



DISCRIMINATION LAW ASSOCIATION

Briefings

JULY 2025 | VOLUME 85 | 1127-1139

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FWS – a controversial and far-reaching decision

The SC's controversial decision in *For Women Scotland (FWS)* is the focus of this month's *Briefings*, for which articles have been commissioned from three different perspectives to ensure a diversity of views on its far-reaching consequences.

The SC's task was to find a coherent interpretation of the word 'sex' between the Equality Act 2010 (EA) and the Gender Recognition Act 2004 (GRA). It had to decide whether the EA treats a trans woman with a gender recognition certificate as a woman for all purposes within its scope, or whether, when parliament drafted the EA, it intended the words 'woman' and 'sex' to refer to a biological woman and biological sex. The decision that the correct interpretation is 'biological sex' has called into question whether the court has struck a fair balance between the rights of one group, i.e. women, lesbians and gay men, and the rights of transgender persons.

The SC recognised that rights protected by the EA can conflict with or contradict one another in some circumstances and this conflict is debated in *Briefings*.

For Karon Monaghan KC, the SC's decision was inevitable; she refers to legislation preceding the EA, including the Equal Pay Act 1970 and the Sex Discrimination Act 1975, in which it was clear that sex meant biological sex. This definition was not altered by legislation¹ which aimed to protect the rights of trans people in relation to gender reassignment; the definition of sex as a binary concept was not modified by the EA. She argues that had the court interpreted sex as including 'certificated sex' in line with the GRA, it would have seriously impaired the rights of women wishing to protect their privacy in single-sex spaces and, by rendering the characteristic of sexual orientation meaningless, would have undermined the rights of lesbians and gay men.

Robin Allen KC also addresses this conflict and the judgment's creation of a hierarchy of rights within the EA. As he states, '*The SC has decided that the EA should be interpreted to promote women's dignity and autonomy when that comes into conflict with the dignity and autonomy of male-to-female transgender persons*'. He expresses concern at the lack of any advice from the SC on the practical

implementation of this hierarchy. He questions whether the acceptance of sex and gender as binary concepts is becoming outdated in the way, for example, these do not accommodate people who are born with non-typical sex characteristics, or whose sex development is different to most other people's.

Jess O'Thompson and Oscar Davies consider that the SC failed to take into account the human rights implications of its decision. They refer to case law under the European Convention on Human Rights (ECHR), which has established gender identity as an important aspect of private life under Article 8 and '*places states under a positive obligation to ensure proper legal gender recognition which must be practical and effective rather than theoretical and illusory*'. If the SC had properly engaged with the ECHR framework, it would have realised a conclusion that sex means biological sex would be non-compliant with the ECHR. As the court failed to do so, they argue that the Article 8 rights of trans people have been violated and they will be pushed into living as, per Lady Hale in *R(C)*², '*a member of a "third sex"*'.

Robin Allen expresses concern about the lack of nuance in the binary approach to sex and the exclusion of trans people from full entitlement to the rights of their new gender, and questions whether this is sustainable in light of ECHR case law. He poses a question about enlarging the '*concept of sex to something like that of race and ethnicity, not binary but as having a range of different aspects*'.

FWS concerns principles at the heart of equality - dignity, fairness and respect. The DLA is concerned about a perceived shift away from these principles in public life and a move away from equality, diversity and inclusivity (EDI) in the workplace. It calls for clear guidance for businesses and employers on implementing EDI policies and culture.

The DLA calls for the reigniting of the debate about promoting a culture where people can live and work without feeling threatened or scared for being different.

Geraldine Scullion
Editor, *Briefings*

¹ Sex Discrimination (Gender Reassignment) Regulations 1999

² *R (on the application of C) v Secretary of State for Work and Pensions* [2017] UKSC 72

Self-determination and the limits to segregation: another perspective on *For Women Scotland*

Robin Allen KC, Cloisters, offers a perspective on the future resolution of conflicts of rights between those whose biological sex is clear and those for whom this is less obviously so. He considers that the *FWS* judgment has created a hierarchy of rights within the Equality Act 2010 and questions how practicable it will be to give effect to this hierarchy. Noting the abstract nature of the case and that the Supreme Court construed the Equality Act 2010 as having a binary approach to sex and gender, he questions whether the resulting lack of nuance in dealing with the broad continuum of human gender identity will survive contact with the European Convention on Human Rights.

Can *FWS* help resolve conflicts of rights?

Before the litigation which led to the SC judgment¹ in *For Women Scotland Ltd v The Scottish Ministers (FWS)*, some thought there had not been enough discussion about the issues raised by the inter-relationship between the Gender Recognition Act 2004 (GRA) and Equality Act 2010 (EA), while for others there was too much but too little real dialogue. Now that judgment has been given, we readers of *Briefings*, anxious to entrench, and advance, equality on the broadest of fronts, must think about these issues more expansively.

Since the judgment, some have been discussing its correctness, while others have focused on elucidating the mandatory consequences in social arrangements which the SC's interpretation of the EA entails. Others still are debating the alleged failures in political polemics about what it is to be a woman or a man or demanding either more, or less, statutory rights for different descriptions of persons.

For me, the polemics are mere noise, and since there is no possibility of appeal from our SC, the 'correctness' of the judgment is not, for now² a real issue.³ A discussion of the need for more or less statutory rights is certainly important, but this should probably follow the publication of the final version of the Equality and Human Rights Commission's (EHRC) amended Code of Practice⁴ with its elucidation of the mandatory effects of the *FWS* judgment.

Given the rapidly increasing number of scholarly opinions on the judgment, even before the EHRC has reached a final view,⁵ I doubt what fresh opinion I can bring to that discussion! My aim is to offer a perspective on the future resolution of conflicts of rights between those who clearly have female biological sex and those for whom this is less obviously so. In doing so, I shall seek to keep in mind two key equality principles: to preserve and maximise both human dignity and personal autonomy or self-determination. These aims are, of course, relational, and it is in discussing the constraints imposed on them by those with whom we interact in society that equality principles are most important.

¹ [For Women Scotland Ltd v The Scottish Ministers \[2025\] UKSC 16](#); April 16, 2025

² Though of course, if and when the European Court of Human Rights accepts an application that requires it to focus on the judgment, that might change: see [UK's first trans judge appeals to European court of human rights](#) Guardian April 29, 2025.

³ Though, for what it is worth, the importance of coherence and internal integrity of legislation as bases for legislative interpretation are of the first order, and so I do understand fully why the SC reached the conclusion that it did.

⁴ See [Update on arrangements for Code of Practice consultation](#) EHRC, May 14, 2025

⁵ See [Google Scholar](#)

Both points were in discussion in *FWS* and played a role in the judgment, their importance being recognised from the point of view of transgender people and those who are biological females.

For instance, at an early stage in addressing a preliminary submission for the appellant that the usefulness of the GRA was now largely spent, the SC recognised that it still had:

... relevance and importance in providing for legal recognition of the rights of transgender people... in recognising their personal autonomy and dignity and avoiding unacceptable discordance in their sense of identity as a transgender person living in an acquired gender. [para 100]

Later, the impact of one argument for the rights of transgender people was contrasted with its impact on the 'the inevitable loss of autonomy and dignity for lesbians'. Having noted the definition of the protected characteristic of sexual orientation in s12 EA, the SC said:

Accordingly, a person with same sex orientation as a lesbian must be a female who is sexually oriented towards (or attracted to) females, and lesbians as a group are females who share the characteristic of being sexually oriented to females. This is coherent and understandable on a biological understanding of sex. On the other hand, if a GRC [gender recognition certificate] under section 9(1) of the GRA 2004 were to alter the meaning of sex under the EA 2010, it would mean that a trans woman (a biological male) with a GRC (so legally female) who remains sexually oriented to other females would become a same-sex attracted female, in other words, a lesbian. The concept of sexual orientation towards members of a particular sex in section 12 is rendered meaningless. It would also affect the composition of the groups who share the same sexual orientation (because a trans woman with a GRC and a sexual orientation towards women would fall to be treated as a lesbian) in a similar way as described above in relation to women and girls.

Thus, as well as the inevitable loss of autonomy and dignity for lesbians such an approach would carry with it, it would also have practical implications for lesbians across several areas of their lives ... Of particular significance is the impact it would have for lesbian clubs and associations governed by Part 7 of the EA 2010 ... if a GRC changes a person's sex for the purposes of the EA 2010, a women-only club or a club reserved for lesbians would have to admit trans women with a GRC (legal females who are biologically male and attracted to women). Evidence referred to by the second interveners suggests that this is having a chilling effect on lesbians who are no longer using lesbian-only spaces because of the presence of trans women (i.e. biological men who live in the female gender). [paras 206–207]

Three problematic aspects of *FWS*'s hierarchy

At the heart of the debate in *FWS* was a concern by women who hold to the view that male-to-female transgender persons should not be treated as women in respect to those specific rights and protections afforded to women by the EA.

For some women this is a general issue and for others it concerns specific aspects of being a woman, such as being a lesbian, as in the passage above. Either way, those rights and protections depended on a clear identification of what it is to be female. In *FWS*, the SC has decided that the EA should be interpreted to promote women's dignity and autonomy when that comes into conflict with the dignity and autonomy of male-to-female transgender persons.

In *FWS*, the SC has decided that the EA should be interpreted to promote women's dignity and autonomy when that comes into conflict with the dignity and autonomy of male-to-female transgender persons.

This interpretation has therefore created a general hierarchy of rights within the EA. Understanding the judgment thus far is a straightforward matter, but two key questions immediately arise:

1. Is it practicable to give effect to this hierarchy of rights?

and

2. Would it always survive contact with the European Convention on Human Rights (ECHR)?

In thinking about those questions, I started by noting three aspects of the *FWS* judgment which seemed to me particularly significant when considering its future relevance and application.

1. No practical advice

The first is that the SC gave no advice as to how its judgment should be given practical effect.

2. Establishing sex in a binary system

The second concerns the court's acceptance that sex is a binary concept. This was assumed by the court in its judgment in *FWS* because the EA was written on this basis, but this assumption is now under critical scrutiny. Deciding which side of the binary dividing line a person falls is not always easy. Some transgender persons truly do 'pass' in their new gender;⁶ others do not. This difficulty is not limited to those persons who are transgender. Some women may have characteristics which stereotypically much of society believes are male.

This is one reason why there is so much debate following *FWS* about what must be done to ensure that there is a way to make a correct identification of a person's sex.

No one wants to see *FWS* leading to a system of gender identity equivalent to the requirements of the pass laws in South Africa which were necessary to make its apartheid system work. Those required a system of identification documents to provide a constantly accessible proof of who was white and who was not. Yet given the possibility of a male-to-female transgender person 'passing' as a birth female or a birth female exhibiting features which are stereotypically associated with being male, how is segregation to be achieved effectively?

Questions being asked include: will clubs require certification? What about toilets in public places such as local authorities or stores? Must someone carry their birth certificate or passport around with them? Does it require submitting to personal examination? How can these rights and protections be preserved for women in a way which is consistent with personal dignity and autonomy?

This last question is, in my experience, particularly apt. In no case in which I have been instructed where the rights of transgender persons have been in issue, has there been a detailed medical report on their personal characteristics which would be considered signs of a classification of their biological sex. Nor, for that matter, has the court sought this information from the opposing party. If such information is too personal to be regularly sought in litigation, how much more would it undermine human dignity in normal daily life? We must remember that we are a nation that has eschewed every political attempt so far to introduce a system of mandatory identification cards.

... the SC gave no advice as to how its judgment should be given practical effect.

⁶ The extent to which this is the case is neither here nor there; the fact that some 'pass' in this way I know from my work with former clients.

These are practical questions about the way in which the EA permits a degree of segregation which, if it were race based would not normally be permitted,⁷ but I can think of no solution at present that does not depend to some significant degree on a binary division of persons into males and females at birth. No other way can adequately sift those who are male-to-female transgender persons from those who are otherwise identified as females. Yet the appellant's success in *FWS* depended on this binary division, and therefore, returning to my first thought – the lack of practical advice, a third aspect of the judgment became significant.

3. The abstract nature of the judgment

This is its general abstract nature.

... it will be justifiable for a degree of segregation to be desired, yet a justified desire and a justified means of securing effective segregation are two quite different things.

No straight male can pretend to have full knowledge of the fears and anxieties which some women have when men are present, nor their needs for single-sex toilets, housing, or organisations; none can fully know the fears and anxieties suffered by those living, or who wish to be living, differently from the male or female stereotype that was given from birth and in early years. While I think I have gained some understanding of these matters from professional engagement with them, I recognise that venturing into this territory requires being both frank and humble about the relevance of that experience.⁸ I should not be taken for a moment as seeking to deny that, in many cases, it will be justifiable for a degree of segregation to be desired, yet a justified desire and a justified means of securing effective segregation are two quite different things.

So, the question is whether the EA is up to the task of enabling this, or whether its mechanisms are too blunt, and whether some more nuanced approach would be better.

Putting theory into practice

One thing I do know is that, when these conflicts arise, the full factual matrix must be understood; nuance is essential if the best outcome consistent with equality principles is to be found. So, it is significant for me that *FWS* did not involve resolving a dispute between actual individuals.⁹

In this abstract context, the SC's task was simply to provide its best interpretation of how to make two pieces of legislation work together, as it said:

... The questions raised by this appeal directly affect women and members of the trans community. On the one hand, women have historically suffered from discrimination in our society and since 1975 have been given statutory protection against discrimination on the ground of sex. On the other hand, the trans community is both historically and currently a vulnerable community which Parliament has more recently sought to protect by statutory provision... The principal question which the court addresses on this appeal is the meaning of the words which Parliament has used in the EA 2010 in legislating to protect women and members of the trans community against discrimination. Our task is to see if those words can bear a coherent and predictable meaning within the EA 2010 consistently with the Gender Recognition Act 2004 ... [paras 1–2]

⁷ See s13(5) EA

⁸ I have represented people with every different protected characteristic under the EA as well as advising employers, service providers and public organisations as to how to give full respect to their employees, service users and the public at large. I have represented, or been involved, in several cases where I have been instructed that my client or a close relative was transgender, and where my client has self-described as being non-binary, and I have represented both male and female clients and clients of all kinds of sexual orientations who have expressed deep anxieties about the way society, or just other people, view their life choices or situations.

⁹ Whether or not the appellant body chose to litigate in the way that it did to avoid the facts of a particular clash between a transgender person and a particular organisation being before the court, is not known to me though it might well have been a consideration had I been instructed to address this dispute for the reasons I develop in this article.

... the ECHR is not there to guarantee theoretical or illusory rights but to ensure that rights are practical and effective for individuals.

The SC's judgment, construing the EA as having a binary approach to sex and gender which was incapable of being extended to those who were transgender, was given in a context devoid of the raw edge of a real, vital conflict between two or more individuals.

The reasons for this binary approach were understandable not merely because of the words of the EA, it also reflected long-held thinking to which the SC had recently given approval in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 559 (*Elan-Cane*).

This matters because when discussing the application of the SC's judgment in another context, the facts of the conflict, including the effects of a decision on each side's dignity and autonomy, are likely to be more specific and personal. When what is at stake is more real, even visceral, the appropriateness of continuing this binary approach might be more significant.

