Employment Law

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South Africa

- Does paying an employee during suspension avoid a CCMA compensation award?
- "*Dishonest*" may not mean what you think
- Sex, certificates and statutes: The UK Supreme Court draws a biological line in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16

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Does paying an employee during suspension avoid a CCMA compensation award?

This was the question in the matter of *Banda v General Public Service Sector Bargaining Council and Others* (LAC, case no: A2025-092122, 15 April 2026). In short, this case makes clear that even a fully paid suspension can expose an employer to a compensation award if it is procedurally or substantively unfair.

Ms Banda was employed in the office of the Minister in the Presidency. On 24 February 2022, she was suspended on full pay pending an investigation into allegations of misconduct.

The suspension was implemented under the Senior Management Service Handbook (Handbook), which permits precautionary suspension but requires that a disciplinary hearing be held within 60 days.

The Ministry treated this period as calendar days and convened a hearing two days before the expiry of the 60-day period. At the disciplinary hearing, the chairperson ruled that the 60-day period referred to weekdays rather than calendar days and purported to extend the suspension beyond the initial period. Relying on this ruling, the Ministry failed to uplift the suspension once the 60-day period expired. By the time the disciplinary hearing concluded, Banda had been suspended for approximately eight months, with six months of the suspension found to be unfair.

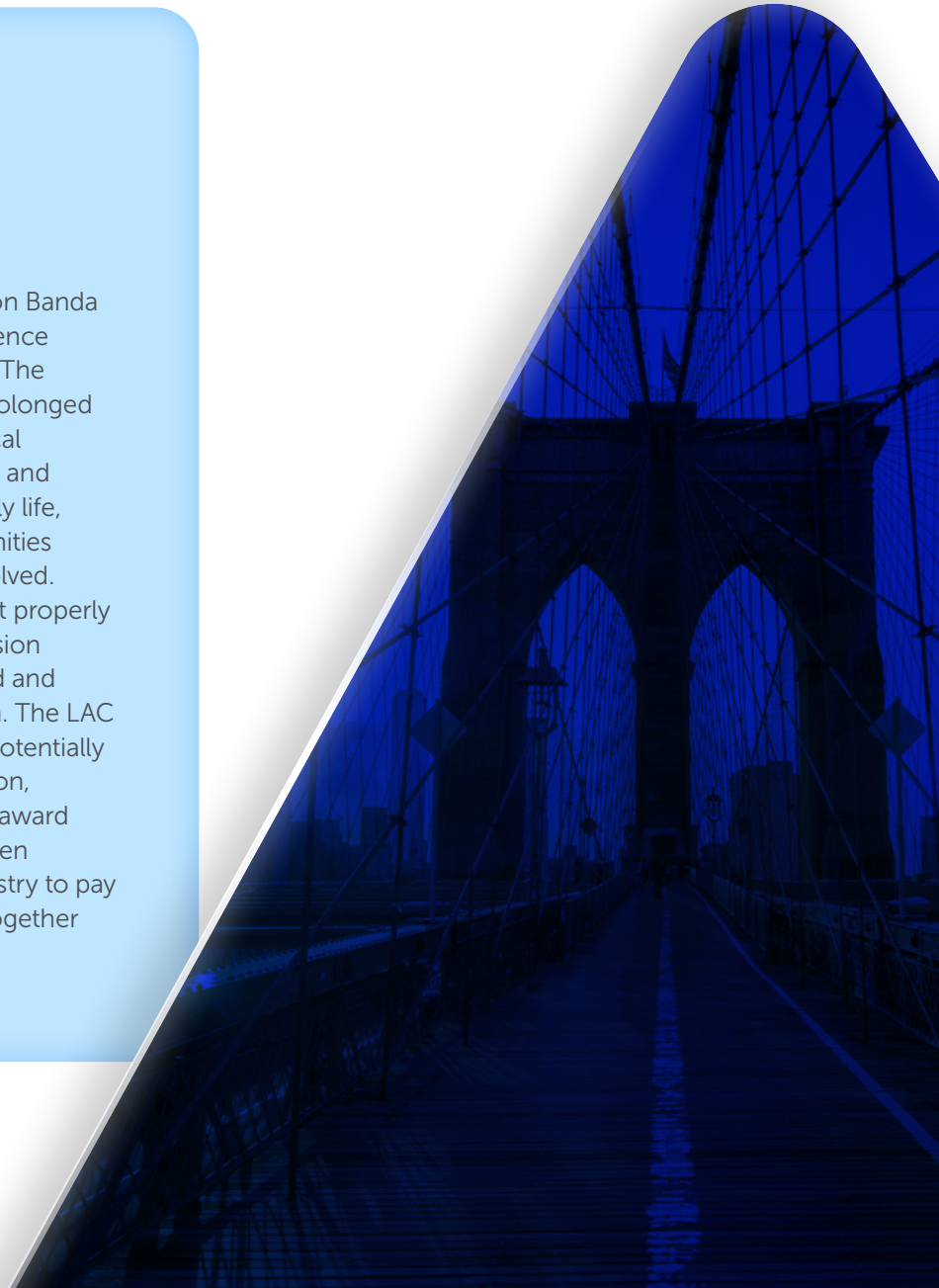
Banda referred an unfair labour practice dispute to arbitration under section 186(2)(b) of the Labour Relations Act 66 of 1995 (LRA) relating to suspension. The arbitrator found that the 60-day period in the Handbook referred to calendar days; the suspension was prolonged and had become punitive; and the suspension therefore constituted an unfair labour practice. The Ministry was ordered to uplift the suspension, but no compensation was awarded. The arbitrator's reasoning was that Banda was suspended on full pay, and the Ministry acted on the basis of an incorrect interpretation of the Handbook and was not malicious. The Labour Court, on review, refused to interfere, holding that the arbitrator had exercised a permissible discretion under section 194(4) of the LRA.

