



Access to Justice for Deaf Communities

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Access to Justice for Deaf Communities - The Equality Act and some top tips!

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How to frame a discrimination claim?

- What is the protected characteristic?
- What is the treatment your client is complaining of?
Identify the decision, omission, policy, practice challenged.
- What is the relationship between Claimant/ client and Respondent/Defendant perpetrator?
- Who is liable?
- Private law claim or exercising a public function?
- S29 EqA 2010 prohibited conduct/ services under the Equality Act 2010
- S149 - PSED
- Time? S118/123 Equality Act 2010 - 3 months? 6 months?
Just and equitable to extend time



Protected characteristic

- Disability (s6) + Schedule 1 –
- Physical or mental impairment, Adverse effect on day-to-day activities, substantial (“more than trivial”), long term - lasted or likely to last 12 months or to end of life
- Office for Disability Issues “Guidance on matters to be taken into account in determining questions relating to the definition of disability”
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality Act 2010-disability definition.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf)



Identify the prohibited conduct

- Crucial to understand the different concepts
 - As a substantive challenge to discrimination
 - As a process challenge to s149 Public Sector Equality Duty – you need to understand the concepts to understand what the PSED is intended to guard against
- Difference in *treatment* v difference in *outcome* = *Direct* v *Indirect* Discrimination



s13 Direct Discrimination

- (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***.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.



S19 Prohibited conduct – Indirect discrimination (PCPs)

(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.

(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**.

Prohibited conduct – Victimisation (s27)

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing **any other thing for the purposes of or in connection with this Act**;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Disability specific discrimination

s15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.



Reasonable Adjustments

S20 Duty to make reasonable adjustments

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a **provision, criterion or practice** of A's puts a **disabled person** at a **substantial disadvantage** in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

S212 (1) General definitions -

“substantial” means more than minor or trivial;

Disability specific discrimination

S20

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.



Disability specific discrimination

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Remedies?

S119

(2)The county court has power to grant **any remedy which could be granted** by the High Court—

(a)in proceedings in tort;

(b)on a claim for judicial review.

...

(4)An award of damages may include **compensation for injured feelings** (whether or not it includes compensation on any other basis).

(5)Subsection (6) applies if the county court or sheriff—

(a)finds that a contravention of a provision referred to in section 114(1) is established by virtue of section 19, but

(b)is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant or pursuer.

(6)The county court or sheriff must not make an award of damages unless it first considers whether to make any other disposal.

Vento damages – Injury to Feelings

- Lower band: £1,100 to £11,200 (for isolated incidents or less serious cases)
- Middle band: £11,200 to £33,700 (for cases that are more serious but not the most serious)
- Upper band: £33,700 to £56,200 (for the most serious cases)

(issuing on or after 6/4/23)



S149 – Public Sector Equality Duty

- only challengeable in public law claim (s156 breach does not confer a private law claim)
- a **procedural** duty - *Bracking v Secretary of State for Work & Pensions* [2013] EWCA Civ 1345



Public Sector Equality Duty

R (MXK & others) v SSHD [2023] EWHC 1272 the Defendant was found to have acted in breach of her s149 duty in the absence of evidence showing that the equality implications of her policy to detain those with NHS debts had been given due regard. Chamberlain J held as follows:

“88 I accept that it is important to read and apply s. 149 with a degree of flexibility and common sense. But it is not the role of the courts to excuse non-compliance with an obligation which Parliament has imposed. In this case, there is no evidence to show that the Secretary of State or any official has ever considered the equality impacts of her use of the examination and detention powers in Sch. 2, let alone kept those impacts under continuing review...”

90 Given the absence of any witness evidence about the consideration given to these issues, it is not possible to say what the outcome would have been if equality impacts had been taken into account. Certainly, it is not possible to conclude that it is highly likely that the outcome would not have been substantially different: see by analogy R (Buckley) v Bath and North East Somerset Council [2018] EWHC 1551 (Admin), [2019] PTSR 335, [43].

In my view, that is fatal to any argument relying on s. 31(2A) of the 1981 Act. 91 Ground 4 therefore succeeds.”

S149 PSED

(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.



S149 PSED – advancing equality of opportunity

S149 (3) 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.



Steps to take account of disabled person's disabilities

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.**

S149(4)



S149 PSED – foster good relations

Having due regard to the need to foster good relations 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) **tackle prejudice**, and
- (b) **promote understanding**.

S149(5)



S149 PSED – who does it apply to?

- public authority s149(1)
- S149(2) 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 149 (1)
- S150(1) persons specified in Sched. 19,
- S150 (5) a public function is one of a public nature for the purposes of the HRA 1998 (see section 6 HRA).



Bracking v SSWP [2013] EWCA Civ

Approved by the SC in *Hotak v Southwark LBC* [2016] AC811

- (1) Equality duties are an integral and important part to meet aims of anti-discrimination legislation”
- (2) Important evidential element = recording of the steps taken
- (3) Duty is upon the Minister or other decision maker personally
- (4) Minister must assess the risk and extent of any adverse impact/the ways in which such risk may be eliminated *before* and not merely as a "rearguard action”
- (5) "exercised in substance, with rigour, and with an open mind“... “not .. ticking boxes“ “no duty to make express reference” “reference to it and to the relevant criteria reduces the scope for argument.”
- (6) Non delegable and continuing duty
- (7) Good practice to keep records

Top tips

1. What is it your client wants? And why?

#Tip 1 – Early, detailed, (if possible) targeted instructions

2. Raise it early -

- Might actually resolve concern (eg reasonable adjustments)
- Opportunity to raise and frame exactly what your client wants at a time when it might still be achievable
- Exhausting internal routes – appeal might actually succeed!
- And if all fails = CONTEMPORANEOUS evidence
- *And* when it comes to your SAR & disclosure, there *will* as a result be internal documentary evidence/ emails etc surrounding that correspondence
- If time points become an issue taken -> just & equitable (no prejudice points) s118/123 Equality Act 2010



Subject access request aka Gold dust

#Tip 2 (Probably my biggest tip)

- **Make that Subject Access request**

(and then, if considerable time passes, consider whether to make it again ...)

