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Using the Equality Act 2010

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INTRODUCTION

1. When the Equality Act 2010 ("the Act") came into force it consolidated 116 separate pieces of legislation into one place and brought together all pre-existing anti-discrimination legislation. The stated intention of the Act was to harmonise and streamline anti-discrimination law and practice, bringing the UK into line with the European Directives and simplifying the system for the enforcement of equality rights.

2. The Act also strengthened the law in a number of areas, and brought in innovations which had previously not been known to housing law, and because of the newly harmonised legal framework, it made reading across the different areas in which discrimination law applies that much more straightforward. It must be regarded as Parliament's intention that, except where expressly provided otherwise, a consistent interpretation be given to the Act's provisions across housing, employment, education and public functions. This is an exciting opportunity for housing law.

3. This paper is intended to follow on from Robert Brown's and looks at some of the unique features of discrimination law, and some of the lessons that can be drawn from case law in other areas. I focus on possession proceedings in relation to people with disabilities (in particular mental health and learning disabilities) because this is the area most frequently encountered by housing lawyers. But much of what I consider would also be relevant to areas such as homelessness appeals and allocations decisions.

4. What I most want to deal with is reasonable adjustments, which is much under-used in housing, and which is a powerful and misunderstood (at least in housing) tool. Reasonable adjustments are important because, unlike other areas of discrimination they are not dependent on an overt act of unfavourable treatment, but on the principle of equal treatment by the creation of a level playing field. In so doing the provisions recognise that different or more favourable treatment may be required in order to address disparate impact. The duty to make reasonable adjustments is essentially a duty to remove disadvantage. While there may be arguments about the reasonableness of steps that are proposed, the nature of the disadvantage and so on, as a general rule the duty is not discharged until the disadvantage has been eliminated: see *Archibald v Fife Council* [2004] IRLR 651 at [15] per Lord Hope of Craighead.

KEY PROVISIONS

5. The key provisions relating to residential premises are as follows:

   a. Section 6 and Schedule 1: the definition of disability

   b. Prohibited conduct:

      i. Section 13: Direct discrimination

      ii. Section 15: Discrimination arising from disability

      iii. Section 19: Indirect discrimination

      iv. Section 21: Failure to make reasonable adjustments

      v. Section 26: Harassment

      vi. Section 27: Victimisation

   c. Part 3 and Schedule 2: Services and Public functions

   d. Part 4 and Schedules 4 and 5: Premises

   e. Sections 113, 118 and 119: Jurisdiction, time limits and remedy

   f. Section 136: Burden of proof and section 138: Power to question

   g. Section 149: Public sector equality duty

   h. Part 13 and Schedule 21: Reasonable adjustments in lettings

   i. The Equality Act 2010 (Disability) Regulations 2010 SI No 2128 ("the Regulations"): interpretation and scope of protections under the Act.

   j. Statutory Guidance: "Guidance on matters to be taken into account in determining questions relating to the definition of disability"

   k. Statutory Guidance: "Code of Practice on Services Public Functions and Associations"

AREAS IN WHICH THE DUTIES APPLY

Premises

6. Part 4 of the Act provides for protection from discrimination in the case of controllers and managers of premises and in respect of decisions to dispose of premises. It therefore covers:

   a. estate agents;

   b. landlords;

   c. local authorities; and,

   d. managers of premises.

7. Part 4 is designed to operate where the premises in question are the victim's home and it does not cover provision of accommodation where it is (a) generally for the purpose of short stays by individuals who live elsewhere, or (b) for the purpose only of exercising a public function or providing a service to the public or a section of the public.

8. Controllers and managers of let premises are under a duty not to discriminate in relation, among others, disposals (section 33) and the management of premises (section 35):

   (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;

   There is a slight change here since the DDA which referred to a "refusal" to dispose. In this way the new law recognises the subconscious drives that are often indicative of discrimination and the difficult issue of proof of discrimination.

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

(Where a disposal is by an owner-occupier and where the landlord does not use an estate agent and does not advertise the letting, she is only prohibited from discriminating on grounds of race: schedule 5 paragraph 1(3).)

9. Section 35 concerns the management of premises:

   (1) A person (A) who manages premises must not discriminate against a person (B) who occupies the premises—

   > *(a) in the way in which A allows B, or by not allowing B, to make use of a benefit or facility;*
   >
   > *(b) by evicting B (or taking steps for the purpose of securing B's eviction);*
   >
   > *(c) by subjecting B to any other detriment.*

10. 'Detriment' is to be given its ordinary meaning and does not connote any special characteristics. It is sufficient that the person might reasonably be said to be disadvantaged: *Shamoon v RUC (Northern Ireland)* [2003] ICR 337, HL.

11. Those who have a right to dispose of premises and managers of premises are also covered by the provisions on harassment and victimisation, both provisions that may offer additional protection and causes of action in cases of breach of quiet enjoyment and unlawful eviction.