Finding

On appeal, the Labour Appeal Court (LAC) had to consider whether compensation should have been paid.

The LAC reaffirmed that the discretion to award compensation under section 194 of the LRA is a narrow one. While interference with the award of the arbitrator is limited, such discretion remains reviewable where an arbitrator applies the wrong legal principles or fails to consider material facts. The LAC held that a refusal to award compensation cannot stand where the arbitrator prioritises irrelevant considerations or ignores undisputed evidence of prejudice suffered by the employee. The LAC emphasised that compensation for an unfair labour practice is not payment for financial loss, but a solatium for the infringement of the employee's right to fair labour practices. Compensation also serves a punitive and deterrent purpose.

The arbitrator placed decisive weight on Banda being on paid suspension and the absence of malice on the part of the employer. The arbitrator ignored evidence that the prolonged suspension caused Banda psychological harm, requiring professional treatment and medication, distress affecting her family life, and loss of career-advancing opportunities while the suspension remained unresolved. This failure meant the arbitrator did not properly weigh the impact of the unfair suspension on the employee, resulting in a skewed and unreasonable exercise of his discretion. The LAC held that these considerations, while potentially relevant to the amount of compensation, could not justify a complete refusal to award compensation once unfairness had been established. The LAC ordered the Ministry to pay Banda one month's compensations, together with costs of the appeal.



Key takeaways

- Suspensions should only be effected by an employer upon proper consideration. While a useful implement in the investigative toolkit, this case emphasises that a suspension which is unfair will ordinarily justify some form of compensation being paid to the employee, despite the employee being paid in full over the period of the suspension. Employers must guard against a suspension amounting to an unfair labour practice that attracts compensation. Not only is the employer paying the salary for no services rendered but also paying compensation for an unfair labour practice.
- Treat suspension as a time-bound, actively managed risk process, not an administrative step.
- HR/IR/Legal must actively monitor suspensions and (i) avoid unnecessary delays and (ii) escalate stalled investigations.

