
Discrimination – harassment – sex and gender equality – same sex toilets

Peggie v Fife Health Board, Employment Tribunal (Scotland), 8 December 2025

Introduction

Recently, the Supreme Court held that the terms "sex", "woman" and "female", and the male equivalents used in the Equality Act 2010 were to be construed as a matter of biology, and that sex was binary and immutable (*For Women Scotland Ltd v Scottish Ministers* ([2025 UKSC 16]). That decision is being responded to by government agencies and employers, and one burning issue is how it affects access of trans persons to female toilets, and the general issue of same sex toilets.

The answer is complex, and in *Peggie* an Employment Tribunal ruled that a health board's grant of permission to a trans woman junior doctor to use the female staff changing room was unlawful under the 2010 Act. However, that ruling only covered a specific period following the female complainant's initial complaint to her employers that a trans person was allowed to use the toilet. The overall decision is more nuanced and does little to resolve the dilemma.

Facts and decision

In August 2023, the Trust gave X (a trans woman who identified as a woman) permission to use the female staff changing room, and on 27 August, the claimant (a woman who held gender critical beliefs) informed senior management that X's use of the changing room made her feel embarrassed and uncomfortable. On 24 December, when the parties were in the changing room at the same time, the claimant stated that it was not appropriate for X to use the changing room, explaining that she felt intimidated because of the presence of X, who was a man, in the women's changing room. She further explained that X could not be there, that it was wrong, and that lots of others felt that way. X explained that the trust employers had permitted X to change there and that if the claimant had concerns, she should raise them formally.

X immediately reported the incident to senior colleagues, who reported it to the claimant's line manager, and on 30 December, the claimant was placed on special leave. In January 2024, the claimant was later suspended to allow an investigation of the allegations. After the trust carried out an internal investigation the claimant was informed that she would face a disciplinary hearing, and the disciplinary investigation began the following month. A month later, it was intimated to the claimant that part of the investigation related to patient care. The claimant returned to work on April 14, 2025, and the rotas were drawn up by the trust to ensure that she and X did not work at the same time. Three months later, the Trust decided that there was insufficient evidence to uphold the key allegations against the claimant. It did not impose any formal disciplinary sanction.

The claimant brought the following claims against her health board employer and a junior doctor: for direct discrimination because of sex or belief, under s.13 of the Act; indirect discrimination in relation to a protected characteristic, being sex or belief, under s.19; a claim for harassment related to sex or belief, under s.26(1); for sexual harassment, under s.26(2); a claim for harassment by rejection of harassment, under s.26(3); and victimisation under s.27.

Upholding the claim in part, the tribunal held as follows. First, the employer's grant of permission to X to use the female changing room was not inherently unlawful under 2010 Act. Although the Supreme Court had held that "sex", "woman" and "female" were to be construed as a matter of biology, and that sex was binary and immutable, and that X's sex for the purposes

of s.11 of the Act was male, the protected he protected characteristic of gender reassignment was of equal status to sex (as were the claimant's and X's respective beliefs). Thus, it was potentially, but not necessarily lawful under the 2010 Act to permit a trans woman to use a female only space in the context of work. In the light of the Supreme Court decision the claimant could argue the claims of direct and indirect discrimination and of harassment if a trans woman was granted permission to use the female changing room. However, equally, X could make arguments of indirect discrimination and harassment if excluded from that changing room.

The tribunal then turned its attention to the balancing of those characteristics and claims, applying the proportionality test in Bank Mellat v HM Treasury ([2013] UKSC 39). The Trust in this case sought to pursue the following legitimate objectives: (a) protecting and upholding X's rights under the Human Rights Act 1998 and the 2010 Act; (b) promoting and upholding diversity and inclusion in the workplace; and (c) appropriate use and provision of available facilities in the workplace. The tribunal found that the measure of granting permission to use the changing room was rationally connected to the objectives, but that after the claimant's initial August 2023 complaint, both parties could have chosen to use spaces other than the changing room on an interim basis pending a permanent solution. In the tribunal's view, an investigation and consideration of the claimant's complaint would have taken about three weeks until 16 September, when X's permission ought to have been revoked pending a long-term solution. There was a strong likelihood that at least one of the options would have been a less intrusive measure whilst meeting the overall objectives. Thus, the Trust had not proved that the grant of permission was the least intrusive measure to achieve the objectives between October 2023 and April 2024, and the severity of the impact on the claimant was not overridden by the objectives. Consequently, during that period the grant of permission to X was not lawful under the Act, and the claimant had a reasonable perception of harassment when X was in the changing room within those dates.

