

Equality Act and Possession Claims

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The Protected Characteristics

1. Section 4 of the Equality Act 2010 specifies a number of characteristics which are protected under the Act:
 - (i) age;
 - (ii) disability;
 - (iii) gender reassignment;
 - (iv) marriage and civil partnership;
 - (v) pregnancy and maternity;
 - (vi) race;
 - (vii) religion or belief;
 - (viii) sex;
 - (ix) sexual orientation.

2. The protected characteristics are defined in sections 5 to 12 of the Equality Act 2010.

Types of discrimination

3. The Equality Act 2010 prohibits a number of different types of discrimination. The principal types are set out in Chapter 2 of the Act:
 - (i) Direct discrimination (section 13);
i.e. treating somebody less favourably because of a protected characteristic (whether their own or somebody else's e.g. a family member's).
 - (ii) Combined discrimination (dual characteristics) (section 14);
 - (iii) Discrimination arising from disability (section 15);
 - (iv) Gender reassignment discrimination relating to absences from work (section 16);
 - (v) Pregnancy and maternity discrimination:
 - a. Non-work cases (section 17);
 - b. Work cases (section 18);
 - (vi) Indirect discrimination (section 19).



4. Part 4 of the Equality Act 2010 imposes a number of provisions which relate specifically to premises, for example:
 - (i) Prohibition on discriminating against a person as to the disposal of premises (the terms on which they are offered for disposal, by not disposing of them or with respect to things done in relation to persons seeking premises): section 33(1);
 - (ii) Prohibition on discrimination by refusing permission for the disposal of premises: section 34(1);
 - (iii) Prohibition on evicting someone, not allowing or restricting the way in which a person can use premises, or subjecting someone to any other detriment in the way that premises are managed: section 35.
5. Part 4 applies not only to landlords but to anyone who controls or manages premises e.g. managing agents and letting agents.
6. Certain types of accommodation are, however, expressly excluded from the provisions of Part 4; section 32(3) provides:

This Part does not apply to the provision of accommodation if the provision—

(a) is generally for the purpose of short stays by individuals who live elsewhere, or

(b) is for the purpose only of exercising a public function or providing a service to the public or a section of the public.

7. The protected characteristics of age and marriage/civil partnership do not apply to Part 4: section 32(1).

Disability discrimination

8. The type of discrimination which features most commonly in possession claims is disability discrimination, for example where a person is accused of anti-social



behaviour which is caused or exacerbated by a mental health condition or where a person is unable to manage their tenancy and rent obligations properly due to such a condition.

Definition of disability

9. Section 6 defines disability:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

10. This is the same definition which appeared in the predecessor legislation on disability discrimination: the Disability Discrimination Act 1995.

11. “Substantial” means an effect which is more than minor or trivial: section 212(1).

12. “Long-term” means an effect which has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the person’s life: schedule 1, paragraph 2.

13. Where an adverse effect ceases for a while but is likely to recur, it is deemed to be continuing.

14. An impairment is treated as having a substantial adverse effect notwithstanding the use of medical aids or treatment to address it.

15. Some specified conditions automatically constitute disabilities under the Act, specifically HIV, multiple sclerosis and cancer: schedule 1, paragraph 6.

16. Addiction to alcohol or a substance does not amount to an impairment for the purposes of the Act unless it was originally the result of medical treatment: Equality Act 2010 (Disability) Regulations 2010 reg 3.



17. Certain conditions are excluded altogether from being a disability under the Act, for example compulsive stealing, compulsive fire-setting, exhibitionism, voyeurism: Equality Act 2010 (Disability) Regulations 2010 reg 4. However a tenant may have a condition which qualifies as a disability under the Act even if part of that condition is an excluded condition e.g. a person with an admissible mental health condition but where that condition sometimes causes them to set fire compulsively: P v Governors of a Primary School [2013] UKUT 154 (AAC).

Discrimination arising from disability (section 15)

18. Section 15(1) states:

(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.

19. Section 15 does not require a comparison with a person who is not disabled. This is in contrast to, say, section 13 direct discrimination which is only made out if a person is treated *less favourably*) and in contrast to the previous legal position as per Lewisham LBC v Malcolm [2008] UKHL 43.

