

A photograph of three business professionals (two men and one woman) sitting at a table in a modern office or cafe at night. They are working on laptops and talking. The background is dark with city lights visible through the windows. The image is partially covered by a dark green overlay at the bottom.

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July Power Hour

10th July 2025

Lowri Phillips, Joga Singh & Sue Jennings

Agenda

- For Women Scotland Ltd Supreme Court Decision and EHRC Interim Guidance
- Case law and Legislation Update
- Employment Rights Bill Roadmap

For Women Scotland Ltd
v
Scottish Ministers [2025]



Background to the case

- For Women Scotland Ltd, challenged the statutory guidance issued by the Scottish Ministers under the Gender Representation on Public Boards (Scotland) Act 2018
- The guidance stated that a trans woman with a full Gender Recognition Certificate (GRC) should be treated as a woman for the purposes of achieving the gender representation objective of 50% women on public boards
- For Women Scotland argued that this interpretation was unlawful and outside the legislative competence of the Scottish Parliament

Key issues

- The central question was whether the Equality Act 2010 (“**EqA**”) references to “sex,” “man,” “woman,” “male,” and “female” should be interpreted in light of the Gender Recognition Act 2004, which allows a person to change their legal sex by obtaining a GRC

Judgment

- On 16 April 2025, the UK Supreme Court reached the unanimous decision that the terms “*man*”, “*woman*” and “*sex*” in the EqA refer to a biological man, a biological woman and biological sex
- Therefore, the legal definitions of “*man*” and “*woman*” do not include transgender men and transgender women, even following a GRC

Following Judgment

- Effects of this Judgment will be far reaching but are yet to be fully understood
- Most common initial concern relates to single sex toilets and other single sex spaces
- ECHR interim guidance
- Full draft code to be laid before Parliament after the summer

Health and Safety Obligations

- Section 21 of *The Workplace (Health, Safety and Welfare) Regulations 1992*
- Duty on employers to provide **separate**, suitable and sufficient washing facilities, including showers if required, for men and women
- Exception when each toilet is in a separate lockable room intended to be used by only one person at a time

EHRC interim guidance

- Interim update from EHRC on 25 April 2025
- Described as “*a snapshot reflection, rather than full guidance*”
- Code of Practice awaited
- Not expected to be significantly different from interim position

EHRC interim guidance

Single Sex Facilities

- *trans women (biological men) should not be permitted to use the women's facilities and trans men (biological women) should not be permitted to use the men's facilities, as this will mean that they are no longer single-sex facilities and must be open to all users of the opposite sex*
- *in some circumstances the law also allows trans women (biological men) not to be permitted to use the men's facilities, and trans men (biological woman) not to be permitted to use the women's facilities*

EHRC interim guidance

Single Sex Facilities

- *however where facilities are available to both men and women, trans people should not be put in a position where there are no facilities for them to use*
- *where possible, mixed-sex toilet, washing or changing facilities in addition to sufficient single-sex facilities should be provided*
- *where toilet, washing or changing facilities are in lockable rooms (not cubicles) which are intended for the use of one person at a time, they can be used by either women or men*

Potential Claims

- You allow employees to use the toilet which they consider most closely aligned to them regardless of their biological gender
 - Breach of Health and Safety legislation
 - Claim of discrimination from woman or man – based on sex or religious or philosophical belief

Potential Claims

- You exclude trans employees from single-sex facilities of their choice
 - Claim of discrimination from trans employee – based on gender reassignment
 - Potential justification?
 - What if they refuse? How will you deal with it?

Problem Areas

- Colleagues unaware that their colleague is trans gender
 - E.g. a trans man has been using a male facilities for lengthy period with no complaint
 - Will you now require them to use the women's toilets?
 - Grievances are likely
 - What if there are no suitable gender-neutral facilities?

Key Takeaways

- This is a difficult and divisive issue
- New statutory guidance dealing with practical situations and solutions is needed urgently
- Employers will likely await the full guidance from the EHRC before updating any internal policies
- Employers will as far as possible need to ensure that toilets and changing facilities are compliant with the interim guidance
- Needs to be handled sensitively so as to minimise distress to any affected staff

Case Law & Legislation Update



Ofsted v Hewston [2025] EWCA Civ 250 (Unfair dismissal – procedural unfairness)

Background

- Employee employed since 2007 as OFSTED inspector
- During inspection, brushed water off pupil & touched shoulder
- Report to LADO & complaint letter to employer
- Dismissed – gross misconduct
- Unfair dismissal claim brought
- ET dismissed claim
- EAT disagreed – dismissal substantially & procedurally unfair

Ofsted v Hewston [2025] EWCA Civ 250 (cont'd)

Court of Appeal decision

- EAT decision upheld
- Substantive unfairness:
 - Whether employee appreciated actions could = dismissal
 - Absence of “no-touch” policy
 - Employee’s attitude vs substantive conduct
- Procedural unfairness:
 - Employee not shown documentation – subsequent decision unfair?

