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The Public Sector Equality Duty

Section 149

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

(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.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

- (a) a breach of an equality clause or rule;
- (b) a breach of a non-discrimination rule.

(9) Schedule 18 (exceptions) has effect.

The Equality Act 2010

1. A breach of the PSED does not confer a cause of action: s.156. What, then, is its effect?
2. There has been a plethora of case law, but no clarity.
3. The PSED applies to public authorities and those exercising a public function. Unlike disability discrimination (s.15) it does not arise in relation to all landlords.
4. In *Aster Communities Ltd v Akerman-Livingstone* Baroness Hale said:

“It simply does not follow that, because those twin aims will almost always trump any right to respect which is due to the occupier’s home, they will also trump the occupier’s equality rights. Equality rights prohibit direct and indirect discrimination, as well as the special concept of disability discrimination. **But they all have the same aim, which is to secure equality of treatment, by prohibiting inequality of treatment on grounds of a protected characteristic**”

5. In relation to s.15 discrimination Baroness Hale went on to say:



“No landlord is allowed to evict a disabled tenant because of something arising in consequence of the disability, unless he can show eviction to be a proportionate means of achieving a legitimate aim. **He is thus obliged to be more considerate towards a disabled tenant than he is towards a non-disabled one.** The structured approach to proportionality asks whether there is any lesser measure which might achieve the landlord's aims. It also requires a balance to be struck between the seriousness of the impact on the tenant and the importance of the landlord's aims. People with disabilities are “entitled to have due allowance made for the consequences of their disability”: **Lewisham London Borough Council v Malcolm [2008] AC 1399 , para 61.** It certainly cannot be taken for granted that the first of the twin aims will almost invariably trump that right. Even where social housing is involved, the general considerations involved in the second of the twin aims may on occasions have to give way to the equality rights of the occupier and in particular to the equality rights of a particular disabled person. **The impact of being required to move from this particular place on this particular disabled person may be such that it is not outweighed by the benefits to the local authority or social landlord of being able to regain possession.**

32. As the Equality and Human Rights Commission have pointed out, the public policy considerations applicable to the general run of social housing cases are also different from the public policy considerations applicable to Equality Act claims. As Etherton LJ explained in the Thurrock case [2013] HLR 69 , para 25:

“the reasons why the threshold is so high lie in the public policy and public benefit inherent in the functions of the housing authority in dealing with its housing stock, a precious and limited public resource.”

That public policy and public benefit has to be weighed against the public policy and public benefit inherent in the Equality Act 2010 , aiming as it does to secure equal treatment and thus equal respect for the human dignity of all people, irrespective of their race, their gender, their sexual orientation, their religion or belief, or, in particular their disability. **When a disability discrimination defence is raised, the question is not simply whether the social landlord is entitled to recover the property in order to fulfil its or the local authority's public housing functions, but also whether the landlord or**

the local authority has done all that can reasonably be expected of it to accommodate the consequences of the disabled person's disability and whether, at the end of the day, the “twin aims” are sufficient to outweigh the effect on the disabled person. These are questions which a court is well equipped to address.



33. A further difference between article 8 and Equality Act cases is that the Equality Act 2010 contains express provisions relating to the burden of proof. The general position under the Human Rights Act 1998 is that, once an interference with the protected right is established, the burden shifts to the public authority to prove that the interference is justified. However, in the *Pinnock case* [2011] 2 AC 104 and the *Powell case* [2011] 2 AC 186 the Supreme Court held that, in possession actions brought by social landlords against tenants who otherwise had no right to remain in the property, it could be taken for granted that the landlord was acting in pursuance of the twin aims and that to do so was proportionate in the great majority of cases. Requiring it to plead and prove this would be “burdensome and futile”: the *Pinnock case*, para 53, citing Lord Bingham of Cornhill's observation to this effect in *Kay v Lambeth London Borough Council* [2006] 2 AC 465 , para 29.

