue to be valued, no matter what their external appearance is. If only this were true."¹⁰⁴

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¹⁰⁴ Edmonds, "Breaking open the system," 160.