20. The cause of the unfavourable treatment need not be solely the person's disability, however it must be:

“a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor.”

(per Nagarajan v London Regional Transport
[1999] UKHL 36, [2000] 1 AC 501)

21. The court should inquire into the precise reasons why the landlord has initiated possession proceedings. For example, although the landlord may be relying on a section



21 notice which does not require the landlord to give a reason for seeking possession, the landlord may have done so because of something arising in consequence of the tenant's disability e.g. behaviour causing a nuisance to other neighbours.

22. Section 15(2) states:

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.

23. Of course social landlords will often have records which indicate that a particular tenant has a particular disability or condition and they will therefore have knowledge of the disability whether or not the particular housing officer dealing with the tenant does.

24. Under the public sector equality duty (section 149), landlords have a heightened duty to enquire into a tenant's circumstances so should not be wilfully blind to evidence that a tenant may have a disability or rely solely on the tenant to provide clear details of their having a particular condition.

25. Where a landlord initiates possession proceedings but only becomes aware during the proceedings that the tenant has a disability (e.g. by the tenant making this known for the first time in their defence), the landlord will have to take a decision as to whether or not to continue the possession proceedings now that they are aware of the disability. That decision may be express or implicit (if the landlord just presses on with the possession claim as if nothing had happened, clearly they will have taken an implicit decision to continue). By choosing to continue with the possession claim, the landlord may be acting unlawfully even if the decision to issue the claim in the first place was lawful (because choosing to continue the possession proceedings will amount to "taking steps for the purposes of securing [the tenant's] eviction" per section 35 of the Equality Act 2010).



Running a disability discrimination defence

The burden of proof

26. Section 136 imposes a reverse burden of proof where there are facts showing a *prima facie* case of discrimination:

- (1) *This section applies to any proceedings relating to a contravention of this Act.*
- (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.*
- (4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

Summary disposal

27. CPR 55.8 provides:

- (1) *At the hearing fixed in accordance with rule 55.5(1) or at any adjournment of that hearing, the court may –*
 - (a) *decide the claim; or*
 - (b) *give case management directions.*
 - (2) *Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)(b) will include the allocation of the claim to a track or directions to enable it to be allocated.*
- [...]

28. Where a tenant orally raises a disability discrimination defence at the first hearing, a written defence will need to be produced. If the landlord is satisfied that there is an arguable disability discrimination defence, they may be content for directions to trial to be made before having sight of the defence. In other cases the landlord may want the matter brought back to court for a longer hearing once a written defence has been produced in order to seek to persuade the court to reject the defence and make a possession order summarily.



29. The leading case on disposing of disability discrimination defences summarily is Akerman-Livingstone v Aster Communities Ltd [2015] UKSC 15. In that case the landlord argued that the court should approach disability discrimination defences in the same way as it was required to approach human rights defences (per Manchester City Council v Pinnock [2010] UKSC 45 and Hounslow LBC v Powell [2011] UKSC 8) i.e. that the court should only have to consider whether the making of a possession order is proportionate if raised by the tenant and if the argument reaches the high threshold of being seriously arguable.
30. The High Court and Court of Appeal agreed with the landlord, however the Supreme Court held that a different approach applies to Equality Act defences as compared to human rights defences. The Supreme Court held that there should be no presumption that disability discrimination defences should be disposed of summarily; unlike human rights which apply to all, the protections of the Equality Act 2010 were targeted at a specific group of people whom Parliament had decided should have special protection. Moreover Parliament had decided by passing the Equality Act 2010 that disabled people should have rights which are extra to those enjoyed by people without a disability.
31. The Supreme Court noted that summary disposal would be appropriate if the landlord could show at an early stage that:
- (i) The tenant has no real prospect of establishing that he or she has a disability;
 - (ii) The reason for seeking possession is not something arising in consequence of the tenant's disability; or
 - (iii) Seeking possession is plainly a proportionate means of achieving a legitimate aim.
32. However showing those things will generally involve disputes of evidence, often including expert medical evidence, meaning that summary disposal will simply not be appropriate in many cases.