34. I am prepared to accept that, in possession actions brought by social landlords against tenants who otherwise have no right to remain in the property, it can generally be taken for granted that the landlord is acting in pursuance of the twin aims; and further that those twin aims are entitled to weigh heavily in a proportionality exercise. However, as already explained, that is not by itself enough to counter a discrimination defence. Once facts are established that could give rise to a discrimination claim, the burden shifts to the landlord to prove otherwise. This will depend on the particular type of discrimination alleged. If it is a claim (or defence) of direct discrimination, for example that a disabled person has been evicted when a non-disabled person in the same or similar circumstances has not, then the landlord would have to show that the disability was not the reason for the difference in treatment. If it is a claim of indirect discrimination, for example that the landlord has imposed a requirement on its tenants which puts disabled tenants at a particular disadvantage, then the landlord would have to show that there was a good independent reason for the requirement. If it is a claim of disability discrimination under [section 15](#) , then the landlord would have to show that there was no less drastic means of solving the problem and that the effect on

the occupier was outweighed by the advantages. The express burden of proof provisions in the [Equality Act 2010](#) cannot simply be ignored because there are some elements in the proportionality exercise which can be taken for granted”



6. Looking at the words emphasised above, it would appear that proportionality covers all that arises under s.149. Section 15 legitimacy and proportionality requires the impact of the action on the defendant to be considered, it requires consequences to be considered. The purpose of s.15 is to ensure equality of treatment and the prohibition of inequality of treatment – the very goals set out in s.149.
7. Section 15 requires legitimacy and proportionality. It does not simply require “due regard”. It requires much in relation to proportionality :
 - More consideration towards a disabled tenant than towards a non-disabled one.
 - Is there any lesser measure which might achieve the landlord's aims?
 - Has the landlord done all that can reasonably expected of it.

Forward

8. In *Forward v Aldwyck Housing Group Limited* [2019] EWHC 24 the housing association brought possession proceedings against the defendant on grounds of nuisance. Essentially, his property was being used as a drug den. In previous proceedings he had disclosed that he had a physical disability (bad back, knee and hip pain). Just prior to the possession proceedings, the defendant’s GP referred him to the CMHT on the basis that the he suffered from mental health issues. It was asserted that these gave rise to his inability to refuse access to drug dealers and to control visitors to his house.
9. At the trial, some of the evidence from the police officers indicated that they considered the defendant to be vulnerable, but other than this there was very little medical evidence.
10. The trial judge concluded that the defendant’s mental health issues were not a disability for the purposes of the Equality Act 2010, and nor were they causative of the matters complained of. The Judge considered the grounds to be made out and that it was reasonable to order possession. He also considered it proportionate to order possession.

11. Whilst an Equality Act assessment had been done in time for trial, the officer in cross-examination admitted that she had not taken into account the defendant's disabilities and that she considered that there was no alternative to possession. It became common ground that the PSED had not been complied with.
12. The Trial Judge did not substantively consider this aspect, being of the view that it could not provide a private law defence. In relation to disability discrimination, it was held that there was insufficient evidence to conclude that Mr Forward's mental health problems amounted to a disability or that it was causative of the matters complained of. The appeal against these findings failed.
13. On appeal, the High Court held that the breach of the PSED could provide a defence in public law proceedings. Mrs Justice Cheema-Grubb said:

"There can be no doubt that a **simple** proportionality assessment is not what the PSED requires," and that "...it requires a broad impact assessment".
14. The implication from this comment, is that the duty to have due regard to s.149 goals (i.e. the PSED) is more onerous than a proportionality assessment.
15. It cannot be that this is correct. Disability discrimination will found a claim for damages, it is a cause of action. It is well-nigh impossible to accept that the PSED – which expressly does not afford a cause of action (s.156) and is expressed as no higher than "due regard" - is something more onerous than a proportionality assessment.
16. In any event, the proportionality assessment that has to meet the standards set out in *Ackerman-Livingstone* can hardly be described as "simple".
17. Further, given the way in which Baroness Hale discusses proportionality in *Ackerman-Livingstone*, when she describes it as involving a consideration of the impact of the steps taken against the tenant and that due allowance must be made for those with disabilities, it is impossible to keep proportionality distinct from PSED (which requires due regard being had to impact). The proportionality assessment necessarily comprises the latter.
18. Despite the Housing Association being in breach of the PSED and despite Mrs Cheema-Grubb saying that compliance with the PSED was more than simply a proportionality

exercise, she went on to dismiss the appeal on the basis that the possession order was proportionate (arguably thereby demonstrating that the proper proportionality assessment will comprise compliance with the PSED).



