



The Work Couch

Navigating today's tricky people challenges to create tomorrow's sustainable workplaces

RPC

Season 3

Episode 10 – Supreme Court ruling on the definition of “sex”: What does this mean for employers?

Ellie:

Hi and welcome to the Work Couch podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law with the emphasis firmly on people. Every other week, we unpack those thorny HR issues that people teams and in-house counsel face today, and we discuss the practical ways to tackle them. My name is Ellie Gelder.

I'm a Senior Editor in the Employment Engagement and Equality team here at RPC and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curveballs that it brings to businesses today. We hope by the end of the podcast that you'll feel better placed to respond to these people challenges in a practical, commercial and inclusive way.

This week we're talking about the landmark decision recently handed down by the Supreme Court in [*For Women Scotland Ltd. v The Scottish Ministers*](#). It is a decision which has prompted much debate and perhaps raises more questions than answers. We know that this is an area of law with deeply human implications and deeply held diverging viewpoints and ultimately lack of clarity in the law is in no one's interests. So today we are going to tackle exactly what the court findings on the definition of a woman actually mean in reality for UK businesses, both in terms of the law as well as practicalities and crucially what still remains unclear. And due to time constraints, we have decided to focus in on the issue of single sex facilities because it is an area about which we're receiving many queries from clients. There are obviously many other areas that this decision impacts, for example, policies and procedures, employee resource groups and associations, and so on. But as I said, for today, we will concentrate on the single sex facilities point. So joining us to explain this important legal development, I'm delighted to be joined by two experts on this area:

Patrick Brodie, Partner and Head of RPC's Employment Engagement and Equality Team and Kelly Thomson, also a partner in the Employment Team as well as being RPC's ESG Strategy Lead. Thank you so much for joining us today. It's been a little while since you were here. Perhaps not surprising given just how busy the world of employment law is at the moment.

Patrick:

Hi, yes, you might say it's been busy for employment teams, whether that's legal reforms or big changes to the interpretation of certain elements of our existing law. And many of the questions to which we've been shaping answers flow from the Supreme Court's decision in *For Women Scotland* almost inevitably because of the nature of the subject and today's, how to say, increasingly polarised and vociferous world, and as advisors, we have to tread carefully and kindly when seeking to understand the consequences of the decision.

Kelly:

Hi Ellie, it's great to be here thank you for having us both. Just completely agree with what Patrick said and we've had lots of questions from clients in all sorts of different sectors about the case because it touches all workplaces really and that's included tech clients, retail, consumer brands, everyone is grappling with the aftermath of the decision.

I think it's really important to say right at the outset of this discussion that we know, we acknowledge it's a highly emotive and divergent area. There may well be lots of different perspectives and views amongst people listening to this podcast. And we know as well, sadly, that there are a lot of people feeling scared, marginalised, othered. And that this case and more particularly the aftermath in terms of discourse around the judgment has exacerbated a lot of those tensions. And as you said Ellie, where the law is unclear, that kind of adds further fuel to the fire. So what we're really keen to do with this discussion is to focus on what the case actually says, because there's an awful lot of misreporting or perhaps sort of partial reporting out there. So we want to look at what's clear in relation to the law and what is less clear from a legal perspective.

