Equality Act 2010 defences in Housing Law;
The Public Sector Equality Duty

The Duty

1. The Public Sector Equality Duty is found in s149 Equality Act 2010;

149 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.

…(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.

(6)Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7)The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation…

Who does the duty apply to

2. Public bodies and bodies exercising public functions are bound by the duty. As a result of large scale stock transfers from local authorities to housing associations, we most commonly encounter hybrid bodies which exercise both public and private functions. The question of whether the duty applies will be determined by the nature of the act being challenged and the principles to be applied were set out at para 35 of *Weaver*[1];

(i) Purpose of s6 Human Rights Act 1998 is to identify bodies which are carrying out functions which engage responsibility under ECHR

[1] *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)

(ii) A public body is one whose nature is broadly governmental but not all exercising those functions are public

(iii) Adopt a factor-based approach – no single factor will determine the case on its own

(iv) Apply s6(3)(b) broadly and generously

(v) Factors include extent the body is publicly funded, exercising statutory functions or taking place of LA, providing a public service (in relation to the particular function)

(vi) Public funding to subsidise the carrying out of the function

(vii) Existence of wide ranging and intrusive set of stat powers is a powerful factor

(viii) Function is governmental in nature – easy to spot if simply delegated.

(ix) Is the body itself providing a public service?

Application of the duty in housing cases

3. The principles governing application of the duty in housing possession cases were outlined by Mr Justice Turner in *Patrick*[2]

4. Possession proceedings were issued against Mr Patrick, an assured tenant, on mandatory ground 7A after he breached an injunction made on the grounds of antisocial behaviour. Mr Patrick's mental health was raised for first time in defence. Two days before the first hearing to assess whether the defence should proceed under CPR 55.8, medical evidence was filed and served asserting that Mr Patrick had a history of schizophrenia. A very limited PSED assessment was carried out which confirmed the decision to proceed. The Judge at first instance concluded there were no substantial grounds of dispute and a Possession Order was made. The Landlord conducted a fuller PSED assessment after the hearing and concluded that the medical evidence made no difference to decision to enforce.

5. Mr Justice Turner set out a non-exhaustive list of factors relevant to the PSED in such cases;

[2] *London and 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. However, duty only arises once Landlord is aware of disability so if it is brought to its attention after decision to seek possession a late assessment will be justified. If disability is raised at the eleventh hour, there may be less chance of affecting the decision.

(vii) Steps in assessment must be recorded. However, PSED can be complied with in absence of referring to duty.

(viii) Court's role is to ensure PSED has been considered properly. It is not entitled to substitute its own views.

<u>Timing of assessment</u>

6. In *Patrick*, Mr Justice Turner set out that;

"…Thus, although the significance of the duty should not be underestimated, it is important that its fulfilment should not be regarded as involving any fixed hoops through which the public body must pass regardless of the stage at, or circumstances under which, the duty is engaged. Otherwise, a litigant seeking to rely upon the PSED could deliberately postpone revealing a disability for tactical advantage to the prejudice of others with a legitimate interest in the outcome of possession proceedings." [44]

7. In *Barnsley*[3] Lloyd LJ said in terms at [34] that even though the claimant council was in breach of its duty before the proceedings were started "it would be open to it to remedy that breach by giving proper consideration to the question at any later stage, including now in the light of our decision"

8. In *Powell*[4] the court considered previous decision which :

   "It has been held in this court in the Barnsley case, that in proceedings of this type, it is open to a social housing landlord to remedy any defect in compliance with the PSED at a later stage in the proceedings." [50]

9. In *Taylor*[5] Mr Justice Zacaroli considered that in the absence of any doubts expressed about these authorities, they established;

   "the proposition that in possession proceedings brought by a local authority a breach of the PSED at an early stage (for example the decision to commence the proceedings) can be remedied by compliance with the PSED at a late stage." [41]

10. Earlier cases where decisions were vitiated in the absence of compliance with the PSED were distinguished on the basis;

    I do not accept the argument that a breach of the PSED cannot be cured, at least in the circumstances of this case, by subsequent compliance with the duty. The cases in which the importance of prospective compliance has been stressed were in the context of policies being set by public officials. As McCombe LJ noted in Powell (above), these raise different considerations to cases involving decisions to commence or pursue individual possession actions. [36]