Ofsted v Hewston [2025] EWCA Civ 250 (cont'd)

Takeaways

- Important for employee to appreciate actions could lead to dismissal
 - Relevant policy key starting point
- Employee's attitude usually not valid reason to “bump up” seriousness of employee's conduct
- Good practice to disclose relevant documents to employee during disciplinary process

Hindmarch v North-East Ambulance NHS Foundation Trust [2025]

Background

- The case considered an employer's requirement to make reasonable adjustments for an employee with severe anxiety
- Claimant working in patient transport services refused to return to work during COVID-19 pandemic unless employer provided FFP3 mask rather than standard issue mask provided to non-emergency drivers
- Claimant maintained that this mask would help him manage his anxiety about catching COVID-19 when transporting infected patients
- Claimant never guaranteed that he would return to work if one was provided
- Employer declined, relying on national guidance and medical advice that FFP3 mask would not provide meaningful additional protection in his role, and would likely not ease his clinically significant anxiety

Hindmarch v North-East Ambulance NHS Foundation Trust [2025]

Tribunal and Court of Appeal decision

- The tribunal rejected both the claims of failure to make reasonable adjustments and unfair dismissal. It found that providing the FFP3 mask would not have removed the disadvantage or enabled Mr Hindmarch to return to work
- The Claimant appealed this decision
- Court of Appeal upheld the decision, noting that the duty to make adjustments under the Equality Act only arises where there is a **realistic prospect that the adjustment would be effective**

Hindmarch v North-East Ambulance NHS Foundation Trust [2025]

Key Takeaways

- Employers must consider requests for adjustments carefully
- BUT they are not required to implement a change if this is unlikely to address the core disadvantage
- The effectiveness of the adjustment is the central concern for the purposes of the Equality Act

Stedman v Haven Leisure [2025] EAT 82

Diagnosis of ADHD or autism – disability?

Background

- Mr Stedman - diagnosis of Autism Spectrum Disorder & ADHD
- Unsuccessful job application with Haven as Animation Host
- Claimed disability discrimination re handling of application
- Tribunal had to consider whether he was a disabled person

Stedman v Haven Leisure [2025] EAT 82 (cont'd)

EAT decision

- Clinical diagnosis of ADHD/autism could be evidence not just of existence of an impairment **but also of its impact**
- Clinical diagnosis means that person has been judged by clinician to have significant difficulties with certain areas of functioning
- Substantial adverse effect:
 - on just one day-to-day activity
 - correct comparison is between the person with the impairment and how they would be without it

Stedman v Haven Leisure [2025] EAT 82 (cont'd)

Key takeaways

- Reminder to audit and review recruitment practices
- Awareness and training for managers on neurodiversity
- ACAS Guidance on Neurodiversity in the Workplace

Duncan v Fujitsu Services Ltd [2025] EAT 44 (Disability discrimination)

Background

- Employee with ADHD & Autistic Spectrum Disorder - disability
- Dismissed for sending inappropriate & offensive messages
- ET – comments = something arising in consequence of disability but dismissal “proportionate response” to some of employer’s aims
- Employee appealed

EAT decision

- Appeal dismissed – ET followed correct approach
- Balancing exercise – dismissal proportionate means of achieving legitimate aim and considered alternatives to dismissal

Duncan v Fujitsu Services Ltd [2025] EAT 44 (Disability discrimination)

Key takeaways

- Follow disciplinary process thoroughly
- Document decisions carefully
- Give careful consideration to legitimate aims, whether sanction is proportionate, whether lesser sanction suitable
- Take into account any relevant medical evidence
- Consider if reasonable adjustments needed to disciplinary process