Ellie:	Patrick, before we look at the decision and its implications in detail, can you just remind us how the case first came about?
Patrick:	Of course. So this was a case that was brought by a voluntary organisation called For Women Scotland Limited. They're an organisation that campaigns to strengthen women's and children's rights in Scotland. The case itself was the, it was the second judicial review challenge, which For Women in Scotland raised about statutory guidance, which the Scottish ministers had published on gender representation on public boards. Now essentially the judicial review related to gender representation on a public board, or more precisely representation that sought to ensure that 50% of non-executive members were women, For Women Scotland raised concerns about the fact that trans women were included in this percentage. The Scottish ministers themselves maintained that for a person who had been issued with a full gender recognition certificate or GRC, that her acquired gender was female and therefore had the sex of a woman so that her appointment would count towards the achievement of their 50 % objective.
Ellie:	So Kelly, what was the Supreme Court's task here then?
Kelly:	Well, this really was all about a question of statutory interpretation under the Equality Act of 2010. So although the implications of the case are wide ranging both kind of legally and from a human and workforce perspective, the legal task itself that the Supreme Court was undertaking was narrow. And I think that that's where some of the difficulties arise, actually, which will come on to, I'm sure. So essentially, the Supreme Court was tasked with confirming the meaning of certain provisions that relate to sex discrimination in the Equality Act of 2010 and confirming what they mean in light of the Gender Recognition Act of 2004. So break that down a little bit. As people listening to this will know, I'm sure the Equality Act is all about protection from discrimination in various contexts which include service provision and also the workplace. And that Act includes prohibitions on gender reassignment discrimination and they're the provisions that protect trans people and it also of course includes prohibitions on sex discrimination and this case, the <i>For Women Scotland</i> case, was concerned with those sex discrimination provisions of the Equality Act. So that's the kind of the core of the task. So the Gender Recognition Act of 2004, that's an act that the UK government introduced following a challenge to the European Court of Human Rights in a case called <i>Goodwin</i> and what the Gender Recognition Act does is it allows adults to change their legal sex by going through a process of obtaining what's called a gender recognition certificate. In order to obtain that certificate the person has to have what's termed gender dysphoria and they have to have lived in that acquired gender for at least two years though there's no requirement for any particular medical process, hormone surgery etc. It's all about living in that acquired gender which means different things for different people. So the key question for the Supreme Court just to kind of bring that back to a summary, was whether those references in the Equality Act of 2010 to sex, woman, man, whether they include a person who has acquired the sex of a woman or of a man, depending on the circumstances, via a gender recognition certificate.
Ellie:	So actually the decision relates to a relatively small proportion then of those people who have a gender recognition certificate.
Kelly:	That's right Ellie, in terms of sort of direct impact, absolutely. And I think that nuance is missing in a lot of the reporting of the case. So for those trans people that don't have a gender recognition certificate, for Equality Act purposes, they've always been defined by their so-called biological sex. So this case directly was only about whether those trans people who do have a gender recognition certificate should be treated differently because of that certificate and because of the Gender Recognition Act. And those people with gender recognition certificates, with GRCs, actually only amount to about 9% of the trans population. And one reason for that percentage being so small is because GRCs are notoriously difficult to get. So as you say, this decision directly relates to only a small number of a small group of people, although the impact has clearly been felt on a much wider scale. And I think given the decision hasn't changed the position for trans people without a GRC, this question...these issues that we're discussing and worrying over as employers, quite rightly, they were always questions for employers to navigate actually, albeit not necessarily in relation to a small proportion of the trans community who did have a GRC. So what the judgment has done, I think, is taken an existing question, an existing challenge, and brought more attention to the topic and also introduced a bigger group of people to whom it directly applies and that's why it's prompting more employers to take action. But perhaps in reality many organisations were leaving this question unanswered or unspoken because of all the difficulties in navigating towards a clear answer which both follows the law and is inclusive of all and that's the tension we're talking about I think here.
Ellie:	Okay, thank you for that useful context. Let's dive into the judgment itself now. Patrick, this is not an easy thing to ask because the judgment runs to 88 pages, but if you can sum up what the Supreme Court decided.