11. However, at [42] Mr Zacaroli went on to stress that earlier non-compliance is still significant even if it is cured;

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[3] *Barnsley MBC v Norton* [2011] EWCA Civ 834
[4] *Powell v Dacorum* [2019] EWCA Civ 23
[5] *Taylor v Slough BC* [2020] EWHC 3520 (Ch)

"That is not to say that the fact that the PSED was not complied with at the earlier stage is irrelevant to the question of later compliance. It is always necessary to find that the public authority has complied in substance, with rigour and with an open mind with the PSED. Where a public authority has commenced proceedings without complying with the PSED, it is important to guard against the risk that its subsequent purported compliance when deciding to continue the proceedings was tainted by the incentive not to depart from a decision already made. That, however, is relevant to the question of fact – whether it has complied with the PSED in the particular circumstances – and is not a bar to it curing the breach as a matter of law."

12. So, a later assessment can make up for a failure to do one at all or replace an earlier inadequate assessment. This is provided the later assessment is not just a 'rear-guard action' and fulfils the requirements set out in *Patrick.* As seen below, it should also not just be an exercise in confirmation bias.

Can a PSED breach be remedied in the witness box?

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

13. MHT sought possession in respect of an assured tenancy of supported accommodation. The tenant, TM has schizoaffective disorder and treatment-resistant paranoid schizophrenia and lacked capacity to litigate. He assaulted an employee at the accommodation by punching him in the face which caused injuries that continued to trial, albeit only to the extent of an aching jaw. Ten days before the assault, TM had exposed himself to a female resident, though this was deemed to be non-sexual.

14. MHT served a S8 notice relying on Ground 14. At trial, three older incidents of abuse/assault were considered.

15. It was common ground that all incidents arose out of TM's mental health condition. At trial TM had benefit of Psychiatric report which confirmed eviction without alternative accommodation would damage TM's wellbeing and amount to a failure to protect him as a vulnerable person.

16. The Trial Judge allowed the claim on the grounds that TM posed significant risk to self and others.

PSED

17. Mr Print, the decision maker, took steps to consider TM's mental health but nonetheless took the decision to issue and proceed with the claim without any expert evidence, which was not available until shortly before the first hearing. At trial, Mr Print gave evidence that had he had sight of report when he conducted his assessment, he would not have pursued possession proceedings but still felt it was proportionate to continue them.

Decisions of the lower court and High Court

18. The Trial Judge confirmed that the PSED is a continuing duty and that MHT's failure to review its decision on receipt of the expert report was a breach. However, he went on to find that Mr Print's evidence remedied that breach.

19. The High Court agreed that the failure to review the decision to proceed with possession proceedings on receipt of the expert report was a breach of PSED but also agreed that Mr Print's evidence remedied that breach. It was also found to be highly likely that Mr Print would have reached same decision if reviewed in light of the expert report given his evidence at trial that he felt it was proportionate to continue proceedings.

Court of Appeal

20. The Appeal was allowed on the facts with Lord Justice Nugee giving the main judgement. Mr Print accepted that the expert report would have changed his mind about continuing with possession proceedings and therefore there was breach of the PSED. His statement that it was still nonetheless proportionate to proceed could not be reconciled with this and the breach of PSED was therefore not remedied in box.

21. LJ Nugee went on to consider whether breach of PSED could, in principle, be remedied in the witness box.

(1) The PSED requires assessment to be carried out with an open mind. Proper records should be kept as this encourages conscientious exercise of disability duties.
(2) Expecting a witness to carry out an assessment in the witness box is "self-evidently about as far removed from that as one could imagine." Because;

"there is an obvious danger of confirmation bias whenever a decision-maker carries out an assessment in relation to a decision that has already been made, rather than in advance; and this is perhaps particularly so in the case of litigation, when costs have already been incurred and the incentive to pursue the proceedings to a successful conclusion can be very high." [39]

22. Lord Justice Green agreed with this and added;

"Any person carrying out a PSED evaluation at trial will be subject to an innate risk of confirmation bias. A witness that gives an honest yet inculpatory answer to a question risks losing the public authority the case, and exposing the employer to a risk of costs. It also places the witness and employer at a reputational peril. Further, the evaluation required to be performed under s. 149 EA 2010 is a rounded evaluation encompassing a range of considerations which must be taken into account. It is a duty to be performed in a dispassionate and objective manner upon the basis of relevant evidence collected in advance. A hostile cross-examination is not an environment suited to the due performance of this assessment." [65] Green

