Sandie Peggie judgment: implications for employers

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Sandie Peggie v Fife Health Board and Dr Beth Upton [4104864/2024]

1. The Employment Tribunal sitting in the Employment Tribunals (Scotland) has recently given judgment in the case of *Sandie Peggie v Fife Health Board and Dr Beth Upton* – making headlines.

2. One particular headline related to paragraph 791 of the written reasons of Employment Judge Kemp, which included an apparently hallucinated quotation from *Forstater v CDG Europe and others UKEAT/0105/20.* Paragraph 791 stated that in *Forstater* the Employment Appeal Tribunal had emphasised that: "It is important to bear in mind that the [Equality Act 2010] does not create a hierarchy of protected characteristics." The Tribunal soon issued a certificate of correction, this time quoting correctly from paragraph 118 of *Forstater* and adding, "We consider that quotation provides support for the proposition that the Equality Act 2010 does not create a hierarchy of protected characteristics."

3. The dispute in *Peggie v Fife Health Board and Upton* has generated significant interest because it concerns the use by a trans woman of a female changing room in a workplace. One aspect of the Tribunal's judgment which is of wider legal interest is its reasoning and conclusions in relation to the Claimant's argument that it was unlawful for the employer to permit Dr Upton to use the workplace female changing room.

4. At the material times, Ms Peggie and Dr Upton were employees of Fife Health Board, the former with very long service as a nurse and the latter at the earlier stages of a career as a doctor. Dr Upton is a trans woman who identifies as female, whom Fife Health Board permitted to use the female changing room used by staff at a hospital where they both worked. On Christmas Eve in 2023, there was an altercation between them in that changing room, concerning Dr Upton's right to use it. Ms Peggie brought claims under the Equality Act 2010 (harassment, direct and indirect sex discrimination, and victimisation)

which related to Dr Upton's use of the changing room, the employer's permission in that regard, and how the employer dealt with a complaint by Dr Upton against Ms Peggie which followed the altercation in the changing room on Christmas Eve.

5. Early on in its written reasons (at paragraphs 23-30) the Employment Tribunal addressed the question of terminology. Miss Peggie and her counsel had referred to Dr Upton using male pronouns, whereas female pronouns were used by Dr Upton and witnesses for the employer. The Tribunal noted that the Equal Treatment Bench Book by the Judicial College states that, typically, it should be unproblematic for a judge to use a trans person's preferred name and pronouns, but where one side's case hinges on the recognition of the biological sex of the trans person as crucial, and the other side on the recognition of their chosen identification, judges need to be careful not to let the choice of gendered pronouns give an appearance of bias, or that there is a predetermined conclusion. In such cases the ETBB suggests using the individual's name instead of a pronoun or alternatively using the gender-neutral pronoun, "they". The Tribunal adopted the former approach but admitted that this resulted in somewhat stilted language.

6. This article will use Dr Upton's preferred, female pronouns, to avoid the problem of stilted language where a pronoun is the obvious and best word to use.

7. The Employment Tribunal considered that the issues in the case were novel and complex, giving rise to a judgment that is unusually lengthy – some 314 pages.

8. One aspect of the Tribunal's judgment which is of wider legal interest is the Tribunal's reasoning and conclusions in relation to the Claimant's argument that it was unlawful for the employer to permit Dr Upton to use the workplace female changing room. The Tribunal agreed that this was a relevant issue for it to decide, because it had a bearing on the Claimant's harassment claim and whether it was reasonable for reasonable for the permission to have the effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

9. The Tribunal accepted, following the Supreme Court's decision in *For Women Scotland Ltd,* that for the purposes of the Equality Act 2010, Dr Upton is male, but it did not accept that this required Dr Upton to be excluded from the female changing room.

10. The written reasons state that "the claimant argued in basic summary that it was the inevitable outcome of the decision of the Supreme Court in *FWS"* that it was not lawful for Dr Upton to use the female changing room (see paragraph 783).

11. As the written reasons do not set out the claimant's submissions in this regard, it is difficult to discern precisely the arguments that were put to the Tribunal, which it rejected.

12. The Tribunal considered that there is nothing stated specifically within the 2010 Act itself, or the Supreme Court's decision in *For Women Scotland Ltd*, that one protected characteristic takes precedence over any other (at paragraph 791). Here the Tribunal considered that its quotation of the EAT in *Forstater* lent support for the proposition that the Equality Act 2010 does not create a hierarchy of protected characteristics.