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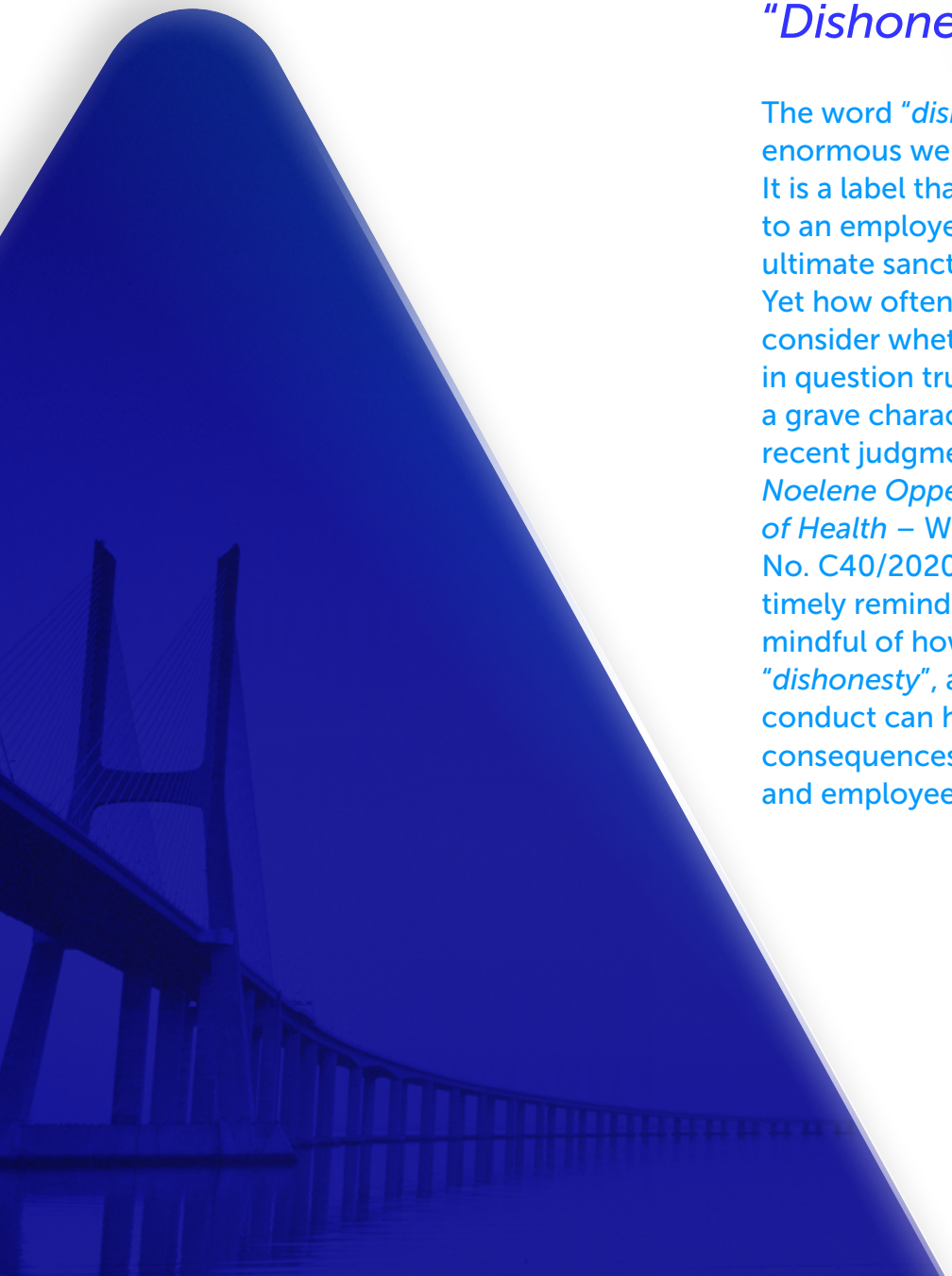


"*Dishonest*" may not mean what you think

The word "*dishonesty*" carries enormous weight in the workplace. It is a label that, once affixed to an employee, can justify the ultimate sanction of dismissal. Yet how often do we pause to consider whether the conduct in question truly warrants such a grave characterisation? The recent judgment in *Sandra Noelene Opperman v Department of Health* – Western Cape (Case No. C40/2020) serves as a timely reminder that we must be mindful of how we use the word "*dishonesty*", and that mislabelling conduct can have profound consequences for both employers and employees.

The facts: A cell phone, a long career and a harsh outcome

Ms Opperman was an administrative clerk at George Hospital in the Western Cape, with more than 28 years of service and an unblemished employment record. The incident that led to her dismissal was, on its face, unremarkable: on 7 March 2019, a Mr Wagenaar left his cellular phone on the desk where Opperman was working after making a delivery to the hospital. The hospital had a procedure in place requiring that lost or found valuables be placed in a safe for safekeeping and returned to their rightful owners upon enquiry.