Powell v Dacorum BC [2019] EWCA Civ 23

19. This case concerned the dismissal of the defendant's application to suspend the warrant of possession.
20. The local authority commenced possession proceedings against the defendant on grounds of rent arrears and nuisance. In defence, Mr Powell denied the allegations and contended breach of Article 8, ECHR. A suspended possession order was made at trial.
21. The defendant breached the terms of that order and a warrant was sought. Before requesting the warrant, the housing officer raised inquiries with the CMHT and with an alcohol support group. She was told by both that Mr Powell was not registered with them. Information was also sought from Mr Powell's GP, but none was forthcoming.
22. In applying to suspend that warrant, Mr Powell said he suffered from a number of very severe health problems including anxiety, depression and Hepatitis C. No mention was made of the PSED. The hearing of the application to suspend was listed for a day's hearing. Shortly before that hearing, Mr Powell was prescribed anti-psychotic medication and his psychiatrist said he was too unwell to attend Court. The hearing was adjourned to a later date, February 21, 2017. Four days before that hearing, the defendant's psychiatrist wrote a detailed letter, setting out more fully the nature Powell's mental health issues and explaining that he was on a three-year treatment pathway which would be put at risk if he were evicted. Following receipt of that letter the Council's officer carried out a proportionality assessment, in which she referred to s.149. The District Judge held that even if the PSED had been breached by seeking a warrant, any such breach had been remedied by the time of hearing.
23. The appeal to the circuit judge was dismissed, it being held again that there was no breach of the PSED.
24. The further appeal to the Court of Appeal was also dismissed. It was held that there was no breach of the PSED when the warrant was sought and that even if there was it was remedied by the subsequent assessment.

25. Possession was sought against the defendant on the basis that she had obtained the property by deception. She ran many lines of defence in relation to fraud (all of which failed) but she also contended that the PSED had been breached and that this was a bar to possession. The defendant suffered from PTSD and her youngest daughter had cerebral palsy which affects her mentally and physically.
26. The defence based on breach of the PSED succeeded. The Housing Association have appealed.
27. In evidence, the claimant's officer said that she did not know of the PSED and did not know what it was. She did not know what the three equality aims were. She had prepared an Equality Act Review in connection with the claim but admitted that she had no idea what she was meant to write and that her solicitor had told her what to look at. She said that she was not aware of any reason why the defendant would not be able to secure private rented accommodation and that she had not considered alternatives to possession. She admitted also that she had not considered the defendant's daughter's disability in seeking possession.
28. Unsurprisingly, the Judge found that the PSED had been breached. The Judge went on to hold that the breach could not be remedy subsequently because:
- There is a real danger that the claimant would be operating with a closed mind
 - It would mean that there would be a possession order hanging over the defendant that the claimant may decide not to enforce in the light of the subsequent PSED assessment
 - It would be a rear-guard action in the circumstances of the case.
29. In relation to reasonableness, the Judge concluded that it would not be reasonable to make a possession order because of the fundamental breach of the PSED.
30. The reasoning seems doubtful. As noted by the High Court in *Patrick v London & Quadrant* (below), every post-order PSED assessment is a "rear-guard" action – as

much is inherent when the duty is ongoing as is the PSED. What the Court in Durdana was saying is that there is a real risk of an improper rear-guard action. I am doubtful that it is correct to assume this against the claimant.



31. With regard to the point about the fact that the defendant would have a possession order hanging over her head, this too seems doubtful. The order could have been postponed for a time, and then worded so as to come to an end if not enforced by a specified date. Also, the fact that there would be a possession order in place would primarily be as a result of the defendant's fraud. The result in this case leaves that completely unaddressed.