Services to the public

12. The provisions concerning goods, facilities and services are at section 29 of the Act and provide for protection of service users, or potential service users, from discrimination, including harassment, victimisation, direct and indirect discrimination. Service providers are under a duty to make reasonable adjustments, and a failure to do so amounts to unlawful discrimination: s. 28(7)(a).

13. Service providers must not discriminate against a person requiring the service by not providing services to that person, by providing it on less favourable terms or by subjecting that person to any other detriment. There is a change from the previous provisions from "refusing or deliberately omitting" to provide a service to now simply "not providing", indicating a slightly lower threshold.

14. "Service provision" to the public is defined as something that could be provided to the public. *In re Amin* [1983] 2 AC 818, the House of Lords said that the test is whether the conduct in question was similar to that which would be or could be undertaken by a private person, and did not extend to actions of entry clearance officers.

Public functions

15. The public function provisions apply in relation to a function of a public nature, exercised by a public authority or another person (including a private organisation), where the function is not covered by the services, premises, work or education provisions of the Act. However, there will be some situations however where the circumstances will fall within Part 3 and will apply:

    a. where the provision of accommodation is generally for the purpose of short stays by individuals who live elsewhere (e.g. decants) s. 32(3)(a); or

    b. where accommodation is provided solely for the purpose of providing a service or exercising a public function (e.g. homeless accommodation): s. 32(3)(b).

16. By section 29(6) a person must not, in the exercise of a public function, do *anything* that constitutes discrimination, harassment or victimisation.

17. Those exercising public functions are under a duty to make reasonable adjustments, and a failure to do so amounts to unlawful discrimination: s. 28(7)(b).

18. Section 31(4) provides that *"a public function is a function that is of a public nature for the purposes of the Human Rights Act 1998."*

DISCRIMINATION ARISING FROM DISABILITY

Definition

19. Section 15 provides as follows

(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) 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.

Unfavourable Treatment

20. The concept of unfavourable treatment is a broad concept. B need not have suffered material or tangible loss. Depriving someone of a choice or opportunity can be unfavourable treatment.

"Because of something..."

21. The "something" must be identified by the court (*P v Governing Body of a Primary School* [2013] UKUT 154 (AAC) [52]) and the disabled person must have been treated less favourably "because of" that something. In a possession case the "something" will be normally be the grounds for possession and will be easy to identify as rent arrears, nuisance behaviour or a breach of the tenancy. However, in a case under the accelerated procedure or in the case of introductory tenants the situation is likely to be more nuanced; in those circumstances, the court must ask what was the reason why the disabled person was treated as she was.

22. The words "because of" were an attempt to avoid the difficulties that had been encountered with the words "on grounds of" in the previous legislation. However, the key authorities are likely to still be helpful, notable the classic speech of Lord Nicholls in _Nagarajan v London Regional Transport_ [2000] 1 A.C. 501 at 512-513:

> *Decisions are frequently reached for more than one reason. 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.*

"… arising in consequence…"

23. The disabled person must have been treated unfavourably because of "something arising in consequence of B's disability"; this might be, for example, rent arrears that arise due to B's depression or nuisance that arises from B's schizophrenia. Anything that arises as a result, effect or outcome of the disability will be something arising in consequence of B's disability.

24. A common issue that arises is the complex interaction between drug and alcohol addiction and mental health. In such circumstances, the tenant may be disabled as a result of depression, PTSD or some other mental health condition, or indeed the physical effects of substance abuse, but the question arises as to whether the "something" is caused by the disability or by an excluded condition such as alcohol addiction or a tenancy to physical abuse. Thus, a tenant may be accused of anti-social behaviour which may be the result of his drinking or his mental health issues, or a combination of the two.

25. In _Edmund Nuttall Ltd v Butterfield_ [2006] ICR 77 (at 85 E-H) which was approved by the High Court in _Governing Body of X Endowed Primary School v Special Education Needs_

and Disability Tribunal and Ors [2009] EWHC 1842 it was said that the following approach should be taken:

> *"It is plain that a claimant may have both a legitimate impairment and an excluded condition… In these circumstances it seems to us that the critical question is one of causation. What was the reason for the less favourable treatment, here the dismissal of the Claimant? If the reason was the legitimate impairment, then prima facie discrimination, subject to the defence of justification, is made out; if the reason was the excluded condition and not the legitimate impairment, then the claim fails by reason of his disability. That distinction may be easily stated. However it does not deal with the case where both the legitimate expectation and the excluded condition for the employers reason for the less favourable treatment….[in such cases the complainant] must show that the less favourable treatment was for a reason related to the [the complainant's] disability….if the legitimate impairment was a reason and thus an effective cause of the less favourable treatment, then prima facie discrimination is made out notwithstanding that the excluded condition also forms part of the employers' reason for that treatment".*

26. Recently this approach was applied in a post Equality Act 2010 case, brought under section 15 in the case of P v Governing Body of a Primary School [2013] UKUT 154 (AAC) which confirmed:

> *"the critical question is one of causation. What was the reason for the less favourable treatment…?" If that analysis shows more than one reason "if the legitimate impairment was a reason and thus an effective cause of the less favourable treatment, then prima facie discrimination is made out notwithstanding that the excluded condition also forms part of the … reason for that treatment."* para 52.

