

Insights

NO PLACE AT THE (POOL) TABLE FOR TRANS WOMEN - HAYNES V THE ENGLISH BLACKBALL POOL FEDERATION

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We report this week on one of the first court decisions dealing with transgender issues since the publication of the Supreme Court's ruling in *For Women Scotland v Scottish Ministers* (FWS). The FWS decision confirmed that words such as "sex", "woman", "male", and "female" in the Equality Act 2010 (EqA) referred exclusively to biological women, men and sex, and do not apply to transgender individuals. Accordingly, a transgender woman, who is a biological man, is not a woman under the EqA. Following a trial which took place in April of this year, the parties were invited to file written submissions about the effect of the FWS decision on this case.

In this case, brought at the county court, the claimant was a professional English eight-ball pool player and trans woman. They possessed a Gender Recognition Certificate.

In August 2023, the English Blackball Pool Federation (EBPF) changed its rules, and only people who were biologically female would be permitted to play in its female teams and competitions. Prior to this, the claimant played for the EBPF's Kent women's team. This rule change meant they could no longer play, although they could play in the men's team.

The claimant brought proceedings asserting that this exclusion was direct discrimination on grounds of gender reassignment, in breach of the EqA.

The defendants raised three defences:

- First, they denied that the new rules discriminated against the claimant because of gender reassignment. They argued they were excluded because they were biologically male and if they had been a transgender person who was biologically female, they would not have been excluded. They argued the exclusion was discrimination on grounds of sex (their exclusion was based on their male sex, not their trans status) and sex discrimination had not been pleaded. Accordingly, they argued, the claim should be dismissed;
- Secondly, the defendants argued that there was no unlawful discrimination because the game of pool is a "gender-affected activity" under s195 of the EqA and therefore the changes to the rules were necessary to secure fair competition. This essentially means that pool is a

game where biological sex puts one sex at a disadvantage – for example, in the game of pool physical reach, based on height and length of limbs, is important, and biological men have a longer reach than biological women, giving them an advantage; and

- Thirdly and finally, the defendants argued that the revised rules were justified as a proportionate means of achieving a legitimate aim. The aim was “promoting the integrity of the game through fairness of competition and diversity through inclusion of females in the game of pool”.

The claim was dismissed. The court held that the effect of the FWS decision is that the claimant’s exclusion was a matter of sex discrimination, not gender reassignment discrimination. The claim fell at the first hurdle because there was no gender reassignment discrimination.

In reaching its decision, the court also considered comparators, noting that, in light of the obiter comments in FWS, the correct comparator for the claimant was someone of the same sex without the protected characteristic of gender reassignment. That would have been a biological man who, in these circumstances, would also have been excluded from the female category for pool teams and competitions and the claimant was unable to show different/less favourable treatment.

The court considered carefully whether English eight-ball pool was a gender-affected activity. Having considered the relative strength and reach (amongst other physical differences) of the average man against the average woman, the court concluded that the average woman was at a disadvantage when competing against the average man in this sport and therefore that it was a gender-affected activity.

The court held there was no reasonable alternative way of achieving fair competition short of exclusion, so if even this case were one of gender reassignment discrimination, the court would have said that the exclusion of the claimant was justified under the gender affected provision of the EqA.

The court finally considered the defendants’ case that the exclusion of trans women from female competitions was a proportionate means of achieving legitimate aims - the aims being to ensure fairness of competition and diversity through the inclusion of females. In respect of the first aim, the court found that fairness of competition is undoubtedly a legitimate aim and if exclusion is necessary to achieve fairness (as it had been found in this case), then it must be a proportionate means of doing so. In respect of the second aim, the court accepted that women have been under-represented among pool players and encouraging greater female participation is a clearly legitimate aim. However, they did not accept that excluding trans women from female competitions would be a proportionate means of achieving this aim, were it not for the need to achieve fair competition.

This case is the first application of the FWS decision in the world of sport. It goes some way to clarifying the legal landscape after the FWS decision, as the Supreme Court made clear that issues

relating to biological sex fall under sex discrimination, not gender reassignment discrimination. It also provides some helpful guidance in the context of gender-affected activities.

Finally, as most sports are probably more “gender affected activities” under s195 of the EqA than pool, this case may be a harbinger of things to come.

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