Understanding the judgment in For Women Scotland Ltd v The Scottish Ministers: what is the meaning of “sex” in the Equality Act 2010?

In the case of For Women Scotland Ltd v The Scottish Ministers the Supreme Court was tasked with determining the interpretation of “woman” in the Equality Act 2010 and whether this definition includes a trans woman with a Gender Recognition Certificate. In this briefing, we consider the decision and what it means for employers.

What happened in this case?

In determining this question, the Supreme Court recognised that women have historically suffered from discrimination and that the trans community has historically been, and remains, a vulnerable community. It also confirmed that it was not the job of the Supreme Court to determine the meaning of the word “woman” in any other context than the specific context of the Equality Act 2010 (**the Act**), nor *“to adjudicate on the arguments in the public domain on the meaning of gender or sex.”* Instead, the Court’s task was to interpret the words used by Parliament in the Act, considering the context and purpose of the legislation.

The Act defines “sex” as binary, referring to “man” and “woman”. The Gender Recognition Act 2004 states that a

person’s gender becomes the acquired gender for all purposes upon receiving a full Gender Recognition Certificate (**GRC**), however, this remains subject to other legislation. Therefore, the Court had to decide whether “sex” in the Act excluded this effect of the Gender Recognition Act 2004.

What was decided?

The Supreme Court considered various provisions throughout the Act to decide what Parliament had intended “woman” to mean. It did not accept that there could be different definitions in relation to different parts of the Act, unless this had been specifically stated within the Act itself, which it was not. The Court emphasised the importance of a clear and predictable interpretation of statutory provisions, which could apply throughout the Act. It therefore found that because some provisions cannot mean anything other than biological sex (the sex assigned at birth), this must be true throughout the Act.

For example, the Court considered the provisions in relation to pregnancy, sex and maternity discrimination. It concluded the word “woman” within these provisions could only relate to *biological* women (which could include trans men), because it was not possible for a man or a trans woman to become pregnant, give birth, take statutory maternity leave or breastfeed. If a certificated sex meaning were used, this would exclude trans men, who may still be able to become pregnant, give birth and breastfeed, from protection.

The Court went on to consider single sex spaces and other provisions which allow for services to be provided only to one sex. It found that it could not include trans people with a

GRC because, in some cases, such as providing cervical screening to women and prostate checks to men, including trans people with their certificated sex would be illogical because they would require the test for their biological sex.

It also found that single sex spaces would no longer be single sex spaces, within the context of the Act, because allowing someone to enter based on their certificated sex would then mean that there were *both* sexes present (according to biological sex) and it could no longer be a single sex space. It also held that including those with a GRC was not workable because organisations were not permitted to ask for a GRC, which is a confidential document, and therefore could not have the information required to determine who should be allowed and who should not. This would also create a two-tier system in that one trans woman who for whatever reason did not hold a GRC would not be admitted but another who did would.

The Court noted that trans people still have protection under the Act by both the protected characteristic of gender reassignment and also sex, through perceived discrimination (where someone is discriminated against because they are believed to have a protected characteristic) or associative discrimination (where someone is discriminated against because they are associated with someone who has a particular protected characteristic).

What does this mean for employers?

The Equality and Human Rights Commission has issued updated interim guidance in light of this case and is due to consult on updating its Code of Practice (the consultation will take place in the final two weeks of May). In the meantime,

employers should consider taking the steps below.

- **Review policies and procedures:** review policies and procedures to ensure they align with the Court's interpretation of "sex" as biological sex, particularly if there are policies regarding single sex changing rooms and toilets. It may also affect policies related to maternity leave, pregnancy, gender identity and menopause.

- **Training and awareness:** provide training to staff on the implications of the judgment. Ensure that employees understand the distinction between biological sex and gender reassignment and how this affects workplace policies and practices. All staff should be treated with dignity and fairness and employers should ensure that employees are protected from discrimination and harassment.

- **Data collection and analysis:** if subject to the Public Sector Equality Duty, ensure that data collection and analysis are based on biological sex.

- **Communication and support:** communicate workplace changes and their implications clearly to all employees. Provide support to those who may be affected by the changes, ensuring a respectful and inclusive workplace environment.

For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent) – UK Supreme Court

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Esmat Faiz (EsmatFaiz@bdbf.co.uk) Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

Court of Appeal confirms that whistleblowing protection for job applicants remains very limited

In the recent case of *Sullivan v Isle of Wight Council*, the Court of Appeal considered the issue of whether an external job applicant was protected from detriment relating to whistleblowing.

What happened in this case?