"… of B's disability."

27. The particular framework of the provisions on disability require that B establish that he or she is a disabled person within the meaning of section 6 of the Act. However, this does beg the question as to the role of carers (associative discrimination) and perceived discrimination.

28. While the Act does not provide in terms that it includes "perceived or apparent discrimination" the intention was to extend prescription of direct discrimination to less favourable treatment on account of the discriminator's perception of the presence of a protected characteristic as well as its actual presence. The Explanatory Notes (para.59) state that the definition of direct discrimination is broad enough to cover less favourable treatment because the victim is "wrongly thought to have the protected characteristic" and give as an example the rejection of the application of a white man by an employer who wrongly believes the applicant is black because he has an "African sounding name".

29. In *Aitken v Commissioner of Police of the Metropolis* (EAT 0226/09) the EAT, in remarks that are clearly obiter, rejected the argument that the Disability Discrimination Act 1995 ("DDA") should be interpreted to include discrimination because of a perceived disability (the case concerned a person with Obsessive Compulsive Disorder and whose problems were found to fall short of a disability). In light of the stated intentions of parliament however these obiter remarks of the EAT in *Aitken* may now be regarded as having been superseded by the 2010 Act. The current position is probably better reflected by the majority in *English v Thomas Sanderson Blinds ltd* ([2009] I.R.L.R. 206 (CA)). The case concerned reg. 5 of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661) which dealt with harassment "on the grounds of sexual orientation". Sedley L.J. and Lawrence Collins L.J. were clear that the claimant's actual sexual orientation was irrelevant to such a question.

30. Similarly, in relation to harassment, direct and indirect discrimination the Act provides protection from discrimination in the case of those who are associated with a disabled person, reaffirming the position under the DDA as confirmed by *Coleman v Attridge Law Coleman v Attridge Law (A Firm)* (C-303/06), ECJ. Therefore the tenant who is treated less favourably because of her son's disability, or who experiences harassment on that basis may bring a claim in respect of her own treatment.

31. Where the protected characteristic is disability however, the perception or associative argument does encounter a difficulty because in these cases the protected characteristic has a particular legal context. Whether a tenant can successfully assert the perception argument where, in the case of disability, the landlord believes – wrongly - that the tenant is a disabled person is yet to be decided.

Knowledge

32. The person (A) must prove that she did not know and could not reasonably have been expected to have known of B's disability at the time of the unfavourable treatment. If this is shown then A will not have acted unlawfully within section 15.

33. The Code of Guidance on Services, Public Functions and Associations replicates the previous Guidance under the DDA, and the corresponding employment Guidance by stating that in order to rely on this defence, "a service provider must do all they can reasonably be expected to do to find out if a person has a disability" (paragraph 6.16). Arguably the same approach should be taken in premises cases and it is noted that in the case of public authorities the public sector equality duty requires enquiries to be made once a public body is on notice that there may be a disability: *Pieretti v Enfield* [2011] H.L.R. 3.

34. It would appear that if A was not aware of the disability when she issued proceedings but was then made aware of the same and decided to continue with the eviction process then A would be caught by section 35(1)(b) which states that A must not discriminate against B who occupies premises by evicting B or "taking steps for the purpose of securing B's eviction". Thus if A, with knowledge of the disability, continues to seek possession, there will be an unlawful act unless A can justify the treatment.

Justification

35. The person who seeks to justify the unlawful treatment can avoid liability if he can show that the treatment was a proportionate means of achieving a legitimate aim.

36. Thus the first step will be to identify the legitimate aim. The aim must be a real objective consideration. See *Balcombe LJ in Hampson v Department of Education and Science* [1989] ICR 179 at 191:

   "In my judgment 'justifiable' requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition".

37. The person seeking to justify the treatment has to set out what is the legitimate aim.

38. The treatment must be proportionate to any legitimate aim. This will involve considering whether the means sought to achieve the aim are appropriate and reasonably necessary to achieve the end. Necessary does not mean that it is the only means to achieve the same end but, if less discriminatory measures could have been taken to achieve the same end, the treatment will not be necessary (e.g seeking to move the tenant to more suitable accommodation).

REASONABLE ADJUSTMENTS

The scope of the duty

39. The duty is set out at section 20 and 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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

40. In order to bring a claim the disabled person must be at substantial disadvantage "*in comparison with persons who are not disabled*". This does not require the strict comparative exercise necessary in other areas of discrimination law and is often readily discernible from the nature of the disadvantage: *Fareham College v Walters* [2009] I.R.L.R. 991 However, advisors must be clear in constructing and interpreting

PCPs to ensure that the person claiming a failure to make reasonable adjustments is disadvantaged compared to those who are not disabled.

