GARDEN COURT
CHAMBERS

Defending possession with the Equality Act – an update

David Renton, Garden Court Chambers

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Which landlords are subject to the EA 2010?

Most possession cases are fought in Parts 3 or 4 Equality Act 2010

Part 3: Public Functions
Section 31 outlaws discrimination in the provision of goods of facilities in the exercise of a public function – covers local authorities and HAs (*Nur and Ors, R (on the application of) v Birmingham City Council* [2021] EWHC 1138 paras 140-7)

Part 4: Management of premises
Section 33 person with right to dispose of premises must not discriminate

If you come within one of these or other Parts of the Act, then statutory torts set out in Part 2 apply:

Direct discrimination
Indirect discrimination
Reasonable adjustment
Discrimination arising from disability
Harassment
Victimisation

Protected Characteristics

Section 4
Protected Characteristics

The following characteristics are protected characteristics—

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

Not all protected characteristics apply to every part

Part 3
Excludes age (if under 18), marriage, civil partnership

Part 4
Excludes age, marriage, civil partnership

Defining the protected characteristic

Relevant protected characteristic is often, but not always, disability (EA 2010 s(6)):

A person is disabled if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. The term “impairment” is given its ordinary and natural meaning

Additional protections given to certain characteristics

DISABILITY
Section 15 EA 2010
Discrimination arising from disability

Occurs when:
A person (A) … treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim

Section 20 EA 2010
Reasonable adjustment

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.

The second requirement … physical feature

The third requirement … but for the provision of an auxiliary aid

Protections against discriminatory possession proceedings

“Parliament has enacted that discriminatory acts proscribed by the [Disability Discrimination Act 1995] are unlawful. The courts cannot be required to give legal effect to acts proscribed as unlawful” (*Lewisham London Borough Council v Malcolm* [2008] AC 1399, para 19).

“The same would, of course, apply to an eviction which was unlawfully discriminatory on other grounds, such as race or sex” (*Akerman- Livingstone v Aster Communities Ltd* [2015] UKSC 15, Lady Hale, para 17 where she quotes Lord Bingham in Malcolm).

It is unlawful to evict an occupier contrary to the Equality Act even though that occupier “had no other claim to remain in the property” (*Akerman- Livingstone*, para 17)

Decision taken on multiple grounds

Nagarajan v London Regional Transport [2000] AC 501, 511A-B

Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.

Must consider alternatives to outright possession

Birmingham v Stephenson [2016] HLR 44, para 22

[T]he flaw in both the Deputy District Judge's approach and the council's respondent's notice is to treat the question of proportionality as a binary choice between eviction, on the one hand, and doing nothing on the other hand. Clearly something must be done for the wellbeing of Mr Stephenson's neighbour. However there may well be intermediate steps that could be taken short of throwing Mr Stephenson out on the street. For example, he could be given support from Social Services in reminding him of appointments that have been made for him to receive medication. He might be given support from mental health professionals. His medication could be changed or its dosage increased. Sound attenuation measures could be installed in his flat. There could be specific agreement on permitted hours for the playing of music rather than the general prohibition on anti-social behaviour contained in the tenancy conditions. The council might seek an injunction prohibiting the anti-social behaviour under the Anti-Social Behaviour, Crime and Policing Act which would require supervised compliance. Or the council might provide him with more suitable alternative accommodation.

Protections against summary possession

Akerman-Livingstone v Aster Communities Ltd [2015] HLR 20, paras 59-60:

Possession can be ordered summarily if the landlord can establish that (i) the defendant has no real prospect of establishing that they were under a disability, (ii) in any event, it was plain that possession was not being sought because of something arising in consequence of the disability or not on whatever other ground the defendant relies, or (iii) in any event, the claim plainly represented a proportionate means of achieving a legitimate aim. Such cases are likely to be rare.

PSED Section 149

Section 149(1)-(2) EA 2010 provides that public authorities and those who provide public functions must, in the exercise of their 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.

Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345

[The decision maker] must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action," following a concluded decision.
The duty must be "exercised in substance, with rigour, and with an open mind." It is not a question of "ticking boxes."