The Claimant applied unsuccessfully for posts with Isle of Wight Council (**the Council**) in 2019. After being rejected, the Claimant filed an online crime report with the police alleging that she had been the subject of a verbal assault during an interview. She also alleged that one of her interviewers had been submitting fraudulent accounts to a charitable trust. She also reported these issues to the CEO of the Council and to her MP. She relied upon her letter to her MP as a protected whistleblowing disclosure.

An investigation was carried out by the Council and the Claimant's complaint was dismissed. The investigating officer advised that, given the Claimant's behaviour and the exceptional circumstances of the case, and as per the Council's complaints policy, she was not allowing the Claimant the usual right afforded to employees to refer the matter to a more senior officer for review. This was on the grounds of protecting the Council's employees.

The Claimant complained to the Employment Tribunal that she had been subjected to a detriment, namely the refusal to allow her to seek a further review of her complaint. She argued that the whistleblowing provisions of the Employment Rights Act 1996 were incompatible with Article 14, read with Article 10 of the European Convention of Human Rights (**the Convention**), in so far as they protected workers and applicants for NHS posts but not job applicants generally. The relevance of Article 14 was that it prohibits discrimination affecting the rights and freedoms set out in the Convention (including, via Article 10, the right to protection from detriment relating to whistleblowing) on several grounds, including the ground of "other status". The Claimant contended that being a job

applicant fell into this “other status” category.

The Tribunal dismissed the Claimant’s claim, finding that her position was not materially analogous to internal job applicants (i.e. already workers/employees) or to NHS job applicants, who are specifically protected under the legislation due to the NHS’s almost unique characteristics as an employer and for reasons of patient safety.

The Claimant appealed to the Employment Appeal Tribunal (**EAT**), which upheld the Tribunal’s decision. The Claimant appealed to the Court of Appeal. The Secretary of State for Business and Trade and the whistleblowing charity Protect were given permission to intervene.

What was decided?

The Court of Appeal dismissed the claim. It disagreed with the Tribunal and the EAT, and held that being a job applicant *could* amount to “other status” for the purposes of Article 14 of the Convention. It was found that a job applicant was an acquired characteristic, resulting from something that an individual had chosen to do. If a person was subjected to treatment on the ground that they were a job applicant, that was capable of being treatment on the ground of some other status.

However, the Court of Appeal agreed that the Claimant was not in a materially analogous position to either workers or applicants for NHS posts who were protected by the whistleblowing detriment provisions. The position of someone seeking work was materially different from someone in work,

and the extension of whistleblowing protection to applicants for jobs with NHS employers was intended to deal with a specific and urgent problem, enabling a culture where health service staff could make protected disclosures about matters concerning patient safety and treatment without fear of retaliation. Since the NHS comprises different legal bodies and entities, the aim was to ensure that people who might want to move from one NHS body to another would not be deterred from making protected disclosures.

The Court of Appeal also opined that in this case, any difference in treatment caused by the legislation would have been objectively justified since it pursued a legitimate aim and the means adopted to achieve that aim were appropriate and proportionate.

What does this mean for employers?

This situation is likely to be rare in practice for employers, but it is nonetheless helpful to know that employers can take a robust stance on complaints from dissatisfied job applicants which might amount to whistleblowing. However, this case does not change the fact that under the Equality Act 2010, all job applicants remain protected from unlawful discrimination by a prospective employer on the grounds of a protected characteristic (age, sex, race etc).

Parliament had decided twice already that the whistleblowing legislation should not be extended to protect job applicants generally – firstly, when drafting the Public Interest Disclosure Act 1998, and, secondly, in 2015 when Parliament rejected a proposed amendment which would have extended protection to a person who “is or has been a job applicant”.

The Court of Appeal said in this case that substantial weight should be given to Parliament's judgement.

However, the CEO of Protect, the whistleblowing charity who intervened in the case, expressed disappointment in the outcome. Justin Madders MP (Parliamentary Under-Secretary for State for Business and Trade) indicated that he was to meet Protect to discuss the issues on which it is campaigning, and the government was aware of the "long-overdue requirement to look at whistleblowing law". Whether this case will cause Parliament to look again at whistleblowing protections remains to be seen.

Sullivan v Isle of Wight Council

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Connie Berry (connieberry@bdbf.co.uk), Margaret Welford (MargaretWelford@bdbf.co.uk) or your usual BDBF contact.

Abusive language, disability, dismissal, and justification:

a view through the prism of disability discrimination law

Is a disabled employee's use of abusive and offensive language towards colleagues a sufficient ground to justify dismissal where there is a link between the employee's behaviour and their disability? In *Duncan v Fujitsu Services*, the Employment Appeal Tribunal (EAT) agreed with the Employment Tribunal that, in this case, the answer was "yes" and the EAT dismissed the appeal.

What happened in this case?