This is not to criticise the *FWS* judgment; the SC had a proper issue to decide in seeking to find a coherent interpretation of the relationship between the two Acts. Yet if we look beyond the domestic legislation, it should also be remembered that the focus of the European Court of Human Rights (ECtHR) is based on understanding and resolving the personal situation where the conflict of rights arises. Its consistent approach is that the ECHR is not there to guarantee theoretical or illusory rights but to ensure that rights are practical and effective for individuals.¹⁰

Both life and professional experience have taught me that the variety of life choices is beyond full description or comprehension. Conflicts of rights can arise in innumerable ways. So, the way that the issue was framed in *FWS*, without a specific personal dimension, may be very important when resolving future disputes. It may also explain why there is so much debate about how the Code of Practice should be amended. It is also why I want to think a little harder about this aspect of the judgment and its real utility in resolving a clash of human rights claimed by two or more individuals, where the intensity of the search for a practical and effective resolution could take on a different dimension.

Personal rather than protected characteristics

There is a contrast here between the EA and equality rights in the ECHR. In *FWS*, the SC was concerned with the interpretation of two of the protected characteristics defined in Chapter 1 of Part 2 of the EA. Each definition of a protected characteristic in the EA provides only a generic description of such a characteristic. This is understandable since statutory legislation tends to have to speak in generalities. Yet obviously describing an individual by reference to the EA's range of characteristics can provide only a limited description of that person's individuality and that description can easily lack the nuance which is needed to ensure equality.

On the other hand, the equality jurisprudence of the ECtHR refers not to the EA's limited set of protected characteristics, but to a wider (though overlapping) concept of personal characteristics. This approach better captures the idea that such characteristics are highly specific to each of us and that we are each a bundle of different specific details, whose collective importance for our rights will differ according to extrinsic circumstances.

Lord Walker neatly described this contrast in *R (RJM) v Secretary of State for Work and Pensions* (Equality and Human Rights Commission intervening) [2008] HL 63, [2009] 1 AC 311 noting that:

¹⁰ See for instance *Airey v Ireland* (1981) 3 EHRR 592; the *Belgian Linguistic Case (Merits)* (1968), Series A, No. 6, p. 31, paras 3 and 4; *Golder v UK* (1975), Series A, No. 18, para 35; *Luedicke, Belkacem and KOÇ v Federal Republic of Germany* (1978) 2 EHRR 149, 161, para 42; and *Marckx v Belgium* (1979), 2 EHRR. 330, 341, para 31.

... the generic classifications in the EA are beginning to look dated and inappropriate, particularly so in relation to the binary description of sex...

... “personal characteristics” used by the European Court of Human Rights in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, and repeated in some later cases ... is not a precise expression and to my mind a binary approach to its meaning is unhelpful. “Personal characteristics” are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual’s personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person’s family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual’s personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify... [para 5]

This raises questions as to whether the EA’s binary approach to sex will always survive contact with the ECtHR’s jurisprudence, where a detailed personal conflict is under scrutiny. In my view it may not, and I think *Briefings* readers should be considering this more closely.

The nuance of ‘intersex’

It is a fact that the generic classifications in the EA are beginning to look dated and inappropriate, particularly so in relation to the binary description of sex as male or female, man or woman. The SC was aware of this in *FWS*, pointing out at the beginning of the judgment that because of the nature of the issue it had to resolve: ‘It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex ...’ thus implying this was not a closed discussion outside the specific case it had before it.

Indeed, two of the judges (Lords Read and Lloyd-Jones) were parties to the *Elan-Cane* judgment and would have been fully aware that there is a developing understanding of a status sometimes described as ‘intersex’. The judgment in that case had noted that:

At the time of the hearing of this appeal, there were agreed to be six contracting states of the Council of Europe which, in some circumstances, allow passports to include markers other than male and female. It appears that Denmark (since 2014), Malta (since 2015), and Iceland (since 2021) permit “X” markers in passports on application. It appears that the Netherlands (since 2018), Austria (since 2018) and Germany (since 2019) permit “X” to be entered on the passports of persons born with ambiguous sexual characteristics (“intersex”), subject in some cases to a court order or in others to the production of satisfactory evidence, such as an “X” birth certificate... [para 16]

These states did not form a majority of the members of the Council of Europe but even so, their views are surely significant and were largely consistent with the view expressed by the Council of Europe’s Commissioner for Human Rights in ‘[Human Rights and Intersex People](#)’ (September 2015). Now they are surely even more relevant having

been specifically noted by the ECtHR's 3rd Section's judgment, given on July 11, 2023, in *Semenya v Switzerland* (Application No. 10934/21)¹¹ (*Semenya*). Yet further, last year, the UN's Human Rights Council passed a resolution *Combating discrimination, violence and harmful practices against intersex persons*,¹² which recognised that:

...persons with innate variations in sex characteristics, that is persons who are born with sex characteristics that do not fit typical definitions for male or female bodies, including sexual anatomy, reproductive organs and hormonal or chromosome patterns (also known as intersex persons) exist in all societies...

The UN's Human Rights Council has called for a report on this issue for its 60th session due to take place in September 2025, which may further illuminate this new recognition of the complexity of sex.

So the developing concept of intersex cannot be ignored as some obscure foreign woke concern. We must ask: how should we approach this, and what impact does it have in working out the practical consequences of the decision in *FWS* that women are entitled to rights and exceptions which segregate them from others?

And we must note that intersex is already the subject of some careful domestic scrutiny in Great Britain.

Scotland has for some time recognised the concept of 'intersex' in its legislation. It first appeared as a subset of the concept of 'transgender identity' some 16 years ago in s2(8) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009. More recently, Scottish judge, Lord Bracadale, who had been retained to conduct an *Independent review of hate crime legislation in Scotland*, said in his final report that this approach (that intersex was a subset of transgender) should be amended¹³ because it was outdated, noting views that:

... the term 'intersex' as an umbrella term for people who are born with variations of sex characteristics, which do not always fit society's perception of male or female bodies...

Embracing 'Differences in Sex Development'

The word 'intersex' has been used widely, but there is another phrase in use which seems to cover the same ground. Neither the administrative policy in question in *Elan-Cane* (what should go on a passport), nor the SC in that case or *FWS* discussed what the NHS calls '*Differences in Sex Development*' (DSD). This term is now often used to be more precise about the meaning of 'intersex'; for instance, in *Semenya* the ECtHR noted its use extensively.

The NHS explains DSD¹⁴ in this way:

Why does DSD happen?

You or your child may have sex chromosomes (bundles of genes) usually associated with being female (XX chromosomes) or usually associated with being male (XY chromosomes), but reproductive organs and genitals that may look different from usual.

¹¹ Note that on November 6, 2023 the case was referred to the Grand Chamber which heard the case on May 15, 2024. Final judgment is due to be given on July 10, 2025, shortly after this edition of *Briefings* will have been published.

¹² See [Resolution 55/14 of the Fifty-fifth session](#) February 26–April 5, 2024

¹³ See now the reference to 'variations in sex characteristics' in s1(2) of the Hate Crime and Public Order (Scotland) Act 2021; see also the explanation at <https://digitalpublications.parliament.scot/ResearchBriefings/Report/2020/9/3/Hate-Crime-and-Public-Order--Scotland--Bill>.

¹⁴ See <https://www.nhs.uk/conditions/differences-in-sex-development/>

So the developing concept of intersex cannot be ignored as some obscure foreign woke concern.

This happens because of a difference with your genes or how you respond to the sex hormones in your body, or both. It can be inherited, but there is often no clear reason why it happens.

The most common times to find out that a person has a DSD are around the time of their birth or when they're a teenager.

There is some disagreement as to the extent to which DSD occurs; though rare, it would be wrong to say that it is such an outlier that it can be completely ignored. Recent research has given its incidence quite a broad range of approximately 1 in 1,000 to 4,500 live births;¹⁵ these figures are broadly comparable with the statistics on babies born blind or developing early onset blindness.¹⁶

The figures may be higher: the UN's office for the High Commissioner for Human Rights has accepted a figure of 1.7% of the population¹⁷ are intersex.

Such differences in sex development are not, as some organisations have called them, 'disorders in sex development'. Such a description is highly offensive and, in my view, should never be used.¹⁸ You can only call a person with DSD 'disordered' if you have a fixed view about what is the right or natural ordering of sex among humans. Such a view is understandable where there is ignorance of the wonderfully different ways in which we can be human. But shocking though it may be to discover that humanity is not quite so neatly categorised, once we know the facts, the only logical and rational thing to do is to recast our ideas to embrace our new knowledge of this difference.

And that means if we are committed to equality, we must recognise that persons with DSD have as many, and as comprehensive, rights as anyone else who is different to us. Challenging though this view will be to those who want all humans to conform to an Adam and Eve concept of sex, I am convinced it is right.

At least it must be recognised that dividing the population on a binary biological basis is beginning to look shaky, even before any consideration of transgender people.

The categorical humiliation of Caster Semenya

Those with DSD just do not fit neatly into this binary classification and forcing them to be so categorised will have heart-rending effects on their dignity and autonomy.

Nowhere has this been more obvious than in the utterly humiliating facts of the treatment meted out to Caster Semenya. For most athletes the rules ban drug-taking, but for her the rules required the opposite, as was noted at the beginning of the judgment in *Semenya*:

The applicant is a South African international-level athlete, specialising in middle-distance races (800m to 3,000m). Among other achievements, she won the gold medal in the women's 800m race at the Olympic Games in London (2012) and Rio de Janeiro (2016). She is also a three-time world champion over that distance (Berlin 2009, Daegu 2011, and London 2017).

¹⁵ See Mehmood, K.T. and Rentea, R.M., 2023. *Ambiguous genitalia and disorders of sexual differentiation* (see <https://www.ncbi.nlm.nih.gov/books/NBK557435/>) citing Blackless M, Charuvastra A, Derryc A, Fausto-Sterling A, Lauzanne K, Lee E. *How sexually dimorphic are we? Review and synthesis*. *Am J Hum Biol*. 2000 Mar;12(2):151-166, and Lee PA, Houk CP, Ahmed SF, Hughes IA., International Consensus Conference on Intersex organized by the Lawson Wilkins, Pediatric Endocrine Society, and the European Society for Paediatric Endocrinology, *Consensus statement on management of intersex disorders*. *International Consensus Conference on Intersex*. *Pediatrics*. 2006 Aug; 118(2): 488-500.

¹⁶ The estimates are that at least four of every 10,000 children born in the UK will be diagnosed as severely visually impaired or blind by their first birthday, increasing to nearly six per 10,000 by the age of 16 years: see Rahi, J.S. and Cable, N., 2003. "Severe visual impairment and blindness in children in the UK". *The Lancet*, 362(9393), pp.1359-1365.

¹⁷ See [Intersex people](#) OHCHR.

¹⁸ See for instance <https://sex-matters.org/glossary/disorders-of-sex-development-dsds/#accordion-1-item-0>

You can only call a person with DSD 'disordered' if you have a fixed view about what is the right or natural ordering of sex among humans.

After her victory in the women's 800m race at the World Championships in Berlin in 2009, the applicant was made to undergo sex testing to determine whether she was "biologically male", and the IAAF informed her that she would have to decrease her testosterone level below a certain threshold if she wished to be eligible to compete in her preferred events in future international athletics competitions.

Despite suffering significant side effects from the hormone treatment she then underwent, the applicant won the women's 800m race at the World Championships in Daegu (2011) and the Olympic Games in London (2012) ... [paras 4–6]

Though the judgment went on to explain that these rules for international athletes were subsequently changed, the regulatory controls on the testosterone levels of those competing in female races continued to be significant. With effect from March 31, 2023, World Athletics, the world governing body for the sport of track and field athletics, 'updated' its controls on DSD athletes to require¹⁹ that they must –

... reduce their testosterone levels below a limit of 2.5 nmol/L for a minimum of 24 months to compete internationally in the female category in any event, not just the events that were restricted (400m to one mile) under the previous regulations.

The domestic English body, England Athletics, has adopted this rule.²⁰ That these rules were considered necessary at all shows how difficult it is to make decisions about sex segregation on a dignified basis in DSD cases.

This is why I think it is important to ask whether our domestic binary approach to sex continues to be appropriate or whether we need to think harder about this. There is some evidence that this is beginning to happen but there is still a great shortage of understanding.²¹

... it is important to ask whether our domestic binary approach to sex continues to be appropriate or whether we need to think harder about this.

If sex is not to be seen as a binary biological characteristic, then the approach to excluding transgender persons from being fully entitled to the rights of their new gender – without a nuanced analysis of its justification in any specific context – may also be unsustainable, and the practicalities of its enforcement all the more questionable.

The approach under the ECHR

Yet I emphasise that it would be an error always to treat persons with DSD in the same way as transgender persons, or vice versa. Sometimes it may be right and sometimes not. The context will always be critical; as with any issue of discrimination, the ECHR supports a more nuanced approach. Two passages make this point well.

Baroness Hale of Richmond's description of the difference²² in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 WLR 1434 is now well known; drawing a contrast to the position under the EA, she said:

*It will be noted, however, that the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether "differences in otherwise similar situations justify a different treatment". Lord Nicholls put it this way in *R (Carson) v Secretary of State for Work and Pensions**

¹⁹ See <https://worldathletics.org/news/press-releases/council-meeting-march-2023-russia-belarus-female-eligibility>

²⁰ See <https://www.englandathletics.org/news/england-athletics-statement-on-eligibility-in-athletics/>

²¹ There are competing claims as to whether non-DSD competitors object to competitions which include those who are DSD. The most recent report of which I am aware suggests that the balance is now in favour of inclusion and that requiring medication as a precondition is unethical: see Fife, N.T., Shaw, A.L., Stebbings, G.K., Chollier, M., Joseph Cox, L.T., Harvey, A.N., Williams, A.G. and Heffernan, S.M., 2025. "Eligibility of Athletes With a Difference in Sex Development in Elite Sport: Opinions of National, Elite and World Class Athletes". *European Journal of Sport Science*, 25(5), p.e12300 which can be found at <https://onlinelibrary.wiley.com/doi/full/10.1002/ejsc.12300>

²² See the full passage in her judgment at paras 20–35

[2006] 1 AC 173, at para 3: “the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to that question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court’s scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.” [para 24]

The second passage worth bearing in mind is in the ECtHR’s judgment in *Semenya*:

... the Court has repeatedly held that differences based exclusively on sex require “very weighty reasons”, “particularly serious reasons” or, as it is sometimes said, “particularly weighty and convincing reasons” by way of justification (see *Stec and Others*, cited above, § 52; *Vallianatos and Others*, cited above, § 77; and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012 (extracts)). The Court considers that similar considerations apply where a difference in treatment is based on the sex characteristics of an individual or his or her status as an intersex person. Furthermore, where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted (see, for example, *Hämäläinen v. Finland* [GC], no. 37359/09, § 67, ECHR 2014; *X and Y v. the Netherlands*, 26 March 1985, §§ 24 and 27, Series A no. 91; and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI; see also *Pretty*, cited above, § 71). [para 169]

So, we should realise that Caster Semenya’s treatment is not just an isolated issue of limited concern. The ECtHR’s review of her treatment may yet force the UK to enlarge its concept of sex to something like that of race and ethnicity, not binary but as having a range of different aspects. If that is so for persons with DSD, it is likely to be true for transgender persons too.

The ECtHR’s review of [Semenya’s] treatment may yet force the UK to enlarge its concept of sex to something like that of race and ethnicity, not binary but as having a range of different aspects.