Update (1): multiple causes / when does proportionality bite?

Nightingale & Anor v Bromford Housing Association Ltd [2024] EWHC 136

[36] The judge's own findings demonstrate that Calum's behaviour and disability, in Lord Nicholls' words in Nagarajan [2000] 1 AC 501, at 513B, "had a significant influence on the outcome". Where that is so, Lord Nicholls added, "discrimination is made out".

[59] To determine whether the notice to seek possession remains lawful, i.e. proportionate within section 15(1)(b) of the Act, the court needs to consider the up to date evidential position.

Update (2): multiple causation

Ms N Bodis v Lindfield Christian Care Home Ltd: [2024] EAT 65

[44] The statutory test is that of whether the unfavourable treatment was because of something arising in consequence of disability; there is no statutory concept of "causal triviality"; nor do I consider it assists in analysing the statutory provisions…The last thing that is needed is another statutory paraphrase. The key question is whether the unfavourable treatment is because of the something arising in consequence of disability, which the authorities clearly establish does not require that the treatment be solely or principally because of the something, but only that the something is of sufficient causal significance, that the unfavourable treatment can be said to be because of it.

Update (3): requisite knowledge

Aecom Ltd v Mallon [2023] EAT 104

[45] The proper questions should have been whether the respondent knew or ought to have known that the claimant had a disability and was by reason of that disability likely to be placed at the substantial disadvantage to which he was placed by the PCP in question.

Claimant applies for job, Respondent sends him email questions, Claimant fails to apply

Send in application form – says he had dyspraxia, calls it a disability, asks to make application orally.

Respondent says must ill in application form; Claimant asks to complete it orally. R asks is there part of form causing difficulty – no answer.

R: "essentially it did not know the nature and extent of the claimant's difficulties at the time, because the claimant was not being clear about the extent of those difficulties"

C: "unnecessary for him to provide specific details by email. Had the Respondent phoned him he would have provided the specific details on the phone"

-R knows about disability
-R has constructive knowledge of disadvantage

Update (4): reasonable adjustment

FG, R (On the Application Of) v Royal Borough of Kensington and Chelsea [2024] EWHC 780

(HC has previously found LA and HA cases allocation (*Nur*) fall within part 3 EA 2010)

In this case, it was found that HA housing duties come within part 4.

[98] In this case, we are concerned with a local authority's obligations as a controller of let premises. Section 32(3) is too slender a basis for the proposition that all of a local authority's activities as social landlord are subject to Part 3 rather than Part 4 of the Act. There is no good policy reason for bringing all those activities under Part 3, and doing so would lead to some difficulties.

[99] Part 3 imposes the Second Requirement and a proactive duty to make anticipatory reasonable adjustments to avoid a disadvantage for disabled persons generally in relation to any "relevant matter". It makes sense that these aspects of Part 3 should apply to the exercise of a public function or the provision of a service, which are relatively narrowly focused and where "relevant matters" can more reasonably be anticipated. The management of let premises, however, involves a wide and varying range of activities, responsibilities, and special considerations. It is not feasible for a social landlord to be expected to anticipate and proactively make reasonable adjustments for the wide range of "relevant matters" that could arise in relation to the multiplicity of possible disabilities (such as, in this case, hypersensitivity to noise or smell).

Update (5): ECHR / EA border

Ghaoui v London Borough of Waltham Forest [2024] EWCA Civ 405

"Choosing to educate your children in a privately run faith school motivated by dislike of your children mixing with other children from a diversity of faiths is not a need…

There is no legal duty for the housing authority to discharge the homeless duty by providing accommodation that meets applicants' wishes or desires…

If you had given the children's welfare priority consideration, any reasonable parent would have relocated their children to a school near their residence"

[36] Homelessness decisions may raise issues that engage a Convention right, but instances where a decision designed to relieve homelessness will amount to a violation will surely be very rare. That is reflected in the virtual absence of decided cases involving human rights arguments about suitability, even under Article 8, and the present case is apparently the first in which Article 9 has been relied upon.

