GARDEN COURT
CHAMBERS

Using the Equality Act 2010 in housing cases: homelessness, *"No DSS"* and discrimination

Edward J. Fitzpatrick, Garden Court Chambers

Tessa Buchanan, Garden Court Chambers

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21st January 2021

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“No DSS”

What does “No DSS” mean?

- “No DSS” indicates that the landlord/letting agent will not accept applicants who receive benefits.
- The effect is that people on benefits are automatically rejected, without any consideration of their individual circumstances.
- It could be a company-wide policy or it could apply to just one landlord or just one property.
- It can be stated on the website, or communicated verbally to an applicant, or advertised in the window…

We Don't Accept Housing and Benefit or DSS!

*SORRY FOR ANY INCONVENIENCE

Scale of "No DSS" within the private rented sector

- Of 13,000 PRS advertisements collected between 2003 and 2005, 1/3 barred HB claimants. Only 1/6 of the remainder, when contacted, said they would accept a HB tenant.
- A survey of 1,000 landlords in 2013 found that 78% were not willing to let to HB tenants.
- In 2014, a representative of the National Landlords Association told the Work and Pensions Select Committee that 52% of their members surveyed said they wouldn't take HB tenants.
- A survey of 1,009 landlords in 2019-2020 found that 41% of landlords had an outright bar on letting to HB tenants. 22% preferred not to.

The Equality Act 2010

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EA 2010: an overview

- EA 2010 prohibits certain unfavourable treatment in respect of the *"protected characteristics"*.
- The protected characteristics are set out Pt 2, Ch 1.
- The types of unfavourable treatment are set out in Pt 2, Ch 2.
- The circumstances in which this treatment is unlawful are set out in Pts 3-7.
- How to take enforcement action is set out in Pt 9.

The protected characteristics

- Age
- Disability
- Gender reassignment
- Marriage & civil partnership
- Pregnancy & maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

The unfavourable treatment

- Discrimination: ss13-19.
- Failing to make reasonable adjustments for disabled persons: ss20-22.
- Harassment: s26.
- Victimisation: s27.

Discrimination

Direct discrimination: s13(1)

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Indirect discrimination: s19(1)

"A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's."

Indirect discrimination

S19(2):

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Circumstances where unfavourable treatment is prohibited

Provision of services to the public: s29(1)

"(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service."

Disposing of premises: s33(1)

"(1) A person (A) who has the right to dispose of premises must not discriminate against another (B)—

(a) as to the terms on which A offers to dispose of the premises to B;

(b) by not disposing of the premises to B;

(c) in A's treatment of B with respect to things done in relation to persons seeking premises."

Enforcement

- A person who has been treated unlawfully under the EA 2010 may bring a claim in the County Court: s114(1).

- Such a claim must be brought within 6 months, although this can be extended by the Court if just and equitable to do so: s118(1).

- The County Court can award any remedy which could be granted by the High Court in a claim for judicial review or tort: s119(2). This includes damages for injured feelings: s119(4).

“*No DSS*” and the Equality Act 2010

Does D have a PCP of not accepting applicants in receipt of benefits?

- *"Provision, criterion or practice"* should be given a wide interpretation: *Ishola v Transport for London* [2020] EWCA Civ 112.

- It can potentially include *"any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions"*: *Equality Act Code of Practice: Services, public functions and associations* (EHRC, 2011).

- It can (but will not necessarily) include a one-off decision: *Ishola v Transport for Transport for London* [2020] EWCA Civ 112.

Does C have a protected characteristic?

- **Disability**:
  - A physical or mental impairment which has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities: s6 EA 2010.
  - An impairment is long-term if it has lasted or is likely to last at least 12 months: Sch 1, para 2.

- **Sex**:
  - Being a man or a woman: s11 EA 2010.

- Other protected characteristics may be relevant.

Does the PCP apply to people without that protected characteristic?

- Indirect discrimination occurs where the PCP is of (apparently) neutral application.

Does the PCP put people with whom C shares the protected characteristic at a particular disadvantage? (1)

***Essop v Home Office (UK Border Agency)* [2017] UKSC 27**:

- Indirect discrimination is about group disadvantage.
- Not necessary to explain why the PCP puts the group at a disadvantage.
- No requirement for a causal link between the protected characteristic and the particular disadvantage.
- Not necessary for every member of the group to be put at the disadvantage.
- Commonplace for the disadvantage to be demonstrated with statistical evidence.