A third sex: returning to an intermediate zone

Jess O'Thompson, legal researcher, and Oscar Davies, barrister, consider the SC's judgment in *For Women Scotland* (*FWS*)¹. They aim to expose the risks the judgment poses to trans equality under the European Convention on Human Rights (ECHR) and to situate *FWS* in the broader trajectory of trans rights jurisprudence from *Goodwin* to the most recent case of *T.H.*² They argue that the effect of the judgment, whether on a broad or narrow reading, is to place trans people in an 'intermediate zone' of a nature incompatible with the ECHR. The consequence is that they are effectively treated as a third sex, and the rights guaranteed by the Gender Recognition Act 2004 following *Goodwin* have become illusory. They conclude that the *FWS* decision is incompatible with the ECHR and will result in violations of trans people's Article 8 rights. They urge the courts to bear in mind the obligations in the ECHR when interpreting the implications of the judgment in future cases and ensure that all people's rights are respected and protected.

Introduction

In *FWS*, the SC ruled that the term 'sex' within the Equality Act 2010 (EA) means 'biological sex' – that is to say (in most cases³) sex as recorded at birth, unamended by a gender recognition certificate (GRC). In doing so, it claims that such an interpretation would not disadvantage or remove protection from trans people. However, the court fails to consider, with any degree of seriousness, the potentially severe human rights implications of its decision.

'Broad' and 'narrow' interpretations – what does *For Women Scotland* mean?

There is much to say about the SC's decision in *FWS* and the reasoning the court adopted to reach its conclusions. The authors do not doubt that such discussions are likely to proliferate and that important debates remain. This article, however, will focus exclusively on the human rights implications of the judgment.

Of course, to consider its human rights implications, it is first necessary to understand the actual consequences of the judgment. However, this remains a highly contested issue. In the authors' view, current interpretations of the judgment coalesce broadly around two poles.

The first pole we term the 'broad' interpretation. Per this view, the SC's ruling has sweeping consequences for the rights of trans people. This broad reading maintains that the EA now not only permits, but indeed mandates, the exclusion of trans people from spaces and services associated with their lived gender. It would prohibit the provision of toilets intended for women, which permitted trans women to use said facilities, unless men were also able to use them. It would mean a women's gardening club, of which trans women were already members, and all other members desired the presence of, would be forced to disinvite those trans members or else admit men. It might mean that mothers would be unable to bring young male children with them into a women's changing room at their local pool, because this would mean that the changing room would cease to be a single-sex space.

¹ *For Women Scotland Ltd. v The Scottish Ministers* [2025] UKSC 16, April 16, 2025

² *T.H. v the Czech Republic*, Application No. 73802/13; October 12, 2021

³ A procedure exists to 'correct' a birth certificate in the cases of some intersex people. Ultimately, determining 'biological sex' remains a question of fact for the court, *Corbett v Corbett (otherwise Ashley)* [1971] para 83; January 23, 1971.

... the [ECtHR] has recognised that Article 8 imposes positive obligations on states to ensure effective access to legal gender recognition without disproportionate or degrading requirements.

Additionally, this broad interpretation is often read beyond the remit of the EA itself, into various other pieces of legislation that refer to 'sex'. This includes the Workplace (Health, Safety and Welfare) Regulations 1992 and the Police and Criminal Evidence Act 1984. The former would mean that employers would be obliged to provide toilets on a single-sex basis (if they cannot provide individual lockable cubicles) in a manner which would prevent trans people from using the toilet associated with their lived gender. The latter would mean that, for example, a trans woman in custody would have to be strip-searched by a male officer.

This can be contrasted with the second view, which we term the 'narrow' interpretation. This interpretation considers that whilst single-sex spaces and services are entitled to exclude trans people from accessing them on the basis of their lived gender, they are not required to do so, and this would not impede their ability to exclude, for example, cis men from a trans-inclusive women's service. Associations, if they so desire, may also remain trans-inclusive. However, there would still be significant implications for trans people's protections from discrimination on the basis of sex. For example, trans women would be unable to bring equal pay claims against their male colleagues. The 'narrow' interpretation would also limit the effect of the judgment to the EA alone, with the definition of sex within other legislation to be interpreted in its own context (and with proper regard to s9 of the Gender Recognition Act 2004 (GRA)).

Both these poles of interpretation would have significant consequences for the rights of trans people, and indeed others. We do not feel it is necessary in this article to adopt a view on which of these poles of interpretation is correct – although it may be that our analysis is relevant to which approach the courts ultimately take in future cases. Rather, we analyse the human rights implications of both the 'broad' and 'narrow' positions, concluding that each raises serious human rights concerns, nonetheless considering that the consequences of the 'broad' position are far more egregious.

Gender identity and human rights

At the outset, it is worth presenting a brief overview of the case law relating to gender identity under the European Court of Human Rights (ECtHR). In its jurisprudence, the court has recognised that Article 8 imposes positive obligations on states to ensure *effective access* to legal gender recognition without disproportionate or degrading requirements. Generally, the ECtHR has found it unnecessary to additionally consider Article 14 in relation to gender identity where it has found a substantive violation of Article 8 (see, among others, *Goodwin*).

Christine Goodwin v the United Kingdom

By far the most significant case in this area is the decision in *Christine Goodwin v the UK* Application No. 28957/95; July 11, 2002. The applicant, a trans woman (described in the case as a '*post-operative male to female transsexual*'), alleged a violation of her Article 8 right to respect for private life under the ECHR, due to the failure of the UK to legally recognise her changed gender. Her complaint related to her pension rights and her ability to marry, but also to her being considered male by an industrial tribunal, as well as her national insurance number potentially outing her as trans to her employers.

The ECtHR concluded that the UK had failed to comply with its positive obligation to ensure the applicant's right to respect for her private life, in particular through the lack of legal recognition given to her gender reassignment [para 71]. In doing so, the court made several important conclusions. It considered that it was of 'crucial importance' that the ECHR be '*applied in a manner which renders its rights practical*

and effective, not theoretical and illusory⁴, and that this meant it was necessary for its approach to remain dynamic and to evolve [para 74].

In *Goodwin* the court noted that the applicant ‘live[d] in society as a female’ [para 76] and recognised that serious interference with private life can arise where domestic law conflicts with an important aspect of personal identity; it emphasised that a ‘*conflict between social reality and law*’ places trans people in ‘*an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety*’ [para 77].

Importantly, the ECtHR stated the following:

Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings [...] In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable ... [para 90] (Emphasis added).

... it was of ‘crucial importance’ that the ECHR be ‘applied in a manner which renders its rights practical and effective, not theoretical and illusory’ ...

It concluded that ‘*having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation...*’ [para 93]. As is well known, the decision in *Goodwin* ultimately led to the passing of the GRA.

It is worth noting also the case of *Hämäläinen v Finland* Application No 37359/09; July 16, 2014, concerning a trans woman who had been unable to obtain full legal gender recognition without converting her existing heterosexual marriage into a registered partnership. This was due to Finland’s legal incompatibility between same-sex marriage and legal gender recognition at that time. Whilst the Article 8 interference was justified, this case reiterated the impact of a discordance between the social reality and the law, finding the applicant’s old male identity number ‘*no longer corresponded to the reality*’ [para 58].

Sterilisation and margin of appreciation

Although at first blush the decision in *Goodwin* applies narrowly to trans people who have undergone gender reassignment surgery, the subsequent case law of the ECtHR makes clear that such a requirement is unacceptable and that the Article 8 protections adhere to trans people more generally.

This issue was addressed in another significant case, *A.P., Garçon and Nicot v France* Applications Nos 79885/12, 52471/13, 52596/13; April 6, 2017. *Garçon* concerned three transgender applicants who were denied legal gender recognition because they had not undergone sterilisation or medical treatment leading to irreversible infertility.

In *Garçon*, the ECtHR ruled that making legal gender recognition conditional on undergoing medical procedures resulting in sterilisation was incompatible with human freedom and dignity [para 128] and amounted to a failure by the state to fulfil its

⁴ See also on this point *Y.Y. v Turkey* Application No 14793/08; March 10, 2015, para 103. The applicant, a trans man, was refused authorisation to undergo gender reassignment surgery because he had not met the requirement under Turkish law to be permanently infertile. The ECtHR found that this condition interfered with the applicant’s right to respect for private life under Article 8 ECHR. It held that the interference was not justified under Article 8(2), as the state had failed to demonstrate that the infertility requirement was necessary in a democratic society [para 121].

positive obligations under Article 8 [paras 132–135]. The interference could not be justified under Article 8(2). Further, the sterilisation requirement undermined their Article 3 rights:

Making the recognition of transgender persons' gender identity conditional on sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – which they do not wish to undergo therefore amounts to making the full exercise of their right to respect for their private life under Article 8 of the Convention conditional on their relinquishing full exercise of their right to respect for their physical integrity as protected by that provision and also by Article 3 of the Convention. [para 131]

In reaching its conclusion, the court emphasised that *'the right to respect for private life under Article 8 ECHR applies fully to gender identity, as a component of personal identity. This holds true for all individuals'*. [para 95]

Importantly, the ECtHR also considered that *'where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted'*. [para 121] In such cases, states will find it harder to justify interference with trans people's Article 8 rights.

Limits of Article 8

However, the ECtHR has also determined that there will be some interferences with trans people's Article 8 rights which can be justified. In the case of *O.H. and G.H. v Germany* Applications Nos 53568/18, 54741/18; April 4, 2023, the first applicant – a trans man – was recorded as the mother on his child's birth certificate. The ECtHR emphasised that Article 8 encompasses the right to self-determination, with the freedom to define one's gender (and legal recognition of such) as one of its most essential components. The court held that this right included protection against involuntary revelation of their trans status [para 81].

The ECtHR reiterated that where a particularly important aspect of an individual's identity is concerned, the state's margin of appreciation is usually narrow. However, where there is no consensus across member states, especially where sensitive moral or ethical issues are raised, or where there is a need to strike a balance between conflicting interests or rights, the margin of appreciation will be wider [para 112].

In *O.H. and G.H.*, the court considered that the complaint did not relate to the first applicant's own records, but rather his child's [para 113]. Additionally, the court recognised that there was no consensus among member states on how to record trans parenthood on children's birth certificates [para 114]. In view of these circumstances, the court concluded that states should be afforded a wide margin of appreciation in this area. However, it was still necessary for the court to consider whether a fair balance had been struck [para 116–117].

In considering proportionality, the court paid particular regard to the fact that birth certificates which did not show parentage were available, and therefore the first applicant would not have to reveal their gender history, reducing the impact on trans people. Because the applicant's trans history would only be disclosed in a limited number of situations, and given the wide margin of appreciation, the ECtHR held that the German court had struck a fair balance between the applicant's right to privacy and considerations relating to the child's welfare and public interests [para 131].

The ECtHR has therefore made clear that it is willing to afford a wider margin of appreciation to states regarding gender recognition where other rights or interests are

The ECtHR ... is willing to afford a wider margin of appreciation to states regarding gender recognition where other rights or interests are at stake. However, this margin will not be unlimited...

at stake. However, this margin will not be unlimited, and in the cases where interference has been found to be justified, it has often been of a very limited nature.⁵

T.H. v the Czech Republic

The most recent decision of the ECtHR concerning gender identity was in the case of *T.H. v the Czech Republic*, Application No. 73802/13; October 12, 2021. The applicant was non-binary but sought binary legal gender recognition as female. The court held that the failure to update the applicant's identity documents unless they had undergone gender reassignment surgery was in violation of their Article 8 rights.

In reaching its decision, the court noted it had attached significant importance to the '*clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transgender people but of legal recognition of the new gender identity of post-operative transgender people*'. [para 52]

One of the interveners, the Institute for Legal Culture Ordo Iuris, submitted that the margin of appreciation should be broadened in relation to trans people. In doing so, it specifically highlighted the '*the persisting relevance of the biological and binary concept of sex*', amongst other concerns [para 44].

The ECtHR noted that whilst '*gender reassignment may indeed give rise to different situations involving important private and public interests*', and that in this case there were relevant issues surrounding gender recognition in the 'general interest', the domestic authorities had '*disregarded the fair balance which has to be struck between the general interest and the interests of the individual*'. [paras 56–59]

The court considered that since the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 and the right to gender identity and personal development is a fundamental aspect of the right to respect for private life, states have only a narrow margin of appreciation in that area [para 53].

Not a third sex

It is evident from the above discussion that the ECtHR has developed a strong body of case law establishing gender identity as an important aspect of private life under Article 8 ECHR placing states under a positive obligation to ensure proper legal gender recognition which must be practical and effective rather than theoretical and illusory.

The ECtHR has recognised the importance of the social reality of trans people's lived gender, and noted that a conflict between this reality and the law results in vulnerability, humiliation and anxiety. It has stated that trans people should not be placed in an intermediate zone where they are recognised as not quite one gender or the other. The court has considered that the involuntary 'outing' of trans people also amounts to an interference with their right to private life.

Where a particularly important facet of an individual's existence or identity is at stake, the margin of appreciation will be narrow. In areas where there is no consensus among member states, or where there is a need to strike a balance between conflicting rights or interests, this margin will be wider. However, it will still be necessary for the court to ensure that a fair balance has been struck between the general interest and the interests of the individual. The interferences which the court has considered to be

... trans people should not be placed in an intermediate zone where they are recognised as not quite one gender or the other ... the involuntary 'outing' of trans people also amounts to an interference with their right to private life.

⁵ See, e.g., *Y v Poland*, Application No. 74131/14; February 17, 2022, where the ECtHR considered that although the trans male applicant's long form birth certificate still contained reference to him as a female, '*in nearly all everyday situations the applicant [was] able to establish his identity by means of identification documents or the short extract of the birth certificate*' [para 78].

justified have been of a very minor nature, such as on a long-form birth certificate which is rarely seen.

The effect of this case law was summarised by the SC in *R(C)*⁶ by Lady Hale (as she then was):

This puts it beyond doubt that the way in which the law and officialdom treat people who have undergone gender reassignment is no trivial matter. It has a serious impact upon their need, and their right, to live, not as a member of a “third sex”, but as the person they have become, as fully a man or fully a woman as the case may be.
[para 29]

The Supreme Court’s analysis in *FWS*

The Human Rights Act 1998 (HRA) is a key component of the UK’s constitutional framework. It incorporates into domestic law the UK’s obligations under the ECHR; s3(1) HRA states:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

In *Ghaidan v Godin-Mendoza* [2004] UKHL 30, the House of Lords considered that s3 imposes a far-reaching obligation on courts to interpret legislation compatibly with the ECHR. The court held that a mere inconsistency of language with an ECHR-compliant meaning does not make such an interpretation impossible. It requires the court to depart even from the ‘unambiguous’ meaning that legislation would otherwise bear. It can require a court to read in words which change the meaning of the legislation and allows the court to modify the meaning and effect of primary and secondary legislation. Courts should not, however, adopt a meaning inconsistent with a fundamental feature of legislation [paras 25–33]. This is a significant and well-known duty upon the court.

Surprisingly, the SC in *FWS* did not engage with the human rights implications of its judgment in any substantive way, and makes no mention of s3 HRA.⁷ We consider that had the SC properly engaged with the ECHR framework, and its obligations under s3 HRA, it would have found that the definition of ‘sex’ it adopts in interpreting the EA is non-compliant with the ECHR. This is true whether a ‘narrow’ or ‘broad’ interpretation of *FWS* is adopted.

