Mrs Sandie Peggie v Fife Health Board and Dr Beth Upton

Employment Tribunal – hearing

Case number: 4104864/2024

WRITTEN INTERVENTION BY FOR WOMEN SCOTLAND

For Women Scotland v The Scottish Ministers [2025] UKSC 16
https://supremecourt.uk/uploads/uksc_2024_0042_judgment_updated_16f5d72e76.pdf

As directors of the organisation that brought this case to the UK Supreme Court we would like to raise our concerns regarding the following three exchanges during the Peggie v NHS Fife and Dr Upton (4104864/2024) case currently being heard in Dundee.

1. 16 July, approx 3:03pm:
   Jane Russell KC for NHS Fife stated that the FWS judgment is an abstract case regarding representation on public boards in Scotland and does not concern toilets etc. (https://x.com/tribunaltweets/status/1945484381335756952)

2. 23 July, approx 2:36pm:
   Ms Russell: **Dr Upton is not a man**, she is a transwoman.
   Ms Cunningham: Dr Upton is a transwoman and transwomen are men, certainly for the purposes of the Equality Act as we know from For Women Scotland. Legally speaking, a transwoman is a man, so there was a man in the women's changing room.
   Ms Russell KC: **I do not agree with that summary of For Women Scotland**, but I will address you about that in submissions.
   Judge Kemp: **I think that's a contentious matter, what exactly For Women Scotland says and what it means**. I think it would be appropriate to put this on a hypothesis that you have outlined - on the **hypothesis** of what you say is correct in law. That would be appropriate. But **until we have had the opportunity of hearing all the submissions** and making our decision on that, **this is a point in dispute**.

3. 24 July, approx 12:54pm
   Ms Cunningham: And that was because Sandie Peggie was guilty of essentially the same heresy that has so exercised Ms Russell in being prepared to say that Dr Upton was a man?
   Ms Russell: I object to that question. It is not heresy It is xxx [several words unclear], there's a line of jurisprudence regarding Article 8. It is offensive to do what Ms Cunningham is doing which is to refer to Dr Upton in these terms, and in particular to call Dr Upton a man. **Dr Upton is not a man. FWS doesn't say so.** And I am very concerned about the latitude being given to Ms Cunningham to be so offensive in court.

The first exchange is simply not factually correct and we are surprised there was no correction by the tribunal. Paragraph 8 of the UKSC judgment specifies the appeal was principally concerned with the Equality Act 2010 and the effect, if any, of the Gender Recognition Act 2004 on the interpretation of the terms “sex, “woman” and “man”. The ruling on the definition of these words applies throughout the entirety of provisions covered by the Equality Act and is not restricted to one single use of a positive action measure, nor is the ruling restricted only to Scotland.

In the second and third exchanges, Ms Cunningham was factually correct in her statement that Dr Upton is a man under the Equality Act, in accordance with the For Women Scotland ruling by the UK Supreme Court. This should not be a point in dispute by the court, nor regarded as contentious or a hypothesis to be tested. The following excerpts from the judgment puts it beyond doubt that, without a Gender Recognition Certificate (GRC), Dr Upton is a man under all law, and is a man under the Equality Act even if in possession of a GRC:

> *“The focus of this appeal is not on the status of the large majority of trans people who do not possess a full GRC. Their sex remains in law their biological sex.”*
> (Paragraph 26)

> *“..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. In other words, in relation to sex discrimination (for the purposes of sections 11 and 212(1)), a person with the protected characteristic of sex has the characteristic of their biological sex only…**a trans woman with a GRC** (biologically male but legally female for those purposes to which section 9(1) [of the GRA 2004] applies), **is a man and not entitled to be treated as a woman under the EA 2010**.” [emphasis added]*
> (Summary on the Equality Act, Paragraph 264)

It is simply not a stateable argument for Ms Russell to propose that For Women Scotland does not say that Dr Upton is a man. It may well be a matter for the court to decide whether the Supreme Court judgment has any applicability to the case in hand, but it is not open for Ms Russell, or the tribunal, to contest the findings of the apex court.

We are concerned about two things, firstly that closing submissions may attempt to re-litigate our case and debate the definitions of “sex, “woman” and “man” in the Equality Act, when these are settled matters in law. And secondly, that if the tribunal does not make it clear to the parties (and the viewing public) that “what exactly For Women Scotland says” is in fact clear and settled law and not “contentious”, “a hypothesis” or “in dispute” then it may render the judgment open to appeal on any point where Dr Upton’s sex is relevant.

Trina Budge, Marion Calder and Susan Smith
For Women Scotland
28 July 2025