Patrick: Thanks, Ellie, you're right. Because of its breadth and expanse, it's not an easy case to sum up neatly. But that said, if the analysis is a blunt review of the court's reasoning, it's slightly easier. In a nutshell, the court concluded, and Kelly's touched on this, that the meaning of the terms 'sex', 'men' and 'women' in Equality Act is biological not certified sex. This means, I apologise somewhat for the rather direct language here, but I'm using the words of the Supreme Court that a trans woman even with a GRC falls under the definition of a man. Similarly, a trans man with a GRC falls under the definition of a woman under the Equality Act. Now the Supreme Court gave several reasons for this conclusion. Firstly, it said that any other interpretation would be inconsistent with other sections of the Equality Act, which rely on the same terminology, and they gave examples. And those included that the pregnancy provisions refer to women, and if certified sex applied to that term, then it would mean that trans men with GRCs would not be protected under the pregnancy provisions, even if they had a baby. Similarly in respect of equal pay claims which require a comparator of the opposite sex, if certified sex is applied this could mean for example that a trans man with the GRC might not be able to make a valid equal pay claim. Secondly and again I'm stressing this is the Supreme Court's view, the court said that using the biological sex definition would not cause a disadvantage to trans people with or without a GRC and pointed to the scope of the existing protections contained in the Equality Act. And those prohibit direct discrimination, harassment, and indirect discrimination on the grounds of gender reassignment. The court also refers back to protections afforded in relation to perceived discrimination. So there are broad, expansive protections available under the Equality Act. Finally, the Supreme Court commented that a certified sex interpretation would create two subgroups within those who show the protected characteristic of gender reassignment. And that would result in giving trans people with a GRC greater rights compared to those without a GRC.

Ellie: Okay, so Kelly, let's break that down then and explore what those findings mean legally. So first of all, what is clear from this judgment?

Kelly: So I think the judgment's been said by lots of people as bringing clarity to the law. And I think, I think, yes, it does bring clarity to particular definitions in the Equality Act for sure, to a point, which we'll come on to. What it doesn't do, unfortunately, is bring clarity for employers or indeed service providers as to how to actually practically navigate the different legal obligations that they've got within and outside of the Equality Act. But that being said, I'm going to answer the exam question you set me Ellie, which is what is clear? What does the case actually mean legally speaking? Just to start with a really important point reiterating what Patrick was just saying, trans people continue to have protection from discrimination under the gender reassignment provisions of the Equality Act. I think it is important to reiterate that. The Supreme Court also reiterated it in the judgment. And the gender reassignment provisions in the Equality Act are broad, but also limited. What do I mean by that? They're broad in the sense that they don't require a GRC or for any period of time to have elapsed with a person living in their acquired gender or for any surgery, hormones, et cetera. So they're broad. However, they're limited in the sense that they are binary and they don't expressly deal with, for example, a position of gender fluid or non-binary folk. Secondly, Patrick's also just explained this, the decision means that even with the GRC, trans people cannot change their biological sex in relation to the provisions contained in the Equality Act. So in effect, and I stress again, this is for the purposes of the Equality Act, sex is fixed at birth. The third point that's clear from the judgment, I think this is really critical, is to remember that the decision relates to public service providers. So for example, this is going to include retailers providing same sex facilities, toilets, changing rooms, et cetera, and other service providers who provide same sex facilities and services. The implications for employers are more nuanced and narrower, perhaps. We'll come on to that. And lastly, and we've already touched on this, the decision applies directly only to those people with GRCs. The position for these people under the Equality Act is now the same legally as it always was for their fellow trans people who don't have that GRC.

Ellie: Thanks Kelly, I just wanted to pick up on that term biological sex which at first blush might seem like a straightforward term but there are issues with it aren't there?

Kelly: Yeah, that's exactly right, Ellie. Think it's one of those examples as to how the case has triggered some really divergent views, sometimes even within the same field of expertise. So the Supreme Court didn't actually define what the term biological sex means. And we've heard opposing views even from within the medical sector. On the one hand, the BMA's resident doctors committee reportedly condemned the ruling and the court's observations, which they said were "scientifically illiterate and biologically nonsensical". On the other hand, that view from the BMA elicited a stark rebuke from other clinicians and lobby bodies, including the Clinical Advisory Network on Sex and Gender, who said that "the position the BMA had put forward risked destroying trust in medicine and perpetuating the profession's long history of misogyny". And I guess that exchange just in and of itself is a kind of good microcosm illustration of the nature of the divisive and at times profoundly upsetting debate. And trying to find that truth is quite hard. It's often

obscured by invective or deliberate misdescription of the judgment that may be driven by individual or group motivations. We need to be really aware of that.

Ellie: Patrick, what is the view of the Equality and Human Rights Commission on the case? What have they said about it?