1. How?

- Make sure when asking for all data held, include all emails, texts/ WhatsApp's
- Comms across other platforms, if these are used in business for comms purposes
- Ensuring all those involved included ('satellite email exchanges', everyone cc'd)



Proceedings ...

#Tip 3 – Plead it right & clearly – (if you can)

1. How?

- Identify clearly what your specific acts of discrimination are
- If you have specific quotes / remarks made, all the better (very hard to counter)
- Plead in the alternative eg the hypothetical comparator/
 - or if eg knowledge point, what respondent/defendant ought to have known
- Pre-empt any time points (listing just & equitable factors in the alternative)



Disclosure ...

#Tip 4 – You can never get enough disclosure (possibly also my biggest tip)

1. How?

- Make no assumptions – eg that disclosure is complete (it probably never will be)
- Continue to remind D of continuing duty
- Ask questions, and in good time, eg if there are references to other docs
- Be wary of so called “redactions” - aka ‘covering up tricky issues’
- ID if there are gaps in disclosure, eg satellite correspondence spinning off from main exchanges
 - Policies, internal training, statistics, discussions, internal advice?
 - Other complaints?



And when it all comes together – a thing of beauty!

(in a legal sense)

#Tip 5 – Be patient!

- Litigation is a strange creature
- It is often only in cross-examination, when R's case starts unravelling at the seams
- Don't be bullied in correspondence
- Remember you haven't seen their witness statements, you know yours, D/R's witnesses might be awful, the more D/R witnesses, the better ! => setting themselves up to fail, difficult for all to remain consistent
- And even if it doesn't all go to plan in XX, submissions can still swing a case

There's only so much you can do... but make sure you do!

#Tip 6

(Probably the most important tip)

This will be a once in a life-time, incredibly difficult process & experience for your client.

Their legal team are the only ones practically supporting them, building their case.

Their voice to bring across what has happened.

If you've done that, you / we've served our clients well.

And if we win – even better!



Thank you.

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Using public law to challenge discriminatory treatment

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GARDEN COURT CHAMBERS



TOP TIER SET
2022



@gardencourtlaw

Contents

- What is judicial review?
- Who can be the Claimant?
- Funding and costs
- Evidence gathering
- Campaigning



What is 'judicial review'?

- A legal challenge brought by a 'Claimant'
- Against a decision/continuing failure of a public authority or those 'exercising public functions'- the Defendant
- High Court
- Prompt/3-month time limit for bringing
- Court can make
 - Mandatory order
 - Quashing order
 - Prohibiting order
 - Declarations
- Can affect more people than just the Claimant- judicial review is a tool for system change



What is judicial review?



What is judicial review?

- NOT a criminal trial- normally no cross-examination
- Can apply for anonymity
- Often about the law more than the facts



What is judicially reviewable?



If it smells wrong, there might be something in it

But there are technical rules and tight time limits... **and it's best to speak to a lawyer quickly.**

Grounds of challenge can include:

- Equality Act 2010
- Human Rights Act 1998
- Breach of statutory duties
- Failure to consult
- Inadequate reasons
- Irrationality
- Irrelevant considerations
- Frustrating Parliament's intention



Who can be the Claimant?

- A Claimant must have 'standing' and be 'directly affected' by the decision. For example, if the local authority closed a special school the children or parents attending that school would be 'directly affected'
- A charity could be a Claimant but the Courts are being stricter about this.



Funding and Costs Protection

- Legal aid- but tight financial eligibility requirements [Check if your client qualifies for legal aid | GOV.UK \(check-your-client-qualifies-for-legal-aid.service.gov.uk\)](https://www.service.gov.uk/check-your-client-qualifies-for-legal-aid)
- Equality and Human Rights Commission
- LawForChange
- Crowd Funding
- Costs Capping Orders? May well be needed if you do not have legal aid.



Evidence gathering

Questions to consider:

1. What are the impacts of the decision/practice I think is unlawful?
2. Who else is affected?
3. Is there any data/statistics that I could use?
4. Is there a charity that works on this issue that could provide evidence in support?
5. SAR/FOIA/Parliamentary question?
6. Is there something that you think the Defendant is hiding from you?



Judicial review as a campaign tool



Raises profile
Applies pressure
System changing remedies



Judicial review can achieve amazing things!

[High Court rules 'blatantly discriminatory' amendments to PIP criteria unlawful | Social Welfare Updates | News | Garden Court Chambers | Leading Barristers located in London, UK](#)

[Secretary of State for the Home Department's Discretionary leave policy for trafficking victims declared unlawful: Upper Tribunal decision in VTL \(Vietnam\) | News | Garden Court Chambers | Leading Barristers located in London, UK](#)

[High Court finds local authority subjected disabled asylum seeker to inhuman and degrading treatment for seven months | News | Garden Court Chambers | Leading Barristers located in London, UK](#)

[High Court rules Home Office use of hotels for unaccompanied asylum-seeking children unlawful | News | Garden Court Chambers | Leading Barristers located in London, UK](#)

[Rwanda Judgment: Supreme Court unanimously rules Rwanda policy is unlawful | News | Garden Court Chambers | Leading Barristers located in London, UK](#)



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