The ‘broad’ interpretation

The ‘broad’ interpretation of *FWS* (outlined above), which would mandate the exclusion of trans people from a range of spaces and services associated with their lived gender, and with which they interact on a daily basis, would amount to a clear and egregious violation of trans people’s Article 8 rights. This is best understood through the lens of a case study⁸, which gives insight into the severe impact a broad interpretation has on the day-to-day life of a trans person.

Let us consider what would be the new day-to-day life of Sophie, a trans woman in possession of a gender recognition certificate.

Sophie has lived as a woman for decades. She is not ‘out’ to her colleagues. She has always used the women’s toilets in her office building, which are on the corridor close

⁶ *R (on the application of C) v Secretary of State for Work and Pensions* [2017] UKSC 72

⁷ This is despite written submissions before the SC from Amnesty International UK concerning the human rights implications.

⁸ This is a pastiche of several of the recurring issues that the authors have received from trans people since the SC judgment.

Surprisingly, the SC in *FWS* did not engage with the human rights implications of its judgment in any substantive way, and makes no mention of s3 HRA.

ECHR case law is clear that the creation of an 'intermediate zone' for trans people is impermissible.

to her office. Following *FWS*, her employer has informed her that she is no longer permitted to use the women's toilets. Instead, she may choose between using the men's toilets on the same corridor or newly created 'gender neutral' facilities on a different floor of the building. She is informed she can no longer be a part of the women's network, or attend their social events, which she enjoys. Her colleagues notice that since the policy change, she has started to use the toilets on a different floor, and that she has suddenly stopped attending women's network events. This 'outs' her as trans against her will and makes her feel isolated at work.

Sophie is driving a long distance and stops at a petrol station to refill her car, and because she needs to use the toilet. She goes into the petrol station and sees that there are only gendered facilities available. Following *FWS*, these are operated on the basis of biological sex. She therefore leaves without using the facilities. During her drive, she worries she is going to wet herself. She feels uncomfortable and ashamed.

Sophie is also a volunteer at a local women's gardening club, which is an association of more than 25 people. She dedicates a lot of time to the club, and it is where she spends most of her time with friends. After *FWS*, she tells the other members of the club that she is trans, and so she will have to stop being part of the club. The other members refuse to accept her resignation, saying that she is their friend and that she contributes so much, and they would like her to continue being part of the club. They amend their constitution to make clear that they are open to both cis and trans women. An organisation which campaigns for a strict biological definition of sex finds out and asks a male member to apply to join the gardening club. When they refuse, he threatens to sue for sex discrimination. Following legal advice, the club decides that they cannot afford litigation, and so Sophie will no longer be a member.

In *Goodwin*, the ECtHR reminds us that '*the very essence of the Convention is respect for human dignity and freedom*' [para 90]. Whilst the SC does consider the concept of 'dignity' in its judgment and discusses the dignity of women [para 217], it does not meaningfully consider the dignity of women like Sophie, who will experience '*vulnerability, humiliation and anxiety*' [*Goodwin*, para 77] in day-to-day life as a consequence of (the broad interpretation of) its decision.

ECHR case law is clear that the creation of an 'intermediate zone' for trans people is impermissible. It is impossible to see how the position in which Sophie has been placed is anything other than such an 'intermediate zone', and that this will amount to an interference with her right to private life. The intermediate zone in which trans people are placed is also evidenced by the discussion in *FWS* concerning the gender reassignment discrimination exceptions with the EA. It was submitted to the court that on a 'biological' reading of sex, such provisions would be rendered void.

The SC disagreed, stating that instead these provisions were intended to capture where, for example, trans men could be excluded both from single-sex spaces for men (because the court considered trans men to be female), but additionally, where justified, from spaces for women as well, based on their 'masculine appearance' [para 221]. This, alongside the practical reality of trans people being separated into third spaces, shows that a broad interpretation of *FWS* treats trans people as the 'third sex' which ECHR case law, and the SC in *R(C)*, have warned against. As noted, the practical consequence is also that people like Sophie will be involuntarily outed as trans on a potentially regular basis, additionally interfering with her Article 8 rights.

The broad interpretation fails to recognise the 'social reality' [*Goodwin*, para 77] in which people like Sophie have lived, and continue to live, as women. Indeed, 'living' in one's acquired gender for at least two years, and intending to do so until death, is

... the ECtHR has generally only considered the interference with trans people's rights justified in such cases where the interference has been very minor ...

a requirement of obtaining a GRC under s2(1) GRA. The broad interpretation of *FWS* recreates a conflict between trans people's social reality and the law in a manner which renders the GRA effectively hollow. By mandating trans people's exclusion from various spaces and services which they access on a day-to-day basis, the practical legal recognition of trans people's gender is largely removed, even if, for other, less obvious purposes, such as pensions, it is recognised. As rights must be practical and effective, rather than theoretical and illusory, it must be considered that, in such circumstances, trans people's Article 8 right to legal gender recognition would all but be removed.

As previously outlined, the ECtHR has held that where a particularly important facet of an individual's existence or identity is at stake, the margin of appreciation afforded to a state will be restricted. Given the sweeping significance of the broad interpretation and its impact on important aspects of the day-to-day lives of trans people, we contend that the margin given to the UK should be a narrow one.

The ECtHR will afford a wider margin of appreciation where there is no consensus across member states. However, if, per the broad view, the EA does indeed now function as an effective trans bathroom ban, then the UK will have made itself a clear outlier among member states, going against a determined consensus towards the greater recognition of trans rights.

The ECtHR will also afford a wider margin of appreciation where other rights or interests are at stake. Some would argue that trans people's rights are in conflict with the rights of women, or with the proper importance of 'biological sex' (although the authors roundly reject such a framing). Therefore, the UK should be afforded a wide margin of appreciation in 'balancing' these rights.

However, the ECtHR has generally only considered the interference with trans people's rights justified in such cases where the interference has been very minor; e.g. concerning infrequently used long-form birth certificates. On the broad interpretation of *FWS*, the interference would be extreme, significantly impacting trans people on a daily basis. It is also difficult to see how various consequences of the broad view relate practically to the rights of others. Taking, for example, Sophie's gardening club: if all the other women want her there, but are unable to include her against their own wishes, how could such an interference be justified by reference to women's rights? Indeed, it seems more likely to infringe additionally upon their rights, such as their Article 11 rights, which protect their freedom of association.

Even if a wider margin were granted, it is still likely that the broad interpretation would be found to be a violation. In *T.H.*, the ECtHR considered submissions on the importance of, among other things, 'biological sex' and nonetheless concluded that the domestic authorities had '*disregarded the fair balance which has to be struck between the general interest and the interests of the individual*'. The position prior to *FWS* already included a mechanism by which to exclude trans people from spaces and services, where this could be justified as a proportionate means of achieving a legitimate aim. This allowed for the appropriate balancing of rights, having regard to the relevant context of each situation. It seems evident that the concerns and the balance to be found cannot be the same regarding a women's gardening club as if it was a women's rape crisis centre. It is difficult to see how the broad interpretation, which in contrast acts as a mandatory exclusionary sledgehammer, could appropriately reach a fair balance for the protection of trans people's human rights.

We therefore consider that the broad view amounts to a significant and unjustifiable violation of trans people's Article 8 rights.

The narrow interpretation

Although far less egregious than the broad view, we contend that even the narrow interpretation of *FWS* would result in a violation of trans people's Article 8 rights.

It seems to have been forgotten, by various campaigners and the courts, who have sometimes sought to limit *Goodwin* to being a case about marriage and pensions, that the applicant also raised in her complaint that she had been considered 'male' by the industrial tribunal when bringing a sex discrimination case. When the ECtHR discussed the harms of an 'intermediate zone', this is part of the zone to which they were referring. Indeed, the ECtHR in *Goodwin* specifically noted the impact that its decision would have on both employment and the justice system [para 91].

The narrow interpretation would still mean, for example, that trans women (unlike other women) would be unable to bring equal pay claims against higher-paid male colleagues. We consider that this would still place trans people in an intermediate zone as regards equality legislation, in a manner which goes against the decision of the ECtHR in *Goodwin*. Moreover, we do not see how in this area the margin of appreciation can be anything but narrow in such cases, as the only interests practically at stake are those of the trans person concerned. We therefore consider that, even on the narrowest possible reading of *FWS*, it may still amount to a violation of trans people's Article 8 rights.

Conclusion

In light of the ECtHR's jurisprudence, we consider that the decision in *FWS* is incompatible with the ECHR and will result in violations of trans people's Article 8 rights. We consider that this is especially likely, and would be particularly egregious, if a 'broad' view of the judgment is adopted.

We therefore urge subsequent courts to interpret the implications of the judgment with the ECHR in mind, giving proper effect to s3 of the HRA, and avoiding the serious violations that would necessarily result from the 'broad' interpretation. If courts find this to be impossible, then they should issue a declaration of incompatibility under s4 of the HRA, encouraging parliament to intervene to protect the human rights of all.

Why the Supreme Court in *For Women Scotland* was right

Karon Monaghan KC, Matrix Chambers, who represented Scottish Lesbians, The Lesbian Project and LGB Alliance as interveners in *FWS*, argues that the Supreme Court's conclusion that 'sex' in the Equality Act 2010 means 'biological' sex was inevitable and followed from the ordinary meaning of the word 'sex'. To have concluded that 'sex' included 'certificated sex' would have made the Act incoherent and unworkable and rendered meaningless the characteristic of sexual orientation.

The judgment in *For Women Scotland v The Scottish Ministers*¹ (*FWS*) has been presented by the media and legal commentators as seismic. In fact, it was an inevitable result of an ordinary construction of the Equality Act 2010 (EA), its predecessors, and case law. What is surprising and what could not have been predicted at the time of the enactment of the EA, is that a unanimous decision of the SC would be needed to state the obvious: females and males are biologically constructed beings with different biological characteristics, and a person's sex depends upon which of those sets of characteristics a person possesses. However, the SC had to grapple with the impact of the Gender Recognition Act 2004 (GRA) on the meaning of sex in the EA; that is, whether 'sex' in the EA (and its correlates female and male) refers to biological sex only or whether it also includes 'certificated sex' (the sex recorded on a gender recognition certificate (GRC)).

Interpreting the Equality Act 2010

Under s212 EA 'woman' means a female of any age and 'man' means a male of any age. In relation to 'sex', s11 EA states that '(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman; (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.' These terms reflect the distinction between men and women as a matter of biological fact and of law. The differences in sex characteristics as between women and men and the legal consequences were described in *Corbett v Corbett* [1970] 2 WLR 130 and later in *Bellinger v Bellinger* [2003] 2 AC:

the distinction between male and female exists throughout the animal world. It corresponds to the different roles played in the reproductive process. A male produces sperm which fertilise the female's eggs ... In this country, as elsewhere, classification of a person as male or female has long conferred a legal status. ... It is not surprising ... that society through its laws decides what objective biological criteria should be applied when categorising a person as male or female. Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction. [Bellinger, para 28]

Further, 'medical science is unable, in its present state, to complete the process. It cannot turn a man into a woman or turn a woman into a man'. [Bellinger, para 57] As a matter of fact, as least so far as the courts are concerned, changing sex is impossible.

When it comes to interpreting the EA, the SC noted the entirely uncontroversial 'presumption that a word has the same meaning throughout the Act when used more than once in the same statute' [para 13]. This is especially so when, as in the EA, the phrase has been expressly defined when it will be 'generally reasonable to assume that language has been

¹ *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16; April 16, 2025

used consistently by the legislature so that the same phrase when used in different places in a statute will bear the same meaning on each occasion'. [para 13, internal citation removed] This, and construing legislation 'according to the ordinary meaning of the words used', is the '*...best way of ensuring that a coherent, stable and workable outcome is achieved*'. [para 12, internal citation removed]

It would be a surprising result, then, if a court were to hold that sex under the EA means biological sex unless a GRC recorded a trans person's sex as the opposite of that recorded at birth. That would mean a different meaning of sex would apply in cases where a person holds a GRC. It would be all the more surprising given that sex under the EA would be determined by reference to '*categories that can only be ascertained by knowledge of who possesses a (confidential) certificate*'. [para 173]

The background to the EA indicates that parliament did not intend that sex under the EA would refer to anything other than biological sex.

The Sex Discrimination Act and the Equal Pay Act

The background to the EA indicates that parliament did not intend that sex under the EA would refer to anything other than biological sex. The first relevant enactment is the Equal Pay 1970 (EPA) followed shortly afterwards by the Sex Discrimination Act 1975 (SDA). Section 11(2) of the EPA stated that the expressions 'man' and 'woman' '*shall be read as applying to persons of whatever age*'. Of 'whatever age' meant girls and boys were captured. The EPA was enacted just about four months² after the judgment in *Corbett v Corbett*³ was handed down.⁴ In *Corbett*, the court held that the criteria for determining what is meant by the word 'woman', in the context of marriage, was biological and determined by reference to '*chromosomal, gonadal and genital tests*'.⁵ The SDA followed with provisions to materially the same effect as in the EPA ('woman' includes '*a female of any age*', and 'man' includes '*a male of any age*'). There can be no doubt that these definitions referred to biological sex since the GRA was not enacted until more than 30 years after the EPA and nearly 30 years after the SDA. There was no question that possession of a certificate could change the sex of a person since none existed.

The SDA was, in due course, amended to take account of the judgment of the European Court of Justice in *P v S* (Case C-13/94) [1996] ICR 795, holding that EU sex discrimination law was not '*confined simply to discrimination based on the fact that a person is of one or other sex*' but '*is also such as to apply to discrimination arising ... from the gender reassignment of the person concerned*' since '*such discrimination is based, essentially if not exclusively, on the sex of the person concerned*'. The UK gave effect to this ruling through the making of the Sex Discrimination (Gender Reassignment) Regulations 1999 (the Regulations). These Regulations introduced new provisions protecting trans people (those who were '*intending to undergo*' were '*undergoing*' or who had '*undergone gender reassignment*'). Importantly, the Regulations did not amend the meaning of sex under the SDA. Sex, for the SDA, remained biological.

If further support were needed for the proposition that sex under the SDA meant biological sex, that would be found in, among other places, the exceptions in the SDA which '*recognised and accommodated the reasonable expectations of people that in situations where there was physical contact between people, or where people would be undressing together or living in the same premises, or using sanitary facilities together, considerations of privacy and decency required that separate facilities be permitted for men and women*'. [para 52]

² May 29, 1970, though it did not come into force until five years later; s9(1)

³ *Corbett v Corbett (Otherwise Ashley)* [1970] 2 WLR 1306

⁴ February 2, 1970

⁵ 1324 H-1325A-B

... an interpretation of sex as including certificated sex would necessarily affect the meaning of sexual orientation under the EA.

The impact of the Gender Recognition Act 2004

The protections and exceptions in the SDA were broadly speaking absorbed into the EA. There is nothing explicit in the EA suggesting the meaning of sex had changed so as to include certificated sex. Nor can that be implied. Indeed, all the indicators in the EA, as with the SDA before it, suggest the contrary.

First, again gender reassignment is treated as a distinct characteristic, not as a facet of sex.

Second, absurd results would follow from a reading of sex as including certificated sex. Perhaps the clearest example is found in the protections that apply to pregnancy and maternity. They are afforded explicitly (and exclusively) to women. If a trans man holding a GRC became pregnant, his GRC would deprive of him of all the rights afforded women during pregnancy, maternity and while breastfeeding.