Patrick: So the EHRC published and it was in relatively short order, which is resulting in some criticism of the guidance, but they produced [interim updated guidance](#), which states that in services that are open to the public in the workplace as it's compulsory to provide sufficient single sex toilets as well as sufficient single sex changing and washing facilities where those facilities are needed. So the EHRC guidance, we know it doesn't have any particular legal status or standing, save that it's the initial view, albeit after what must be careful legal reflection, of the equality watchdog. But essentially the guidance says that in workplaces and services that are open to the public, trans women, so biological men, should not be permitted to use the women's facilities and trans men, biological women, should not be permitted to use the men's facilities, as this will mean that they are no longer single sex facilities. The guidance then goes on to say and observe that in some circumstances the law will also allow trans women not to be permitted to use the men's facilities and trans men, biological women, not to be permitted to use the women's facilities. However, where facilities are available to both men and women, trans people should not be put in a position where there are no facilities for them to use. The guidance then goes on to say that where possible mixed sex toilets, washing and changing facilities in addition to sufficient single sex facilities should be provided. And finally where facilities are in lockable rooms so not cubicles in the case of toilets where with a sink which are intended for the use of one person at a time they can be used by either men or women.

Ellie: And just explain why that interim update guidance from the EHRC has come under fire.

Patrick: The focus of the Supreme Court's judgment was the issue of separate and single-sex services, which related to services provided to public. And here's the important distinction. The Supreme Court didn't consider the question of single-sex spaces in the workplace. The requirements for separate toilets, washing facilities and changing rooms for men and women in the workplace are found in specific health and safety legislation. Specifically, the Workplace Health Safety and Welfare Regulations 1992 (the 1992 regulations). As mentioned, the Supreme Court didn't in its decision have to interpret or consider these 1992 regulations because they weren't relevant to the question of single sex services provided to the public. That was the issue, as I said, which the Supreme Court had to consider. So, alternatively, when an employer works out what its obligations are to provide toilets in the workplace, it has to turn to and decipher the 1992 regulations. And it's only by understanding how those regulations work that employer understands its workplace obligations. The regulations provide that toilets are not suitable unless...separate rooms containing conveniences are provided for men and women except if each convenience which must, and I've touched on this previously, which must include washing facilities is in a separate room, the door of which is capable of being secured from inside. This is the additional lockable room exception. Now the 1992 regulations follow, they follow very similar principles in relation to the provision of washing facilities and changing rooms including that there are separate facilities for and they use the language of men and women. And you recall that's the same terminology which is used within the Supreme Court's decision when reflecting on the interpretation of the Equality Act. Now, if the terms men and women held a different meaning in relation to the 1992 regulations that would require to hold instead a certified sex meaning, which would be that would be aligned with the Gender Recognition Act. So where a person is issued with a full GRC, that person's sex becomes for all purposes their acquired sex. Then compliance with the 1992 regulations would require an employer to permit trans women with GRCs to use the women's toilets. Conversely, if the meaning of the terms men and women held the same meaning for both the Equality Act and the 1992 regulations, the biological sex meaning, then trans women would have to use men's facilities. So you see that there's a potential divergence.

Ellie: Yeah, and that sounds like a really difficult situation for businesses. So what's your view on that tension between the 1992 regulations and the Equality Act?