41. There are differences in the scope of the duty in respect of these three areas:

Premises

42. Subject to certain limited exceptions, only the first and third requirements apply to landlords in relation to lettings and sub-lettings: section 36. In summary therefore the duty requires a controller of let premises -

    a. to take reasonable steps to avoid substantial disadvantage created by a provision, criteria or practice; and

    b. to take reasonable steps to provide an auxiliary aid or service where, without it, the disabled person would be put at a substantial disadvantage.

43. Further details of the scope of the duty to make reasonable adjustments in relation to premises are set out in schedule 4, paragraph 2 of which provides details in relation to the duty on controllers of let premises the duty to make reasonable adjustments applies to a tenant of the premises, or someone who is otherwise entitled to occupy them.

44. In relation to premises, the disabled tenant or occupier must be at a "substantial disadvantage" in relation to - (a) the enjoyment of the premises; (b) the use of a benefit or facility, entitlement to which arises as a result of the letting.

45. This replaced the previous test in relation to let premises of there being a duty to make reasonable adjustments where there is a "practice, policy or procedure which has the effect of making it impossible, or unreasonably difficult, for a relevant disabled person (i) to enjoy the premises, or (ii) to make use of any benefit, or facility, which by reason of the letting is one of which he is entitled to make use, or (b) a term of the letting has that effect." (s. 24D DDA 1995). This change brought the provisions on

premises into line with those on employment and education, a process which began when the duty to make reasonable adjustments was introduced in the 2005 Act.

46. The key innovation of the Act in this area is that it introduced a unified test of "substantial disadvantage" so that where the disabled person is at a substantial disadvantage, reasonable steps are required. To this extent the change confirms the case law which had given a broad meaning to the phrase "impossible or unreasonably difficult" (see *Roads v Central Trains* [2004] EWCA Civ 154). However, "substantial" now bears a statutory definition of "more than minor or trivial" (s. 212) and therefore, this indicates a somewhat lower threshold which must be reached in order for the duty to be triggered.

47. Similarly, there is no longer a requirement that the auxillary aid "would be of little or no practical use to the relevant disabled person concerned if he were neither a person to whom the premises are let nor an occupier of them".

48. By changing the words "practice, policy or procedure" the Act again indicates that the same test should be applied across employment, education housing and public functions. While arguably there is little difference between the old test and the new "provision, criteria or practice" or PCPs bears an established and very broad meaning in employment law which can now be relied upon.

49. What is different about the duty to make reasonable adjustments in housing is that no duty to make such adjustments unless and until a controller receives a request to do so from or on behalf of a tenant or person entitled to occupy: sch. 4 paras. 2(6) and 3(5).

50. Subsection 7 makes clear that any reasonable adjustments that are made at to be at the landlord's expense. She is not entitled to require the disabled person to contribute to the costs of complying with the duty.

Provision of services and exercise of public functions

51. Schedule 2 provides for detail on the duty to make reasonable adjustments in the provision of services and public functions. Schedule 2 paragraph 2 provides that

references to "a disabled person" is to "disabled persons generally". As the Explanatory Notes to the Act make clear, the change in wording to "disabled persons generally" is intended to indicate that the duty is an anticipatory one, so that service providers and those exercising public functions must anticipate the needs of disabled people in advance and make appropriate adjustments: para. 676. Knowledge of an individual's disability is not required.

52. 'Disabled persons generally' in this context does not mean that all disabled persons must be disadvantaged, or even that a class of disabled persons must be disadvantaged. It is sufficient that the person claiming discrimination is not experiencing the disadvantage as an individual but as part of an ascertainable group: *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin).

53. If a benefit is or may be conferred in the exercise of the function being "placed at a substantial disadvantage" means being placed at a substantial disadvantage in relation to the conferment of the benefit: sch. 2 para. 2(5)(a). So for example, in relation to the allocation of housing the conferment of the benefit is housing. For the duty to make reasonable adjustments to arise the applicant must be at a disadvantage which is more than minor or trivial, in relation to the conferment of housing.

54. Similarly, where the public function is one by which people are subjected to a detriment, being "placed at a substantial disadvantage" means suffering an unreasonably adverse experience when being subjected to the detriment: see schedule 2 para. 5. This may apply in the case of policies on anti-social behaviour or possession for example.

55. Again, the Act was a move to a unified test, with "substantial disadvantage" now connoting a lower threshold test than that contained in section 21E DDA, which referred to PCPs that made it "impossible or unreasonably difficult" for disabled persons to receive a benefit conferred or to be subjected to the detriment in question.

Discharge of duty

56. The duty to make reasonable adjustments is discharged only when the disabled person is no longer at a substantial disadvantage: *Archibald v Fife Council* [2004] IRLR 651 at [15] per Lord Hope of Craighead. A landlord or public body which says 'because we did something, the duty upon us is discharged' does not satisfy the Act if the something it did was ineffective to alleviate the problem but something more would have alleviated it. As Lord Hope put it, the question is whether 'one more step' was required.

57. The only exception to this rule is in relation to the provision of services and the exercise of public functions and in respect of the second requirement, that is, the physical features requirement. In those circumstances the service provider or public body is under a duty either to take reasonable steps to avoid the disadvantage, or to adopt a reasonable alternative method of providing the service or exercising the function: schedule 2 para 2(3).

