

Client Alert

Global Human Capital and Compliance

April 30, 2025

For more information, contact:

Tessa Cranfield

+44 20 7551 7567

tcranfield@kslaw.com

Marie Hoolihan

+44 20 7551 7587

mhoolihan@kslaw.com

King & Spalding

London

8 Bishopsgate

London, EC2N 4BQ

United Kingdom

T. +44 20 7551 7500

What is 'Gender' Under the Equality Act? Landmark Ruling – but Controversy Continues.

LANDMARK RULING ON GENDER – WHAT SHOULD EMPLOYERS DO NOW?

In a major ruling, the UK's Supreme Court has held that 'sex' under the UK Equality Act means biological (birth) sex. This is regardless of whether an individual has legally changed gender with a Gender Recognition Certificate.

The ruling was in a case brought by an activist group to challenge the Scottish Government's approach that female gender targets for the make up of public boards should include trans women (biological men). This was the final decision in years of dispute and litigation and means that for purposes of Equality Act protections, protections apply based on biological sex.

The case did not relate specifically to employment. It still leaves certain points open and subject to EHRC (equalities body) guidance which is now subject to a public consultation ending mid-May. However, the judgment has already proved highly controversial in what was already a polarised debate. This has resulted in litigation and payouts to both trans and 'gender critical' employees.

What are employers' immediate actions?

The interim EHRC guidance currently suggests that employers must limit access to washrooms and changing rooms based on biological (birth) gender – e.g. limiting women's bathrooms to biological women at the risk of discrimination or harassment claims by those women. It also states that trans people should not be put in a position where there are no facilities for them to use. There is no guidance on the practicalities of this if a workplace does not provide for separate (individually lockable) washrooms to accommodate trans people who do not want to use the washrooms of their biological gender.

- The same principles would apply to access to single-sex resource groups such as a group targeted at women or potentially, lesbians or gay men. This is based on there being freedom of association for (biological) women and men. Many companies are already more flexible – for example in allowing men to join their predominantly women’s resource group and in broadening LGB groups to cover LGBTQI+.
- However employers should tread carefully. Policing access to these facilities and groups may reveal a trans person’s biological gender. For an individual with a gender recognition certificate this is a criminal offence. Unisex spaces are an alternative provided a self-contained room (i.e. not a cubicle in a larger washroom).
- Employers who currently allow employees to report gender based solely on self-identification should review this. For certain purposes such as justifying positive action, biological sex is now needed. For other purposes such as gender pay gap reporting, it appears that employers should continue to follow an employee’s own self-identification of their gender. There are questions as to whether ERGs/ affinity groups can limit membership based on biological gender – but many employers already take an inclusive approach in allowing men to take part in female-focused groups, on which basis it would be direct sex discrimination to exclude trans women in any event.
- Some employers – in particular in certain sectors – have in the past made the mistake of showing more sympathy to one group (e.g. trans) over (gender critical – or vice versa). Given tensions are running high it is more important than ever to show an even-handed approach and to bring in outside experts for advice and potentially to run investigations where clashes occur. Employers should consider a proactive message of reassurance to all staff and a reminder of social media policies as employees who feel vulnerable are more likely to be drawn into online debates over this period.

What is not changing?

- The judges were at pains to make clear that this ruling does not reduce the specific protection for trans people in terms of protections against harassment or indirect discrimination. Trans employees will still be able to rely on the gender reassignment being a protected characteristic under the Equality Act. This protection applies to employees in the process of transitioning broadly - whether or not they have undertaken medical treatment.
- Although a trans person could not bring a direct discrimination claim based on their trans (versus biological or birth) gender, they would have a claim if discriminated against based on a perception that they were of their new, trans gender. They may also be protected against indirect discrimination where trans people face the same disadvantage as the group with which they identify – for example a policy or practice disadvantaging older women which also impacts trans women.
- There is also no change to the existing ‘genuine occupational requirements’ justifying limiting roles to a specific gender – for example a personal care assistant.

This continues to be a highly sensitive area. Employers will feel caught between the interim EHRC guidance suggesting they must limit access to single sex facilities versus the need to show accommodation and sensitivity to all groups. We will update on the EHRC guidance when published and in the meantime employers should seek advice to de-fuse potential conflicts.

For Women Scotland v the Scottish ministers

REMOTE WORK AND CHANGES TO MEDICAL COVER NOT IN BREACH OF TUPE

In a helpful case for employers, an Employment Tribunal has held that a change to remote work and alterations to medical insurance which would end children’s coverage at a younger age were not material detriments entitling an

employee to resign with compensation as part of a TUPE transfer. As context, TUPE gives employees extra protections against detrimental changes related to the transfer which can be an issue when bringing them into the new employer's policies and working practices.

The claimant worked on a hybrid basis, splitting his time between home, the office (which was not part of the sale) and visiting customers. Following the transfer he would be fully home-based and moved to a new health insurance scheme with some changes in coverage.

The Tribunal found it was not reasonable view these changes as material detriments in the circumstances, particularly in light of the claimant's existing medical conditions. He had resigned before the TUPE transfer took place which restricted the new employer's ability to assist him, including exploring the possibility of working at another office in the region.

Neither change amounted to a breach of contract, highlighting the benefit of retaining flexibility in the drafting of employment contract. The contract included a mobility clause under which his place of work could be changed within a reasonable travelling distance. His contract entitled him to family medical cover but not the specifics of the underlying insurance policy. The new employer was entitled to rely on that contract flexibility.

MacMurray v Aegon UK Corporate Services Ltd, 3304563/2024

JOB APPLICANTS NOT PROTECTED AS WHISTLEBLOWERS

The Court of Appeal has clarified that an external job applicant is not protected based on whistleblower status. The case concerned an unsuccessful applicant who claimed to have been subjected to a detriment because of past concerns they had raised about senior personnel on the interviewing panel, in a separate capacity. This ruling excludes applicants to the National Health Service for reasons of "*patient safety and treatment*".

The decision provides clarity that external job applicants do not have the same whistleblowing protections as employees, workers, or external NHS job applicants.

Sullivan v Isle of Wight Council (Department of Business and Trade and Protect intervening) [2025] EWCA Civ 379

ABOUT KING & SPALDING

Celebrating more than 140 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,300 lawyers in 24 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

View our [Privacy Notice](#).