Proportionality

33. The Supreme Court endorsed a four-stage approach to be followed when deciding whether the making of a possession order is a proportionate means of achieving a legitimate aim:
- (i) Does the landlord have a legitimate aim in seeking to evict the tenant?
 - (ii) Are those aims rationally connected to the tenant's eviction?
 - (iii) Is the tenant's eviction no more than necessary to achieve those aims?
 - (iv) Does evicting the tenant strike a fair balance between achieving the landlord's objectives and the impact of eviction on the tenant?
34. The first two stages of that four-stage approach are usually not difficult for a landlord to satisfy: the legitimate aims are generally to vindicate the landlord's property rights and to ensure effective management of its housing stock. Those aims are usually rationally connected to a decision to evict.
35. Most disability discrimination cases will thus turn on the third and fourth stages. For the reasons set out above, these will usually require determination at a full trial rather than a summary hearing.

Other duties

Duty to make reasonable adjustments

36. Section 20 imposes a duty to make reasonable adjustments for disabled persons. It comprises three requirements:
- (i) 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;
 - (ii) 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;



- (iii) 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.

37. A “substantial disadvantage means one which is more than minor or trivial: section 212(1).

38. The “relevant matters” referred to in section 20 are:

- (i) The enjoyment by the tenant of the premises; and
- (ii) The use of a benefit or facility, entitlement to which arises as a result of the letting.

(schedule 4, paragraph 2(5))

39. In let premises, the second requirement of the duty to make reasonable adjustments (which relates to physical features) does not apply: schedule 4, paragraphs 2(2) and 3(2). It is deemed never to be reasonable for a landlord of let premises to have to remove or alter a physical feature of the property: schedule 4, paragraph 2(8).

40. A failure to comply with the duty to make reasonable adjustments constitutes discrimination against a person affected: section 21(2).

41. There is no proportionality defence to a failure to make reasonable adjustments, although in practical terms, since a landlord is only required to take *such steps as it is reasonable to take*, considerations of proportionality may well come into play.

42. A failure to make reasonable adjustments can be relevant to a number of different matters, in particular:

- (i) Whether a landlord can justify discrimination as being a proportionate means of achieving a legitimate aim;
- (ii) Whether the making of a possession order on a discretionary ground is reasonable;



- (iii) Whether the landlord has complied with the public sector equality duty (see below).

43. The duty to make reasonable adjustments applies to:

- (i) a controller of let premises;
- (ii) a controller of premises to let;
- (iii) a commonhold association;
- (iv) a responsible person in relation to common parts.

(section 36(1))

44. The sorts of things which might amount to reasonable adjustments include:

- (i) Providing a more simply worded tenancy agreement or conditions of tenancy;
- (ii) Use of an acceptable behaviour contract or injunctive proceedings rather than seeking possession;
- (iii) Providing more face to face assistance if the tenant has difficulty engaging by other methods;
- (iv) Referring the tenant to support services or debt advice;
- (v) Exploring options for local authority involvement e.g. for a care assessment.

45. The Code of Practice on Services, Public Functions and Associations (<https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>) lists factors to be considered when a landlord is deciding whether an adjustment is reasonable:

- (i) whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question;
- (ii) the extent to which it is practicable for the service provider to take the steps;
- (iii) the financial and other costs of making the adjustment;
- (iv) the extent of any disruption which taking the steps would cause;
- (v) the extent of the service provider's financial and other resources;
- (vi) the amount of any resources already spent on making adjustments; and



- (vii) the availability of financial or other assistance.