58. Once adjustments have been identified the question is the reasonableness of the proposed steps. This will involve consideration of the cost of taking that step, the impact on the landlord/service provider's organisation and others and the resources available to it. As such it is likely that a local authority landlord is likely to have a far higher hurdle in showing that the step was unreasonable than a small private landlord.

59. It goes without saying that it will rarely be wise to argue that ignoring the rent arrears/breach of tenancy/anti-social behaviour is a reasonable step. Such an adjustment to the landlord's normal practice is highly unlikely to be considered reasonable. However, what may be considered reasonable is taking some action short of possession or taking some action to support a disabled person in their tenancy. Consideration will be given to the range of powers that are available to the landlord, including community care referrals, management transfers, housing support, and so on.

60. Crucial is the issue of whether the proposed adjustment would be effective in eliminating the disadvantage; thus in the case of possession proceedings, whether it is likely to avoid the behaviour/rent arrears/breach of tenancy that caused possession to

be pursued. In respect of service he Code of Practice on Services Public Functions and Associations states that:

> *A service provider [including those exercising public functions] would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding whether a step is reasonable, a service provider should consider its likely effect and whether an alternative step could be more effective. However, a step does not have to be effective to be reasonable.*

61. In *Cumbria Probation Board v Collingwood* UKEAT/0079/08: HHJ McMullen said that "it is not a requirement in a reasonable adjustment case that C prove that the suggestion made will remove the substantial disadvantage". The EAT then went on to uphold a finding of a failure to make a reasonable adjustment which effectively gave the claimant "a chance". Similarly in *Leeds Teaching Hospital NHS Trust v Foster* [2011] EqLR 1075, the EAT held that there was no need for the tribunal to have found that there would have been a "good" or "real" prospect of removing the disadvantage. It would have been sufficient for it to have found simply that there would have been a prospect. If there was a real prospect of an adjustment removing a disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but that did not mean that anything less than a real prospect would be insufficient to make the adjustment a reasonable one (see para.17 of judgment).

REASONABLE ADJUSTMENTS IN PRACTICE

Anti-social behaviour

62. A good example of how the duty to make reasonable adjustments can be used in housing law is the case of *Barber v Croydon LBC* [2010] H.L.R. 26. CA. This case concerned a defendant who had learning difficulties and a personality disorder, and suffered from acute depression. In 1999, the Council accepted a homeless duty to him and secured him temporary accommodation. In 2007, the defendant had an argument with the caretaker of his block. The defendant swore at the caretaker and threatened him. He spat in the caretaker's face and kicked him in the knee causing an injury which required hospital treatment. The caretaker reported the incident to the authority's

antisocial behaviour officer. The officer consulted with his manager and it was decided to serve notice to quit on the defendant. In defending possession proceedings two points were raised under the then DDA, in addition to a public law defence (1) Breach of the public sector equality duty at s. 49A DDA 1995; and (2) Disability related discrimination under s. 3A(1) DDA 1995. No issues or counterclaim was raised in respect of failure to make reasonable adjustments.

63. By then, disability related discrimination had been rendered redundant to all intents and purposes by _Malcolm_ and this claim was rejected, both at the County Court and at the Court of Appeal. However, the Court of Appeal in rejecting the claim gave reasons that echo the requirements for a reasonable adjustments claim:

> *The issue, however, in this case is whether that general policy applied or should have been applied to Mr Barber in this case. The criticisms of the way in which the Council handled the incident are not based on any discrimination by them against him.* [i.e. disability related discrimination] *The question is not whether he was treated less favourably than a person without his disabilities but whether he should have been treated differently precisely because he has such disabilities and because they were a significant contributory factor to his behaviour that day.*

64. The argument on section 49A DDA was that the Council was obliged to have regard to Mr Barber's disabilities when deciding to take action in respect of the incident which occurred on May 22, and again, was formulated in terms strongly resonant of the duty to make reasonable adjustments:

> *35 [Counsel for the Defendant]'s case on this appeal is that Mr Barber, as a disabled and vulnerable person within the meaning of that policy, had a legitimate expectation that the guidelines I have referred to would be applied to him and that it was unreasonable for the Council to have served a notice to quit and instituted possession proceedings against him without first having consulted the IMHS and social services in order to decide whether a recurrence of his May 22 behaviour could be avoided by a measure short of the recovery of possession. The categorisation of his conduct as a category 3 case cannot obviate the need to explore these possibilities nor, he submits, can it exclude the use of something short of immediate eviction where that would both avoid further ASB on Mr Barber's part and avoid the risk to his stability and wellbeing which a possession order might create.*

65. The Court of Appeal found that the decision to seek possession was unlawful in public law terms for reasons that sound very similar to the issues that would be considered in a reasonable adjustments claim. Namely, that although the defendant's assault on the caretaker was serious, the claimant was required to explore options other than eviction given the isolated nature of the incident, and having regard to the psychiatrist's assessment of the defendant; the authority ought to have consulted other agencies on whether an alternative to eviction, such as an antisocial behaviour contract, was appropriate. As a result, the decision to seek possession was one which no reasonable authority could make.

