

The Equality Act: Defences to possession and claims/counterclaims

Equality Act claims arising in Housing Law matters

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Who are EAEL?

- Legal Aid provider with contracts for remote advice and face-to-face work in Discrimination.
- Around 1000 cases per year encompassing discrimination in employment, education, public services, goods and services provisions, and housing.
- Clients across England.
- Litigated cases in County Court and Employment Tribunal as well as non-litigated casework.
- Around £1,000,000 in damages secured for our clients in the past year – primarily in employment cases.
- Non-monetary benefits *e.g.* preventing further discriminatory conduct, obtaining reasonable adjustments.



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How cases arise

“Stand-alone” Equality Act claims in the Housing context can arise independently or in the context of another legal matter. For example:

- Discrimination in lettings processes (“No DSS”; allocations procedures);
- Discriminatory conduct by landlord, employee or agent;
- Discrimination in service provision by landlord (disrepair; improvement and renovation; dealing with ASB either as perpetrator or victim);
- Failure to provide reasonable adjustments (may involve Care Act 2014 or Housing Grants, Construction & Regeneration Act 1996);
- Possession and eviction (including unlawful eviction).



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Who may be liable?

Equality Act 2010, Part 4 claims (premises):

- “A person who manages premises” (s. 35) – landlords, managing agents, RTM companies, etc.
- “A person who has the right to dispose of premises” (s. 33) – landlords of properties to let, superior leaseholders, homeowners in a sale of property, etc.
- “A person whose permission is required for the disposal of premises” (s. 34)
- “A controller of let premises” / “A controller of premises to let” (s. 36) – reasonable adjustments duty
- Some other categories in relation to leasehold and commonhold premises.

Equality Act 2010, Part 3 claims (services):

- “A person (a ‘service-provider’) concerned with the provision of a service to the public or a section of the public” (s. 29) – letting agents, local housing authorities, social landlords providing functions arising out of their role as landlords (e.g. repair services, complaints mechanisms).



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Agents

What about the case where the party committing the act of discrimination is not the landlord or their employee, but somebody contracted by the landlord?

- s. 109(2): “Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.”
- s. 109(3): “It does not matter whether that thing is done with the employer's or principal's knowledge or approval.”
- An agent who does something which causes the principal to be in breach of the Equality Act is liable in their own right (s. 110(1)).
- Letting and managing agents may be liable in any case (Part 3 claim) if providing a service to the public or a section of the public.

Prohibited conduct (Equality Act 2010 part 2)

“Conduct-based”:

- Direct discrimination (s. 13)
- Harassment (s. 26)
- Victimisation (s. 27)

“Victim-based”:

- Discrimination arising from disability (s. 15)

“Policy-and Procedure-based”:

- Indirect discrimination (s. 19)
- Failure to make reasonable adjustments (s. 20-21)



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What are reasonable adjustments?

Equality Act, s. 20 – three requirements:

1. where a provision, criterion or practice (PCP) 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;
2. 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;
3. 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.



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Reasonable adjustments – who has a duty?

Part 3 claims (s. 29(7) and Schedule 2) – anticipatory duty:

- Service providers must comply with all 3 requirements.

Part 4 claims (Schedule 4) – duty only arises when a request is made:

- Duty applies where the person disadvantaged is a tenant or lawful occupier;
- Applies in relation to the enjoyment of the premises or the use of a benefit or facility, entitlement to which arises as a result of the letting;
- Controllers of let premises must comply with the first and third requirements;
- **No duty** on landlords under the Equality Act to make adjustments to physical features;
- Removal or alteration of physical features is never a reasonable adjustment.

Separate duties on local authorities may arise under the Care Act 2014 or HGCRA 1996.



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Remedies available

s. 119(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.

- A declaration that discrimination has occurred;
- Damages (injury to feelings – *Vento v Chief Constable of West Yorkshire Police*; special damages if applicable);
- Mandatory orders (e.g. to provide specific adjustments);
- Injunctions (possibly including interim relief?).