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- Patrick:** I think the answer emerges from this, there's a growing consensus that a court is likely to read the definitions of men and women in the 1992 regulations as similarly adopting the terminology of the Equality Act in relation to biological sex and not certified sex. That's because much of the reasoning of the Supreme Court would carry across equally to the 1992 regulations. For example, the Supreme Court was persuaded by the point that it would in practice be virtually impossible to distinguish between trans men and trans women who did or didn't have a GRC. Also, if you look at the chronology of the legislation in question, the 1992 regulations came after the Sex Discrimination Act, which is 1975, but before the Gender Recognition Act, which is 2004. And as the Supreme Court noted, the Sex Discrimination Act referred to biological sex and so given the 1992 regulations preceded the Gender Recognition Act, there's logic to the view that the drafter of that Act couldn't have intended any other meaning but the biological meaning. And I guess the final point, and it's worth bearing in mind, that the Equality Act's reach when safeguarding the workplace rights of individuals with protected characteristics is expansive, suggesting that it would be unexpected if other legislation that also provided similar workplace safeguards adopted different meaning to the same terms.
- Now that bolsters the view that the definition of men and women will be the same for both the Equality Act and also the 1992 regulations where both adopt the biological sex interpretation.
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- Ellie:** Thank you, Patrick. And Kelly, tell us about some of the challenges to the ruling that we're reading about at the moment.
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- Kelly:** Yeah, there are quite a number of challenges being made in different fora and it's very much evolving as we speak so by the time the episode is published this position might have changed but first there's a challenge by Victoria MacLeod, Victoria's Britain's first transgender judge because she was refused leave to intervene in the *For Women Scotland* case so she's applying to the European Court of Human Rights to bring action against the UK for infringement of Article 6 of the European Convention on Human Rights which guarantees the right to a fair trial. She's arguing that the Supreme Court breached Article 6 by refusing to hear her evidence about the impact of the judgment on trans people and for failing to give reasons for that refusal. She's also referring to the fact that the disability community weren't represented in the case despite the potentially inevitable impact on them if trans people are required to use disabled toilets in organisations going forward. Another vocal critic of the decision is Robin Moira White, she's a discrimination barrister and she believes that the decision itself breaches the European Convention of Human Rights, specifically in this case Article 8, which confers the right to respect for privacy. Robin is arguing that she's giving the example of a trans woman whose trans identity is known only by her employer and not by her colleagues. And she is required to use male facilities in effect that amounts to her employer outing her trans identity to her colleagues and so potentially breaching her human right to privacy. There's also a high court challenge being brought by the Good Law Project and three individuals against the Equality and Human Rights Commission and Bridget Phillipson who's the Minister for Women and Equalities and they argue that the interim EHRC guidance that Patrick talked through breaches human rights law by humiliating trans people into having to reveal personal information about their gender while using the toilet facilities so kind of similar arguments to Robin Moira White in the case I just mentioned and then meanwhile you've got Carla Denyer MP and she's co-leader of the Green Party of course who's written a letter to the Minister for Women and Equalities requesting that that interim update from the EHRC be withdrawn if answers to various written questions she's put forward can't be provided. There's also a recent report that 38 biologists and doctors have asked the government to restore transgender people's access to public spaces, cautioning that "the policy based on scientific misconceptions or oversimplifications such as the EHRC interim update could lead to serious harm to real individuals in public spaces, medical contexts, and in many other areas of life", to quote them. So that's kind of the challenges that we know about. At the same time, it's obviously important to bear in mind that there are many people who strongly support the decision and indeed fought for the decision. For example, the charity Sex Matters, whose object is to promote human rights where they relate to biological sex and who also appeared as interveners in the Supreme Court case. According to a recent survey that Sex Matters commissioned, in which just over 2000 adults across Britain were polled, 63 % of respondents to the survey reported that they believe that the Supreme Court made the correct decision in its April ruling. So just illustrating that divergence of views.
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- Ellie:** Yeah, so given that polarising effect of the decision, how can employers then ensure that all of their people feel supported, safe and included?
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- Kelly:** Well, this is the golden question, isn't it? And I think without wanting to sound like a lawyer, I am going to sound like a lawyer, which is to say that this is absolutely fact-, individual-, organisation-specific. And I would really urge employers that are grappling with this to take good informed legal advice early on because it's much better to plan whatever changes you may be making and how you communicate them with legal advice as part of that planning rather than to try to stick it on the top afterwards. So having put my plea out there, I think picking up on some of the practical

challenges that arise from the decision which Patrick has mentioned. One obvious, although not always easy practically, one obvious step is to have a range of toilet facilities. So having some individual locked rooms that contain a sink, or gender-neutral toilets. Obviously, we're just talking about the kind of toilet position here, there's a lot of different implications as well. But if you can have those different options, including individual facilities, then you're not going to have, for example, a trans woman being compelled to use the men's toilets or a trans man to use the women's toilets, which is the scenario that we might think is most likely to lead to a kind of a sense of profound upset, loss of dignity on the part of the trans person. And may also, let's be honest, not be welcomed by others as well.