13. The Tribunal also took the view (at paragraphs 796-798) that the Claimant's contention was not consistent with the Supreme Court's conclusion (at paragraph 248) that "a biological sex interpretation [of the Equality Act 2010] would not have the effect of disadvantaging or removing important protection under the EA 2010 from trans people (whether with or without a GRC)." The Tribunal considered that if the decision of the Supreme Court had been that all trans persons must be excluded from the changing rooms or toilets of the sex they identify with and may also be excluded from the changing rooms or toilets of their biological sex, that does impact on their rights under section 7 of the 2010 Act (which defines the protected characteristic of gender reassignment). Indeed, the Tribunal took the view that the outcomes that flowed from the claimant's argument were not consistent with the Supreme Court decision being workable: the Tribunal reasoned that if the claimant's construction was right, it would have the effect that no male plumber could enter the female changing room to make repairs (at paragraphs 801-802).

14. The Tribunal also cited a part of the *For Women Scotland Ltd* judgment, to be found in paragraph 217, which, in the Tribunal's view, suggested that a trans woman using female-only facilities may be lawful under the 2010 Act (see paragraphs 803-804).

15. The Tribunal further noted that the Supreme Court did not adversely comment on the Court of Appeal's judgment in *Croft,* which the Tribunal interpreted to mean that a trans woman can be permitted to use a female changing room in principle, dependent on circumstances (see paragraph 805).

16. The Tribunal's primary view was that the terms of Schedule 3 of the Equality Act 2010, which relate to services, are not relevant to issues arising under Part 5, which relates to work. It considered that Parliament intended that changing rooms and toilets should be treated differently in the context of work to the context of public services (see paragraphs 806, paragraphs 830 to 833 and 839). However, it noted that the exceptions in Schedule 3 do not mandate separate and single sex services; they permit them, where the specified conditions apply (see paragraphs 806-809).

17. The Tribunal also cited paragraph 151 of the Supreme Court's judgment in *For Women Scotland Ltd*, where the Supreme Court stated that the Equality Act 2010 "… seeks to strike a balance between the rights of one group and another, rights that can conflict with or contradict one another in some circumstances. An obvious example of such conflict emerges in employment cases concerning the protected characteristics of religion or belief on the one hand and sexual orientation on the other: see for example *Islington London Borough Council v Ladele* [2009] EWCA Civ 1357; [2010] 1 WLR 955…" (see paragraph 810).

18. The Tribunal further considered that a provision, criterion or practice which had the effect of excluding trans persons from both male and female changing rooms, was clearly liable to amount to indirect discrimination which would be very hard to justify as proportionate, and if the trans person were told not to use any single sex space where there were no other alternatives that might be direct discrimination, which could not be justified (see paragraph 811).

19. The Tribunal concluded that it may be lawful to grant permission to a trans person to use the changing room that aligns with the sex they identify as having, dependent on the circumstances (see paragraph 820). The Tribunal considered that if this were unlawful in any circumstances, it is likely this would put the United Kingdom in breach of its obligations under the Convention (see paragraphs 812 to 814).

20. The Tribunal noted that there are exceptions to the provisions of Part 5 of the Equality Act 2010 relating to work, the terms of which are substantially different to those relating to services in Schedule 3 (see paragraph 823).

21. The Tribunal noted that Schedule 22, paragraph 1, provides an exception to certain provisions of the Equality Act 2010 where a person does something they are required to do by an enactment. However, the Tribunal noted that the exceptions in Schedule 22,

paragraph 1 do not provide any exception in relation to sex or gender reassignment discrimination at work (see paragraph 825).