Opperman did not follow this procedure. Instead, she took the cell phone home. She later handed it to a Mr Malgas but proffered no explanation as to why she had taken it home in the first place. For this, she was dismissed, and when she sought to challenge the arbitration award upholding her dismissal, her review application ultimately failed on procedural grounds.

What is dishonesty, really?

It is in the opening paragraphs of Banderker AJ's judgment that we find the most instructive guidance. The court quoted with approval the dictum in *Lynch & Co v United States Fidelity & Fidelity Guarantee Co* [1971] 1 OR 28, in which Fraser J held that "*dishonest*" is normally used to describe an act where there has been some intent to deceive or cheat, and that to use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning. The court further cited *Amcu obo Thlanganyane v Beesnaar NO* (2023) 44 ILJ 2210 (LC), in which Sethene AJ held that dishonesty requires both actus reus (physical conduct) and mens rea (mental element): a person must purposefully act with intent to achieve a certain desired outcome for their benefit at the detriment of another. These passages illuminate a critical distinction that is too often blurred in disciplinary proceedings. Conduct may be disobedient, foolish, or in breach of an employer's rules, but that does not, without more, make it "*dishonest*". Dishonesty demands an intent to deceive or cheat, a mental element that transforms mere rule-breaking into something morally culpable in a fundamentally different way.

Why the label matters

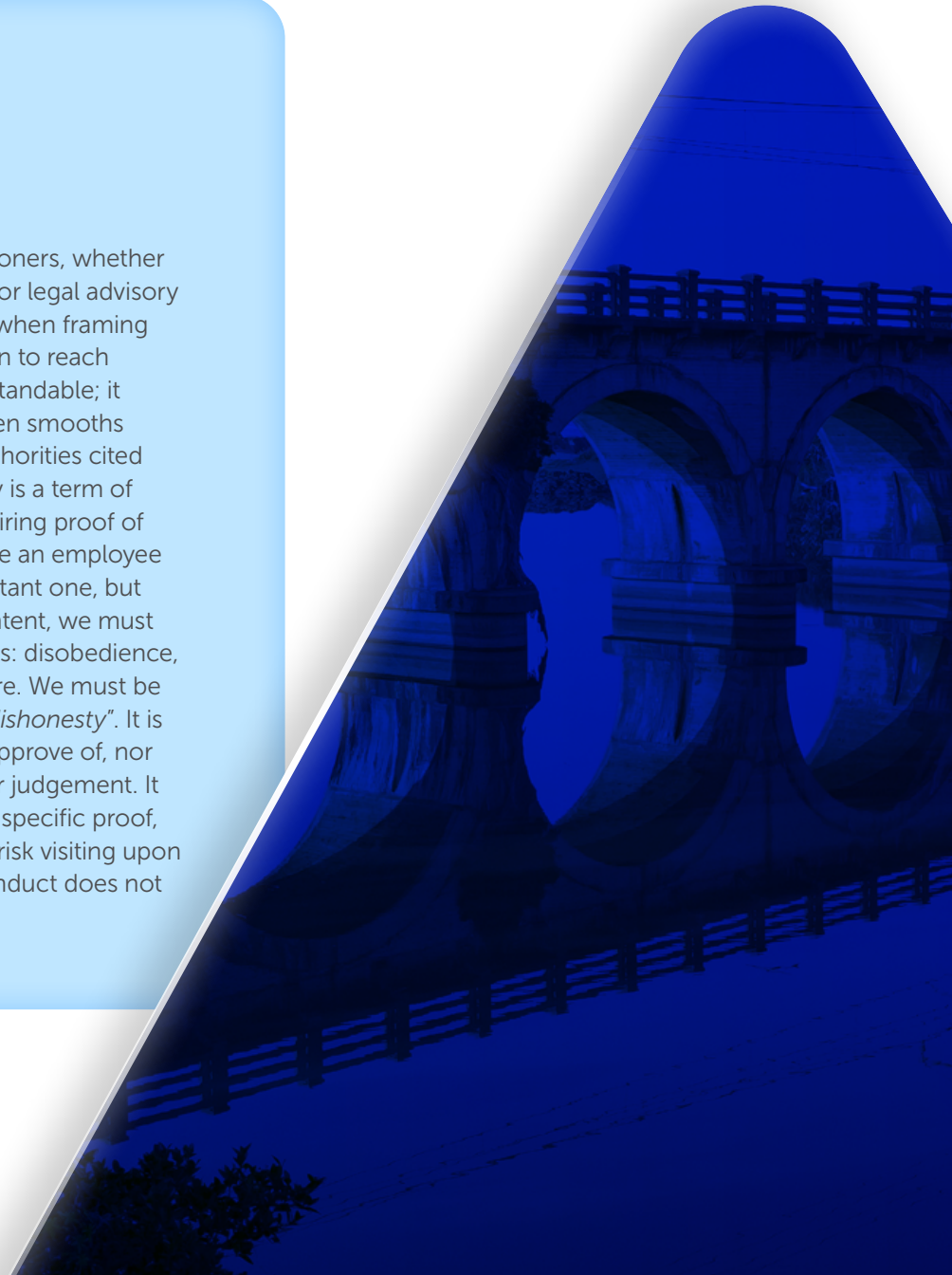
The characterisation of misconduct as "*dishonesty*" is not merely a semantic exercise. In South African labour law, dishonesty is treated as one of the most serious forms of misconduct, often justifying dismissal even for a first offence. If the conduct is more properly characterised as negligence, disobedience or foolishness, the appropriate sanction may be far less severe, particularly where, as in Opperman's case, the employee has decades of loyal service.

