Single-sex facilities in the workplace: controversy without clarity

Bringing further controversy and uncertainty to how employers should balance competing protected characteristics, a Scottish employment tribunal has held that NHS Fife Health Board unlawfully harassed a female nurse, including by allowing a transgender doctor to continue to use the female changing room after the nurse complained (*Peggie v NHS Fife Health Board and another ETS/4104864/24*).

This is one of the first tribunal rulings in this area following the Supreme Court ruling in *For Women Scotland Ltd v The Scottish Ministers* (*[2025] UKSC 16; see News brief "Supreme Court ruling on definition of "woman": implications for employers", www.practicallaw.com/w-046-7242*). The *Peggie* decision, which will be appealed, has been widely criticised for a number of reasons, including speculation that quotes within the judgment were AI hallucinations (*see box "Judgment errors"*). Despite the controversies, employers can draw a number of practical lessons from the case.

Judgment errors

The judgment in *Peggie v NHS Fife Health Board and another* has faced significant criticism over a number of misquotes and other errors that are contained in it (*ETS/4104864/24*). These include statements of law that were attributed to previous decisions that either did not exist or had been altered to change their meaning. For example, direct quotes that were attributed to the Employment Appeal Tribunal in *Forstater v CDG Europe and others*, and to the Supreme Court in *Lee v Ashers Baking Co Ltd and others*, were not contained in those judgments and a key word from the judgment in *For Women Scotland Ltd v The Scottish Ministers* was deleted and context was removed so that the original meaning was reversed (*UKEAT/0105/20, see News brief "Protection of gender-critical beliefs: balancing inclusivity", www.practicallaw.com/w-036-3685; [2018] UKSC 49, see News brief "Direct discrimination in supply of services: it's not straightforward", www.practicallaw.com/w-017-1280; [2025] UKSC 16; see News brief "Supreme Court ruling on definition of "woman": implications for employers", www.practicallaw.com/w-046-7242*).

The tribunal took the unusual step of issuing a certificate of correction on 11 December 2025 to remedy the *Forstater* misquote and, on 23 December 2025, made a further 11 changes to correct "clerical" mistakes, errors and omissions. Some commentators have speculated that the pattern of errors suggests that the judgment was AI-generated and raised concerns that this undermines confidence in the legal analysis in *Peggie*. In previous cases, the courts have taken a robust approach to the inclusion of false information in legal pleadings resulting from the use of AI (*Taiwo v Homelets of Bath Ltd and others [2025] EWHC 3173 (KB); see News brief "Warnings on AI-generated false authorities: risks for practitioners", this issue*).

Changing room incident

Nurse Sandie Peggie was suspended after objecting to sharing the female changing room with Dr Beth Upton, who had a male birth certificate but had identified as female since around January 2022. The parties agreed that Dr Upton had the protected characteristic of gender reassignment. After the suspension, NHS Fife launched an investigation into complaints by Dr Upton relating to comments that Ms Peggie made when encountering Dr Upton in the changing room and incidents where it was claimed that she had avoided dealing with Dr Upton in the department, allegedly affecting patient safety.

Following a year-long investigation, Ms Peggie was invited to a disciplinary hearing. The hearing eventually took place 18 months after the initial suspension and concluded that there was insufficient evidence to support the allegations against her. However, NHS Fife noted that a registered nurse was expected to have the skills "to de-escalate" such a situation and therefore a "facilitated reflective practice discussion" was arranged to consider her approach in relation to the changing room incident.

Ms Peggie brought tribunal proceedings alleging harassment, victimisation, and direct and indirect discrimination against NHS Fife and Dr Upton.

Tribunal findings

The tribunal found that NHS Fife had harassed Ms Peggie by:

- Failing to revoke permission for Dr Upton to use the female changing room between September 2023, when Ms Peggie complained about Dr Upton's use of the changing room, and April 2024. This had resulted in two encounters between Dr Upton and Ms Peggie.
- Taking an unreasonable length of time to investigate the allegations, finding that a reasonable period of time was not more than six months.
- The manner in which she was made aware of the patient care allegations.
- Instructing her not to discuss the case, until a later message clarified that the instruction applied only to the investigation, not the litigation.