The Claimant was employed by Fujitsu from September 2017 until April 2021 when he was dismissed for gross misconduct. Fujitsu had knowledge of the Claimant's two disabilities: attention deficit hyperactivity disorder (**ADHD**) and autistic spectrum disorder (**ASD**).

During employment, the Claimant raised three grievances, all of which were dismissed. As part of the third grievance, he disclosed "chat logs" which contained messages between himself and two other colleagues which had been exchanged on Fujitsu's Slack communication system. These communications contained abusive and offensive language towards other colleagues, such as: "*stab, stab, stab*", "*imma f***in kill you*", "*I just can't believe how much of a c*** he is*", and "*room had been full of business c****s*" (redactions by BDBF LLP).

In response, Fujitsu invited the Claimant to attend a

disciplinary hearing on 1 March 2021. On 24 February 2021, he emailed Fujitsu stating that he did not plan to attend the disciplinary hearing, but that it should proceed in his absence. He sent a document containing his mitigating factors, which included his submission that there was a link between his disability and his use of the offensive language.

On 3 March 2021, the investigating manager emailed the Claimant with 12 questions. On the same day, he responded stating "*I would appreciate no further questions regarding my disabilities*". On 16 April 2021, the Claimant was dismissed without notice. The investigating manager found that the comments were inappropriate and offensive, and she dealt with each of the mitigation points that had been raised.

Whilst the investigating manager considered (to the extent possible on the limited information before her) the issue of a potential link between the disability and the offensive behaviour, she concluded that the behaviour was deliberate, repeated, and hateful towards other colleagues. As such, she considered that the only appropriate sanction in the circumstances was dismissal for cause.

The Claimant appealed that decision but said he would be unable to meet with the appeal manager. The appeal hearing proceeded in his absence and was, ultimately, dismissed.

The Claimant went on to bring claims of disability discrimination and unfair dismissal.

What was decided?

The Claimant lost his claims and raised one ground of appeal which contained two limbs in the EAT.

The first limb was that the Tribunal should have considered whether the offensive language arose *directly* from his disability. The Claimant argued that he suffered from an "*involuntary loss of control of emotion*" and that he did "*not understand social rules*". The question for the EAT was whether the Claimant had advanced this argument before the Tribunal. The EAT found that he had not. Amongst other matters which persuaded the EAT of this, the Claimant had not led medical evidence on this point. The EAT considered that the Claimant had, instead, brought his claim based on the basis of their being an *indirect* link. As such, Mr Duncan failed on this first limb.

The second limb of appeal was that the Tribunal had insufficiently analysed whether his dismissal was a proportionate means of achieving a legitimate aim – if it was not it would amount to disability discrimination. For example, it was argued that the Tribunal did not appear to have considered whether there were options short of dismissal that would have reduced the discriminatory effect on him.

The EAT reiterated that this was an objective test. It held that certain of Fujitsu's legitimate aims were valid, including, for example, preventing the use of threatening language about managers and colleagues, preventing harassment and other behaviour that leads to a hostile working environment and preventing threats of violence against colleagues (expressed to other colleagues but directed repeatedly and forcefully at colleagues and managers) in any work-related context.

The EAT held that the words used were very strong examples of foul and abusive language towards colleagues and there was no evidence that assured Fujitsu that the offensive remarks would not be repeated. The EAT found that the Tribunal had carried out its own assessment of proportionality and was entitled to find that the dismissal was justified. In particular, the Tribunal had considered legitimate aims and found that, on the basis of at least some these, the decision to dismiss because of the abusive communications was a proportionate response with respect to achieving Fujitsu's legitimate aims. Accordingly, the second limb of appeal also failed.

What does this mean for employers?

Employer clients should be mindful of employees' disabilities when subjecting them to disciplinary sanctions. Even where there is no obvious direct link between an employee's behaviour and their disability, there may be an indirect link that proves problematic.

Where that is the case, employers should consider the justification defence and, in particular, whether a lesser sanction than dismissal is appropriate in the circumstances with respect to achieving a particular legitimate aim.

If a sanction short of dismissal would enable an employer to achieve that legitimate aim, an Employment Tribunal may conclude, once it has done its own analysis, that the decision to dismiss was not proportionate, in which case the employer would be liable for discrimination arising from disability.

Duncan v Fujitsu Services Ltd

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact James Hockley (jameshockley@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

Nick Wilcox speaking at ELA Annual Conference 2025

On 15 May 2025, BDBF Partner Nick Wilcox will be speaking at the ELA Annual Conference in London.

Nick's panel session, entitled "When Employment Duties & FCA Rules Collide: Non-Financial Misconduct and Other Knotty Issues" will look at practical issues faced by regulated employees whose fit and proper status is imperilled and will examine possible solutions presented by employment rights.

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