22. The Tribunal also considered Schedule 22 paragraph 2 (see paragraphs 826 to 828). That paragraph states:

> 2(1) A person (P) does not contravene a specified provision only by doing in relation to a woman (W) anything P is required to do to comply with—
> (a) a pre-1975 Act enactment concerning the protection of women;
> (b) a relevant statutory provision (within the meaning of Part 1 of the Health and Safety at Work etc. Act 1974) if it is done for the purpose of the protection of W (or a description of women which includes W);
> (c) a requirement of a provision specified in Schedule 1 to the Employment Act 1989 (provisions concerned with protection of women at work).
> (2) The references to the protection of women are references to protecting women in relation to—
> (a) pregnancy or maternity, or
> (b) any other circumstances giving rise to risks specifically affecting women.
> (3) It does not matter whether the protection is restricted to women.
> (4) These are the specified provisions—
> (a) Part 5 (work);
> (b) Part 6 (education), so far as relating to vocational training.
> (5)A pre-1975 Act enactment is an enactment contained in—
> (a) an Act passed before the Sex Discrimination Act 1975;
> (b) an instrument approved or made by or under such an Act (including one approved or made after the passing of the 1975 Act).
> (6) If an Act repeals and re-enacts (with or without modification) a pre-1975 enactment then the provision re-enacted must be treated as being in a pre-1975 enactment.
> (7) For the purposes of sub-paragraph (1)(c), a reference to a provision in Schedule 1 to the Employment Act 1989 includes a reference to a provision for the time being having effect in place of it.
> (8) This paragraph applies only to the following protected characteristics—
> (a)pregnancy and maternity;
> (b)sex.

23. The Claimant argued that regulations 20 and 24 of The Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004) fell within those exceptions. Regulation 20

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." Regulation 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."

24. However, the Tribunal disagreed (see paragraphs 826 to 828). The Tribunal considered that there was nothing to indicate that those regulations were made to address risks specifically affecting women, as they applied to facilities for men and women, and it considered that regulation 24 refers to "reasons of propriety" which, in the Tribunal's view, is not a term consistent with risks.

25. The Tribunal further held that even if Schedule 22 *permits* an employer prohibit a person male by sex from using the female changing room, it does not *require* the employer to prohibit this (see paragraph 829).

26. The Tribunal did not agree with the respondents' argument, which it summarised as follows: "once a person has the protected characteristic of gender reassignment it is necessarily lawful to regard that person as having the sex they identify as having, in this case female, and allow access to facilities such as the changing room on that basis" (see paragraph 836). Insofar as the respondents' arguments were based on the Code of Practice on Services, the Tribunal did not consider that Code to be applicable to employment. The Tribunal also considered that the cases at the CJEU and its predecessor, *KB*, *Richards* and *MB,* did not address the circumstances of the present case, where there was no evidence of surgery or medical treatment to align the physiological aspects of sex with those of the desired sex, for example (see paragraph 843). Similarly, it did not think cases concerning intersex people, namely *Elan-Crane* and *Semenya v Switzerland (Application N. 109431/21)* were relevant, as there was no suggestion in the evidence that this was the circumstance of Dr Upton (see paragraph 844).

27. The Tribunal also considered the rhetorical question asked by the respondents, how can enforcing the binary position on sex be policed, and answered it by noting, “it is not for us to question the effectiveness of the terms of a statute, or their desirability in more general terms. Those are matters for the Legislature, not us” (see paragraph 846).

28. According to the written reasons, the respondents separately argued that there are nuances as to sex, that there is no definition of what biological sex means, and that there are some with intersex or other conditions of unusual chromosomes. The Tribunal allowed that, “As question of biology it may be unduly simplistic to say that every human being is either male or female, although the incidence of those without what may be termed a standard chromosomal presentation is from the evidence we heard of the order of up to around 0.3%. But whatever may be the position in biology, which may be relevant in other legal contexts, we cannot disapply the conclusion of the Supreme Court of the meaning of a term in the Act, which is binding on us, and there was in any event no evidence that the second respondent was someone who had non-typical chromosomes or physiology” (see paragraphs 846 to 847).

29. The written reasons record that the Claimant accepted that the Tribunal has no jurisdiction to determine an issue under the 1992 Regulations but argued in effect that they were an aid to the construction of the Equality Act 2010 and required the employer not to give the permission it had to Dr Upton (see paragraph 855). The Tribunal noted that section 69 of the Enterprise and Regulatory Reform Act 2013 has the effect that the 1992 regulations confer criminal liability if breached, but not civil liability, and concluded that the Claimant was not right to argue that she had a right under the 1992 Regulations to a single sex space. It also considered that the 1992 Regulations do not have a definition of men or women, that the Supreme Court in *For Women Scotland Ltd* did not determine the meaning of words in the 1992 Regulations and had specifically stated that its analysis was confined to the 2010 Act. The Tribunal concluded that there are arguments both for and against the claimant’s and respondents’ arguments on how to construe the 1992 Regulations consistently with Article 8, but those arguments were not ones that the Tribunal could competently address. The Tribunal considered that it did not have jurisdiction to define a term in the 1992 Regulations so as to determine whether or not the Fife Health Board’s grant of permission to Dr Upton to use the female changing room amounted to a criminal offence (see paragraphs 856 to 863).