Update (6): quantum in EA cases

Vento v Chief Constable of West Yorkshire Police
[2002] EWCA Civ 1871

- i) The top band should normally be between [£35,200] and [£58,700]. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race … Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
- ii) The middle band of between [£11,700] and [£35,200] should be used for serious cases, which do not merit an award in the highest band.
- iii) Awards of between £[1,200] and £[11,700] are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £[1,200] are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

Hickmet and Cheerz Express Limited v Dragos
(Luton County Court, 19 January 2024)

The harassment and discrimination claim alleged attempts to pressure Ms D into signing a tenancy agreement at a higher rent, attending the property without notice and late at night, pressuring Ms D to leave, threatening to enter the property by force and eject Ms D and her two small children, shouting and swearing at Ms D to pay her rent, and calling Ms D a foreigner who non-one would want to help.

£32,000 for discrimination and harassment

PSED update; proving discrimination

Nick Bano, Garden Court Chambers

26 July 2024

PSED update – three Westminster cases

- *R (AK) v Westminster* [2024] EWHC 769 (Admin) (cross-borough management transfers for survivors of domestic abuse).
- *R (AB) v Westminster* [2024] EWHC 266 (Admin) (disability, suitability and pets).
- *R (Yabari) v Westminster* [2023] EWHC 185 (sufficiency of medical evidence for triggering the s.188(1) duty).

AK – silence is not compliance

- AK lived in social housing in a neighbouring borough. The household had to flee child sexual abuse.
- In line with their policy, Westminster refused to agree to a ‘reciprocal transfer’. They said this would amount to jumping the queue.
- AK argued that that a policy that treated Westminster residents more favourably than others was indirect sex discrimination (because women are more likely to need to move into another borough as a result of abuse or violence).
- The PSED point succeeded – Westminster could not demonstrate any compliance with the PSED in formulating their policy.
- A problem for local authorities who say ‘of *course* we comply with the PSED, trust us. We just don’t write it down anywhere’.

DHCJ Simon Tinkler's judgment in *AK*

"It is of course difficult for the Claimant to prove that Westminster has not done something it should have done […] The Claimant says that if Westminster had considered the guidance or changes in statute then the Policy would reflect that somewhere" [30].

"If Westminster had considered its PSED on any of the multiple occasions in recent years in which guidance has been issued centrally or when Westminster reviewed its policy then it would have evidence of such consideration readily to hand. It has failed to provide any such evidence" [33].

"I conclude from that absence of evidence, together with the absence on the face of the Policy of any consideration of the PSED duty or recent guidance, that Westminster has not, as of today, had regard to the factors to which it should have regard in relation to the Policy, and it has therefore not complied with its PSED" [34].

AB – no breach if the council actually agrees with you

- The claimants were a homeless couple with physical and mental disabilities. Their dog was a 'support animal'.
- They challenged Westminster's policy of requiring medical evidence to demonstrate a need to be housed with an animal (we'll come back to the discrimination point).
- On the PSED, the challenge concerned the suitability of the accommodation offered (rather than the policy).
- The challenge failed, because Westminster had already *conceded* on suitability – specifically for disability-related reasons.
- A useful reminder that the PSED concerns process, not outcome.

DHCJ Dan Squires KC’s judgment in *AB*

“It is impossible to see how there will be a breach of the PSED in assessing the suitability of accommodation where it is accepted the accommodation is not suitable because of the individual's disability” [79].

“As *Haque* makes clear, the PSED can be raised in an internal review under HA 1996 s 202, and can be considered by the County Court under s 204. That is the appropriate mechanism for the Claimants to raise concerns that their current accommodation is not suitable or that the Defendant has failed properly to take account of their disabilities in determining suitability” [79].

“The Claimants' disabilities were factored into the Defendant's decision-making when it assessed suitability as required by *Haque*. That discharges the EA 2010 s 149 duty. The fact the Defendant did not then find the Claimants suitable accommodation until 17 October 2023 may be a substantive breach of HA 1996 s 193(2), but is not a breach of the PSED” [82].