The procedural tragedy

The broader tragedy of Opperman's case lies in the procedural morass that ultimately defeated her challenge. Having paid her erstwhile attorneys in excess of R80,000 to prosecute the review, she received no satisfactory response from them over a period of years. By the time she instructed new attorneys in September 2023, the damage was done: her application was deemed to have been withdrawn for failure to file the complete record within the prescribed period. The court found that she had failed to demonstrate good cause for revival and that her conduct in taking the cell phone home undermined her prospects of success on the merits in any event. The application was dismissed with costs.

A call for precision

This case should prompt all practitioners, whether in human resources, management or legal advisory roles, to exercise greater precision when framing disciplinary charges. The temptation to reach for the word "*dishonesty*" is understandable; it conveys moral seriousness and often smooths the path to dismissal. But as the authorities cited by the court make clear, dishonesty is a term of art with specific legal content, requiring proof of an intent to deceive or cheat. Where an employee has breached a rule, even an important one, but there is no evidence of deceptive intent, we must have the discipline to call it what it is: disobedience, negligence or a breach of procedure. We must be mindful of how we use the word "*dishonesty*". It is not a catch-all for conduct we disapprove of, nor a synonym for carelessness or poor judgement. It is a specific allegation that requires specific proof, and when we deploy it loosely, we risk visiting upon employees a sanction that their conduct does not truly warrant.