30. The Tribunal concluded that it is potentially but not necessarily lawful under the Equality Act 2010 to permit a trans woman to use a female only space, such as the changing room, in the context of work (see paragraph 854).

31. What is also of wider interest in the written reasons is the Tribunal's answer to the question it asked itself, how is a such a conflict between protected characteristics to be determined under the Equality Act 2010?

32. The Tribunal considered that an employer in this situation is faced with an exceptionally difficult matter to address. Whatever decision it takes can be challenged as unlawful under the Equality Act 2010 (see paragraph 895). The Tribunal considered that the Article 8, 9 and 10 rights of the Ms Peggie and Dr Upton were engaged (see paragraphs 914 to 915).

33. The Tribunal considered that the circumstances of trans people may differ very widely. A trans person who is biologically of one sex may present to those who are unaware of the background as entirely of the other sex, or they may not, and some people looking at the person may be able to recognises aspects of physiological attributes of the sex assigned at birth whilst others may not. How a trans person thinks that they are perceived by others may or may not be how all do so. A trans person may also choose not to have surgery or hormonal or other treatment, or may be waiting for that to commence or conclude. They may wish to retain as private details of what changes to physiological aspects of sex have been made, or choose to disclose some or all of them. A trans woman who wishes to live life as fully in the gender they have transitioned to, or is transitioning to, may well have a desire to use female spaces such as toilets or changing rooms as a part of doing so, and to use the changing room for males may well be seen as direct discrimination or harassment as it is so contrary to their perception of identity (see paragraphs 897 to 900).

34. The Tribunal further considered that workplace changing rooms and toilets can cause particular difficulties, as people using them will normally wish to have a degree of privacy. They may be in a state of at least partial undress when changing and may feel vulnerable or a sense of embarrassment or similar from that fact, and there may be a desire to be present only with those who share their same sex and biology (see paragraph 901). The Tribunal found that in this case, the claimant did not wish to be in a changing room with a person who was biologically male, a matter which was likely to have been affected by an experience of inappropriate behaviour she had when relatively young, which she had not articulated to anyone at work at the material time (see paragraph 903). The Tribunal considered that the private feelings and concerns of employees may only be known to

each one individually and privately, and for entirely good reasons they may not wish to discuss them with anyone at work (see paragraph 903).

35. However, the Tribunal considered that what staff choose to tell their employer is a material factor in assessing the employer's decisions: an employer can only make a decision on the basis of what it knows or ought reasonably to know (see paragraph 904).

36. The Tribunal considered that if there are no alternative toilet facilities, such that there is only a choice between using a male or a female toilet at a location, practical questions arise as to which one to use for a trans person whilst at work, and however the employer decides to proceed there may be persons who argue that their rights under the 2010 Act have been breached (see paragraphs 906 to 910). The Tribunal considered that the extent of the options available, or that there are only male or female facilities and no other at that time, is a factor that can be relevant (see paragraph 910).

37. The Tribunal also considered that there is a practical difference between the circumstances of the workplace and those of public services: for a workplace, the employer knows who is to be present, can give reasonable instructions to its employees, and the relationship is underpinned by the contractual obligations each owes the other (see paragraph 911).

38. The Tribunal considered that there may be circumstances where all staff are content that a trans person uses the facilities of the sex they have transitioned to, at whatever stage that transition has reached and there may be other circumstances where staff feel uncomfortable but do not wish to make a complaint or issue about it. The Tribunal considered that if there are no complaints or issues raised, that would be an indicator that the wishes of the trans person on which facility to use can be accommodated. A complaint may be raised formally or informally, and the nature of the responses of other staff, or lack of same, which may differ from one workplace to another, is a further factor to consider (see paragraph 913).

39. The Tribunal considered that the Parliamentary intention must have been that an employer can act lawfully when faced with such a dilemma: if there is no way of doing so the Act becomes unworkable (see paragraph 918). The Tribunal considered that as the Act does not specifically provide a test to apply, it must be inferred. The test must be one which can address the differing factors and circumstances which should be taken into account, and

the test must be able to balance the conflicting rights (see paragraph 919). The Tribunal decided that the test to apply is found in *Bank Mellat*, which has four elements: (i) is the objective of the measure sufficiently important to justify the limitation of a protected right, (ii) is the measure rationally connected to the objective, (iii) could a less intrusive measure have been used without unacceptably compromising the achievement of the objective, and (iv), whether, balancing the severity of the measure's effects on the rights of the person to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The test is an objective one and the employer must prove that the test is satisfied in all four elements (at paragraphs 920 to 922).