The tribunal then considered whether the claimant manifested her protected beliefs in an objectively impermissible manner. In the tribunal's view, certain of the claimant's comments were impermissible and amounted to harassment of X related to the protected characteristic of gender reassignment. Those comments were reasonably perceived by X to be impermissible and thus constituted a breach by the claimant of s.26 of the 2010 Act. Accordingly, the trust was entitled, in principle, to act on the complaint. X was also entitled to regard the claimant's actions as a breach of X's Article 8 ECHR rights (the right to enjoy private life).

With respect to the respective claims for harassment, under s.26 of the Act, the tribunal found that X's use of the changing room when the claimant was also present was unwanted conduct related to the protected characteristic of sex and thus a breach of s.26. The claimant's perception of harassment from X using the changing room from 16 September 2023 to 14 April 2024 was reasonable in so far as it related to the grant of permission and arose from the trust not meeting the *Bank Mellat* test, above. However, it then concluded that the conduct otherwise did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment as required by s.26. Thus, the claimant's objection to X's presence in the changing room was a part of her gender critical belief and the trust engaged in unwanted conduct relating to the claimant's protected gender critical belief by intimating to the claimant on 28 March 2024 that part of the investigation related to patient care, which constituted a detriment and harassment related to belief. Further, the trust had failed to progress the disciplinary investigation promptly; the time taken (almost a year) being unexplained, disproportionate and not because of the claimant's impermissible manifestation of her belief. Finally, the trust had prohibited discussion of her case with colleagues; the instruction being ambiguous and not the least intrusive measure from 3 to 22 July 2024. This contributed to a hostile environment for that period and the claimant's perception of that was reasonable.

The tribunal then dismissed the claims of direct sex discrimination (s.13). In the tribunal's view, by giving X permission to use the changing room the employers did not treat the claimant differently from another not in that protected category. The claimant had not been required to use the changing room, or not to do so, and if there had been any treatment it was of X when

permission was given. That there was an impact on the claimant, as was her claim, is insufficient. The tribunal also dismissed the claim for indirect sex discrimination on grounds of sex (s.19). In the tribunal's view as the claimant has been the only member of staff raising any complaint to the first policy it concluded that there had been no breach of s.19, as under s.19(2)(d) a discriminatory provision, criterion, or practice (PCP) is justified if the person applying it can show it was a proportionate means of achieving a legitimate aim.

The tribunal also rejected the claim for victimisation under s.29, the tribunal finding no evidence of victimisation by the employers (whereas the claimant had subjected X to harassment, above). Finally, it found that there was no basis to establish X's personal liability under the 2010 Act.

Commentary

The finding of the Supreme Court in *Sex Matters* that the term sex was based on biological criteria was seen by many as a final victory over those espousing trans views. However, the current case reminds us that the Equality Act 2010, and the rights under the European Convention on Human Rights 1950, apply to both protected groups. That is because the 2010 Act includes both sex and transgender rights as protected categories; and that both groups are protected by the right to private life (under Article 8) and the right not to be discriminated on those grounds (under Article 14) of the ECHR. Further, the dilemma over same sex toilets, or allowing trans people into female, or male, toilets, is certainly not clarified by this decision.

Thus, in *Peggie*, the tribunal states quite clearly that the policy of allowing X into the female toilets was not, at the outset at least, unlawful and could have been legitimate had the conflict between the claimant and X been dealt with differently or more sympathetically. The decision, therefore, represents a *procedural* victory for those objecting to such facilities, and sends a clear message to those enforcing them to consult with all affected parties to ensure that their respective rights and concerns are being accommodated. Indeed, X's interests in this case were recognised by the tribunal as it found that X had been subject to harassment by the claimant with respect to the manner in which she raised her concerns. Whether such claims succeed will depend, therefore, on all the circumstances and the way in which the facilities are imposed, how complaints are dealt with and what practical impact the policies have on the respective individuals or groups.

There have been other decisions after this case, which provide fuller protection of the claimant's rights than the one in *Peggie*. Thus, in *Hutchinson v County Durham and Darlington NHS Foundation Trust* (Newcastle Employment Tribunal, 12 January 2025), a tribunal upheld claims against an NHS Trust in both harassment and indirect sex discrimination after the claimants were required to share a female changing room with a transgender colleague and where their concerns were dismissed. In *Hutchinson*, the claimant alleged harassment, victimisation and indirect sex discrimination with respect to the Trust's policy permitting transgender staff to use the changing room corresponding to their affirmed gender. In this case, the tribunal upheld the complaint of harassment against the Trust, who had subjected the claimants to harassment without providing *suitable alternative facilities*; and by not taking seriously and declining to address the claimants' concerns. That included referring to the need for the claimants to be educated on trans rights and to broaden their mindsets as well as the later provision of inadequate and unsuitable changing facilities for those who had objected to sharing the female changing room with a trans person.