Third, and the key concern for my clients, three lesbian and gay organisations, was that an interpretation of sex as including certificated sex would necessarily affect the meaning of sexual orientation under the EA. It would mean that *'a trans woman (a biological male) with a GRC (so legally female) who remains sexually oriented to other females would become a same-sex attracted female, in other words, a lesbian'*. If that were to be the case, the concept of sexual orientation towards members of a particular sex would be 'rendered meaningless' [para 206]. It would also result in an *'inevitable loss of autonomy and dignity for lesbians'* and it would have 'practical implications'. For example, *'a women-only club or a club reserved for lesbians would have to admit trans women with a GRC (legal females who are biologically male and attracted to women)'*. [para 207] As the SC noted, evidence from the lesbian interveners suggested *'that this is having a chilling effect on lesbians who are no longer using lesbian-only spaces because of the presence of trans women (i.e. biological men who live in the female gender)'*. [para 207]

Having regard to all of that, could it really be said that the GRA changed the meaning of sex under the EA? That seems inherently unlikely. The SC said no, it did not. This is because of the operation of s9(3) of the GRA.

S9(1) provides that:

Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

S9(1) operates *'for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards)'* (s.9(2)).

S9(3) provides that s9(1) *'is subject to provision made by this Act or any other enactment or any subordinate legislation.'*

As to the meaning of s9 and its application to the EA, the SC said:

... section 9(1) applies unless section 9(3) applies. Section 9(3) will obviously apply where the GRA 2004 or subsequent enactment says so expressly. But express disapplication of section 9(1) is not necessary Section 9(3) will also apply where the terms, context and purpose of the relevant enactment show that it does, because of a clear incompatibility or because its provisions are rendered incoherent or unworkable by the application of the rule in section 9(1). [para 156]

Since there is no express disapplication of s9(1) in the EA, the SC reviewed the EA in detail to determine whether its terms, context and purpose show that s9(3) applies because

Interpreting “sex” as certificated sex would cut across the definitions of “man” and “woman” and thus the protected characteristic of sex in an incoherent way.

of a clear incompatibility or because its provisions would be rendered incoherent or unworkable by the application of the rule in s9(1). Its review included a survey of the protections afforded trans people and the impact on them of a biological interpretation of sex. In addition to the position of a pregnant trans man mentioned above, the SC recognised and took account of the extensive protections against discrimination which a trans person and trans people as a group otherwise enjoy under the EA. These include wide protection against direct and indirect discrimination and harassment connected to gender reassignment (including discrimination arising from absence from work because the person is proposing to undergo, is undergoing or has undergone the process (or part of the process) of reassigning their sex by changing physiological or other attributes of sex; s16 EA). Further, since direct discrimination protects a person from discrimination where a discriminator perceives that the complainant has the characteristic in issue, or in some other way associates the complainant with the protected characteristic, a trans woman, for example, will be protected against discrimination arising from a perception that she is a woman or because she is associated with women, as well as protected against gender reassignment discrimination.

The SC concluded that the *‘examination of the language of the EA 2010, its context and purpose, demonstrate that the words “sex”, “woman” and “man” in sections 11 and 212(1) mean (and were always intended to mean) biological sex, biological woman and biological man. These and the other provisions to which we have referred cannot properly be interpreted as also extending to include certificated sex without rendering them incoherent and unworkable.’* [para 264].

Matters the SC listed in the summary of their reasoning included that:

Interpreting “sex” as certificated sex would cut across the definitions of “man” and “woman” and thus the protected characteristic of sex in an incoherent way. It would create heterogeneous groupings. As a matter of ordinary language, the provisions relating to sex discrimination, and especially those relating to pregnancy and maternity (sections 13(6), 17 and 18), and to protection from risks specifically affecting women (Schedule 22, paragraph 2), can only be interpreted as referring to biological sex. ... That interpretation [certificated sex] would also seriously weaken the protections given to those with the protected characteristic of sexual orientation for example by interfering with their ability to have lesbian-only spaces and associations. [paras 265(x) and (xiii)]

ECHR rights

Amnesty International UK also intervened in *FWS* and argued, as it has been argued both before and after the SC’s ruling by a number of legal commentators, that a reading of sex in the EA as biological sex would contravene the rights protected under the European Convention on Human Rights (ECHR), in particular Article 8. The source of this argument lies primarily in the case of *Goodwin v UK* (2002) 35 EHRR 18. It was *Goodwin* (and then *Bellinger v Bellinger*) which led to the enactment of the GRA. In *Goodwin*, the applicant complained of a breach of Article 8, prior to the enactment of the GRA, by reason of the absence of any mechanism by which she could secure legal recognition of her changed gender. Article 8 ECHR provides that *‘(1) Everyone has the right to respect for his private ... life ... (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others.’* The European Court of Human Rights (ECtHR) upheld her complaint.

An important principle that the ECtHR in *Goodwin* took into account when holding that there was a breach of Article 8 was that *‘regard must ... be had to the fair balance that*

As the SC held, the EA ... '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'.

has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the convention'. [para 72] Those general interests include the interests of women and lesbians and gay men. Importantly too, the ECtHR recalled that 'the very essence of the convention is respect for human dignity and human freedom. Under art 8 of the convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings'. [para 90]

Respect for human dignity, human freedom and personal autonomy and protection of the personal sphere of each individual, including the right to establish details of their identity as individual human beings, are rights that women, lesbians and gay men also enjoy.

In *Goodwin*, the ECtHR held that *'the fair balance that is inherent in the convention now tilts decisively in favour of the applicant.'* But it will not always be the case that the balance will tilt in favour of a trans person or trans people. Since the ECtHR regards sexual orientation as concerning *'a most intimate part of an individual's private life'*, there must exist *'particularly serious reasons'* before such interferences can satisfy the requirements of Article 8(2)⁶ The same is true of sex (being a female or male).⁷ An interpretation of sex as including certificated sex, so rendering sexual orientation meaningless, would cut across the rights of lesbians and gay men. The same is true of women whose access to single-sex spaces, affecting their privacy, would be seriously impaired. Further, Article 11 protects the right to freedom of association and this covers associations formed for protecting cultural heritage or for asserting a minority consciousness, both of which are important to the proper functioning of a pluralistic democracy⁸ and especially for minorities in helping them to preserve and uphold their rights.⁹ A law which requires that a lesbian association, whether formally constituted or not, admit males, interferes with lesbians' rights to freedom of association. It is an especially important right for lesbian groups given their minority status, the disadvantages they experience and the desire of many to have their collective voice heard: *'Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership.'*¹⁰ Any discrimination against women, lesbians and gay men arising from an interpretation of sex as including certificated sex would fall within the ambit of Article 8 and 11 and would require justification under Article 14. Since women, lesbians and gay men are 'suspect classes', justification would be subject to strict scrutiny and would require weighty reasons.

Given these matters and the reasons given by the SC, a meaning of sex as biological represents a fair balance and one that tilts decisively in favour of women, lesbians and gay men. As the SC held, the EA:

... gives important legal rights to individuals and groups who are vulnerable to unlawful discrimination because of a particular or shared protected characteristic, and both protects against unlawful discrimination and seeks to advance equal treatment... [and] in doing so it 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'. [para 151]

⁶ *Smith and Grady v UK* (1999) 27 EHRR CD 42, paras 89-90

⁷ *Abdulaziz, Cabales and Balkandali v United Kingdom* (Applications 9214/80, 9473/81, 9471/81), para 78

⁸ *Gorzelik and others v Poland* (Application No. 44158/98) [2004] ECHR 44158/98, para 92

⁹ *Gorzelik*, para 93

¹⁰ *Associated Society of Locomotive Engineers and Firemen (ASLEF) v the United Kingdom* (2007) (Application No. 11002/05), para 39

Tribunal's duty to determine issues not in agreed list

Moustache v Chelsea and Westminster Hospital NHS Foundation Trust ♦ [2025] EWCA Civ 185; February 27, 2025

Implications for practitioners

Where an able litigant in person has pleaded their claim to include some items and not others, and engaged with the respondent in agreeing a list of issues, the tribunal has a limited duty to help them further formulate their claim.

Facts

Ms Nicole Moustache (NM) worked for the NHS in an administrative capacity. In 2012 and 2015 she had hip replacement operations consequent on which she experienced mobility difficulties which were admitted, in the course of proceedings, to amount to a disability under the Equality Act 2010 (EA).

NM raised grievances in 2017 and 2018 about work matters. On December 10, 2018 she lodged an ET1 (the first claim) about the matters dealt with in her grievances alleging disability discrimination.

In May 2018, NM began a period of sickness absence which ended when she was dismissed on June 13, 2019 on the grounds of capability. In January 2019, the internal occupational health assessment had reported that NM might be fit to return to work with some support but that she had decided that she would not return to work.

On September 1, 2019, NM lodged a second ET1 (the second claim) alleging that she had been unfairly dismissed but not alleging disability discrimination.

NM completed both ET1s herself.

Employment Tribunal

The ET consolidated both claims and, after exchange of witness statements, the employer's solicitors produced a list of issues to which NM agreed. The list included discrimination issues relevant to the first claim but only 'ordinary' unfair dismissal relevant to the second claim.

The case was heard between October 5 and October 9, 2020 and, by a reserved decision dated January 6, 2021, all the claims were dismissed.

Employment Appeal Tribunal

NM appealed to the EAT on the grounds that the ET had erred in law in failing:

1. to identify and determine NM's claim of disability discrimination arising out of her dismissal; and/or
2. to have adequate regard to the disability claim in determining whether the dismissal was unfair.

By a judgment handed down on June 15, 2023, HHJ Tucker allowed the appeal and remitted the matter to the ET stating that the claim should have been evident to both the employer and the tribunal from the information supplied by NM. She said that

♦ [2025] IRLR 470

The ET's role is arbitral, not inquisitive or investigative.

self-represented parties are not generally expected to label their cases with correct legal language and that judges should not allow slavish adherence to a list of issues to prejudice a fair trial. The issue of a discriminatory dismissal had become increasingly obvious in NM's witness statement. The judge went as far as saying that it may have been appropriate for the respondent to have alerted the tribunal to the possibility of the claim for a discriminatory dismissal.

HHJ Tucker also accepted NM's representative's statement that she had only had occasional legal assistance in bringing her claim.

Court of Appeal

The employer appealed on a number of grounds, four of which were given permission to proceed to a full hearing. They were that the EAT had erred in:

1. the way it had accepted evidence on a material factor – what legal assistance NM had received;
2. substituting its own judgment as to the issues to be determined when no such application had been made to the ET;
3. applying the wrong test; and
4. going behind an agreed list of issues.

The CA (LJ Dingemans, LJ Laing and LJ Warby) allowed the appeal and reinstated the final order of the ET.

Considering first the scope of the ET's duty to identify the issues where the parties have agreed a list, the CA identified four general points:

- proceedings are adversarial;
- the issues raised by the parties are those which emerge clearly from their statements of case;
- where a party seeks a ruling on an issue which emerges from an objective analysis of the statements of case, the ET has a duty to address that issue; and
- the ET's role is arbitral, not inquisitive or investigative.

The CA approved the analysis in *Drysdale v Department of Transport* [2014] EWCA Civ 1083 of the level of assistance an ET should offer to litigants in formulating and presenting their claim. The court further reviewed the authorities on the status and effect of a list of issues.

The CA found that the EAT had not clearly identified the legal basis for finding that the ET was in breach of its duty. Notwithstanding 'indications' that NM regarded her dismissal as discriminatory, the employee did not plead such a case. It found that, in bringing her claim, NM had demonstrated that she was:

...an articulate professional woman who had recently demonstrated an understanding of the concepts of discrimination and disability.

She did not tick the relevant box in bringing the second claim, which was '...a matter of considerable weight'. And the second claim did not set out the elements of a discrimination claim. The CA held that there were no exceptional circumstances requiring a different approach and it allowed the appeal on grounds 2, 3 and 4. It was not necessary to deal with the first ground. The CA also doubted that a respondent had any duty to alert a tribunal to a possible claim as the EAT had suggested.

Comment

Intelligent, able claimants, especially those who have brought previous employment tribunal claims and who have engaged, as they should, with the necessary process to produce a list of issues for hearing which reflects the pleadings, will find it hard to persuade an appeal court that they should be allowed to reopen the case after the ET hearing to allege a missing element of their claim.

Robin Moira White
Old Square Chambers

ABBREVIATIONS

AC	Appeal Cases	ICR	Industrial Case Reports
Ch	Chancery Division of the High Court	IPC	Infection protection and control
Civ	Civil	IRLR	Industrial Relations Law Reports
DLA	Discrimination Law Association	KC	King's Counsel
DSD	Differences in Sex Development	KGB	Komitet Gosudarstvennoy Bezopasnosti (the Committee for State Security of the Soviet Union)
EA	Equality Act 2010	LGB	Lesbian, gay and bisexual
EAT	Employment Appeal Tribunal	LJ/LJJ	Lord, Lady Justice/s
ECHR	European Convention on Human Rights 1950	LLP	Legal liability partnership
ECtHR	European Court of Human Rights	MRI	Magnetic resonance imaging scan
EDI	Equality, diversity and inclusion	NHS	National Health Service
EHRC	Equality and Human Rights Commission	nmol/L	Nanomoles per litre, expressing the concentration of testosterone in a blood sample
EHRR	European Human Rights Reports	OHCHR	Office of the United Nations High Commissioner for Human Rights
EPA	Equal Pay Act 1970	PCP	Provision, criterion or practice
ERA	Employment Rights Act 1996	PTWR	Part-Time Workers Regulations 2000
ET	Employment Tribunal	SC	Supreme Court
ET1	Employment Tribunal claim form	SDA	Sex Discrimination Act 1975
EWCA	England and Wales Court of Appeal	UKEAT	United Kingdom Employment Appeal Tribunal
EWHC	England and Wales High Court	UKHL	United Kingdom House of Lords
GP	General practitioner	UKSC	United Kingdom Supreme Court
GRA	Gender Recognition Act 2004	WLR	Weekly Law Reports
GRC	Gender recognition certificate		
HHJ	His/her Honour Judge		
HL	House of Lords		
HRA	Human Rights Act 1998		
IAAF	International Association of Athletics Federations		

Time limits in discrimination claims: the CA's reasoning on just and equitable extensions

HSBC Bank plc v Chevalier-Firescu ♦ [2024] EWCA Civ 1550; December 11, 2024, and *Jones v Secretary of State for Health and Social Care* ♦♦ [2024] EWCA Civ 1568; December 13, 2024

Implications for practitioners

The CA has provided significant insight into judicial approaches to extending time under the '*just and equitable*' test in discrimination claims.

These cases highlight the careful balance courts must maintain between ensuring access to justice and enforcing procedural discipline. While *Chevalier-Firescu* emphasised the necessity for clear reasoning when evaluating a claimant's knowledge-based extension request, *Jones* reinforced the importance of substantive justification, particularly when employer conduct is cited as the cause for delay.

Key points for practitioners include:

- Tribunal reasoning: ETs must provide fully reasoned decisions when rejecting extensions.
- Knowledge and delay: claimants need to establish when they became aware of the core elements of their claim.
- Employer conduct: if the employer's actions contributed to the delay, tribunals must assess whether refusal of an extension would lead to unfairness.

These judgments reiterate that extensions are discretionary and must be justified through rigorous reasoning and evidence.