23. However, LJ Nugee went on to confirm that there could be late remedy of breach of PSED. He began by reviewing the authorities and considered that;

"These authorities establish, in my judgment, the proposition that in possession proceedings brought by a local authority a breach of the PSED at an early stage (for example the decision to commence the proceedings) can be remedied by compliance with the PSED at a late stage (for example in deciding to continue the proceedings)." [41]

"The significant point is that although breach of the PSED can be relied on as a defence to a claim for possession, if it has been complied with, albeit belatedly, the Court is not obliged to refuse the claim for possession, any more than it is obliged in judicial review proceedings to

quash a decision where there has been belated compliance: *Forward* at [31], [36]. The Court does not act as some sort of mentor or nanny to decision-makers (*ibid* at [25]) and its approach should not be that of a disciplinarian, punishing for the sake of it (*West Berkshire* at [87]).” [50]

24. At [47] LJ Nugee went on to make comments about whether a breach could be remedied in cross examination but he considered it unlikely, but possible if for example a minor point had been overlooked but would make no difference to the decision. He went on to say;

“…It is possible, one supposes, for there to arise a situation in which an earlier PSED was performed but was incomplete in some relatively modest manner and the lacuna was adequately filled later in the witness box. That, however, is a far cry from the present situation.” [66]

25. TM suggests that a breach of PSED might be remedied in the witness box but only when an assessment was lacking in a minor way and witness evidence is sufficient to make up for it. It is unlikely that witness evidence could be sufficient where no assessment has been carried out until that point given the requirement for rigorous assessment.

Issue 2: Breach but no remedy – materiality

26. There is some overlap between the two issues as where a Landlord has achieved effective late compliance either that is sufficient or, the content justifies a finding that the outcome would have been the same had an proper assessment been carried out.

Background

27. First mention of the materiality of breach of PSED in a possession case was made in the 2011 case of *Norton* by LJ LLoyd;

By analogy, given that a breach of a public law duty is relied on by way of defence in the present case, it seems to me that it is open to the court in this situation to take the

view that, if the decision would not have been set aside on an application for judicial review, it should not provide a basis for a defence to the proceedings for possession [37]

28. This was confirmed by LJ Carnwath whose closing comment was;

"…Applying a practical approach the judge was entitled to find that consideration of Sam's disability would not have made any difference to the authority's decision to seek possession" [46]

29. In *Patrick* Mr Justice Turner made endorsed LJ Carnwath's comments and comments made by the High Court in the case of *Forward* saying "…where a breach of the PSED is not material then the court is entitled to uphold the decision complained of regardless." [54]

30. Mr Justice Turner went on to consider that s31 of Senior Courts Act 1981(as amended) supported this approach;

"Furthermore, I observe that section 31 of the Senior Courts Act 1981 (as amended) now provides:

"(2A) The High Court –

(a) must refuse to grant relief on an application for judicial review, and
(b) may not make an award under subsection (4) on such an application,
if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

It may be thought anomalous that the effect of a non-material breach of the PSED should automatically frustrate private law claims brought by a public body but, equally automatically, be ignored entirely in the context of public law challenges." [56-57]

31. When the Court of Appeal heard *Forward*[6], LJ Longmore also approved the approach taken in Norton (at [32]);

Rather than acting as some sort of mentor the court should, in deciding the consequence of a breach of PSED, look closely at the facts of the particular case and, if on the facts it is highly likely that the decision would not have been substantially different if the breach of duty had not occurred, there will (subject to any other relevant considerations) be no need to quash the decision. If, however, it is not highly likely, a quashing order may be made. [25]

32. LJ Patten confirmed this In *Durdana*[7] at [28];

Although derived from s.31(2A) of the Senior Courts Act 1981 which deals with the refusal of relief on an application or judicial review, it is now well established that the Court will refuse to dismiss a claim for possession where a breach of s.149 is relied on by way of defence if satisfied that it is highly likely that the outcome would not have been substantially different had no breach of the duty occurred: see *Aldwyck*[8] at [25].