40. The Tribunal sought to apply that test to the facts of this case.

41. It seemed to the Tribunal that the first two elements of the test were met, as Fife Health Board was seeking to protect and uphold the rights of Dr Upton under the Human Rights Act 1998 and the 2010 Act, to promote and uphold diversity and inclusion in the workplace, and the appropriate use and provision of available facilities in the workplace was a further aim (see paragraphs 925 to 926).

42. As for whether the third and fourth elements were met, the Tribunal considered the case in relation to three different time periods, the first period being from when permission was initially granted to Dr Upton up to the point at which the claimant made her complaint. The Tribunal considered that, up till then, the employer was entitled to proceed on the basis of there not being an issue in contention, as it was not aware and could not reasonably have been aware that there was likely to be a perception of harassment by other staff (see paragraph 929).

43. After the claimant's complaint was made, however, how to address it required investigation and consideration. The Tribunal held that there must be a common sense consideration of what the options were. In this case, there were options beyond the male and female changing rooms including ones that a few female members of staff had chosen to use instead, and that range included single user spaces such as a well-being room and a store area, both having lockable doors. The Tribunal held that those choices were provided to the claimant, but they could also have been provided to the second respondent on an interim basis until a more permanent solution was found. The tribunal decided that the employer had not proved that its grant of permission to Dr Upton to use the female

changing room was the least intrusive measure to the objective, and so they failed that element of the test at this stage (see paragraphs 933 to 937).

44. However, the Tribunal decided that once a solution to rotas had been found, such that Ms Peggie and Dr Upton would not use the changing room at the same time, the test was met, as the changing of the rotas was the least intrusive measure, with no appreciable adverse effect on either Ms Peggie or Dr Upton.

45. The Tribunal did not accept arguments from the Claimant to the effect that all women felt as she did, such that permission should be permanently withheld to Dr Upton, or that a climate of fear prevented evidence from other women to that effect from being adduced (see paragraphs 939 to 940).

46. The Tribunal applied the 'balance' element of the test separately, although it considered there was some cross over with the 'measure' element (see paragraph 941).

47. The Tribunal considered that the extent to which a person who has the protected characteristic of gender reassignment has undergone the process of gender reassignment is a relevant factor (see paragraph 942). What changes have been made, if any, to the physiological attributes of sex of the trans person, to the extent that the trans person chooses to disclose this, is also a relevant factor in the context of separate sex changing rooms where staff are at least partly undressed (see paragraph 943). The Tribunal considered this approach to be consistent with the cases of *West Yorkshire* and *Croft* (see paragraphs 944 to 946).

48. The Tribunal considered that the claimant, having the sex of a female, had as a matter of common sense a clear and reasonable expectation to use the female changing room whereas the position of the second respondent was more nuanced (see paragraph 948).

49. The Tribunal considered that the extent of the objections by other staff to a trans person in a changing room, and the reason for that, was also a factor to consider (see paragraph 949).

50. The Tribunal also took into account that there was no evidence that the employer had conducted any form of equality impact assessment (see paragraph 951).

51. The Tribunal summarised (at paragraph 952): “We concluded from all the above that whether to permit a trans woman to use a particular single sex space such as a changing room which meets the balance test depends on all the circumstances and includes factors such as the views of other staff as expressed to the employer, how many do so and in what terms, the stage of transition that the trans person has reached including what if any changes to the physiological attributes of sex the person have been made and which the trans person chooses to inform the employer of, the trans person’s appearance as can be observed by others, the wishes of the trans person, the options where other facilities exist and what the employer knows or ought reasonably to know. It added (at paragraph 953): “Our analysis indicated that as circumstances change, so can the lawfulness of the decision.”

52. It concluded that the balance test was met by the employer in relation to the first and third time periods, but not the second.

53. It appears likely that the Claimant, at least, will seek permission to appeal elements of the Tribunal’s judgment.

54. However it may be argued that the Tribunal has attempted to provide guidance to employers in relation to this vexed area, where currently such guidance is lacking.

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