Did the Court of Appeal kill the PSED?

Luton Community Housing Limited v Durdana [2020] EWCA Civ 445; March 26, 2020

McMahon v Watford Borough Council & Kiefer v Hertsmere Borough Council [2020] EWCA Civ 497; [2020] PTSR 1217; April 8, 2020

The public sector equality duty (PSED) is contained in s149 of the Equality Act 2010 (EA). It was introduced to tackle systemic racism in public institutions. It is a preventative measure. It is designed to stop discrimination before it happens.

There have been two recent very important CA cases on the PSED in the context of housing law. They have both severely limited the impact of the PSED in this area. One of the cases concerns a possession claim; the others concern homelessness applications.

Luton Community Housing Limited v Durdana

The case of *Luton Community Housing Limited v Durdana* [2020] EWCA Civ 445 was the possession claim. Luton Community Housing Limited (LCHL) relied upon ground 17 in Schedule 2 to the Housing Act 1988 which applies where the landlord was induced to grant a tenancy by a false statement. The county court judge found that the ground was satisfied. The appellant had lied about where she was living, her bank accounts and the family income. However, the judge did not make a possession order because she found a breach of the PSED and therefore dismissed the claim. She said that she did not need to go on and consider whether it was reasonable to order possession, but had this been necessary, she decided that the breach of the PSED meant that it was not reasonable. LCHL appealed to the CA.

Court of Appeal

The appeal was allowed. Patten LJ gave the leading judgment, with which Moylan LJ and Newey LJ agreed. The CA found that the judge had been right to decide that there was a breach of the PSED, per Patten LJ at [26]. The appellant suffered from PTSD, and her daughter from cerebral palsy; however LCHL had not taken into account the likely effect of these disabilities on them in relation to the proposed eviction although it knew what the disabilities were at the time of its decision, knew they were being relied upon as a defence and had copies of the medical reports.

However, the CA then went on to ask, applying the Senior Courts Act 1981 s31(2A) by analogy, and following *Aldwyck Housing Group Ltd. v Forward* [2019] EWCA Civ 1334 at [25], whether it was highly likely that the outcome would not have been substantially different had no breach of the PSED occurred, see [29]. It was held that it was highly likely that LCHL would have made the same decision to seek possession, if it had paid due regard to the evidence and complied with the PSED, see [35].

The CA ordered a remittal of the case to the judge to decide whether, in light of the court's findings in relation to the PSED, it is reasonable to order possession.

Supreme Court

The appellant is applying for permission to appeal to the SC. This is on two main grounds. First, she argues that the 'highly likely' test should not apply in cases such as this. It was aimed only at minor procedural breaches, and not designed to create such a huge constitutional shift. Secondly, she says that the CA wrongly applied the test in this case, especially given the absence of any evidence from LCHL as to what their decision would have been had it complied with the PSED.

As matters stand, even if there is a breach of the PSED, this may have no consequence if the court is satisfied that it is highly likely that the decision-maker would have reached substantially the same decision if he had complied with the PSED. This would seem to significantly limit the PSED's ability to prevent discrimination.

McMahon v Watford Borough Council & Kiefer v Hertsmere Borough Council

In *McMahon v Watford BC*, and *Kiefer v Hertsmere BC* [2020] EWCA Civ 497; [2020] PTSR 1217, the CA revisited the PSED but in relation to homelessness law.

In both appeals, the respondents had applied for

homelessness assistance but their applications had been refused on the basis that they were not in priority need. That decision was upheld on review, and the respondents appealed against those review decisions to the county court under s204 of the Housing Act 1996. Both appeals were successful. The judges in the county court held that although the reviews had correctly concluded that the respondents were not vulnerable, there was a breach of the PSED. The local housing authorities then appealed to the CA.

Court of Appeal

Both appeals were allowed. Lewison LJ gave the leading judgment, with which both Floyd LJ and Coulson LJ agreed. The CA found that there had been no breach of the PSED, and therefore did not go on and decide whether, as per *Durdana*, the 'highly likely' test applied in the homelessness context.

The judges below had allowed the appeals on the basis that the review officers had not made clear findings as to whether the respondents were disabled and therefore had breached the PSED. The CA disagreed and said that an express finding was not necessary. Instead, the court held that it was clear from the review decisions that the authorities were finding that the respondents' medical conditions were not so serious as to impact on their daily living activities and therefore that they were not disabled even though that was not expressly stated in the decision letters.

However, what is significant about this decision is the CA's very relaxed approach to compliance with the PSED. In many ways, this was a stark contrast to the decision of the SC in *Hotak v Southwark LBC* [2015] UKSC 30 [2016] AC 811. In particular, the SC had set out a four-stage test to help authorities comply with the PSED in the context of homelessness vulnerability decisions. This requires review officers to focus very sharply on (i) whether the applicant is under a disability (ii) the extent of such disability (iii) the likely effect of the disability and (iv) whether the applicant is, as a result, vulnerable for the purposes of homelessness law.

The CA held that it was important to avoid an arid debate, not to force review officers into a straitjacket and to adopt a test that was practical, see [44] of the judgment. The PSED is not a freestanding duty and is not a duty to achieve a result, but a duty to have due regard to achieve the goals identified in s149 EA, see [48]. It was held that Lord Neuberger's test was not sequential, and not a rigid test to be applied in all PSED cases, see [53]. It was not a fatal flaw in a decision if no finding as to disability was made. What matters is the substance of the assessment, not its form. Provided that a review officer appreciates the actual mental or physical problems from which the applicant suffers, the task will have been properly performed, see [68]. The CA warned of the real danger of the PSED being used as a peg on which to hang highly technical arguments, and was not a disciplinary stick, see [89].

The CA did agree that when considering whether a person suffered from an impairment of their abilities to carry out normal day-to-day tasks, it was necessary to concentrate on what a person could not do, rather than on what they could do. This includes tasks at work, as well as in and about the home. However, it was also held that this was not the role of the review officer whose function was primarily to carry out an assessment of vulnerability for homelessness purposes, see [56].

This judgment appears to demonstrate a shift away from a more strict approach to compliance with the PSED as illustrated by the SC in the *Hotak* case. The statement by the CA at [68], that provided a review officer appreciates the actual mental or physical problems from which the applicant suffers, the task will have been properly performed, does not sit comfortably with the PSED jurisprudence. However, it is a statement which is confined to homelessness decision-making.

Both respondents are trying to obtain public funding to appeal to the SC on the basis that the decision is inconsistent with *Hotak* for the reasons set out above.

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