Facts

HSBC Bank plc v Chevalier-Firescu

Ms Chevalier-Firescu (CF) applied for a senior role at HSBC Bank (HB) in early 2018 but was rejected, allegedly due to negative references from her former employer, Barclays. She contended that these references were tainted by sex-based stereotypes, and HB's reliance upon them constituted discrimination and victimisation.

Although CF heard about these references in 2018, she argued that she only became aware of their discriminatory nature in mid-2020 when HB disclosed internal emails about the recruitment process. The documents revealed discussions between senior HB managers and her former boss at Barclays, suggesting sexist and potentially race-based bias.

CF filed her discrimination claim in November 2020, more than two years out of time. The key legal question was whether it was '*just and equitable*' to extend the limitation period.

Jones v Secretary of State for Health and Social Care

Dr Nicholas Jones (NJ) applied unsuccessfully for a senior role at Public Health England (PHE) in March 2019. He was only informed of the outcome on July 3, 2019, after the primary limitation period had expired. Seeking transparency, NJ requested information about the ethnicity of the successful candidate, but PHE withheld this information until a preliminary hearing in July 2020.

♦ [2025] IRLR 268

♦♦ [2025] IRLR 282

NJ contended that the delayed disclosure frustrated his ability to identify race discrimination as a possible factor in his rejection, and he argued for an extension under the '*just and equitable*' test. The central issue was whether employer non-disclosure could justify an extension.

The decisions

HSBC Bank plc v Chevalier-Firescu

Employment Tribunal: the ET ruled CF's claims were time-barred, finding she had sufficient knowledge in 2018, and refused an extension under s123(1)(b) of the Equality Act 2010 (EA).

Employment Appeal Tribunal: the EAT overturned the ET's ruling, holding that the tribunal failed to properly evaluate CF's awareness and whether external circumstances materially impeded her ability to bring proceedings in time.

Court of Appeal: Laing LJ, with Underhill LJ and King LJ concurring, held that the ET failed to provide adequate reasoning for rejecting the extension. The CA's judgment emphasised the necessity for structured judicial reasoning when assessing discretionary extensions. HB's appeal was dismissed and CF's case was remitted to a differently constituted ET for reconsideration.

Jones v Secretary of State for Health and Social Care

Employment Tribunal: the ET ruled NJ's claim was out of time and refused an extension, stating that employer non-disclosure alone was not a valid reason for failing to meet statutory deadlines.

Employment Appeal Tribunal: the EAT upheld the ET's decision, finding NJ had not established that PHE's actions materially obstructed his ability to file on time.

Court of Appeal: the CA unanimously overturned the EAT's ruling, holding that the refusal to extend time was perverse. It found that NJ lacked the necessary information to bring his claim within the limitation period, and the delay in disclosure constituted a valid reason for extending time. The CA remitted the case to the EAT for reconsideration of the claim's merits.

Comment

These cases provide contrasting approaches to the application of the '*just and equitable*' test for time extensions in discrimination claims:

- Procedural fairness in *Chevalier-Firescu*: the CA emphasised that tribunals must thoroughly assess delayed knowledge and external factors before rejecting extensions.
- Strict application in *Jones*: the CA confirmed that suspicion alone is insufficient for an extension. Claimants must demonstrate a substantive impact on their ability to file. The ruling indicated that promptness is important but should not encourage claims based purely on suspicion.
- Judicial discretion and evidential burden: courts will intervene where tribunal reasoning is inadequate, ensuring decisions are properly justified. However, they will not readily override statutory time limits unless claimants provide clear evidence of prejudice caused by the limitation. This balance reinforces the importance of procedural fairness while maintaining the integrity of limitation rules.

... courts will intervene where tribunal reasoning is inadequate, ensuring decisions are properly justified.

Practitioners should note the following in particular:

- For claimants: establish a clear timeline of awareness and provide compelling evidence showing that external circumstances directly hindered the ability to file on time.
- For respondents: ensure where possible that ET decisions are well-reasoned, particularly in limitation disputes. Poor tribunal reasoning increases the risk of appellate reversal.
- For tribunals: provide structured reasoning when refusing extensions, ensuring all factors are clearly articulated to withstand appellate scrutiny.

Conclusion

The rulings in *Chevalier-Firescu* and *Jones* reaffirm the importance of reasoned decision-making in disputes about time limits. While judicial discretion exists, it is firmly constrained by evidential requirements and fairness principles.

Chevalier-Firescu highlights that procedural fairness demands well-reasoned judgments. *Jones* reaffirms that discretion to extend time must be exercised cautiously.

For practitioners, these authorities will undoubtedly shape arguments around s123(1)(b) EA 2010 going forward.

Ultimately, success in disputes about time limits hinges on precision in pleadings, evidence, and in legal submissions.

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Causation in part-time worker discrimination claims: effective cause v sole cause

Augustine v Data Cars Ltd [2025] EWCA Civ 658; May 20, 2025

Implications for practitioners

The CA confirmed that the 'sole cause' test remains binding for discrimination claims under the Part-Time Workers Regulations 2000 (PTWR), despite strong criticism from the presiding judges. This presents a high bar for claimants, who must show that their part-time status alone caused the less favourable treatment. Practitioners should ensure they thoroughly consider causation when advising claimants about discrimination on grounds of part-time status, or seek evidence of alternative explanations when defending claims.

Although the CA upheld the 'sole cause' test, Edis and Bean LJ endorsed a more protective reading of the PTWR aligned with other areas of discrimination law, favouring the lower bar of an 'effective cause' test. Given permission to appeal has been granted, advisers should remain alert to the possibility of a change in the applicable causation test, which may lower the threshold for claimants in the near future.

Facts

Mr Warren Augustine (WA), a private hire driver, worked part time for Data Cars Ltd (DC). All drivers – regardless of the number of hours worked – were required to pay a fixed weekly 'circuit fee' of £148 to access the company's booking system. WA worked an average of 34.8 hours per week; his chosen comparator worked over 90 hours per week.

WA brought a claim under Reg 5 of the PTWR, arguing that charging the same fee to all drivers amounted to less favourable treatment on the ground that he was a part-time worker. He argued that the flat fee operated to his comparative disadvantage and that no objective justification had been provided.

Employment Tribunal

The ET accepted that WA fell within the protection of the PTWR as a part-time employee but dismissed the claim. It found no less favourable treatment because all drivers paid the same flat fee and WA worked sufficient hours to cover it, meaning he was not at a comparative disadvantage.

Even if the fee had amounted to less favourable treatment, the ET held that it was not imposed '*on the ground that*' WA worked part time, as required by Reg 5(2)(a) PTWR. Applying the approach set out by the Scottish Court of Session (Inner House) in *McMenemy v Capita Business Services Ltd* [2007] IRLR 400, the ET considered it was necessary to examine the employer's intention and determine whether WA had been treated less favourably for the 'sole reason' that he worked part time. On the evidence, it found that DC charged the circuit fee to all drivers – regardless of hours worked – as a standard business model and revenue mechanism. There was no evidence that WA's working hours influenced the requirement to pay the fee. The ET, therefore, concluded that the fee had not been imposed 'solely' because of WA's part-time status.

Employment Appeal Tribunal

The EAT (Eady J, President) allowed WA's appeal in part.¹ It held that:

1. the ET had erred in its approach to less favourable treatment by failing to properly apply the '*pro rata principle*' under Reg 5(3) PTWR, which showed the flat fee resulted in a lower effective hourly rate for WA compared to full-time comparators. The correct comparison required consideration of time and proportion, not seemingly identical treatment.
2. the ET's application of the *McMenemy* standard of causation was wrong because it incorrectly treated the employer's intention as determinative, and there was no basis for inserting the word 'solely' into Reg 5(2)(a) PTWR.

While the EAT preferred the '*effective and predominant cause*' test from *Sharma v Manchester City Council*² and *Carl v University of Sheffield*,³ it concluded that the otherwise non-binding precedent in *McMenemy* was nevertheless to be followed for the '*pragmatic good sense*' of consistent judicial application of parliamentary legislation across Great Britain (following *Marshall's Clay Products Ltd v Caulfield and others*⁴).

Court of Appeal

WA appealed on grounds that:

1. the EAT had incorrectly considered itself bound by *McMenemy* despite recognising that the decision was wrong and that it was not legally required to follow it; and
2. in any event, the CA is not bound by *McMenemy*, which wrongly requires part-time status to be the sole cause of less favourable treatment; the correct test is whether part-time status is an 'effective cause'.

The CA unanimously dismissed the appeal, albeit with divided reasoning.

Lord Justice Edis considered *McMenemy* was wrongly decided. He highlighted the deliberate omission of the word 'solely' from Reg 5(2)(a) PTWR, diverging from the language of the Council Directive 1999/70/EC of June 28, 1999, concerning the framework agreement on fixed-term work (the Framework Directive), that the PTWR sought to implement. Edis LJ emphasised that the phrase 'on the ground that' mirrors wording in other anti-discrimination statutes, which courts have interpreted as requiring an 'effective cause' rather than an exclusive or 'sole cause'. He found that this amounted to a purposive interpretation aligned with protecting workers from substantial discrimination due to part-time status.

However, despite deciding the decision in *McMenemy* was 'wrong', Edis LJ concluded (in line with the EAT) that interpretive consistency required adherence to *McMenemy*. In doing so, he referenced the principles from *Abbott v Philbin*⁵ and the recent ruling in *Jwanczuk v SSWP*.⁶ (It should be noted that *Jwanczuk* is currently subject to appeal in the SC and as such this position could change).

Lord Justice Bean concurred fully with Edis LJ and noted in particular that the established interpretation in most areas of discrimination law favoured the broader '*effective*

¹ See [2024] Briefing 1109

² [2008] IRLR 336

³ [2009] IRLR 616

⁴ [2004] ICR 436

⁵ [1960] Ch 27

⁶ [2023] EWCA Civ 1156

Despite strong denunciations ... *McMenemy* remains the prevailing authority. It establishes that part-time status must be the 'sole cause' of less favourable treatment under the PTWR.

and predominant cause' standard.⁷ He considered the reasoning of Elias J in *Sharma* persuasive, criticising the overly restrictive interpretation adopted in *McMenemy*. Despite this disapproval, Bean LJ agreed that maintaining uniform judicial application, per *Abbott* and *Jwanczuk*, warranted following *McMenemy*.

Edis LJ and Bean LJ indicated that permission to appeal to the SC would be granted, should WA choose to pursue it.

Lady Justice Laing deviated firmly in supporting the correctness of *McMenemy*. She reasoned that the narrower causation test set out explicitly in the Framework Directive was deliberate, reflecting a careful balance struck by the 'social partners' between worker protection and business flexibility. Laing LJ identified no clear legislative intention within the PTWR to expand this restrictive test. Consequently, she concluded the PTWR must be construed narrowly, adhering closely to the Framework Directive.

Comment

Despite strong denunciations from Eady J in the EAT and from Bean LJ and Edis LJ in the CA, *McMenemy* remains the prevailing authority. It establishes that part-time status must be the 'sole cause' of less favourable treatment under the PTWR. As a result, claimants continue to face a high threshold when bringing these claims.

This ruling is the latest development in a long, complex and inconsistent series of PTWR cases which have struggled with interpreting the scope and requirements of the regulations. In light of Edis and Bean LJ's characterisation of the 'sole cause' test as 'unsatisfactory' and 'clearly wrong', the issue may soon receive long-awaited clarification from the SC.

If WA proceeds with an appeal to the SC, Laing LJ's well-reasoned endorsement of *McMenemy* would provide a strong counterpoint to the staunch opposition of Edis and Bean LJ (and Eady J in the EAT). At the heart of this disagreement is a fundamental question about the purpose of the Framework Directive which underpins the PTWR: should it be interpreted as a protective, pro-worker measure aimed at eliminating discrimination against part-timers, or as an instrument designed to balance the interests of employers and employees?

Much would depend on how the SC were to navigate the tension between these competing interpretive approaches and visions of purpose. On one hand, there has been a notable shift in judicial attitudes since the early 2000s, with growing recognition of the need to protect workers in atypical or precarious forms of employment. On the other, the PTWR were introduced in the political climate of the 1990s when EU and UK policymaking prioritised business flexibility and minimal regulation. The forthcoming decision in *Jwanczuk* about binding precedent across jurisdictions further complicates this picture. Practitioners and advisers should continue to monitor developments in this area closely.

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⁷ *O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School* [1997] ICR 33

Not so fast: considerations for costs awards in discrimination claims

Madu v Loughborough College [2025] EAT 52; April 16, 2025

Implications for practitioners

Costs in the employment tribunal, although '*rare and exceptional*', can be awarded to a winning party. This case should give pause to those considering applying for costs in discrimination cases on the basis of '*no reasonable prospect of success*' or '*unreasonable conduct*', and give support to those defending such an application, particularly where a claimant may have been unrepresented at some point. Although the legal test applied is the same regardless of the type of claim, there are certain factors to consider such as policy matters when addressing the reasonableness of bringing a discrimination claim. Tribunals should also be wary of applying hindsight to what it thinks a claimant should have known before hearing all the evidence.

Facts

Mr E Madu (EM), who identifies as Black British of African descent, applied and was rejected for a part-time lecturer role at Loughborough College (LC). The position was given to one of the other two candidates, both of whom were white. After receiving notice of his interview time, EM asked if he could arrange a later time to enable a cheaper train ticket. LC refused this request; however, EM later discovered that it had granted a request to postpone one of the other interviews until the next morning. Further, EM had requested feedback on his interview and he alleged LC delayed in providing this.

EM was unrepresented when he lodged his claim and at the preliminary hearing; he was represented at the final hearing. After a finding of no liability, LC applied for costs under Rule 74(2) of the Employment Tribunal Procedure Rules 2024 based on the claim having no reasonable prospect of success and the claimant's unreasonable behaviour in pursuing the complaint.

Employment Tribunal

In awarding costs, the ET relied on an assumption that once EM was legally represented, he would have been advised that there was no reasonable prospect of success and it was therefore unreasonable of him to continue with the claim. The ET also found it was not relevant that LC, who was legally represented, did not apply for a strike-out or deposit order, noting that such an application in a discrimination context would have had limited prospect of success. The ET found that race played no part in what happened and preferred LC's evidence concerning its delay in providing feedback.

The ET then criticised EM for expressing his views on the existence of widespread racism, which he claimed existed among judges, and for being '*fixed in his views that the only explanation for the things he complained of was racism*'. Further, the ET criticised EM for threatening to bring a costs application after an adjournment when LC's counsel became ill.

Ultimately, the ET found the claim was misconceived; EM had been unreasonable in pursuing it and the tribunal awarded £20,000 in costs to LC.

Employment Appeal Tribunal

There were three grounds of appeal before the EAT:

1. the ET had assumed without evidence that when EM obtained legal representation, he would have been advised his claim had no reasonable prospect of success;
2. the ET had also failed to take account of the substantial period during which EM was unrepresented; and
3. the ET had not considered the nature, gravity and effect of EM's alleged unreasonable conduct.

LC conceded the ET had erred in law in finding that EM had been advised his claim had no reasonable prospect when it had no information about the confidential advice the claimant had received from his solicitors. However, LC argued it did not matter as the ET had found the claim was misconceived in any event. This was rejected by the EAT, which found this assumption was a significant component of the decision to award costs and that error alone undermined the entirety of the ET's judgment.

Further, the EAT found the ET failed to consider the particular difficulties faced by a claimant, particularly a litigant in person, when determining whether a discrimination claim has a reasonable prospect of success. It could not reconcile the ET's finding that EM should have realised his claim was without merit, with its finding that LC's failure to apply for a strike-out was irrelevant, given this involved a similar test.