Public sector equality duty

46. Section 149 imposes the public sector equality duty:

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) 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.*

47. Complying with the public sector equality duty may involve treating some persons more favourably than others (although that does not permit conduct which is otherwise prohibited by the Equality Act 2010): section 149(6).
48. Having “due regard” means regard that is “appropriate in all the circumstances”: R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141 (concerning a duty under predecessor legislation to the Equality Act 2010).
49. Most social landlords will be exercising public functions when bringing possession proceedings and will therefore fall within section 149(2).
50. The duty is to have due regard, not to achieve a particular outcome
51. It is for the landlord to decide how much weight to give to the various factors at play in a particular case. In Hotak v. Southwark London Borough Council [2015] UKSC 302, Lord Neuberger stated at [75]:
“...it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that ‘there has been a rigorous consideration of the duty’. Provided that there has been a ‘proper and conscientious focus on the statutory criteria’, he said ‘the court cannot interfere ... simply because it would have given greater weight to the statutory criteria.’”
52. That approach was more recently endorsed in The Queen (on the application of Jewish Rights Watch, t/a Jewish Human Rights Watch) v Leicester City Council [2016] EWHC 1512 (Admin) at [28].
53. There has been a considerable amount of case law on the public sector equality duty. It was summarised by the Court of Appeal in Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345 at [25]:



“(1) As stated by Arden LJ in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.

(4) A Minister 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: per Moses LJ, sitting as a Judge of the Administrative Court, in Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin) at [23 – 24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), as follows:

- i) The public authority decision maker must be aware of the duty to have “due regard” to the relevant matters;*
- ii) The duty must be fulfilled before and at the time when a particular policy is being considered;*
- iii) The duty must be “exercised in substance, with rigour, and with an open mind”. It is not a question of “ticking boxes”; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;*
- iv) The duty is non-delegable; and*
- v) Is a continuing one.*



vi) *It is good practice for a decision maker to keep records demonstrating consideration of the duty.*

(6) *“[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.” (per Davis J (as he then was) in R (Meany) v Harlow DC[2009] EWHC 559 (Admin) at [84], approved in this court in R (Bailey) v Brent LBC [2011] EWCA Civ 1586 at [74–75].)*

(7) *Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be “rigorous in both enquiring and reporting to them”: R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941 at [79] per Sedley LJ.*

(8) *Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) (Divisional Court) as follows:*

(i) At paragraphs [77–78]

“[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of ‘due regard’ requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield’s submissions on this point were correct, it would



allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.”

(ii) At paragraphs [89–90]

“[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):

‘...the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.’

[90] I respectfully agree....”

54. There is some case law to suggest that compliance with the public sector equality duty “after the event” might be sufficient to avoid the quashing of the decision, although it should be noted that these cases are not specifically in the context of landlord and tenant litigation: R (Hottak) v SSFCA [2016] EWCA Civ 438 at [106]-[108]; R (West Berkshire DC) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441.
55. The public sector equality duty continues up to and including the moment of eviction; the decision to enforce a possession order by way of a bailiff’s appointment requires ongoing compliance with the public sector equality duty: Barnsley MBC v Norton [2011] EWCA Civ 834.



Practical considerations

Counterclaiming

56. There is no need for discrimination to be pleaded as a counterclaim since it operates as a free-standing defence. However a tenant can counterclaim if they wish to seek damages. Legal aid is available because the counterclaim is a counterclaim to a possession action: Legal Aid, Sentencing and Punishment of Offenders Act 2012, Sch 1 para 33(6)(a). Notably, free-standing Equality Act claims are also within scope for legal aid: Legal Aid, Sentencing and Punishment of Offenders Act 2012, Sch 1 para 43.

Public law defences

57. Where an Equality Act defence is to be raised, advisors and tenant lawyers should always consider bringing any public law defence which might arise. Frequently a breach of the Equality Act will overlap with a freestanding public law defence, for example where a social landlord has failed to follow their own policies. For this purpose, requests should always be made to see the landlord's policies if they are not already available to consider.

Witness evidence

58. Given the reverse burden of proof imposed by section 136 of the Equality Act 2010, good evidence from the tenant showing facts which *prima facie* show a breach of the Equality Act 2010 is important. A well-drafted witness statement setting out the conduct complained of should therefore be obtained.

59. If the tenant is counterclaiming for damages, any witness evidence will need to describe the impact of the discriminatory statement on the tenant.

Reasonable adjustments

60. If the tenant contends that there are reasonable adjustments which the landlord should be making, any order adjourning the proceedings on terms could include a recital setting out the adjustments to be made, thereby giving the landlord some added impetus to make the adjustments which have been proposed.



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