66. A strong part of the reasoning in *Barber* was the fact that the Council had failed to follow its own policy in respect of vulnerable tenants. Nonetheless, the case demonstrates how a reasonable adjustments argument can be used; that is, where the landlord's PCP on possession or anti-social behaviour is applied to a disabled tenant, advisors should consider making a request for a pause or stay in proceedings while alternatives are sought or while support is put in place or referrals made. Where such steps are reasonable a landlord would be acting unlawfully in pressing ahead.

67. In identifying reasonable adjustments, as long as the adjustments are directed at eliminating the disadvantage suffered by the tenant *compared with those who are not disabled,* and are reasonable, there will be a duty to make that adjustment. Thus, where a tenant or a member of her family has both a disability, and also an excluded condition such as a tendency to physical violence or an addiction, the question is whether the adjustments proposed are *only* directed at the excluded condition or are *also* directed at the disability. Thus, in *Governing Body of X Endowed Primary School v Special Educational Needs and Disability Tribunal, Mr. and Mrs. T, The National Autistic Society* [2009] I.R.L.R. 1007 the Administrative Court found that because the reasonable adjustments which were proposed were directed at the whole of the Claimants behavioural difficulties and not just to the excluded part, the claim for discrimination should succeed.

68. In that case a pupil was excluded from school because of behaviour which amounted to a tendency to physical violence and was therefore outside of the protection of the DDA under Regulation 4 of the Disability Discrimination (Meaning of Disability) Regulations 1996 S.I.1996/1455:

69 However, the Tribunal's decision is founded on its conclusion that the Governing Body had failed to take such steps as it was reasonable for them to take to ensure that JT was not placed at a substantial disadvantage in comparison with pupils who are not disabled. It is that conclusion which is specifically challenged in this appeal.

70 Although a number of complaints were made by Mr. and Mrs. T in the proceedings before the Tribunal of alleged failures to make reasonable adjustments, the only one which was upheld was the failure to enlist the advice and support of the Access to Learning Specialist Teaching Team prior to the incident of 6th November 2007. […] the Tribunal concluded that an appropriate strategy and reasonable adjustment for the school would have been to enlist the advice and support of the Access to Learning Specialist Team prior to the incident on 6th November 2007. This was, the Tribunal considered, a practical step to have taken and one which would not have made unwarranted demands on the financial resources of the responsible body. The Tribunal expressed its surprise that these strategies were not already in place.

71 While the measures described in the decision at paragraph 19F appear to include means of controlling a tendency to physical abuse, I do not understand them to be limited to such matters. On the contrary, they appear to include measures for the management of pupils with ADHD generally, including calming and de-escalation strategies. Such strategies may be directed at non-compliant and disruptive behaviour falling short of a tendency to physical abuse. [...] I consider that there was here a failure to make a reasonable adjustment in respect of a protected disability.

69. What this case shows is that the lawfulness of a decision can be challenged by using the duty to make reasonable adjustments even where on justification, reasonableness or proportionality a person would be bound to lose. In the case like the one above, disciplinary action in a school, as indeed the issue of possession proceedings, are likely to be justifiable even where the behaviour is caused by a disability but even more so where the behaviour arises from an excluded condition. By using the reasonable adjustments duty, and approaching the issue from the side, tenants can avoid the problem in *Higgins v Manchester City Council* [2006] H.L.R. 14 where a straightforward balancing exercising will always favour the neighbours of those committing of anti-social behaviour.

Rent

70. In relation to rent arrears cases two PCPs may be relevant to the issue of reasonable adjustments:

    a. The requirement to pay rent, contained in the tenancy agreement, and the terms upon which rent is payable; and,

    b. The landlord's policy or practice in respect of rent arrears including any informal practice as to when possession proceedings are issued.

71. Arguably, either of these requirements is capable of putting a person with mental health or learning disabilities at a disadvantage in comparison to those without that disability, although a difficulty is that rent arrears are clearly highly prevalent among those who do not have such disabilities. The disadvantage will be the defendant's exposure to possession proceedings.

72. The key issue in such cases is likely to be identification of adjustments and the reasonableness of those adjustments. It is highly unlikely to be considered to be a reasonable adjustment to ask a landlord to waive or reduce the right to rent, although there may be circumstances in which such a request is appropriate, for example a tenant who has a temporary and serious issue such as cancer.

73. More likely the court will concerned with how the tenant with mental health problems or learning disabilities can be helped to pay the rent, or to clear arrears. Reasonable steps might include reminder telephone calls, visits, the authorisation of a third party to assist, a referral to social services or to a support organisation, the appointment of an advocate etc.