Statutory neo-natal pay and leave

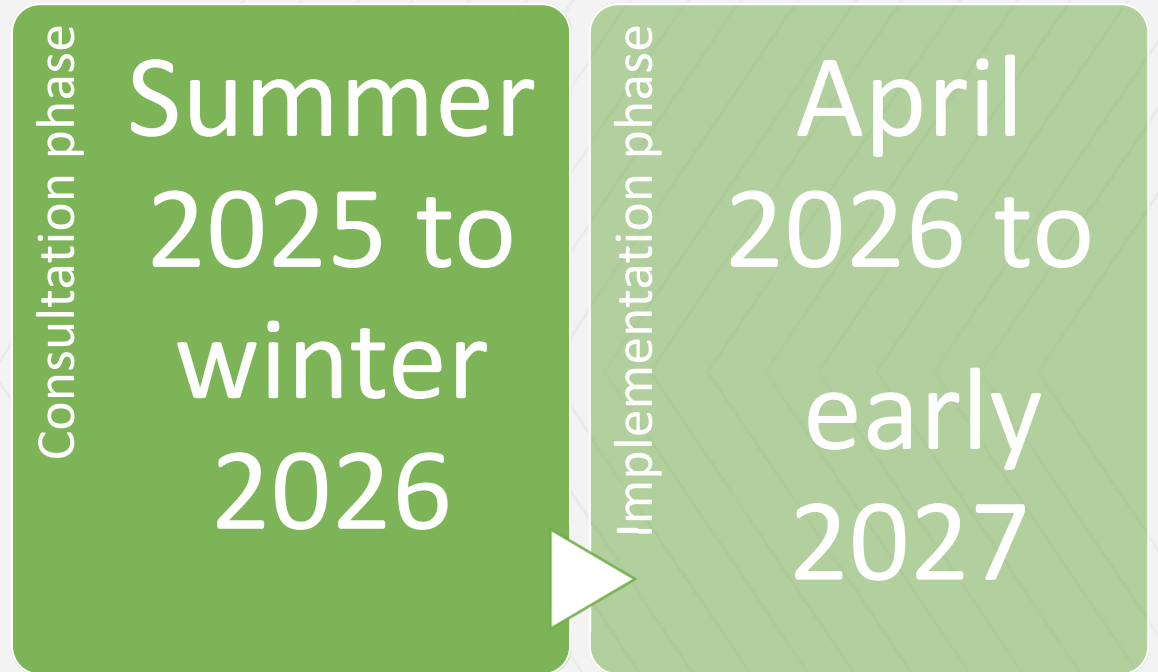
- As of 6 April 2025, statutory neo-natal pay and leave is now a day one right for parents whose children need neo-natal care
- Neonatal care is the name given to care for newborn babies which starts in the first 28 days after birth. This may be for:
 - hospital care
 - medical care after leaving hospital - this must be under a consultant and include ongoing visits or checks arranged by the hospital where your baby was treated
 - palliative or end of life care

Statutory neo-natal pay and leave

Key takeaways

- Ensure policies are in place or are updated to reflect the new statutory entitlement
- Ensure proper training has been provided to managers and HR on the new entitlement
- Communicate the new entitlement to employees and manage expectations, particularly for those employees where their baby is born prior to 6 April and requires neonatal care

Employment Rights Bill – Road Map



Consultation Phase



Summer/ Autumn 2025

The government will consult on:

- Reinstating the School Support Staff Negotiating Body
- Fair Pay Agreement for the Adult Social Care sector
- Unfair dismissal as 'day 1' right
- Statutory probation period

Autumn 2025

The government will consult on:

- Trade union measures
- Fire and rehire
- Regulation of umbrella companies
- Bereavement leave
- Rights for pregnant workers
- Ending the “exploitative” use of Zero Hours Contracts

Winter/early 2026,

The Government will consult on:

- Further trade union measures
- Tightening tipping law
- Collective redundancy
- Flexible working

Consultation phase

- Some measures may require more than one round of consultation
- Code of Practice
- Commencement timings
- Stakeholders –employers, workers, trade unions.

Implementation Phase



When measures will take effect

- Policy measures will take effect in phases
- 6th April and 1st October?
- Impact determined during consultations

Measures that will take effect at Royal Assent or soon afterwards include:

- Repeal of the Strikes (Minimum Service Levels) Act 2023
- Repeal of the great majority of the Trade Union Act 2016
- Removing the 10-year ballot requirement
- Simplifying industrial action ballot notices
- Protections against dismissal for taking industrial action

Measures that will take effect in April 2026 include:

- Increase in collective redundancy protective award
- 'Day 1' Paternity Leave and Unpaid Parental Leave
- Whistleblowing protections
- Fair Work Agency body established
- Statutory Sick Pay changes
- Simplifying trade union recognition process
- Electronic and workplace balloting

Measures that will take effect in October 2026 include:

- Fire and rehire
- Fair Pay Agreement Adult Social Care Negotiating Body
- Tightening tipping law
- Right to join a trade union
- Trade unions' right of access

Measures that will take effect in October 2026 cont:

- Sexual harassment – “all reasonable steps”
- Protection from harassment by third parties
- New rights and protections for trade union reps
- Employment tribunal time limits
- Protection against detriments for taking industrial action

Measures that will take effect in 2027 include:

- Gender pay gap and menopause action plans
- Rights for pregnant workers
- Sexual harassment – identify “all reasonable” steps
- Blacklisting
- Industrial relations framework
- Regulation of umbrella companies

Measures that will take effect in 2027 cont:

- Collective redundancy & consultation threshold
- Flexible working
- Bereavement leave
- Ending exploitative use of zero hours contracts
- Unfair dismissal – ‘Day 1’ right

Key takeaways

- The first phase of implementation is only 9 months away
- Updating contracts and policies
- Identify business needs
- Staff on zero hours contracts
- Training managers

Any questions?



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Lowri Phillips

Partner

+44 (0) 29 2039 1758
Lowri.Phillips@geldards.com



Sue Jennings

Senior Associate

+44 (0)1332 378 304
Sue.Jennings@geldards.com



Joga Singh

Partner

+44 (0) 29 20 386 549
Joga.singh@geldards.com

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Thank You

www.geldards.com
info@geldards.com