33. In *Patrick* confirmed this approach was correct

"I would endorse Turner J's reliance in Patrick on section 31(2A) of the Senior Courts Act 1981. That provides that the High Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. It would be very odd if a non-material breach could be disregarded on a public law challenge but was fatal to a private law claim in which public law was relied on as a matter of defence. As Lloyd LJ pointed out in Barnsley the allowance of the defence to private law claims must carry with it the public law consequences of relying on such a defence."

34. In TM, Counsel argued that the application of S31(2A) SCA 1981 should be confined to trivial procedural failings. The Court of Appeal did not determine the point but at

[6] *Forward v Aldwyck Housing Group Limited* [2019] EWCA Civ 1334)
[7] *Luton Communities HL v Durdana* [2020] EWCA Civ 445

[8] *Aldwyck Housing Group Ltd v Forward* Ltd [2019] EWCA Civ 1334

[55] referred to *R (Goring-on-Thames Parish Council) v South Oxfordshire DC* [2018] EWCA Civ 860 at [47] where the proposition was described as 'surprising' given its regular application to substantive decision making in first instance and Court of Appeal and the view expressed that it was mistaken (full argument not heard) [55]

On the test

35. In *Ali*[9] LJ Latham confirmed the decision at first instance that the Respondent had not fulfilled their obligations under s184 Housing Act 1996 to make sufficient enquiries about the existence and nature of the duty owed to the Appellant. He went on to consider whether further enquiries would have made any difference to the decision;

    It is accepted that, in a situation such as this, the county court should only confirm a decision otherwise vitiated by procedural irregularity if it can properly be said that the decision would inevitably have been the same even if the matter had been dealt with properly: See *Barty-King v Ministry of Defence* [1979] 2 All ER 80 . [13]

    The fact is, as implicitly recognised by the recorder in the passage to which I have referred, that there was the possibility that a proper assessment by Social Services, with medical help, would have concluded that indeed this was a family and these were premises where the living room should not be treated as a bedroom. That possibility was one which is left open, it seems to me quite plainly on the facts of the case. If that possibility exists, it cannot properly be said that the result of the matter being remitted to the respondents would inevitably be the same. However small the possibility may be that the Social Services Assessment Team will conclude that this family does require a separate living room, it seems to me that an opportunity must be provided for such an assessment to be made. [19]

36. The test applied was whether it was inevitable that the decision would be unaffected which set a very high threshold before a decision would be vitiated which was not met even where the possibility of a different outcome was small.

[9] *Ali & Nessa v Newham LBC* [2001] EWCA Civ 73

37. In the PSED cases, once reliance was placed on s31 SCA first by J Turner in *Patrick* [56], then by LJ Longmore In *Forward* [36], the threshold set out in that section was applied, namely whether it was highly likely that the decision would be the same on consideration of relevant factors. This is a lower threshold to meet before a decision is vitiated.

38. In *Luton Community Housing Limited v Durdana* [2020] EWCA Civ 445, LJ Patten confirmed this and explicitly rejected a test of inevitability;

(The Judge) Having explained why she considers that a breach of the PSED occurred, she addressed the consequences of that by asking herself not whether it was highly likely that on a proper consideration of the relevant factors LCH would have made the same decision, but rather whether such a conclusion was inevitable. That, says Mr Manning, sets the bar too high. [31]

I agree that the judge has misdirected herself and we must therefore decide whether, on the facts of this case, it is highly likely that a proper PSED assessment would have not led to a different decision. [32]

Application of the test

39. In *Patrick*, the content of the relevant assessment is not revealed but from the matters considered by Turner J it appears that the court weighed the considerations relating to Mr Patrick's disability against the significant impact of his behaviour on his immediate neighbour. LJ Longmore did the same in *Forward.*

40. However, in *Durdana*, the court weighed up considerations relating to disability against policy considerations;

In the face of a continuing shortage of public housing, LCH is justified in operating a policy of seeking to remove tenants who have obtained their accommodation by deception. The duties owed to other homeless applicants support and justify that policy. Mr Vanhegan has not sought to contend otherwise on this appeal. The weight to be accorded to these policy considerations as opposed to the position of the respondent and her daughter as disabled persons is, of course, a matter for LCH as the decision-maker but it seems to me to be completely unrealistic to

suggest that the balance of reasonableness would in this case have come down in favour of the respondent. This was not a case where the medical evidence suggested that the impact of eviction on the respondent and A as disabled persons would have been either acute or disproportionate. And nothing else could have acted as a sufficient counterbalance to the social objectives which underpinned the policies of LCH. Even after paying due regard to these disabilities LCH could lawfully have decided to continue with the claim for possession and are highly likely to have done so. For these reasons, I would allow the appeal against the judge's order dismissing the claim. [35]

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

41. Injunction application made in June 2020 under Part 1 ASBCPA 2014 against tenant for alleged antisocial behaviour dating back to 2017. CW has Obsessive Compulsive Disorder and acts under a compulsion to film things happening around her.