Does the PCP put people with whom C shares the protected characteristic at a particular disadvantage? (2)

Disability

- Disabled households in the PRS are almost 3x more likely to claim HB than non-disabled households
- Disabled households in the population generally are almost 5x more likely to claim HB than non-disabled households

(Shelter's analysis of Understanding Society survey, wave 9)

Sex

- Women in the PRS are more than 1.5 x as likely as men to claim HB

(Shelter's analysis of DWP statistics in conjunction with data from English Housing Survey, Census, and ONS)

Did C suffer that disadvantage?

- Question is whether C was put, or would have been put, at that disadvantage

- Indirect discrimination may occur *"where a person is deterred from doing something, such as applying for a job or taking up an offer of service, because a policy which would be applied would result in his or her disadvantage"*: Explanatory Notes.

Was the PCP nevertheless justified? (1)

- PCP is justified if it is a *“proportionate means of achieving a legitimate aim”*: s19(2)(d).
- Burden is on D to justify the PCP: s19(2)(d).
- Court will make its own judgment. There is no *“margin of discretion”* given to D: *Hardys & Hansons plc v Lax* [2005] EWCA Civ 846.
- The more serious the disadvantage, the more compelling the justification will have to be: *Code of Practice* §5.35.
- A wish to save costs cannot on its own justify discrimination, although a need to reduce costs may: *Heskett v Secretary of State for* Justice [2020] EWCA Civ 1487

Was the PCP nevertheless justified? (2)

- “The rent won’t be paid”
- “It would be a breach of my mortgage”
- “My insurance doesn’t cover it”

“*No DSS*” in the Courts

“Jane” v A Letting Agent

- C was a disabled single mother. C was searching for accommodation and made enquiries about a property D was advertising. D told her they had had a policy for many years of not accepting Housing Benefit.

- C issued proceedings seeking a declaration and damages.

- D subsequently abandoned policy.

- Case compromised with declaration made by consent that D’s former No DSS policy was unlawfully indirectly discriminatory on the grounds of sex and disability. Damages of £3,500 and costs paid.

Stephen Tyler v Paul Carr Estate Agents (1)

- The Claimant
- Homelessness and the search for accommodation
- Telephone call on 7 September 2018
- Subsequent messages
- Pre-action correspondence

Stephen Tyler v Paul Carr Estate Agents (2)

- Trial 8 September 2020 in front of HHJ Stacey (now High Court Judge) sitting with an assessor.

- Judge accepted C's evidence of the telephone call and found there had been a policy, in respect of the 3 properties C had enquired about, not to accept HB applicants.

- Criteria at s19(2) were met:
    - Policy amounted to a PCP;
    - It was of neutral application;
    - It put disabled people at a particular disadvantage;
    - It put C at that disadvantage; and
    - D could not show it was a proportionate means of achieving a legitimate aim.

Stephen Tyler v Paul Carr Estate Agents (3)

Declaration:
"The Defendant unlawfully indirectly discriminated against the Claimant by applying to him the provision, criterion, or practice of refusing to consider applicants in receipt of Housing Benefit for three private rented properties that were being marketed by the Defendant."

Damages of £6,000 plus interest:
- This was a serious matter that damaged C's feelings quite considerably.
- Injury to feelings was aggravated by the manner in which D had conducted the proceedings.

Costs on an indemnity basis:
- D's case was hopeless and could not possibly have succeeded.

Case against Phillip Mann Estate Agents

- C was told that the landlord is *“ideally looking for professional tenants, no pets, no children, and no benefits”*.

- Following issue of proceedings, order made by consent:
  - **Declaration** that D unlawfully indirectly discriminated against C on the ground of sex by rejecting her application for a tenancy because she was in receipt of benefits.
  - **Damages** of £3,500.
  - **Costs**.

Other No DSS cases

- Rosie Keogh: settled with admission, damages, costs.

https://www.bbc.co.uk/news/education-42979242

- Emma Loffler: settled with apology, damages, and costs.

https://www.bbc.co.uk/news/education-51642316

- Amanda Staples: settled with apology, compensation, and costs.

https://www.bbc.co.uk/news/education-51642316

Application of PSED in Homelessness Cases

Edward J. Fitzpatrick, Garden Court Chambers

21st January 2020

Section 149 Equality Act 2010

"Public sector equality duty"

(1) A public authority must, in the exercise of its functions, have due regard to the need to—
(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves **having due regard, in particular, to the need to—**
(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

Section 149 Equality Act 2010 Continued…

A person with a protected characteristic may need to be treated more favourable than others so as to comply with the PSED under s.149(6).