32. In relation to reasonableness, the Judge concluded it was not reasonable to make a possession order in circumstances where there had been a PSED breach. This, it seems to me, muddles two distinct things.

33. Towards the end of her Judgment, the Judge says

“Had the PSED been properly addressed...this court would have given weight to the fact that the Claimant had decided to evict notwithstanding the disabilities...It would have been an important factor in deciding whether it was reasonable to evict or not. On the other hand, it may be that in the light of the impact that the eviction may have on the Defendant and more importantly her daughter, the Claimant might conclude that it was not right to seek eviction. That is not a decision for this Court to make. Hence if I have to reach a conclusion on reasonableness, my conclusion is that where there has been a failure to consider the PSED in circumstances where it could make a difference, it is not reasonable to make a possession order.”

34. The implication from this is that whenever discretionary grounds are established, but the claimant has failed to consider the PSED in circumstances where it could make a difference, it will not be reasonable to make a possession order.

35. It may have been better for the Court to conclude that because of the breach of the PSED the Court could not form a view as to reasonableness. The Court could have made findings on the grounds, and the breach of the PSED and, then adjourned the hearing to another day to allow the PSED breach to be addressed and then consider reasonableness in the light of that. This would have allowed both to be properly considered.

London and Quadrant Housing Trust v Patrick



36. In *London and Quadrant Housing Trust v Patrick* [2019] EWHC 1263 the High Court dismissed an appeal in which the appellant, Mr Patrick, contended that it was wrong to make a possession order on mandatory grounds at a summary hearing against him as a disabled person in circumstances where the Trust had not complied with the Public Sector Equality Duty. The claim for possession was otherwise proportionate; a defence based on non-compliance with the PSED did not justify trial directions.
37. The Trust obtained an anti-social behaviour injunction against Mr Patrick, one of its tenants, which he shortly after breached. Upon hearing the committal application and being satisfied as to breach, the Circuit Judge sentenced Mr Patrick to four weeks custody, suspended for a year. On May 28, 2018 the Trust was granted permission to amend its claim for possession, which had previously been commenced on grounds of rent arrears only, to include a mandatory ground based on breach of the ASB injunction.
38. In response, on June 13, 2018 Mr Patrick filed and served an amended defence in which it was pleaded for the first time that he suffered from a mental impairment, the nature of which was not further particularised. He contended that the Trust had unlawfully discriminated against him under s.15 of the Equality Act 2010, and had failed to comply with the public sector equality duty (PSED) as set out in s.149 of that Act, in pursuing possession.
39. The claim was listed for hearing on June 28, 2018. Two days before, Mr Patrick served medical records which showed that he had been diagnosed with paranoid schizophrenia. The lateness of this disclosure occurred in circumstances where the Trust's solicitors had sent two letters in April and May 2018, asking for Mr Patrick's medical evidence in the light of his assertions that he was unable to provide contractors with access because of his mental health, but no information was then forthcoming.
40. The Judge was obliged to consider whether to decide the claim on a summary basis or whether to give case management directions for trial, a matter which had to be resolved by reference to CPR 55.8: was the claim genuinely disputed on grounds which appeared to be substantial. Despite the disclosure of medical records, the Judge found that there were no substantial grounds of defence and made a possession order, suspended for six weeks to take account of Mr Patrick's disability.
41. In doing so, the Judge held that it was proportionate to make the possession order, and that even if there was a potential breach of the PSED, it did not prevent the Court from proceeding in a summary manner.