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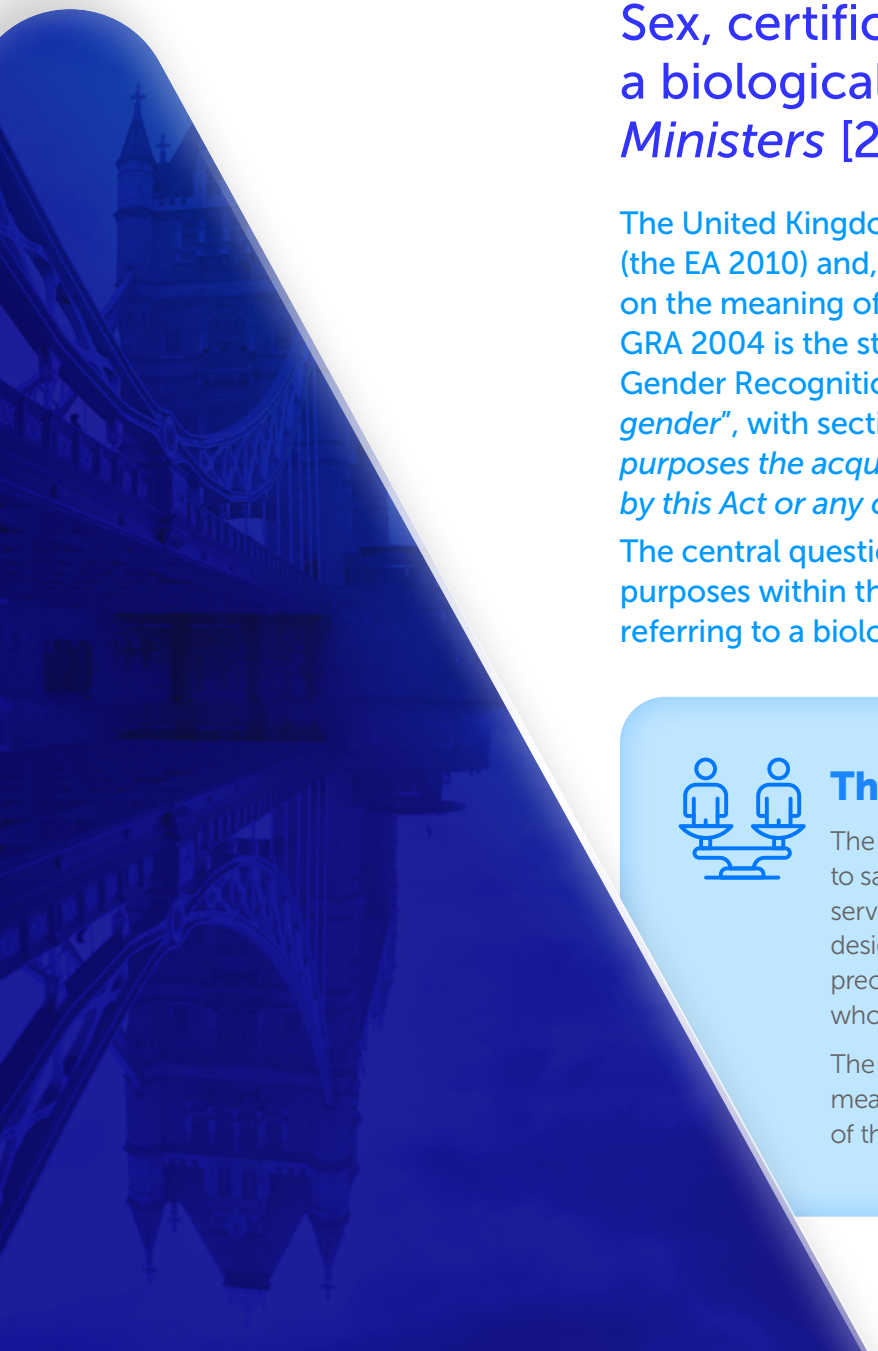


Sex, certificates and statutes: The UK Supreme Court draws a biological line in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16

The United Kingdom Supreme Court had to determine the correct interpretation of the Equality Act 2010 (the EA 2010) and, in particular, the effect (if any) of the Gender Recognition Act 2004 (the GRA 2004) on the meaning of the words "*sex*," "*man*," "*woman*," "*male*" and "*female*" as used in the EA 2010. The GRA 2004 is the statute that established a framework permitting a person aged 18 or over to apply to a Gender Recognition Panel for a Gender Recognition Certificate (GRC) on the basis of "*living in the other gender*", with section 9(1) providing that on the issue of a full GRC "*the person's gender becomes for all purposes the acquired gender*" subject to section 9(3) which limits this application by any "*provision made by this Act or any other enactment or any subordinate legislation.*"

The central question was whether the EA 2010 treats a trans woman with a GRC as a woman for all purposes within the scope of its provisions, or whether, when that Act speaks of a "*woman*" and "*sex*," it is referring to a biological woman and biological sex.

The discrimination and fairness dimension

The case lay at the intersection of two protected groups whose interests the EA 2010 simultaneously seeks to safeguard. On one hand stood biological women, whose sex-based rights (to, for example, single sex services, separate spaces, pregnancy and maternity protection, equal pay, and positive action measures designed to redress entrenched disadvantage) depend on the legislature's ability to identify the group with precision. On the other stood trans people, a population of whom only a small minority hold a GRC and whose dignity, privacy and protection from discrimination the EA 2010 also secures.

The appellant, For Women Scotland Ltd, argued that "*sex*" in the EA 2010 carries its ordinary biological meaning. The Scottish Ministers contended that a trans woman with a full GRC is, by force of section 9(1) of the GRA 2004, a "*woman*" for the purposes of the EA 2010.

The law the Court considered

The Court traced the statutory lineage from the Sex Discrimination Act 1975 (the SDA 1975), in which references to *"sex," "man"* and *"woman"* were biological, through the 1999 Regulations (which introduced the protected characteristic of gender reassignment but did not amend the definitions of *"man"* or *"woman"*), to the GRA 2004, whose amendments to the SDA 1975 also left those definitions intact.