Changes to terms / breach of tenancy agreement

74. An interesting example of this issue, and which demonstrates the some of the differences in the new drafting under the Act can be seen in the case of *Thomas-Ashley v Drum Housing Association Ltd* [2010] EWCA Civ 265. The case concerned a dog called Alfie, who lived with the Appellant in an assured shorthold property. The

Appellant, who suffered from a bipolar mood disorder, appealed the possession order on the basis that the landlord was in breach of their obligation to make reasonable adjustments under Section 24A(2) of the DDA 1995.

75. There was expert evidence that the companionship of the dog and the obligation to care for and exercise him promotes the mental health and well-being of the appellant to a marked degree. The evidence that the dog was beneficial to the appellant's mental health was summed up in the following answer from the witness Dr. Schenk who stated that "I can conclude that Alfie is not only beneficial for her mental health but essential in her rehabilitation".

76. The Court of Appeal found *inter alia* that as Alfie's company was not a factor in the Appellant's use or enjoyment of the premises, but of her state of mind more intrinsically there was no discrimination.

77. However, had the case been brought under the new indirect discrimination provisions it may have been successful on that point (although not overall) as there is no requirement under the provisions at section 19 for the particular disadvantage to go to the use or enjoyment of the premises. Any person claiming such indirect discrimination would need to demonstrate that others with mental health disabilities are also disadvantaged by a no pets rule.

BRINGING DISCRIMINATION CASES

The structure of the claim

78. The case law on reasonable adjustments indicates that courts should require an "intense focus" on the words of the statute. A general discourse as to the way in which a landlord or employer had treated a disabled person generally, or as to the thought processes which had been gone through, is to be avoided. A court must be satisfied that there was a provision, criterion or practice which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The duty is to take such steps as are reasonable to prevent that disadvantage: *Royal Bank of Scotlan v Ashton* [2011] I.C.R. 632.

79. Thus, when considering a claim of failing to make reasonable adjustments, a court cannot not properly judge whether any proposed adjustment is reasonable without first identifying the provision, criterion or practice, or the relevant physical features of the premises, the identity of non-disabled comparators, where appropriate, and the nature and extent of the substantial disadvantage suffered by the claimant. The identification of the substantial disadvantage might involve looking at the cumulative effect of both the provision, criterion or practice and the physical nature of the premises: *Environment Agency v Rowan* [2008] I.C.R. 218 applied (paras 14-16).

80. Schedule 4 para 2 states that "provision, criterion or practice" includes a reference to a term of the letting. However this is not the only thing that PCP can mean. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future such as a policy or criterion that has not yet been applied, as well as a 'one-off' or discretionary decision: see Code of Practice on Services, Public Authorities and Association para 5.6. Examples of the wide definition of a PCP include the refusal of a phased return to work: *Fareham College v Walters* [2009] I.R.L.R. 991, or the job description / the requirement to do the job: *Archibald*. However, the court cannot simply "list things that it does not like and label them as failures to comply with the duty to make reasonable adjustments": *The Newcastle Upon Tyne Hospitals NHS Foundation Trust v Mrs K Bagley* [2012] Eq. L.R. 634 at 84

81. Great care should be taken in identifying the PCP and the disadvantage occasioned by it. The focus should be upon the practical result of the measures which could be taken (see *Ashton* paras 2, 24 of judgment).

Jurisdiction

82. By section 114 the county court has jurisdiction to hear claims of discrimination under the various parts referred to above. There is no specific mention of the Administrative Court or the extent to which private law claims can be brought as part of a judicial

review. However, the law appears to be clear that an applicant is not precluded from raising private law claims and/or issues in public law proceedings (see e.g. *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin)) and in any event, the lawfulness of a decision in discrimination terms is bound to be highly relevant to public law legality.

Burden of proof

83. The burden of proof in discrimination cases is more than simply a reverse burden and does not only apply in marginal cases. It is an important two stage process, mandated by the Burden of Proof Directive, the aim of which is to give full effect to the enforcement of anti-discrimination rights. In so doing it recognises the difficulty that claimants face in obtaining direct evidence of discrimination. See for example *Network Rail v Griffiths-Henry* [2006] I.R.L.R. 865 at paragraph 18 and

84. Section 136 provides for a reverse burden of proof to operate:

 (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.

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

85. Thus there is a two stage test, where at the first stage the party alleging discrimination need only prove facts from which it *could* infer discrimination. The guidance on the way that court should apply the reverse burden is set out in *Igen Ltd v Wong; Chamberlin Solicitors v Emokpae; Brunel University v Webster* [2005] EWCA Civ 142 and, at this first stage, calls for special regard to be had to the fact that primary evidence of discrimination is unusual and that "the outcome at this stage of the analysis by the [Court] will therefore usually depend on what inferences it is proper to draw from the primary facts found". *Igen Ltd v Wong* was recently approved in most enthusiastic terms by the Supreme Court in the case of *Hewage v Grampian* [2012] UKSC 37.

86. If such facts are proved, it is then for the alleged discriminator to show that it did not commit an act of discrimination. To discharge that burden it must prove, on the balance of probabilities, that the treatment was "in no sense whatsoever" on the

grounds of the protected characteristic. Since the facts necessary to prove an explanation would normally be in the possession of the Defendant cogent evidence would normally be expected to discharge that burden of proof: *Igen Ltd v Wong*.