Most claims are relatively low value in terms of damages (lower *Vento* band – currently £900-£9,100) – value to the claimant often lies in obtaining a declaration or getting injunctive relief.



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Our clients

Mainly disability discrimination – s. 15 claims, reasonable adjustments, sometimes indirect discrimination. Occasionally direct disability discrimination.

Clients often have multiple complex needs and a history of being let down by statutory authorities.

Direct discrimination or harassment: race, religion, sexual orientation.

More rarely: age, sex, gender reassignment.

Landlords may be acting in their capacity as landlords (Part 4 EA 2010) or service-providers (Part 3 EA 2010).



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Before issuing a claim

- No pre-action protocol. *Practice Direction – pre-action conduct* applies.
- Letter before action and pre-action disclosure (where required).
- Timescale for Defendant’s response: between “14 days in a straightforward case and no more than 3 months in a very complex one.”
- Limitation (s. 118(1)):
 - 6 months minus 1 day from the act complained of (s. 118(1)(a));
 - Court discretion to extend time limit if just and equitable to do so (s. 118(1)(b)).

Issuing a claim: some pitfalls

Limitation – is the time limit about to expire before pre-action work is complete?

- Standstill Agreement – “stops the clock” to enable pre-action steps to be taken and ADR explored;
- Protective issue of the claim – 4 months to use the sealed claim form (CPR r 7.5);
- Relying on “just and equitable” is risky – may be no other option if claim is already out of time.

Identifying the Defendant(s) – it may not be obvious who to bring the claim against, e.g.

- Unknown landlord (“No DSS” cases);
- Who makes housing allocation decisions?
- Is the perpetrator an employee of the landlord, or a contractor?



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Duty to notify

Practice Direction – Proceedings under Enactments relating to Equality

- para. 2.1 - when a claim is commenced, the claimant must
 - give notice of the commencement of the proceedings to the Equality and Human Rights Commission;
 - file a copy of that notice with the Court.
- No prescribed form for the notice.
- EHRC has power under the Equality Act 2006 to intervene in claims if they choose to do so.



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Once the claim is issued

- Claims usually issued in the County Court Money Claims Centre if remedies sought are damages and a declaration.
- Injunctive relief will require issue in the local County Court.
- Allocation to track depends on remedy – common for “damages-only” claims to be allocated to Small Claims despite complexity.
- Practice Direction 1A (from April 2021) – “Vulnerability of a party or witness may impede participation and also diminish the quality of evidence. The court should take all proportionate measures to address these issues in every case” (para. 2). “Ground Rules” hearings are available if Claimant requires reasonable adjustments.
- s. 114(7) – power for the Court to appoint assessors – **must be exercised** unless the judge is satisfied that there are good reasons for not doing so.
- Role of assessor (CPR r 35.15): to assist the court in dealing with a matter in which the assessor has skill and experience. Can advise judge at trial and/or prepare reports in advance – at cost to the parties!



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Legal Aid – the challenges

- Difficulty obtaining public funding – usually requires high value claim or significant wider public interest.
- Over-reliance by LAA on cost-benefit test (Civil Legal Aid (Merits Criteria) Regulations 2013, Reg. 42(2)) – where damages are not the primary remedy sought, the reasonable private paying client test (Reg. 7 and 42(3)) should be applied instead.
- Cases may involve claims in overlapping areas (e.g. discrimination and housing disrepair, or discrimination and unlawful eviction) – parts of claims may attract public funding and parts may not.
- Claimants are often at costs risk.



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Final thoughts...

“Claims under the Equality Act 2010 can be undertaken by either a provider with a Discrimination contract or a provider with a contract in the category of law that relates to the underlying substance of the case. For example, a housing-related discrimination claim can be carried out by a provider with a Discrimination contract or with a Housing contract.”

(LAA Statistics department, July 2021)

Have you tried it?

If not (or you don't have the expertise available) we are happy to consider collaborating on suitable cases...



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