The tribunal also upheld the claims for indirect sex discrimination as the policy put women at a particular disadvantage when compared to men, in that women were more likely than men to experience feelings or apprehensions of, fear, distress and humiliation by being required to change their clothes in front of a member of the opposite sex. The Trust had also been in breach of the Workplace (Health, Safety and Welfare) Regulations 1992 - which require "suitable and sufficient sanitary conveniences" and separate rooms for men and women unless each convenience is in a lockable room - had infringed the claimants' right to respect for private life

under Article 8 ECHR, as they had been unable to show that the policies were a proportionate means of achieving its aims.

However, that decision can be contrasted with the tribunal decision in *B M Kelly v Leonardo UK Ltd* (24 November 2025), which dismissed a challenge to the employer's policy permitting employees to use toilets aligned with their gender identity; the tribunal dismissing claims of harassment related to sex, and direct sex discrimination and indirect sex discrimination under the Equality Act 2010. Although in *Kelly* the tribunal accepted that the policy was unwanted by the claimant and related to sex because it determined access to facilities by gender rather than sex, it found, on the facts, that the policy did not have the effect of violating her dignity or creating an intimidating or hostile environment. Her objection was rooted in her gender-critical philosophical beliefs rather than in any actual experience of harassment, and her perception of the toilet access policy as "mixed-sex" depended on her ideological belief that gender identity is not real and that trans women are men. Thus, it noted that the policy had no practical effect on her day-to-day use of facilities, as she continued using the same toilets, did not report any negative encounters and her grievance focused on ideological disagreement with "gender identity theory" rather than any hostile or degrading environment. In addition, the availability of single-occupancy toilets further mitigated any potential impact.

The Tribunal also rejected her claim for direct sex discrimination, finding that the correct comparator was a man using male toilets that were also accessed by trans men. Thus, it found that the policy applied equally to men and women, as both sexes were subject to the same rule: employees could use facilities aligned with their gender identity. The Tribunal also dismissed the claim that the presence of trans women in female toilets violated women's privacy more than the presence of trans men in male toilets violated men's privacy. The tribunal found that there was no such disparity, as both sets of facilities had lockable cubicles and additional single-occupancy toilets were available throughout the site. Also, with respect to the claim for indirect discrimination, although the tribunal acknowledged that women's greater fear of men and privacy needs during menstruation, pregnancy and menopause are matters of common knowledge, these effects were not shown to operate in this workplace. There had been no complaints from other female staff, and the claimant did not report fear or safety concerns.

Shortly after this decision, the High Court rejected a legal challenge brought by the Good Law Project, relating to the Equality and Human Rights Commission interim update published after the judgment in *For Women Scotland Ltd, In R (Good Law Project) v EHRC* [2026] EWHC 279, it was noted that the Commission accepted that it issued the update because it was concerned that organisations and individuals could be subject to misinformation and misrepresentation regarding the judgment and its consequences, and that it will consider further legal proceedings in line with its statutory duties. Thus, the court rejected claims that the Commission had broken any of its statutory duties or that the advice was contrary to any relevant ECHR rights. That statement, and the court's dismissal of the proceedings against the Commission, show that there are still ambiguities in the law and its application, and that further legal action will be needed to resolve these dilemmas.

The High Court in *Good Law* held that read as a whole, the guidance accurately reflected the law after the Supreme Court's decision, and that the guidance was not required to be comprehensive, provided it appropriately focused on the provision of single-sex facilities. The guidance correctly stated the legal position in relation to such facilities and included important caveats, including advising that specialist legal advice should be sought, that proportionality must be assessed, and that provision for trans people should be made where possible. The Court did not accept the assertion that the guidance proposed that service providers could require trans people to use lavatories that correspond to their biological sex. Instead, the guidance encouraged that, where single-sex facilities are provided, additional provision should be made for trans people. It also made clear that single-sex provision is permitted only to the extent that it is proportionate.

Conclusion

These recent decisions are bound to excite appeals to the Employment Appeal Tribunal and to the Court of Appeal and the Supreme Court. Although each case is decided on its own facts, and the tribunals take into consideration the impact of the policies on the claimants, there are still many issues regarding the interpretation of the Act and the effect of *Sex Matters* to be resolved. The Good Law decision attempts to resolve some of those difficulties, but does little more than make some broad, aspirational statements of equality and diversity. Both employers and employees need further and clearer guidance on these issues to avoid litigation and industrial unrest. Further, those advocating rights, based, alternatively, on sex and gender identity, will be unhappy that they have not succeed to gain a dominant position in the conflict, and that both groups will need to be accommodated in this, and other similar conflicts.

Dr Steve Foster, Honorary Fellow, Coventry University