87. The burden of proof provisions are unlikely to assist very much in cases of reasonable adjustments and indirect discrimination (see *Ms B E Dziedziak v Future Electronics Ltd* [2012] Eq. L.R. 543) however, they can be vital in demonstrating discrimination in cases of discrimination arising from disability or where unfavourable treatment is alleged.

Questionnaires

88. One of the unique aspects of discrimination law is the ability to serve a questionnaire on the other side with a view to obtaining information. Section 138 sets out the right to serve the questionnaire and provides details of the consequences that follow from the procedure. The Equality Act 2010 (Obtaining Information) Order 2010/2194 sets out the form of request and the procedure.

89. It is designed to be a pre-action step and the permission of the court is needed if you intend to serve a questionnaire after the issue of proceedings.

90. Questionnaires are vital in indirect discrimination cases where claimants need to prove not only that they have been put at a substantial disadvantage but that they belong to a group of people who have been collectively disadvantaged. In these cases statistical evidence is usually vital. An example of how this may be useful in the housing context may where an applicant for a housing transfer wishes to know how many properties are available that would be suitable for him.

91. Section 138(4) provides that a court may draw an inference from—

    (a) a failure by R to answer a question by P before the end of the period of 8 weeks beginning with the day on which the question is served;

    (b) an evasive or equivocal answer.

92. A failure to respond to a questionnaire, or the provision of an evasive or equivocal answer can be a fact from which discrimination can be inferred, although this should only be in appropriate cases. In this respect, they are to be regarded as similar to pleadings, and indeed questionnaires, and answers can be struck out in the same way as statements of case: Practice Direction – Proceedings Under Enactments Relating To Discrimination para 4.3.

Time limits

93. The time limit for bringing a claim in the county court is 6 months starting with the date of the act to which the claim relates, or (b) such other period as is just and equitable (s. 118). Conduct extending over a period is to be treated as done at the end of the period.

94. Where the act complained of is a failure to act, such as a failure to make reasonable adjustments the failure to do something is to be treated as occurring when the person in question decided on it and in the absence of evidence to the contrary, is when the landlord/service provider/public authority does an act inconsistent with doing it, or on the expiry of the period in which they might reasonably have been expected to do it.: s. 118(6) and (7). Advisors should note the case of *Matuszowicz v Kingston upon Hull* [2009] I.R.L.R. 288 which found that the onus was on those alleging a failure to make reasonable adjustments to identify the date by which they ought reasonable to have been made.

Remedies

95. By section 119(2) (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. Thus the county court is entitled to quash local authorities' decisions and mandate action, as well as make declarations as the legality of policies.

96. Section 119(4) provides that an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis). The

appropriate levels for an award of injury to feelings were set out in *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 101 and amended in *Da'Bell v NSPCC* [2010] I.R.L.R. 19:

> **Lower band** (for the least serious cases, e.g. a one-off or isolated incident of discrimination) - up to £6,000 (formerly £5,000)
>
> **Middle band** (which is used for serious cases that do not merit an award in the highest band) - £6,000 to £18,000 (formerly £15,000)
>
> **Top band** (for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. The guidelines suggest that only in the most exceptional case should an award of compensation for injury to feelings exceed £30,000) - £18,000 to £30,000 (formerly £25,000).

97. In the case of unintentional indirect discrimination the county court must not make an award of damages unless it first considers whether to make any other disposal: s. 119(6).

98. It is important to bear in mind that an injury to feelings award should have an evidential base. Therefore, when drafting witness statements lawyers should be astute to the ways in which the landlord's failure disempowered the client or diminished them in their self esteem, since these are the kinds of issues that the award is intended to deal with.

CONCLUSION

99. The duty to make reasonable adjustments is unique in offering a substantive equality duty to take positive action. It can provide a vital tool for housing lawyers ready to identify the steps that could be taken to improve your client's position. However, a clear understanding of the legal framework is required in order to set out and request appropriate adjustments at an early stage. Even in service and public function cases, where a request is not required, early action in identifying the PCP is important.

100. In possession cases, as in decisions on reasonableness, the issue is frequently whether the package of measures proposed, whether a repayment plan, a managed move, a behaviour contract etc is likely to be effective and reasonable. Advisors must guard against the desire to use discrimination provisions as simply a 'bolt on' to reasonableness, inviting the court to find a tenant less culpable or somehow deserving of sympathy. The duty is one that works towards delivering a level playing field, it does not demand special treatment except to the extent that it is necessary to achieve equality.

101. One area where the duty is particularly helpful is in the case of local authority landlords where the landlord will have a range of powers available to it. In those circumstances the duty to make reasonable adjustments is important because it is an objective test as to the reasonableness of the proposed steps. Thus, a tenant can avoid having to get over a high *Wednesbury* test and demand, in effectm a full merits review of the authority's decision.

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15 May 2013