By Section 4 "protected characteristics" are: age, disability; gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.

Section 6 of the 2010 Act provides that a person has a disability if he has a physical or mental impairment which has "a substantial and long-term effect" on his ability to carry out normal day-to-day activities. Section 212 of the Act defines "substantial" as "more than minor or trivial". Further guidance is given under Schedule 1 paragraph 5. Schedule 1 paragraph 1 enables regulations to be made providing for particular conditions to be, or not to be, an impairment.

Pieretti v Enfield LBC [2011] HLR 3

The Court of Appeal recognised that section 49A(1) Disability Discrimination Act applied not only to the formulation of "policies" but also the application of those policies in individual cases. It was held that there had been a failure in assessing "intentionality" to take into account and make further enquiries as to the disability and the possibility that the appellant's acts and omissions in relation to non-payment of rent; were affected by a mental impairment.

The approach in *Cramp v Hastings* had to be modified in relation to applying section 49A and it would be wrong in the light of section 49A(1) to say that a reviewing officer should consider disability only if it is obvious. On the contrary he needs to have due regard to the need for him to take steps to take account of it [32].

But the law does not require that every case decision-makers under s.184 and s.202 must take (active) steps to enquire into whether the person to be the subject of the decision is disabled and, if so, ***is disabled in a way relevant*** *to the decision. That would be absurd … "due" means "appropriate in all the circumstances" … so the simple task would have been to survey all the circumstances and then to ask what steps it would be appropriate to take in the light of them [33]. .." I would refine the question as follows: did she fail to make further enquiry in relation to some such feature of the evidence presented to her as raised a real possibility that the appellant was disabled in* ***a sense relevant to whether he acted "deliberately"*** *[35].*

Hotak v Southwark LBC & others [2015] HLR 27

Lord Neuberger at [78] It is therefore appropriate to emphasise that the Equality Act duty, in the context of an exercise such a s.202 review, does require the reviewing officer to focus very sharply on: (i) whether the applicant is under a disability (or has another relevant protected characteristic); (ii) the extent of such disability; (iii) the likely effect of the disability when together with any other features, on the applicant if and when homeless; and (iv) where the applicant is as a result “vulnerable”

Haque v Hackney [2017] PTSR 769 CA

Lord Justice Briggs considers at para 43 what the PSED requires:

- *a recognition that Mr Haque suffered from a physical or mental impairment having a substantial and long term and adverse effect on his ability to carry out normal day-to-day activities …*
- *a focus upon the specific aspects of his impairment, to the extent relevant to suitability …*
- *a focus upon the consequences of his impairments, both in terms of the disadvantages which he might suffer in using Room 315 as his accommodation, by comparison with persons without those impairments …*
- *a focus upon his particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons without such impairments …*
- *a recognition that Mr Haque's particular needs arising from those impairments might require him to be treated more favourably in terms of the provision of accommodation than other persons not suffering from disability …*
- *a review of suitability of Room 315 as accommodation for Mr Haque which paid due regard to those matters."*

Lomax v Gosport BC [2008] HLR 40

Appellant arguing homeless s175 as not reasonable to continue to occupy accommodation in Dorset, due to deteriorating mental health, application to Gosport rejected comparing case to those on waiting list. Successful appeal where argued sharp focus under Hotak blunted and comparative exercise needed.

Lord Justice Lewison in allowing the appeal found:
In broad terms I accept Mr Lewin's submission. However, the PSED applies at all stages of the decision making process, and is not to be compartmentalised. As Mr Drabble QC, for the Equalities and Human Rights Commission, submitted, in performing a comparative exercise between Ms Lomax' particular needs and disabilities on the one hand, and general housing conditions in Gosport on the other, there is a serious danger that the sharp focus becomes blunted [45].

Kannan v Newham LBC [2019] HLR 22

Where the Court of Appeal overturned the County Court appeal decision as to "suitability". One of the main issues relied on was the fact that the appellant who was disabled experienced "severe" pain when climbing the fourteen external steps to get into the premises. It was accepted in the decision that he suffered from this severe pain on each occasion he climbed the stairs, this was downgraded later in the decision with reference made to the pain being "uncomfortable and inconvenient.