42. Mr Patrick was granted permission to appeal on the ground that the Judge had been wrong in law to reject the defence based on s.149.
43. In dismissing the appeal, the High Court held that it was only upon receipt of the medical evidence that the Trust could sensibly be expected to engage with the PSED, but that the engagement of that duty was not a trump card which mandated the giving of directions rather than summary disposal. To hold otherwise would run the risk of a litigant deliberately concealing a disability for tactical advantage, and would only serve to frustrate the purpose of the PSED. In addition, it was important to appreciate that the fulfilment of the duty does not involve any fixed hoops through which the public body must pass, regardless of the stage at which the duty is engaged.
44. Given the timing of the disclosure, the Trust could not be considered to be in breach of the PSED, and it was – in any event, and even if in breach – open to them to comply with that duty prior to the enforcement. The Trust had, in fact, carried out a formal proportionality and PSED assessment after the possession hearing which, contrary to submissions made by Mr Patrick’s counsel, could not be described as a “rear-guard action”.
45. Nor, even if there had been an extant breach, would that hinder possession where it could be said that it did not materially affect the outcome. To come to any other conclusion would present an anomaly between judicial review proceedings, where the High Court must decline relief if it appears to be highly unlikely that the outcome for the applicant would not be substantially different (s.31(2A) Senior Courts Act 1981), and private law claims defended on a public law basis.
46. The High Court, noting that much of significant case law on the PSED often concerned ministerial decisions on matters of policy, listed some factors that would, in many instances, be relevant to possession claims:
- (i) When a public sector landlord is contemplating taking or enforcing possession proceedings in circumstances where a disabled person is liable to be affected, it is subject to the PSED.
 - (ii) The PSED is not a duty to achieve a result, but a duty to have due regard to the goals set out in s.149(1). The public sector landlord must weigh the PSED goals against countervailing factors, which factors may include, for example, the impact the disabled person’s behaviour is having on others.
 - (iii) The PSED is designed to secure a brighter illumination of a person’s disability so that, to the extent that it bears upon his rights under other laws, it attracts full appraisal.
 - (iv) A public sector landlord is not required in every case to take active steps to inquire into whether there is disability and whether it is relevant. If, however, there is

- some feature of the information before the decision maker which presents a real possibility that this might be the case then a duty to make further inquiries arises.
- (v) The PSED is a matter of substance over form. It is not a tick-box exercise. Whilst it is helpful to record the steps taken in seeking to comply with the duty, nevertheless cases may arise when the conscientious decision maker, focussing on the impact of disability, may comply with the PSED even where he is unaware of its existence.
 - (vi) The duty is a continuing one and does not elapse after a possession order is granted and before it has been enforced. The PSED consequences of enforcing an order should be considered, ideally, before the order is sought; in the absence of any material change of circumstance, the continuing nature of the duty will not mandate further explicit reconsideration thereafter.
 - (vii) The duty to have due regard only takes on any substance if the landlord knew or ought reasonably to have known of the disability. The lateness of any such knowledge may impact on the discharge of the PSED. For example, a tenant whose anti-social conduct has already been adversely affecting his neighbours but whose disability is raised at the eleventh hour may find that the discharge of the PSED is less favourable to that person because the landlord's options have been limited and the rights and reasonable expectations of others are more pressing.
 - (viii) If the Court is satisfied that the public sector landlord has carried out a sufficiently rigorous consideration of the PSED, it is not entitled to substitute its views as to the weight that should be attached to the competing factors.

47. This guidance in the Judgment makes it clear that compliance with the PSED is about balancing the factors relevant to promoting the goals identified in section 149, with countervailing factors such as the impact the anti-social behaviour is having on others. Where the PSED is run in conjunction with s.15, by way of defence to a possession claim, it is difficult to see how the PSED adds anything of real substance to factors that arise under s.15. The High Court noted that in judicial review proceedings the Court could (in effect) ignore non-material illegality where the outcome would not have been materially different for the applicant, and commented that it could be thought anomalous if the same approach were not taken in private law claims defended public law grounds. The conclusion is surely correct; it results in the focus being on justification and proportionality (s.15(2)), rather than on the "elusively broad" duty to have due regard under s.149, the breach of which does not confer a cause of action, (s.156).

Conclusion

48. The PSED in the context of possession proceedings will be looked at against by the Court of Appeal in both the Forward and the Durdana cases. It may be, after judgment in those cases, the lower courts will have some clear parameters of a PSED defence.