For Women Scotland Ltd v The Scottish Ministers – what are the legal and practical implications for employers?

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The judgment in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 was given on 16 April 2025, making headlines in the national press and internationally. The Supreme Court made clear that it was not adjudicating on the wider arguments in the public domain on the meaning of gender or sex, nor on the meaning of the word "woman" (or "man") other than when it is used in the provisions of the Equality Act 2010. The Supreme Court held that the terms "man", "woman" and "sex" in the 2010 Act refer to 'biological sex' (to use the Supreme Court's terminology). So, references to "men" in the 2010 Act are references to biological males and do not include trans men (on the basis that trans men are biological females), whether they have a Gender Recognition Certificate ('GRC') under the Gender Recognition Act 2004 or not, and references to "women" in the 2010 Act are references to biological females and do not include trans women (on the basis that trans women are biological males), whether they have a GRC or not. What are the practical implications for employers?

The Supreme Court was interpreting the 2010 Act in the light of section 9 of the Gender Recognition Act 2004. Section 9(1) of the 2004 Act provides that where a full GRC is issued to a person, the person's sex/gender (the Supreme Court held that 'sex' and 'gender' are used interchangeably in this context) becomes "for all purposes" the acquired sex/gender, so that, if the acquired sex/gender is the male sex/gender, the person's sex/gender becomes that of a man and, if it is the female sex/gender, the person's sex/gender becomes that of a woman. However, section 9(3) provides that 9(1) is subject to provision made by the GRA 2004 or any other enactment or any subordinate legislation. The Supreme Court held that section 9(3) applies to the 2010 Act because the provisions of the 2010 Act would be rendered incoherent or unworkable by the application of the rule in section 9(1).

The Supreme Court decision does not affect the legal position that gender reassignment is a protected characteristic under the 2010 Act as defined in section 7. A person does not need to have a GRC to have the protected characteristic of gender reassignment.

For many employers, the most immediate question relates to the everyday provision of toilets, washing facilities and changing rooms in the workplace.

The Supreme Court gave substantial consideration in its judgment to the issue of separate and single sex services in the context of Part 3 of the 2010 Act, which relates to services provided to the public or sections of the public, and the exceptions to Part 3 in Schedule 3. However, it did not consider the question of single sex spaces in the workplace, presumably because the provisions of Part 5 of the 2010 Act (Work) and the exceptions to Part 5 (in Schedule 9) do not expressly address this issue.

Requirements for separate 'sanitary conveniences', washing facilities and changing rooms for men and women in the workplace are to be found in regulations 20, 21 and 24 of The Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004), which the Supreme Court did not interpret or consider.

In relation to toilets, reg. 20 of the 1992 regulations requires that "suitable and sufficient sanitary conveniences shall be provided at readily accessible places", and that sanitary conveniences shall not be suitable unless, *inter alia*, "separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside."

In relation to washing facilities, reg. 21 requires that "suitable and sufficient washing facilities, including showers if required by the nature of the work or for health reasons, shall be provided at readily accessible places" and washing facilities shall not be suitable unless, *inter alia,* "separate facilities are provided for men and women, except where and so far as they are provided in a room the door of which is capable of being secured from inside and the facilities in each such room are intended to be used by only one person at a time."

In relation to changing rooms, reg. 24 requires that "suitable and sufficient facilities shall be provided for any person at work in the workplace to change clothing in all cases where — (a) the person has to wear special clothing for the purpose of work; and (b) the person cannot, for reasons of health or propriety, be expected to change in another room" and such facilities shall not be suitable unless, *inter alia*, "they include separate facilities for, or separate use of facilities by, men and women where necessary for reasons of propriety and the facilities are easily accessible, of sufficient capacity and provided with seating."

It follows from the Supreme Court's decision that a trans person (with or without a GRC) whose employer refused them permission to use the workplace toilets, washing facilities or changing

rooms of their *own* biological sex *would* be able to claim direct discrimination on grounds of the protected characteristic of gender reassignment under the Equality Act 2010.

However, it also follows from the Supreme Court's decision that a trans person with a GRC whose employer refuses them permission to use the workplace toilets, washing facilities or changing rooms of their 'certificated sex' (to use the Supreme Court's terminology) will *not* be able to claim direct discrimination on grounds of the protected characteristic of gender reassignment under the EqA 2010. That is because the Supreme Court's decision confirms that the relevant comparator in such a case would be a person of the same *biological* sex who does not have the protected characteristic of gender reassignment. The relevant comparator for a trans woman with a GRC who was refused permission to use the women's workplace facilities would be a biological man without a GRC who (presumably) would also be refused such permission, whilst the relevant comparator for a trans man with a GRC who was refused permission to use the men's workplace facilities would be a biological woman without a GRC, who (presumably) would also be refused such permission.

