

Equality Act 2010 defences

The Public Sector Equality Duty in s149 Equality Act 2010

Sonia Birdee: Garden Court North Chambers

The 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.

...(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.

Who can be challenged

- Only decisions of a public body or a body exercising public functions
- Not all social landlords are public authorities (*Donoghue v Poplar HARCA* [2001] EWCA). This question will be decided on the facts – look at the nature of the provider and the functions it performs.
- Features which are relevant are the way the body is funded (public subsidy/grant), whether its freedoms to decide allocation are restricted (close relationship with local authority) and the nature of regulation. It will be relevant if L can use special statutory powers to address ASB which private L doesn't have (*R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587 confirmed in *Eastlands Homes v Whyte* [2010] EWHC 5 (Admin) and *R (McIntyre) v Gentoo Group* [2010] EWHC 5 (Admin)).
- But see *R (McLeod) v Governors of the Peabody Trust* [2016] EWHC 737 (Admin))

London & Quadrant Housing Trust v Patrick

[2019] EWHC 1263

- (i) Public sector Landlord seeking to evict a person is subject to the PSED when someone with disabilities might be affected by that decision,.
- (ii) PSED is not a duty to achieve a result but to have due regard to the need to achieve results. Weigh the factors set out in s149 against countervailing factors such as impact of disabled person's behaviour on others.
- (iii) If there is a real possibility that the person subject to its decision is disabled, the Landlord has a duty to make further enquiries.
- (iv) PSED must be exercised "in substance, with rigour and with an open mind and should not be reduced to no more than a "tick-box" exercise."
- (v) PSED is a continuing duty which does not end after possession order is made. If there has been a material change of circumstances at that point and before enforcement, the landlord will be under a duty to make a new assessment.
- (vi) Assessment before decision to seek possession not as a "rear-guard action" following a concluded decision. Duty only arise though once Landlord is aware of disability.
- (vii) Steps in assessment must be recorded.
- (viii) Court's role is to ensure PSED has been considered properly. It is not entitled to substitute its own views.

Timing

- No fixed hoops to jump through (*London and Quadrant Housing Trust v Patrick* [2019] EWHC 1263 at [44])
- Open to remedy breach of s149 at a later stage (*Barnsley MBC v Norton* [2011] EWCA Civ 834 at [34], *Powell v Dacorum* [2019] EWCA Civ 23 at [50], *Taylor v Slough BC* [2020] EWHC 3520 (Ch) at [41])
- However, where assessment is carried out after a decision has been made to seek possession, courts must guard against the risk of confirmation bias (*Taylor* at [45])

Metropolitan Housing Trust v TM(A protected party, by his litigation friend DM) [2021] EWCA Civ 1890

- There is an obvious risk of confirmation bias when breach of the PSED is remedied in the witness box [39], [65].
- However, if a breach of the PSED has been remedied late, the court is not obliged to refuse possession [50].
- Remedy of breach in the witness box might be effective in the case of a modest breach which could be adequately filled by evidence in the witness box [47] [66].

Breach but no remedy

- No remedy if breach would not have made any difference to the decision (*Norton* [37] [46], *Patrick* [54])
- In *Patrick* reliance was placed on 31 of the Senior Courts Act 1981 (as amended) to provide authority for this conclusion (confirmed in *Luton Communities HL v Durdana* [2020] EWCA Civ 445)
- Argument that s31 should be confined to technical breaches unlikely to succeed (*TM* at [55])

The test for materiality

- Inevitability was applied in *Ali & Nessa v Newham LBC* [2001] EWCA Civ 73
- But the threshold is now established as 'highly likely' which mirrors the wording in s31 SCA (*Durdana* at [31-32])
- Relevant factors will include the seriousness of the impact of asb on other people (*Patrick and Forward*) but might include relevant policy considerations (*Durdana*).

Rosebery Housing Association Ltd v Williams & Anor (2021) EW Misc 22 (CC)

- Success on an Equality Act defence and counterclaim against an application for an injunction under Part 1 of the Antisocial Behaviour Crime and Policing Act 2014.
- Counterclaim award of £27, 400 - lower end of the top *Vento* band because of continuing nature of discrimination.
- Useful (non-binding) guidance on factors relevant to proportionality and level of damages.
- Endorsement of the assistance that an Equality Act assessor can provide.