42. Pursuant to an order of the court, Landlord selected 6 out of 100 allegations most of which alleged that CW filmed her neighbours with the intention of harassing them. CW defended and counterclaimed relying on s15 and s35 Equality Act 2010.

43. HHJ Luba QC readily found discrimination. The injunction was sought for something arising in consequence of her disability, namely the obsessive filming which resulted from her OCD.

44. The key question was whether the Landlord's actions in seeking an injunction were proportionate. HHJ Luba QC found they fell far short of this because;

    (i) They failed to follow their own ASB policy by failing to put allegations to CW at the time – in fact they waited several years.
    (ii) They exacerbated tensions between the neighbours by encouraging them to film CW.
    (iii) They did not investigate the complaints made by CW that the neighbours were targeting herself and her family.
    (iv) There was no attempt to foster good relations – they failed to understand CW's condition and try to encourage understanding and acceptance from the neighbours.

(v) Lesser measures were not explored – allowing CW to buy remaining interest in her house and relocate.

(vi) Expert evidence was totally ignored including that an injunction was likely to inflame the situation rather than provide relief.

45. Significant damages awarded, £27,400 because;

> "Her social landlord failed to see her as the victim, rather than the perpetrator. It failed to protect her from the anti-social conduct of others. It was bad enough that she had the misfortune of a life blighted by the crushing rituals and behaviours caused by her OCD. On top of that, she had the burden of defending herself when presented with a deluge of over 100 allegations not previously raised with her, a final warning, a notice seeking possession, and this claim for an injunction hanging over her for some eighteen months."

46. HHJ Luba was also at pains to commend the assessor who sat in the case;

> … Because of the nature of the counterclaim, I sat with an Assessor appointed pursuant to section 114(7) of the 2010 Act. Ms Lucy Moreton has long experience in the fields of disability and discrimination and sits as a fee paid member in the specialist tribunals. I pay tribute to the considerable assistance she provided to the Court, both during the trial and in a post-trial discussion. Her contribution amply justified the statutory presumption in favour of the appointment of specialist assessors in this class of case.

<u>Quick note on assessors</u>

47. Assessors are dealt with in s63 County Courts Act 1984;

> *63 Assessors.*
> *(1) In any proceedings in the county court a judge of the court may, if he thinks fit, summon to his assistance, in such manner as may be prescribed, one or more persons of skill and experience in the matter to which the proceedings relate who may be willing to sit with in the county court a judge of the court and act as assessors.*

48. They are mandatory in EA proceedings by virtue of s114(7);

(7) In proceedings in England and Wales on a claim within subsection (1), the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) must be exercised unless the judge is satisfied that there are good reasons for not doing so.

49. Guidance is given by Court of Appeal by LJ Clarke in *Cary v Commissioner of Police for the Metropolis* [2014] EWCA Civ 987 in which confirmed that no special skill or experience is required to be an assessor just some in relation to 'the matter' [49].

50. The court also referred to one of the statutory codes for the Equality Act 2010 to make the point that if the court believes it can take the place of an assessor, this is not a 'good reason' for dispensing with one;

    The *Code of Practice on Services, Public Functions and Association* issued under the *Equality Act 2006*, section 14, which a court "*shall*" take into account where it appears relevant, provides that assessors will be persons "*of skill and experience in discrimination issues who help to evaluate the evidence*". The Code notes that it is mandatory for assessors to be appointed, absent "*good reason*" and that it "*would not be a good reason that the court believes itself capable of hearing the issues in the case without an assessor or that having an assessor would lengthen proceedings*". [27]

51. The problem is that there is no list of assessors and the court often refuses to pay for one despite an assessor being provided to assist the court. This means that HHJ Luba's endorsement could be helpful if you come up against a resistant Judge.

52. This case is also useful for an idea on level of damages in housing cases where there have been ongoing decisions causing considerable stress.

Sonia Birdee

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