With regard to EM's specific conduct, the EAT found that the ET erred in law in concluding it was unreasonable for him to have pursued his discrimination claim. It considered that it was reasonable for EM to have thought the preference for the white candidate supported his race discrimination complaint, particularly with the low percentage of employees of colour at LC, and thus race could have been a factor.

The EAT noted that discrimination claims often turn on witness evidence at a final hearing and costs awards should avoid being '*influenced by hindsight of how the evidence in fact unfolded at trial*', citing *Iyieke v Bearing Point Ltd* [2025] EAT 25.

As to the claimant's further conduct, the EAT found the ET did not analyse the nature, gravity and effect of his comments regarding widespread racism or his '*combative and argumentative cross-examination*' or comments about applications he might, but ultimately did not, bring. The EAT stated that none of this behaviour had a significant effect on LC's costs and although the ET considered EM's views on widespread racism to be 'irrelevant' to the case, expressing such opinions was not a reason to award costs against him.

The EAT remitted the matter to a differently constituted tribunal so it could be considered afresh.

Comment

As with considerations related to striking out a discrimination claim before hearing all the evidence, this decision demonstrates that an ET should be similarly stringent when exercising its discretion to order costs against claimants in such cases. The importance of factors such as nuance and perspective may only become apparent at a full hearing and it is important to focus on what the claimant might reasonably be expected to have known before such evidence unfolds. This should act as a reminder to ETs to consider the difficulties a claimant, especially if unrepresented, faces when determining the merits of their case prior to a hearing, even when they are ultimately unsuccessful.

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As with considerations related to striking out a discrimination claim before hearing all the evidence ... an ET should be similarly stringent when exercising its discretion to order costs against claimants in such cases.

Group disadvantage and justification in indirect sex discrimination cases

Marston (Holdings) Limited v Mrs A Perkins ♦ [2025] EAT 20; February 19, 2025

Facts

Mrs A Perkins (AP) was employed as Head of Enforcement, a Grade 3 managerial role, at the Helmsore office of Marston (Holdings) Limited (Marston), a national company assisting with the enforcement of penalties, including unpaid council tax and child benefits. AP had worked for Marston since 2005.

In 2021, Marston initiated a company-wide restructuring plan. AP's role was to continue in Helmsore with potential minor adjustments to her duties to reflect the broader regional oversight, including overseeing areas such as Darlington, Epping and Birmingham.

However, contrary to her initial view that the different role she accepted would constitute suitable alternative employment, AP was later informed of more significant changes to her duties. The revised conditions included extensive travelling, in particular visits to the Epping office, over four hours away by car. These travel demands posed a significant burden on AP who was the primary carer for her two young children.

AP and Marston were unable to agree on the new travel requirements. AP proposed travelling 'reasonable distances'; however, her employer inserted a new requirement into the company's job description for further travel and warned that non-compliance could result in disciplinary action. AP was invited to consultation meetings and having refused Marston's proposed changes, was dismissed for reason of redundancy. Her job was subsequently given to another woman.

Employment Tribunal

AP brought claims of indirect sex discrimination and unfair dismissal.

For the indirect sex discrimination claim, AP contended that the provision, criterion or practice (PCP) requiring Grade 3 managers to travel significant distances was likely to put women, who customarily take primary responsibility for childcare, at a particular disadvantage. AP argued that she was unable to accept the alternative role due to her childcare responsibilities, and she was dismissed as redundant.

Marston disputed that AP had been put at a particular disadvantage because of the travel requirement, but in any event contended this was a proportionate means of achieving a legitimate aim, namely business efficacy and staff morale.

Regarding the unfair dismissal claim, AP initially seemed to accept at an earlier case management hearing that there was a genuine redundancy situation, but that Marston had failed to make proper efforts to find alternative employment. This was recorded in the list of issues. AP later disputed redundancy as the reason for dismissal at a full merits hearing.

The ET upheld the indirect sex discrimination claim. It found that the PCP requiring Grade 3 managers to undertake extensive travel placed women with childcare responsibilities at a particular disadvantage. AP was the only woman in the pool for comparison. The ET took judicial notice of the fact that women are the primary carers of small children and accepted that AP could not travel while meeting her childcare responsibilities.

♦ [2025] IRLR 318

The ET then considered whether the PCP was a proportionate means of achieving a legitimate aim. Marston argued that the aim was to enhance efficacy and staff morale but the tribunal found that the means chosen to achieve that aim – extensive travel – were not proportionate. Less discriminatory measures, including remote team management, were suitable; accordingly, the PCP was unjustified.

The unfair dismissal claim was also upheld. Marston argued that AP was dismissed due to the fair reason of redundancy. However, the tribunal found no evidence of a genuine redundancy as there had been no reduction in the work she performed after the restructuring. The tribunal concluded that the dismissal reason was the refusal to comply with the travel requirement.

Marston appealed both decisions.

Employment Appeal Tribunal

The ET judgment sought to rely on the requirement to take judicial notice of matters ‘so noticed by the well-established practice or precedents of the courts’, noting the childcare disparity between men and women established in *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699. However, Marston argued that the ET went further than the judicial notice in *Dobson* when it stated that ‘women are the primary carers of small children’ (rather than the more nuanced position in *Dobson* that women were ‘more likely’ to take on childcare responsibilities).

The EAT upheld Marston’s ground of appeal, agreeing that the ET had exceeded the limits of that judicial notice. Established authorities require careful evidential assessment of whether the PCP caused group disadvantage, but the ET’s reasoning had lost sight of the nuanced characterisation of the childcare disparity in *Dobson* and this lack of clarity made its judgment unsafe.

The EAT also concluded that, in considering whether the PCP was a proportionate means of achieving a legitimate aim, the ET had improperly focused solely on AP’s position and had failed to properly balance Marston’s legitimate business aims against the discriminatory impact of the PCP on all Grade 3 managers. The EAT found that the ET’s sole focus on AP rendered its assessment insufficient; it should have considered the PCP’s group impact. Noting that AP had conceded redundancy as the reason for dismissal at an earlier hearing (and in the agreed list of issues), the EAT also found that the ET erred in revisiting that list in its deliberations and permitting her to withdraw that concession. Further, both parties should have been permitted to make representations about this point. The EAT also agreed with Marston that the ET did not clearly explain why it rejected redundancy as the dismissal reason, noting that the tribunal’s recorded reason ‘because she would not travel significant distances following the respondent’s reorganisation’ did not alone provide a clear answer as to whether redundancy might in fact still have been the reason, or principal reason, for dismissal.

The EAT allowed the appeal. It was unclear from the reasons provided whether the ET had approached the question of group disadvantage on the basis that the childcare disparity meant this was intrinsic in the PCP or simply an obvious consequence of it. It had also failed to properly engage with the application of the PCP as a general rule, rather than in terms of its particular application to the claimant. On the unfair dismissal appeal, when the ET accepted AP’s redundancy challenge it should have permitted the parties to address the issue; the tribunal’s reasoning was not clearly stated in a way which would have enabled Marston to properly understand why it had lost the case.

Tribunals should be cautious when applying judicial notice, ensuring it is not exceeded and is not substituted for evidence.

Comment

- Tribunals should be cautious when applying judicial notice, ensuring it is not exceeded and is not substituted for evidence.
- While the impact on the claimant can be considered, tribunals must not place improper focus solely on the claimant when assessing the impact of a PCP on an entire group.
- Procedural fairness requires that parties are not unfairly prejudiced by late amendments to a party's legal case, and tribunals should permit both sides to make representations on such amendments.

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The limits of employers' liability for harassment in the workplace

Campbell v Sheffield Teaching North Hospitals NHS Foundation Trust & Wesley Hammond [2025] EAT 42; March 27, 2025

Facts

Mr John J. Campbell (JJC) was employed by Sheffield Teaching Hospitals NHS Foundation Trust (the Trust). He was also a full-time branch secretary for the trade union UNISON. Mr Hammond (WH), who was also employed by the Trust, had been a member of the union but had decided he wanted to leave. Despite this, subscription fees kept being deducted from his salary. After being advised by human resources to speak to UNISON directly, WH approached JJC to ask whether these fees could be refunded. JJC refused to reimburse him, and WH started calling him abusive names, including a racially discriminatory term.

Employment Tribunal

JJC brought claims of racial harassment against both respondents.

The ET initially examined whether the incident happened '*in the course of employment*' as set out in s109(1) of the Equality Act 2010 (EA). Both JJC and WH were employed by the Trust and the incident took place on the Trust's premises during working hours. However, it occurred during a break from work and concerned a personal matter related to UNISON, rather than WH's employment duties. Furthermore, WH's decision to join UNISON was voluntary and not a requirement for his role with the Trust. The deductions from his salary resulted from his union membership and were not a decision taken by his employer. In light of this, the ET viewed this as a personal issue between WH and the union regarding subscription fees rather than something occurring as a result of his employment.

The ET also determined that the Trust had taken '*all reasonable steps*' under s109(4) EA to prevent racial harassment. Those steps (paragraphs 18 of the ET decision and 11 of the EAT decision) included:

- An induction session highlighting '*acceptable behaviour at work*' and the Trust's core values of '*affording dignity, trust and respect to everyone*';
- Annual performance reviews, which included assessment of adherence to the Trust's values;
- Display of the Trust's values on posters in the workplace;
- Mandatory training on equality and diversity every three years.

Employment Appeal Tribunal

JJC appealed to the EAT on two grounds:

1. The ET had misapplied s109(1) EA by focusing too narrowly on the statements made without considering the broader context, such as the workplace location and the natural connection between union membership and the workplace.
2. The ET had incorrectly applied s109(4) EA by only considering what steps the Trust had taken, without evaluating whether any further reasonable preventative steps could have been taken.

Regarding the first ground of appeal, the EAT held that the ET had properly balanced all relevant factors in concluding that the incident did not occur '*in the course of employment*'. The ET had not erred in law or overlooked any relevant factors.

The decision on the first ground of appeal meant the appeal had to fail, but the EAT proceeded to examine the second ground. The EAT determined that the ET correctly applied the statutory defence under s109(4) EA. JJC did not propose any additional reasonable steps which could have been taken to prevent the incident, and the EAT had no further suggestions. Therefore, the ET made a clear factual finding that the Trust had taken all reasonable steps to prevent racial harassment.

The EAT also found it persuasive that the Trust had provided WH with mandatory equality and diversity training in a small group just eleven days before the incident.

The appeal was dismissed.

Implications for practitioners

The EAT's decision illustrates the limits of employer liability under the EA. Whilst each case turns on its own facts, employers may not be liable for employees' actions that are personal in nature or unrelated to their work duties, even if such conduct takes place on work premises.

It also highlights the importance of employers taking proactive and preventive steps to prevent discrimination as a means of avoiding liability for discriminatory acts committed by their employees. The case provides helpful guidance for employers on the '*all reasonable steps*' defence under s109(4) EA as it sets out specific examples of what such steps may involve. The employer in this case had taken comprehensive steps to promote equality and diversity and regularly reinforced its values to ensure that its employees remained aware of them. Although the '*all reasonable steps*' defence has a high bar, these measures were crucial to the employer's successful reliance on this defence.

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... employers may not be liable for employees' actions that are personal in nature or unrelated to their work duties, even if such conduct takes place on work premises.

Disability discrimination; redundancy; suitable alternative employment

Marshall v East & North Hertfordshire NHS Trust [2025] EAT 46; April 16, 2025

Implications for practitioners

Tribunals must clearly consider and address each element of claims. Even where large numbers of issues are presented, failure to address specific elements can amount to an error of law and consequently lead to appeals.

Additionally, employers have a duty to consider suitable alternative employment in redundancy situations but are not obliged to offer roles which are materially different or contrary to employee preferences. An employer's knowledge of an employee's preferences at the time (e.g. unwillingness to take ward-based roles due to Covid-19) is highly relevant when assessing reasonableness under s98(4) Employment Rights Act 1996 (ERA). Additionally, employees who disengage from redeployment efforts may undermine their own claim that an employer failed to consider alternatives.

Facts

Mrs Marshall (LM) had been employed by the East & North Hertfordshire NHS Trust (the Trust) since 1999, most recently as a surgical site surveillance nurse since 2014. In January 2021, she was dismissed on the grounds of redundancy. The redundancy process began in late 2020.

Subsequently and in her capacity as a litigant in person, LM brought complaints of disability discrimination, harassment, victimisation, protected disclosure detriment, automatically unfair dismissal and ordinary unfair dismissal. These complaints had been raised in three different claims but were later conciliated into one claim.

The impairments relied upon by LM were anxiety and depression, chronic fatigue syndrome and poor vision due to early-stage cancer.

Employment Tribunal

The ET identified 12 separate detriments forming part of LM's claim under s15 Equality Act 2010 (EA). One of these detriments related to an incident on September 21, 2019 when she was sent home by her manager (Mr McCabe) and told to take sick leave after becoming very agitated at work.

The ET found that the decision to send LM home followed advice from human resources, was based on concerns for her mental health and welfare, and was taken as part of the employer's duty of care towards her.

The ET found that the redundancy process was fair. Two alternative roles for an infection protection and control (IPC) nurse became available in June and August 2020. LM argued that she should have been offered these roles as suitable alternative employment. The ET held that LM's role and that of the IPC nurse role were entirely different and '*not broadly similar*'.

The ET dismissed all of LM's claims. Consequently, she appealed to the EAT on the grounds that the ET had:

- failed to consider her s15 EA claim (discrimination arising from a disability) regarding having been sent home;
- erred in concluding that her redundancy dismissal was fair when it failed to consider redeployment to one of the IPC roles.

Employment Appeal Tribunal

Ground 1

LM's counsel argued that the ET's findings failed to acknowledge her position that her outbursts and conduct on September 21 arose from her disabilities, namely anxiety and depression, and that the tribunal's reasons did not engage with this position. In addition, the ET failed to query whether *'the decision to send her home ... because of that behaviour'* amounted to unfavourable treatment; and if so, whether it was justified as a proportionate means of achieving a legitimate aim.

The EAT upheld the first ground, ruling that the ET *'simply overlooked issues that were before it'*. Relying on the guidance provided in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763, the EAT remitted the discrete issue of the s15 claim back to the ET.

Ground 2

LM's counsel argued that the ET had erred in failing to consider whether the IPC vacancies in June and August 2020 were suitable alternative roles for the appellant having regard to her skills, qualifications and experience. Further, that in only comparing the job descriptions of her existing role and the IPC nurse, the ET had lost sight of this point.

The EAT held that LM had clearly communicated her concerns about alternative roles to the Trust prior to her dismissal, specifically stating that she did not wish to take on a ward-based role due to the ongoing Covid-19 pandemic. The reasonableness test under s98(4) ERA requires the ET to consider whether the employer's actions fell within the range of reasonable responses open to a reasonable employer, based on what the employer knew at the material time. In light of LM's communicated preferences, the EAT upheld the ET's conclusion that the employer had acted reasonably in not offering her the IPC vacancies which arose in June and August 2020, as they involved a *'significant amount of ward-based activity'*.

Comment

This case highlights the critical importance of tribunals thoroughly addressing every aspect of discrimination claims, especially under s15 EA, to avoid procedural errors which can lead to appeals and remittals.