Lord Justice Lewison :

- Adopting his judgment in the case of *Lomax v Gosport BC* the public sector equity duty also has a significant impact on the way in which a reviewing officer is entitled to have regard to general housing conditions. The particular reasons why continuing a occupy accommodation would continue to cause problems has to be taken into account.
- *As in Lomax, I do not consider that the decision is saved by the reviewing officer's subsequent reference to the public sector equality duty. There mere recitation of Lord Neuberger's formula in para.28 of the decision letter is no substitute for actually doing the job.*

McMahon v Watford Borough Council; Kiefer v Hertsmere Borough Council [2020] HLR 29

Two successful s.204 appeals relying on PSED at first instance overturned by the Court of Appeal wherein the interaction between homelessness legislation as to "vulnerability" and compliance with "PSED" reviewed.

***Mr McMahon** suffered back neck shoulder and arm pain. It was found by Mr Perdios the reviewing officer that he could walk independently with no reported limits. It was found he was able to wake up and take the dog out for a walk. He was able to plan meals and use appliances. He suffered from asthma which it was found by Mr Perdios had no significant impact on his ability to look after himself or on his mobility. **Mr Kiefer** suffered from wrist pain caused by a road traffic accident with intermittent claudication, severe wrist pain. He suffered from Type II diabetes and also suffered from depression and low mood. The reviewing officer Ms Kaissi found that the physical condition was dealt with by painkillers but there was no information to suggest he required any special wristbands. On review it was found there was no information to suggest his mobility was currently restricted or information to suggest he was known to any specialist and requires ongoing treatments. Based on this the reviewing officer was satisfied that he had an ability to carry out daily activities. In relation to depression the reviewing officer was satisfied that his ability to manage daily activities was not affected by this condition, and that he was able to approach his GP and approach various services while homeless.*

McMahon v Watford Continued…

Lord Justice Lewison carried out a detailed review of the interaction between vulnerability and the PSED by reference to previous authority and restated a number of propositions and principles to be applied:

- Reiterates what Lord Neuberger said in *Hotak* that PSED was "complimentary" to the assessment of vulnerability. It applies to the way in which a public authority exercises its functions. [47-48].

- By reference to *Hotak* and *Haque* a conscientious reviewing officer may have properly performed his function and had due regard to PSED even if unaware that the equality duty was engaged. A reviewing officer need not make findings about whether or not the applicant does or does not have a disability, or the precise effect of PSED [50, 62].

McMahon v Watford Continued…

- *The relevant function in this case was to determine whether the applicant in question was "vulnerable" for the purpose of section 189(1)(c). In addition as many cases have emphasised, the PSED is not a duty to achieve a result, but a duty to have due regard to achieve the goals identified in s.149. Lord Neuberger referred to these cases in Hotak at para 73 & 74* [48].

- The PSED duty applies both in the investigation and reporting stages of the review. In *Pieretti* the housing authority had failed to undertake sufficient enquiries into the applicant's mental problems before coming to a decision that they were intentionally homeless [51].

- Lord Neuberger guidance in *Hotak* at 78 does not lay down a sequential test which the reviewing officer must follow step by step, that would not be practical. What needs to be considered in an assessment of vulnerability **is that which is relevant to a person's ability to deal with the consequences of being homeless** [52, 56].

McMahon v Watford Continued…

- By reference to *Pieretti* it is clear that, however extensive the duty is, it is confined to the disabilities relevant to the particular decision [57-59].

- By reference to *Lomax v Gosport BC* and *Kannan v Newham LBC* the review decisions were vitiated by non-compliance with the PSED because of a failure to take specific features of the case into account. By reference to *Powell v Dacorum BC* whilst the impact of PSED is universal in application to the function of public authorities , but its application will differ from case to case, depending upon the functions being exercised and the particular facts of the case [64].

- *The greater the overlap between the particular statutory duty under consideration and the PSED, the more likely it is that in performing statutory duties the authority will also have complied with the PSED even if it is not precisely mentioned* [67]

McMahon v Watford Continued…

- *In vulnerability assessments there is substantial overlap between the requirements of the Homeless Code and the PSED. It is difficult to see how that task can be performed without a sharp focus on the extent of the illness, handicap or physical disability; and its effect on a person's ability to deal with the consequences of homelessness.* ***What matters is the substance of the assessment not its form*** [68].

- *Just as a failure to mention the PSED or a failure to tabulate each feature if it will not necessarily vitiate the vulnerability assessment, so a mere recitation of the PSED will not save such an assessment if it has failed in substance to address the relevant questions: Kannon at para 24* [68]

- Some categories of persons are entitled to automatic priority but the disabled are not. They are only entitled to priority if the disability causes them to be vulnerable. If they are not vulnerable despite having a disability, then a decision that they do not have priority need is, to use Lord Neuberger's phrase, "simply putting Parliament's decision into effect" [73].