Ms Peggie's other claims failed.

Access to single-sex changing rooms

In *Peggie*, the tribunal said that the Supreme Court in *For Women Scotland* had not been dealing with the question of whether biological males should be excluded from female changing rooms but was considering the meaning of the words "man", "woman" and "sex" in the Equality Act 2010 (2010 Act). It took the view that barring Dr Upton from the female changing rooms would prioritise the rights of women over the rights of those with the protected characteristic of gender reassignment. The tribunal said that, in dealing with conflicting rights at work, the correct approach is to follow a four-stage proportionality exercise based on the Supreme Court's analysis in *Bank Mellat v HM Treasury (No 2)* (*[2013] UKSC 39*) (*see feature article "Conflicts of belief in the workplace: forging a path", www.practicallaw.com/w-040-3874*). This looks at whether:

- The objective of the measure is sufficiently important to justify the limitation of a protected right.

- The measure is rationally connected to the objective.
- A less intrusive measure could have been used without unacceptably compromising the achievement of the objective.
- When balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (the balance test).

The tribunal concluded that, before September 2023 when Ms Peggie first complained, NHS Fife was not aware and could not reasonably have been aware of Ms Peggie's concerns, and therefore granting Dr Upton permission to use the female changing room was the least intrusive measure at that point. However, once Ms Peggie had raised concerns, NHS Fife should have revoked the permission until a longer-term solution could be found; that is, arranging Ms Peggie's and Dr Upton's shifts so that they would no longer be rostered together. The tribunal considered that, after this, Dr Upton could again be allowed into the female changing room.

Controversies

The decision in *Peggie* is highly controversial and several aspects of the judgment may be susceptible to challenge, either in this case or a future one. In essence, it suggests that, in some circumstances, allowing employees to access single-sex facilities on the basis of their gender identity may be lawful and, in some cases, it may constitute harassment and/or discrimination. This leaves employers in a difficult position.

1992 Regulations. The tribunal disregarded the Workplace (Health, Safety and Welfare) Regulations 1992 (*SI 1992/3004*) (1992 Regulations), finding that they do not give specific protection to women and stating that the tribunal did not have jurisdiction to enforce them. The 1992 Regulations require employers to provide single-sex changing facilities where employees need to remove more than outer clothing, and single-sex toilet and washing facilities.

While the tribunal is not responsible for enforcing the 1992 Regulations, there are cogent arguments that their requirements are, at the very least, relevant considerations in the context of an employer's objectives, an employee's expectation of the provision of single-sex facilities and the *Bank Mellat* balance test. Indeed, in the recent decision in *Hutchison and others v County Durham and Darlington NHS Trust*, an employment tribunal held that an NHS trust's policy of allowing access to single-sex changing rooms on the basis of gender identity was an unlawful breach of the 1992 Regulations, and led to findings of harassment and discrimination (*ET/2501192/2024; see News brief "The right to single-sex facilities at work: no competition", this issue*).

Article 8 rights. The tribunal interpreted case law on the right to respect for private and family life under Article 8 of the European Convention of Human Rights (Article 8) as including the right to access single-sex services on the basis of gender identity, and then engaged in the *Bank Mellat* proportionality test on this basis. Some commentators have pointed out it is far from settled that there is such a right and the tribunal did not provide reasoning for this interpretation, whereas *For Women Scotland* provides Supreme Court authority on the importance of maintaining the availability of single-sex spaces under the 2010 Act, including changing rooms. In *Hutchison,* the tribunal found that the transgender colleague's Article 8 rights were not engaged, and so there were no competing rights to balance.

Onus on employees to object. The tribunal rejected Ms Peggie's indirect discrimination claim on the basis that there was no evidence of group disadvantage for women because nobody other than Ms Peggie had officially complained. In addition, the tribunal suggested that there would be no harassment unless and until an employee were to complain.