Section 9 of the GRA 2004 was treated as the pivot. Sub-section (1) effects a change *"for all purposes"* upon issue of a full GRC; sub-section (3) carves out cases where provision to the contrary is made by the GRA 2004 itself or by any other enactment. The Court accepted that section 9(1) contemplates a change in legal state of affairs but does not require past states to be expunged and noted that the GRA does not compel belief but does require respect for the legal consequences of a GRC where the acquired gender is legally relevant.

Within the EA 2010, the Court focused on section 11 (the protected characteristic of sex), section 212(1) (defining *"man"* as *"a male of any age"* and *"woman"* as *"a female of any age"*), section 7 (gender reassignment), section 12 (sexual orientation), sections 13(6), 17 and 18 (pregnancy, maternity and breast-feeding), Schedule 3 (separate and single-sex services), Schedule 9 (occupational requirements), Schedule 22 (protection of women), Schedule 23 (communal accommodation), section 149 (the public sector equality duty), and the positive action provisions in sections 158, 159 and 104.

Application of the law to the facts

The dispute crystallised around guidance issued by the Scottish Ministers under the Gender Representation on Public Boards (Scotland) Act 2018, which proceeded on the footing that a trans woman with a full GRC counts as a *"woman"* for the purpose of meeting the representation objective. The Scottish Outer House and the Inner House had both upheld the guidance, holding that section 9(1) is clear and that the GRA 2004 and the EA 2010 could be read harmoniously by adopting the wider, certificated sex meaning.

The United Kingdom Supreme Court took the opposite view. It accepted that section 9(1) presumptively applies but held that the EA 2010 falls within section 9(3) because the words, context and purpose of its provisions are *"rendered incoherent or unworkable by the application of the rule in section 9(1)."*

The Court demonstrated its reasoning with reference to the following examples:

- Pregnancy and maternity protections target biological women only, and a certificated-sex reading would absurdly exclude a pregnant trans man with a GRC (biologically female, legally male) from automatic protection while requiring him to litigate a gender reassignment discrimination claim.
- References to sexual orientation are coherent only on a biological reading.
- the single-sex services exceptions cannot sensibly turn on a confidential document of which a service provider can have no knowledge.
- Communal accommodation, occupational requirements, the protection of women and equal pay all generate analogous incoherence.
- There is a single definition of *"woman"* applicable throughout the Act, which must therefore have one consistent and predictable meaning.

Findings

The Court concluded that the words *"sex"*, *"man"* and *"woman"* in the EA 2010 mean, and were always intended to mean, biological sex, biological woman and biological man. A trans woman with a GRC is not a *"woman"* for the purposes of section 11; a trans man with a GRC is not a *"man"* for those purposes. The Scottish Government's Guidance under the 2018 Act was therefore incorrect. The Court emphasised that this conclusion does not strip trans people, with or without a GRC, of EA 2010 protection. Trans people retain protection under the distinct characteristic of gender reassignment and may bring sex discrimination claims based on their biological sex or on how they are perceived.