Additionally, employers facing redundancy situations must carefully balance the duty to consider suitable alternative employment with the employee's expressed preferences and health considerations. The decision reinforces that what matters is whether the employer's approach falls within a reasonable range of responses based on the information available at the time, not whether any available role was offered.

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... employers facing redundancy situations must carefully balance the duty to consider suitable alternative employment with the employee's expressed preferences and health considerations.

Impact of behaviour modifications on day-to-day activities

Zagorski v North West Anglia NHS Foundation Trust ♦ [2024] EAT 164; September 12, 2024

Facts

The appellant, Mr Christopher Zagorski (CZ), began working as a consultant radiologist for the North West Anglia NHS Foundation Trust (NWA) for three days a week from October 1, 2019. CZ had substantial caring responsibilities for his wife and their children as his wife had suffered a serious injury when giving birth to triplets in 2015. In 2021, CZ relocated to Surrey to be closer to his family for support. However, this substantially increased his commute to work from 35 minutes to two-and-a-half to three hours each way. In addition, CZ often worked long days, sometimes up to 12 to 13 hours.

In December 2019, CZ developed headaches and felt excessively tired, run down and physically exhausted. Blood results and an MRI scan undertaken in early 2020 were considered 'fine', but he continued to suffer from migraine headaches, and the prescribed medication was proving ineffective. CZ commenced a period of sick leave on December 7, 2021 until he resigned in July 2022. During his sick leave, fit notes and GP records documented that CZ continued to suffer from migraines around twice a week and the migraines caused symptoms like vertigo, visual disturbances, nausea, sensitivity to light/sound and a lack of concentration, which had a negative impact on his ability to work. After his resignation, CZ brought tribunal claims against NWA for constructive unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments and whistleblowing detriment.

Employment Tribunal

CZ complained that NWA failed to take reasonable steps to accommodate his disability (migraines, exhaustion and debility) by failing to reduce his onsite hours and allowing him to work from home. He also complained that NWA treated him unfavourably because of his sickness absence arising from his disabilities.

CZ claimed that he was subjected to detriments by NWA on the ground that he had made a protected disclosure when he had complained that software used in carrying out breast cancer MRI scans by NWA was unreliable. CZ claimed NWA breached the implied term of trust and confidence due to his treatment, and this caused him to resign.

At a preliminary hearing, the ET considered whether CZ was disabled under s6 of the Equality Act 2010 (EA). S6 EA defines disability as having a physical or mental impairment with a substantial and long-term adverse effect on ability to carry out normal day-to-day activities. The ET decided that CZ's exhaustion and debility were not impairments under s6 EA and instead attributed these symptoms to a '*normal physical and emotional reaction to the extremely demanding work-life conditions the claimant found himself in*'. When considering statutory guidance on matters to be taken into account in determining questions relating to the definition of disability, it was the ET's view that CZ could have taken steps to decrease his exhaustion:

... if the claimant had made reasonable changes to his extremely demanding schedule, as it was recommended to him, the adverse effect on his day-to-day activities would not have been substantial.

♦ [2025] IRLR 99

While the ET acknowledged that migraines can be an impairment, his migraines were found not to have had a substantial and long-term adverse effect on his day-to-day activities.

The ET ruled that CZ did not have a disability within the meaning s6 EA at the relevant times. He appealed.

Employment Appeal Tribunal

The EAT clarified that the fluctuating nature of a condition does not prevent there being a substantial and adverse effect on day-to-day activities.

The EAT allowed CZ's appeal and substituted a finding that his migraines did meet the definition of a disability under the EA. The EAT found that while the ET accepted that migraines were an impairment, it failed to properly assess whether the claimant's migraines had a substantial and long-term adverse effect on his day-to-day activities. The EAT highlighted that CZ's role required him to use screens to interpret scans, and that when he had a migraine he could not focus on a computer screen and so it was impossible for him to undertake his job. He would also become unsteady on his feet and would need to lie down and, when the symptoms were severe, he could not read, write, or use screens at all. Considering CZ suffered migraines approximately twice a week, and that professional duties are included in 'day-to-day activities' under the EA, it was clear that there was a substantial adverse effect on his ability to carry out day-to-day activities.

The EAT also found that the ET's finding that CZ could reasonably have been expected to modify his behaviour to prevent or reduce the effects of his migraines to be perverse. This is because the evidence demonstrated that his migraines continued at a similar level despite him being on sick leave, and so such modifications had already been in effect. The EAT stated that in assessing the effect which modifications to behaviour might have, the tribunal should consider the effect of the impairment on day-to-day activities without any modifications and reach a reasoned conclusion as to the change which would occur if the behaviour was modified. The ET should generally consider whether any day-to-day activities would still be affected and, if so, whether they would be affected to a degree which would be more than minor or trivial.

Furthermore, the EAT concluded that the ET had erred in law or was perverse in its reasoning that CZ was not disabled because his migraines may have been caused by exhaustion. The ET had also erred in finding that the recurring nature of the migraines meant that CZ was not disabled. The EAT clarified that the fluctuating nature of a condition does not prevent there being a substantial and adverse effect on day-to-day activities.

Comment

This decision provides important authority for claimants with conditions with fluctuating or recurring effects. The EAT has made clear that the fluctuating nature of CZ's headaches, and the fact that there were more periods when he did not suffer from migraines than when he did, did not prevent there being a substantial and adverse effect on his day-to-day activities.

The case also acts as an important reminder that when assessing if an individual is disabled, tribunals can consider how far a person can reasonably be expected to modify their behaviour. In this judgment, the EAT helpfully clarified the approach an ET should take when assessing the potential effect of behaviour modifications on any day-to-day activities and whether they would be affected to a degree which is more than minor or trivial.

Sean O'Donoghue
Paralegal
Leigh Day

Victimisation claims and protected acts in the workplace

M Kokomane v Boots Management Services Ltd [2025] EAT 38; March 11, 2025

Implications for practitioners

This case highlights the importance of looking beyond the facts presented in a claim for victimisation and thoroughly reviewing the context of alleged 'protected acts'. Consideration should be given to the nature of the act, the identity of the claimant, the wider environment (including the individuals surrounding the claimant), and any other contextual factor which helps to provide an explanation.

Facts

Ms M Kokomane (MK) worked as a customer advisor for Boots Management Services Limited (Boots) from January 2001 until May 2021. MK is of black African ancestry and was the only non-white full-time member of staff at the Boots Sheerness store from January 2018.

MK had been regarded as an 'above performing' employee in 2018 and won multiple awards for her skills and attributes. However, she experienced a difficult relationship with the pharmacist in the Sheerness store, Carola Seteu (CS).

In June 2019, an incident occurred involving the key for the controlled drug (CD) cabinet. MK called out 'CD key' and CS (who was acting as a temporary manager) complained she was 'shouting'. MK said that she used the same tone her white British colleagues used when asking for the CD keys and denied shouting.

MK found the behaviour of CS towards her in general to be aggressive. In April 2020, MK raised a grievance against CS alleging several incidents of bullying, harassment, and victimisation, and that CS had been treating her differently from the other staff members. Boots could not deal with the matter at the time due to Covid-19.

In September 2020, a voluntary redundancy process started at the Sheerness store, and CS gave out application forms to all staff. MK believed CS was pressurising her to apply, so she did not express an interest.

Later in October 2020, MK emailed Boots' human resources department to follow up on her grievance against CS and made further allegations that she had been harassed whilst on sick leave. MK requested that CS no longer contact her because it made her condition worsen.

In January 2021, a formal redundancy process commenced, and managers were required to rate their staff on different criteria. CS completed MK's scoring exercise, giving her the lowest scores of the three staff members in the redundancy pool. MK complained and was re-scored by her previous manager, but it resulted in similar scores. The redundancy process was put on hold so MK's grievance could be properly investigated. Ultimately, her grievance and subsequent appeal both failed, and MK was made formally redundant in May 2021.

MK was given an '*employee redundancy information pack*' which included a link to a Boots portal which listed available vacancies for staff facing redundancy. MK searched the portal but was not able to find any suitable roles.

The EAT's decision emphasises the importance of applying a holistic approach in determining whether a protected act has occurred in a victimisation claim ... the claimant does not need to make a precise allegation ...

Employment Tribunal

MK issued claims of harassment relating to race, victimisation, and unfair dismissal.

The ET considered MK's eight allegations of harassment. It found that CS's approach to addressing staff was generally '*direct, abrupt and harsh*' and accepted that MK had experienced unwanted conduct on multiple occasions. However, the ET did not find that any of that conduct was related to race because CS communicated in a similar style with all staff.

In relation to whether MK was victimised by Boots because of a protected act, MK relied on her grievances against CS and issues raised in the grievance hearing as her protected acts. The ET found that while MK complained about CS's treatment of her, she did not make any assertion that the treatment was related to race or was unlawful discrimination contrary to the Equality Act 2010 (EA). The ET further found that there was nothing which could be seen as MK alleging a breach of the EA and it concluded that a protected act had not been carried out.

The ET did, however, uphold MK's claim for unfair dismissal on the grounds that whilst the redundancy consultation and selection processes had been fair, the dismissal was not a reasonable response as there were inadequate steps taken to assist MK in her redeployment following her redundancy at the Sheerness Boots store.

When assessing compensation, particularly whether to make a *Polkey* reduction, the ET considered evidence of a vacancy in the Sittingbourne Boots store and concluded MK would have been likely to have accepted this role if it had been offered to her. Therefore, no *Polkey* reduction was applied.

Employment Appeal Tribunal

MK appealed the decision on victimisation, arguing that the ET erred in law when considering whether her grievances and the grievance hearing amounted to protected acts.

The EAT found that the ET used a 'too narrow' approach when defining a protected act and did not consider the wider context of the grievances on which MK relied. That context included that she was the only black full-time staff worker at the Sheerness Boots store, and that in the grievance hearing, she had alleged CS used a negative stereotype in calling her a '*loud black woman*'. The EAT did not believe that the ET applied this knowledge cohesively with the other considerations.

The appeal was upheld and the matter was remitted to the same tribunal.

Comment

The EAT's decision emphasises the importance of applying a holistic approach in determining whether a protected act has occurred in a victimisation claim. Consideration should be given to all parts of the allegations and patterns of facts.

The approach should not be a restrictive one which limits what amounts to a protected act to what can be seen at first glance. Furthermore, the claimant does not need to make a precise allegation for it to be a protected act. Facts can be deduced to determine whether the claimant made a protected act.

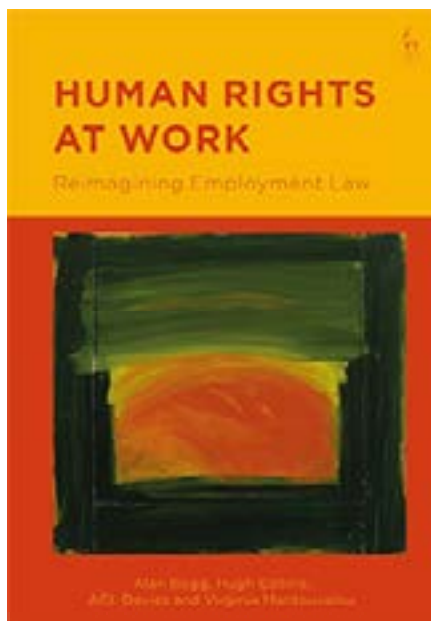
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BOOK REVIEW



Human Rights at Work: Reimagining Employment Law

Alan Bogg, Hugh Collins, ACL Davies and
Virginia Mantouvalou

2004 Hart Publishing, 339 pages, Paperback £36.99,
(Ebook £33.29)

Employment law in the UK is a curious hybrid, rooted in contract law but given a distinctive shape by decades of domestic statutes, European Union directives and a growing body of human rights law. This book provides a comprehensive and fascinating overview of the last of these, written by four of the most important scholars of labour rights working in the UK. For discrimination lawyers and activists, who are used to drawing on employment case law for their basic concepts, it provides both useful context and pointers for the future.

The first two chapters set out the framework for the rest of the book. Chapter one sketches the recent history of international human rights and labour law and discusses the interplay between collective and individual approaches to the protection of UK workers since the mid-twentieth century. It introduces three different theoretical approaches to the relationship between human rights and labour rights. It also sets out the different routes to enforcement and influence, through international bodies such as the International Labour Organization, as well as through domestic and international courts.

Chapter two provides a comprehensive overview of the various sources of human rights which may benefit workers in the UK. The most obvious of these is the European Convention on Human Rights (ECHR), which is enforced domestically via the Human Rights Act 1998 (HRA). However, as

the authors note, it is surprising how little impact the HRA has had on the reasoning of courts and tribunals: when reading discrimination cases it is often possible to forget that there is a duty, so far as possible, to interpret all sources of law in a manner that is compliant with ECHR rights. The European Union's influence is more pervasive, and for the purposes of discrimination law, the past case law of the Court of Justice of the European Union has largely been preserved by the Equality Act 2010 (Amendment) Regulations 2023. It remains to be seen whether UK courts will start to diverge from EU case law in the future.

These first two chapters together provide an essential introduction for the next sixteen chapters, which address a wide range of topics. These include the right to equal treatment and equal opportunity; rights which are exercised collectively, such as freedom of association and rights to bargain and strike; employment status, the right to work and to protection from unfair dismissal; rights to fair pay and limitations on working hours; rights against slavery, servitude and forced labour; rights in the context of international business supply chains, and rights to privacy and freedom of expression both at work and away from work.

In the final chapter, the authors draw together the argument which runs behind each chapter: that human rights both explain and justify employment law and labour standards and are therefore essential to understanding this curious hybrid field.

BOOK REVIEW

Discrimination lawyers will find chapter four, on the right to equal treatment and equal opportunity, particularly interesting. It starts by examining the distinctive approach of human rights law, and particularly Article 14 ECHR, to the problem of unjustifiable discrimination. One important point is that the scope of protected characteristics is unlimited, because the list of those characteristics in Article 14 ends ‘... or other status’: the list is illustrative, not exhaustive. That has allowed the European Court of Human Rights to extend protection over time as society acknowledges new groups which suffer prejudicial disadvantageous treatment because, for instance, of disability, sexual orientation or trans status.

Another important difference is that under Article 14, unlike in UK or EU law, there is no distinction between direct and indirect discrimination, and direct discrimination is in principle capable of justification. As the authors explain: ‘*Grounds of distinction between persons can be impugned if they have no objective and reasonable justification. The ground of distinction must pursue a legitimate aim in a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*’ In fact, of course, we recognise that direct discrimination is sometimes morally right, but the Equality Act 2010 can only permit it by creating specific and rather rigid exceptions, such as for reasonable adjustments and for genuine

occupational requirements. The result is cases which tend to turn on definitions and technicalities. In contrast, the focus of Article 14 is always on the issue of proportionality and therefore on the fundamental purpose of discrimination law. In the authors’ view, this may, for instance, create space for more inventive approaches to positive action.

A number of the remaining chapters also directly address discrimination issues, including chapters 13 and 14 on the right to a private life, and chapter 16 on freedom of expression outside work. Chapter 17 on freedom to manifest a religion contains particularly helpful discussions about conscientious objection to particular work tasks and expressing religious views at work.

It is possible to gain a lot by focusing on these obviously relevant sections, but I would encourage readers to explore this book in full. As discrimination lawyers, our day-to-day focus is the protection of individuals, particularly through litigating individual cases. I found this book reminded me to stop and look around from time to time. It provides a broader context, particularly by reminding us that our individual legal rights have been won – and continue to be developed and defended – by collective action.

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