Critics of the decision say that this sets an unrealistically high bar for indirect discrimination as it treats the absence of formal complaints as evidence that there was no group disadvantage. Rather than applying the test of whether a protected characteristic puts a group at a particular disadvantage, it risks turning indirect discrimination into a test about who is willing to make a complaint. Similarly, the legal test for harassment turns on unwanted conduct, rather than whether there has been an official complaint. In *Hutchison*, the tribunal accepted that there was group disadvantage and that it was unrealistic to expect everyone who was affected to complain, particularly as there was a reticence on the part of women to voice their objections.

Employee privacy. The tribunal said that, when applying the balance test under *Bank Mellat*, the stage at which a person's transition has reached should be taken into consideration; that is, what, if any, "change to a trans person's physiological attributes of sex have been made, to the extent that the trans person chooses to disclose them". The tribunal said that "it is an indicator that the balance test may be met in respect of such granting of permission where the physiological attributes of sex have been changed than where they have not, either fully or at all".

This approach puts the onus on employers to ask employees deeply personal and intrusive questions. It is difficult to see how this is justified given that the information could not realistically be disclosed to female colleagues and it is, in any event, doubtful whether they would feel any more comfortable. The prevailing trend is that rights should not depend on medical transitioning, which may entail risks and side effects. Some transgender employees may also be uncomfortable with the implication that their gender identity must be "proved" through medical steps and may feel pressured to disclose intimate details in order to avoid being perceived as less genuine or their gender identity as less valid.

Practical lessons for employers

Regardless of the outcome of *Peggie*, the case raises a number of practical issues for employers to consider.

Policies and alternative facilities. In *Peggie*, there were no policies dealing with the issue of who could use which facilities, with the result that concerns had to be addressed reactively. In practice, an approach that respects the rights and concerns of all protected groups is preferable. This will usually include establishing separate male and female changing rooms that comply with the 1992 Regulations and, wherever possible, alternative gender-neutral facilities, as well as clear guidance on their use.

Proactively address issues. Ms Peggie first raised concerns informally with her

manager. There was a two-month delay in responding and, when Ms Peggie expressed unhappiness with the response, she was not directed to the grievance procedure and there was no consideration of other options such as facilitated discussions or altering shift patterns. The tribunal found that Dr Upton would have been amenable to interim measures while matters were resolved, such as changing shift patterns or changing elsewhere. NHS Fife's lack of proactive attempts to address the situation arguably led Ms Peggie to speak directly with Dr Upton when they later met in the changing rooms. Had NHS Fife responded promptly and directed Ms Peggie on how to complain formally, this incident might have been avoided.

Timescale for investigations. While some delays may be unavoidable, the 12 months taken to investigate was unacceptably long, particularly given that the patient safety allegations could have affected Ms Peggie's ability to practice.

Equality of support. There was an imbalance between the treatment of Dr Upton and Ms Peggie; for example, senior managers expressed support for Dr Upton and condemnation of Ms Peggie before any investigation had taken place. In addition, the limited updates and lack of support that Ms Peggie received from NHS Fife stood "in stark contrast to the materially higher level of support" and regular updates that Dr Upton received.

Expression of belief. *Peggie* is one of the few decisions dealing with expressions of belief in the workplace, as opposed to social media use, between an employee with gender critical beliefs and a transgender colleague. Ms Peggie was entitled to state her belief that Dr Upton should not use the female changing room, that she felt intimidated and that women have a right to feel safe. However, the tribunal considered that some of Ms Peggie's statements were impermissible expressions of her belief, such as an analogy drawn with a high-profile case of a transgender prisoner housed in a female prison. The factual context will always need to be considered on a case-by-case basis, but the degree of latitude that is permissible on social media may not be the same in the workplace when speaking to a transgender colleague.

Sexual harassment. Employers should also be alive to the duty to take reasonable steps to prevent sexual harassment, which applies to "conduct of a sexual nature", and the forthcoming strengthening of this duty under the Employment Rights Act 2025 to require employers to take "all" reasonable steps (*see feature article "Employment Rights Act 2025: rights, rules and remedies", this issue*).

While the tribunal in *Peggie* rejected an argument that Dr Upton's conduct constituted sexual harassment, this would be a risk on different facts. Therefore, employers should factor the possibility of sexual harassment claims into any risk assessment concerning single-sex spaces.

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