Yabari – medical evidence matters

- The claimant was a wheelchair user, and there was a dispute about whether his care needs meant that he required a second bedroom for a carer.
- The claimant had been very reluctant to provide medical evidence, and the local authority had only seen partial GP records.
- Westminster offered one-bedroom accommodation under s.188(1), which was refused.
- The Claimant challenged the decision to 'close' the s.188(1) application, i.e. to fail to offer an alternative to the one-bedroom accommodation.
- The PSED challenge was not made out on the evidence – or, rather, on the lack of medical evidence that the Claimant had provided.

Richie J's judgment in *Yabari*

"I do not consider that ground 3 is made out on the evidence. To the contrary the Defendants have focussed intensely on the Claimant's disabilities and needs arising therefrom and have been blocked and frustrated in doing so by the Claimant's long term refusal to provide access to his own treating doctors' records and opinions" [159].

"Is the Authority in breach of PSED? In my judgment the Defendants have carefully focussed on the Claimant's disabilities save in relation to the fire risk. They have been frustrated in their ability to do so by the Claimant's refusal to provide any medical evidence, notes, reports and treating doctors' details so that proper information can be obtained and assessed" [169].

Proving the discriminatory impact of a PCP – recent cases

- *R (Willott) v Eastbourne* [2024] EWHC 114 (impact of ASB rules on people with autism and ADHD).
- *R (AB) v Westminster* [2024] EWHC 266 (Admin) again (disability, suitability and pets).
- *R (TRX) v Network Homes* [2022] EWHC 456 (domestic abuse and management transfers).
- *R (Imam) v Croydon* [2021] EWHC 379 (discrimination in failure to comply with the s.193(2) duty).

The ‘reverse burden of proof’ in Equality Act claims

Section 136(2):

“If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred”.

Section 136(3):

“But subsection (2) does not apply if A shows that A did not contravene the provision”.

Reverse burden – some pretty generous case law

- The 'reverse burden' does not just apply at the proportionality stage – it applies in considering whether discrimination has taken place (*Igen v Wong* [2005] EWCA Civ 142).
- A claimant only needs to show, on the balance of probabilities, that there is a *prima facie* case that a PCP has a discriminatory impact (*Imam* at [94]).
- The burden then shifts to the Defendant to show that the protected characteristic "played no part" in the decision or the outcome (*Efobi v Royal Mail* [2021] UKSC 33).
- The 'reverse burden' – which is derived from EU law – is important, because it stops discriminators sitting back and taking a 'you have to prove it!' stance (*EB v BA* [2006] EWCA Civ 132).
- But the Admin Court has been surprisingly strict, in recent cases, as to whether claimants have shown a 'prima facie' case.

Proving discrimination – recent High Court cases

- *Willott*: various medical reports and studies were insufficient to satisfy the judge that people with autism and/or ADHD would be put at a disadvantage by anti-ASB provisions in an allocations scheme (a causal connection which some experienced housing lawyers might have thought was obvious?).

- *AB*: comments from a disability expert, saying that people often lack formal evidence establishing a need for a support animal, were insufficient. There was "no basis for assuming, certainly without evidence, that the requirement disproportionately disadvantages those with disabilities".

- *TRX*: a requirement for corroborating evidence in DV cases was not discriminatory, because there was not enough information for the court to draw an inference that women would be put at a greater disadvantage.

- *Imam*: the discrimination claim was said to be based on assertions, rather than evidence.

Proving discrimination – lessons learned

- Section 136 is not really fulfilling its statutory purpose in housing JRs: local authorities are sitting back and calling on us to prove discrimination.
- The High Court is difficult to impress, so be sure to gather and rely on 'impact' evidence at the earliest possible stage (i.e. in PAP letters) or approach specialist intervenors.
- Rely on s.136 at the PAP stage: *assert* that there is a *prima facie* case and call on the Defendant to *disprove* the discriminatory impact of a PCP.
- Rely on s.136 in possession claims. In correspondence, we could be calling on landlords to *disprove* discrimination; to establish a positive case that disability played no part whatsoever in the decision to evict.
- Rely on the PSED. If they don't know whether a PCP is having a discriminatory impact, they're probably breaching their duty to monitor!

Thank you

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