Whether there may be other, successful grounds of challenge, remains to be seen.

It seems unlikely that workplace arrangements will go without legal challenge where a trans person with a GRC is simply required to use the separate sex facility assigned for their own biological sex.

It is also expected that, following the Supreme Court's interpretation of the Equality Act 2010, there will be legal challenges that the United Kingdom is in breach of its obligations under the Human Rights Act and the European Convention of Human Rights.

On Friday 25 April 2025, the EHRC issued an "interim update on the practical implications of the UK Supreme Court judgment". This has already drawn some criticism in the national press.

The Supreme Court held that its 'biological sex' interpretation of the 2010 Act would not disadvantage or remove protection from trans people, with or without a GRC, in terms of direct sex discrimination and harassment related to sex. For example, a trans woman who applied for a job as a sales representative and was not offered the job, even though she performed best at interview, because the sales manager thought she was a biological woman because of her appearance, would have a claim for direct sex discrimination because of her *perceived* biological sex. If a trans woman who was perceived as a biological woman at work was harassed by colleagues, by making sexualised references to what she was wearing, or degrading comments about how she looked, she could bring a claim for harassment related

to sex (she could also bring a harassment claim related to gender reassignment, but might not wish to do so).

The Supreme Court also held that trans people are protected by the indirect discrimination provisions of the 2010 Act without the need for a 'certificated sex reading' of the Act, because of the provisions of s. 19A of the 2010 Act. Where a provision, criterion or practice places biological women at a particular disadvantage, and a trans woman suffers the same disadvantage, she may bring a claim of indirect sex discrimination under s. 19A even though she does not share the same protected characteristic of biological female sex.

In relation to Equal Pay, the effect of the Supreme Court's decision is that a trans woman, with or without a GRC, cannot bring an equal pay claim by identifying a biological male comparator who is paid more than her. However, the decision confirms that a trans man, with or without a GRC, could do so. The Supreme Court pointed out that on either definition of sex, i.e. 'certificated' or 'biological', some trans people would not be able to use the equal pay route. That is a consequence of the requirement in s. 64(1)(a) of the 2010 Act to identify an actual comparator of the opposite sex.

The Supreme Court did not consider in detail the exceptions to the provisions of the 2010 Act relating to occupational requirements, except to note that the EHRC had acknowledged that this was one of the areas where, on a 'certificated sex interpretation' of the Act, it had not been straightforward for service-providers and employers to apply the law, including in areas such as sport and health services. Employers are sometimes permitted to restrict positions to women or to men. An employer can (for example) require that a warden in a women's or girls' hostel be female. On a 'certificated sex interpretation' of the Act, such a role would be open to a trans woman with a GRC, but not to a trans man with a GRC. A 'biological sex interpretation' would correct this perceived anomaly.

It follows from the Supreme Court's 'biological sex interpretation' of the 2010 Act (but also from a 'certificated sex interpretation) that an employer may be able stipulate, without unlawful discrimination, that, for example, a counsellor working with female victims of rape should be a biological woman and not a trans woman *or* a trans man, with or without a GRC. The occupational requirement exception provisions in paragraph 1 of part 1 of Schedule 9 enable employers to apply a requirement that a person be a woman or a man (meaning a biological woman or man, following the Supreme Court's decision), or that they are *not* (to use the language of the EqA 2010) a 'transsexual' (i.e. they do not have the protected characteristic of gender reassignment) without breaching those provisions, if the statutory conditions in paragraph 1(1) are met. Those conditions include, *inter alia*, that the employer must show that

the person is not a woman or a man, as the case may be (meaning a biological woman or man, following the Supreme Court's decision) or (as the case may be) that the person is a 'transsexual' and/or the employer has reasonable grounds for not being satisfied that the person is not a 'transsexual'. The Supreme Court did not consider these tests and how they work together from a legal or practical perspective.

It remains to be seen how and in what way case law ranging from *Goodwin v United Kingdom* (Application No 28957/95 (2002) 35 EHRR 18 to *Chief Constable of West Yorkshire Police v A (No. 2)* [2004] UKHL 21 to *Croft v Royal Mail Group Plc* [2003] EWCA Civ 1045 to *Earl Shilton Parish Council v Miller* [2023] EAT 5 will be followed.

It is unfortunate, to say the least, that legal and practical confusion remains in this highly sensitive and controversial area.

30 April 2025

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