McMahon v Watford Continued…

In concluding the case Lord Justice Lewison sets out:

"One of the striking features of both appeals is that there is no evidence that any of the various medical conditions (whether physical or mental) has any real effect on the ability of either Mr McMahon or Mr Kiefer to carry out normal day-to-day activities. [88]

All this goes to show that there is a real danger of the PSED being used as a peg on which to hang a highly technical argument that an otherwise unimpeachable vulnerability assessment should be quashed. I do not consider that that is why the PSED exists. It is not there to set technical traps for conscientious attempts by hard pressed reviewing officers to cover every conceivable issue. Nor is it a disciplinary stick with which to beat them. [89]"

Adesotu v Lewisham [2019] HLR 48

It was argued that the way in which the authority had applied a short and inflexible time limit for an applicant to accept an offer having regard to her disability was in breach of s19 EA 2010. In addition that deciding the duty under section 193 had come to an end breached s.15 EA 2010. Further that the authority had breached the PSED duty by failing to allow the applicant more time to decide whether to accept the offer.

In the leading judgment Learned Judge Bean at paragraph 18 holds:

- Grounds 1 and 2 of the Grounds of Appeal the County Court raised issues of disputed facts which fell within the exclusive jurisdiction of the County Court under Pt.9 of the 2010 Act. ***The most important of these was whether or not the appellant was disabled. I cannot accept Ms Davies' submissions that this was an issue of law. Of course the statutory definition of disability is a question of law, but whether the appellant fell within it depended on findings of fact, followed by an evaluative judgment as to whether those facts fitted the statutory definition.***

HM(a protected party by his litigation friend) v Southwark LBC legal action December 2020 p46

HM aged 66 years old had a number of health conditions including vascular dementia and back and knee pain that limited his mobility. Provided with interim accommodation in Croydon in a second floor flat accessed by 25-30 steps. The main duty accepted and applicant to remain in interim accommodation. A review as to suitability was dismissed. On appeal His Honour Judge Johns QC found:

- Findings made that access to the property was not impossible and that HM could limit the use of his property by making increases in video and telephone calls. Suggested that the reviewing officer had not applied the requisite sharp focus to the relevant questions under s.149.
- In particular, it did not show an awareness of the need to take steps to meet HM's needs or that meeting his needs might require more favourable treatment.

TAKING THE ARGUMENTS FORWARD

- As in cases such as *Kannan* it is important to align the arguments as to the substantive challenge with the PSED arguments whether arguing in relation to "vulnerability", "suitability", "intentionality".
- It is unlikely that the PSED will result in a freestanding argument in *vulnerability* cases where the decision is otherwise unimpeachable.
- The Court of Appeal has demonstrated now in a number of cases that close scrutiny will be given to the facts as adjudicated on by the reviewing officer. In the negative cases one can see how when a sharp focus has been applied the decision stands up to scrutiny. It is clearly not enough to point to disability in vulnerability cases one has to identify with precision the way that disability is likely to cause injury harm or detriment when (a) attempting to secure alternative accommodation (b) finding oneself without accommodation.
- Technical arguments based on the precise wording of the review decision are likely to be rejected as being "over-zealous linguistic analysis".
- Always try and respond to "minded to" letters.

Further issues arising

- In sensitive cases it may be appropriate on lodging the section 204 appeal to make an application for an anonymity order under CPR 39.2 – *XXX v Camden LBC* [2020] 4 WLR 165.
- In a recent case involving Westminster City Council where there were arguments as to vulnerability where the the applicant was gender fluid. The application forms did not cater for non-binary gender. Issues also arose in relation to the way the applicant was to be addressed when the case came before the court.
- Gender reassignment cases and cases involving gender fluidity particular sensitivity is needed in addressing questions as to priority need and considering detriment and harm that may be suffered if without accommodation. Issues are also likely to arise with regard to the provision of temporary accommodation.
- Following *James v Hertsmere BC* [2020] EWCA Civ 489 CA; *Bankole-Jones v Watford BC* [2020] EWHC 3100 possibility of transferring section 204 appeal to High Court applying s42 County Courts Act 1984, CPR 30.3(2)(e) we may have more cases where an appeal is lodged but that an application is made to transfer it to the High Court to allow for further discrimination arguments/policy arguments to be raised.

Thank you

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