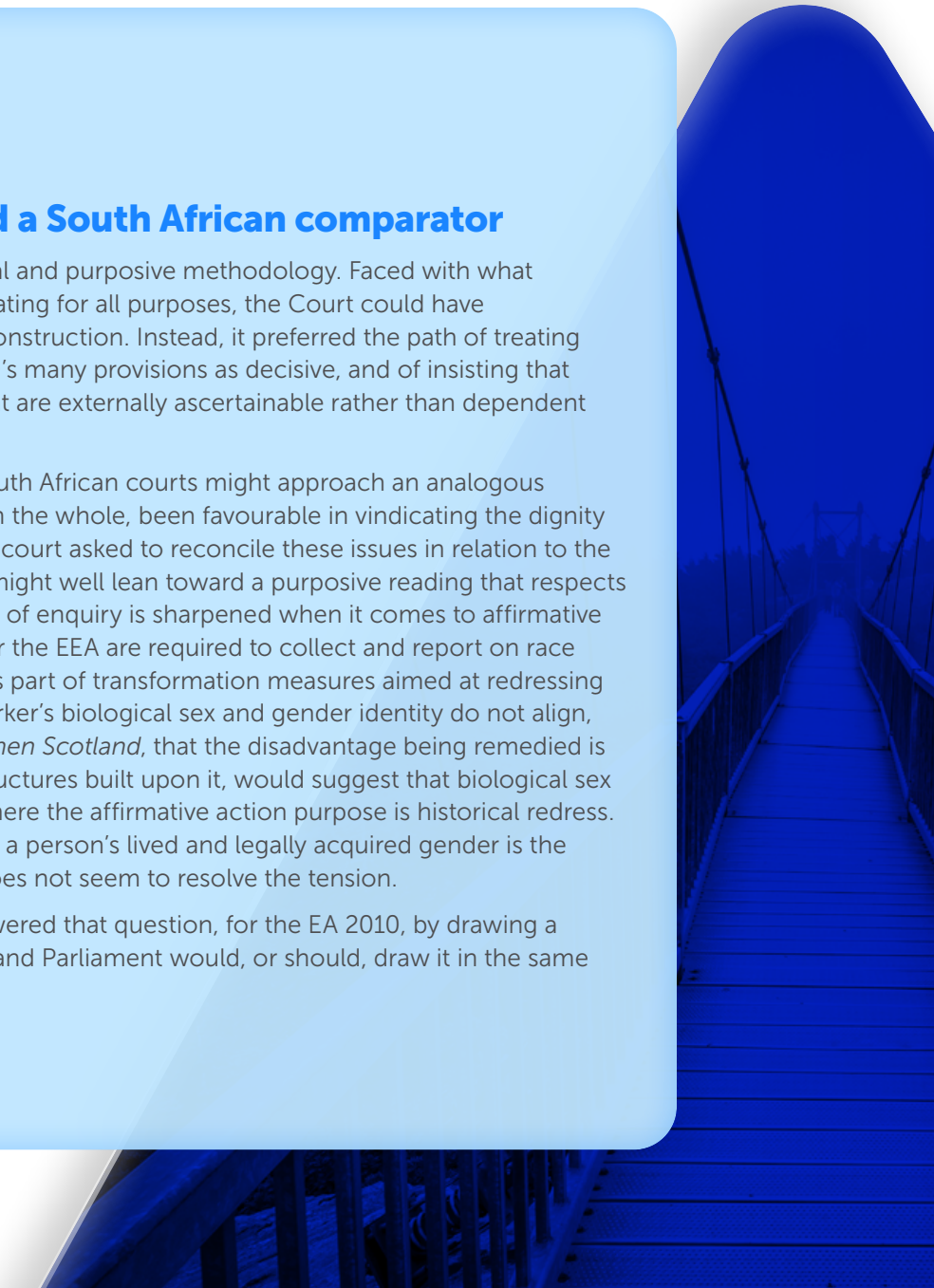
A conservative literal turn and a South African comparator

The judgment is important for its literal, textual and purposive methodology. Faced with what section 9(1) of the GRA 2004 calls a rule operating for all purposes, the Court could have adopted the Inner House's accommodating construction. Instead, it preferred the path of treating coherence and workability across the EA 2010's many provisions as decisive, and of insisting that group based equality rights require groups that are externally ascertainable rather than dependent on confidential certification.

It is an interesting exercise to imagine how South African courts might approach an analogous challenge. South African jurisprudence has, on the whole, been favourable in vindicating the dignity and equality of trans persons. A South African court asked to reconcile these issues in relation to the Employment Equity Act 55 of 1998 (the EEA) might well lean toward a purposive reading that respects an individual's acquired sex. However, this line of enquiry is sharpened when it comes to affirmative action measures. Designated employers under the EEA are required to collect and report on race and gender representation in the workforce as part of transformation measures aimed at redressing historical privilege and exclusion. Where a worker's biological sex and gender identity do not align, which is to be reported? The logic of *For Women Scotland*, that the disadvantage being remedied is one rooted in biological sex and the social structures built upon it, would suggest that biological sex is the relevant reporting data point, at least where the affirmative action purpose is historical redress. A more dignity centred reading may insist that a person's lived and legally acquired gender is the appropriate identifier. The EEA, as it stands, does not seem to resolve the tension.

The United Kingdom Supreme Court has answered that question, for the EA 2010, by drawing a biological line. Whether South African courts and Parliament would, or should, draw it in the same place is a debate South Africa is yet to have.

Aadil Patel



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