But that will course depend on the available resources, it won't be possible for all employers. I think one thing that is really important to think about is the extent to which you can and should be consulting your people, including your trans people in your organisation, seeking their views on appropriate facilities, seeking their views on the impact of the various options available to you, listening to them and ensuring that they're comfortable with any arrangements that need to be put in place at the same time, depending on where you end up, you might have to be explaining the difficult position that the exclusivity of a women's toilet is now regarded as a statutory requirement in terms of biological sex in the light of the *For Women Scotland*'s judgment and depending on, as Patrick was illustrating, on the interpretation of the 1992 regulations. I think it's going to be important in a lot of organisations to conduct the proper analysis of those impacts, perhaps even a kind of risk assessment in relation to any proposed changes to your facilities because you're juggling potentially protected beliefs around gender critical views, potentially protected, you're juggling the position under the Equality Act in relation to sex, interpreted in line with the *For Women Scotland* judgment, you're juggling gender reassignment, discrimination risk, you're juggling disability, discrimination risk, as well as your inclusion and diversity goals and the kind of human elements of it also, there's an awful lot to factor into your kind of risk assessment. I think in all cases, adopting a sensitive approach and where it's possible legally and practically a flexible approach is helpful. And I would say that the case hasn't changed anything in terms of the need for employers to support all of their people in feeling both psychologically and physically safe at work. And trans inclusion, just to reiterate what we were saying earlier, does continue to be an important part of workplace culture, not just for your organisation's workforce, but for customers, prospective employees, suppliers, other stakeholders. And I just want to plug a [previous podcast episode](#), Ellie, that you recorded with Emma Custin from Global Butterflies, who speaks really eloquently about how people can be effective allies for their trans colleagues. She also talks very openly about her lived experience as a trans woman and seeks to dispel some perhaps commonly held myths around the trans and non-binary community. So for anyone who's wanting to look at that trans inclusion piece more generally, I would recommend that as a very good starting point.

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- Ellie:** Thanks, Kelly. Yeah, I'd absolutely agree with that. It's a great place to go if you want to hear a bit more about that. So Patrick, can we just finish then by looking at any other key watch outs that employers need to keep an eye on?
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- Patrick:** Yeah, of course. So the first on the EHRC's further consultation. We know that the EHRC has launched a six-week consultation, and that's on an updated code of practice for services, Public Functions Association, connected to and helping better understand the consequence of the Supreme Court's judgment. The EHRC has reportedly said that it expects to lay the revised code of practice before Parliament ahead of the summer recess, which starts on 22nd July. So time is...really tight and that consultation incredibly critical. Coming to the second point, it's essential to bear in mind that critical privacy protections mean that, sometimes forgotten, that employees are not required to disclose and employers must not, because to do otherwise would be a criminal offence under the Gender Recognition Act, disclose that a person holds or is applied for a GRC.
- Also, as Robin White has pointed out and has touched on by Kelly, requiring trans women who have previously been using female toilets to use male toilets may risk individuals being identified or outed as transgender with the myriad of challenges and harms including to dignity and privacy that that brings. It's complicated and often the consequences are unintended but flow from the Supreme Court's decision.
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- Ellie:** Well, thank you both for guiding us expertly through the various complex implications of this case and crucially for arming our listeners with some practical takeaways. Thank you.
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- Kelly:** Thank you for having us, Ellie.
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- Patrick:** Thanks Ellie

Ellie:

If you would like to revisit anything we discussed today, you can access transcripts of every episode of The Work Couch podcast by going to our website: www.rpclegal.com/theworkcouch. Or, if you have questions for me or any of our speakers, or perhaps suggestions of topics you would like us to cover on a future episode of The Work Couch, please get in touch by emailing us at theworkcouch@rpclegal.com – we would love to hear from you.

Thank you all for listening. You won't have long to wait until our next episode, which will land next week to tie in with Carers Week when we will be discussing supporting colleagues who have caring responsibilities. So we hope you'll join us again then.



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