The way forward for the PSED?

Forward v Aldwyck Housing Group Limited [2019] EWCA Civ 1334; July 29, 2019

This case note discusses *Forward v Aldwyck Housing Group Limited* and the legal implications of breaching the s149 Equality Act 2010 (EA) public sector equality duty (PSED).

Implications for practitioners

The CA decision has made it clear that a breach of the PSED will not necessarily result in the grant of relief. The implications for practitioners are therefore obvious. A breach of the PSED may not result in the grant of any remedy to the person affected.

In summary, it was held that, if on the facts of the particular case, it is highly likely that the relevant decision would not have been substantially different if the breach of the PSED had not occurred then, subject to any other relevant considerations, there will be no need to quash the decision, per Longmore LJ at para 25.

The case concerned a possession claim in respect of social housing where the tenant had behaved in an anti-social manner. The CA left open the possibility that the same approach may not be taken in other areas, such as major governmental decisions affecting numerous people.

Facts

In 2013 Aldwyck Housing Group Limited (AHG) granted Mr Forward (F) an assured tenancy of a flat in Watford (the property). In early 2017 anti-social behaviour became a problem. The main issue was drug use and dealing, but there were also complaints of fighting and noise.

On April 7, 2017 AHG served on F a notice seeking possession of the property which relied upon grounds 12 and 14 in Schedule 2 to the Housing Act 1988. These grounds relate to breach of tenancy and anti-social behaviour and, if proved, give the court the power to order possession if it is reasonable to do so.

On May 23, 2017 the police executed a warrant at the property and found evidence of Class A drugs and drugs paraphernalia. Subsequently the police obtained a Closure Order in respect of the property, which was later extended for a further three months. F has not lived at the property since the Closure Order was made. Even after it expired, he did not return, because he gave an undertaking to the court not to do so.

County Court

AHG issued the claim for possession on July 19, 2017. The trial took place in January 2018. Prior to the trial on September 21, 2017, AHG's witness Ms Savage, conducted an assessment of the case in order to attempt to show compliance with the PSED. However, at the trial, she admitted that it was inadequate for several reasons. She was aware of F's disability but had not obtained any medical evidence; she had not approached the assessment with an open mind because she had not considered alternatives to the possession proceedings, and had preferred the neighbours' evidence to that of the police which was that F was vulnerable and being exploited by drug dealers.

In light of this evidence, it was common ground between the parties that AHG had breached the PSED. AHG argued successfully that it did not matter because the case was so serious. The county court judge agreed and, on March 12, 2018, made a possession order. The judge found that F had a physical, but not a mental, disability.

High Court

F's appeal was heard by Cheema Grubb J who rejected an application by AHG to adduce new evidence to show subsequent compliance with the PSED. She did not allow F to adduce evidence of mental disability either.

Grubb J decided that the county court judge was wrong not to have permitted the defence based on the PSED, and wrong to have decided whether relief should have been granted for breach of the PSED by reference to the concept of proportionality. She held that compliance with the PSED involved more than a proportionality assessment. However, she found that those errors were immaterial because the court could be satisfied that AHG could and would legitimately make the same decision, if now required to do a proper PSED assessment. She therefore dismissed the appeal.

Court of Appeal

F appealed, arguing that a breach of the PSED should give rise to the grant of a remedy. He identified two categories of cases where relief had been denied for a breach of the PSED. The first group of cases was where there was a breach of the PSED, but later compliance. The second was where there was a promise of later compliance.

AHG wanted to withdraw the concession that there had been a breach of the PSED, and argued that the court had a discretion as to whether to grant relief, and that discretion was not confined to the two categories of cases.

Longmore LJ gave the leading judgment, with which Bean LJ and Moylan LJ agreed. The CA did not permit AHG to withdraw its concession that it had breached the PSED. Accordingly, it dealt head on with the question of whether a breach of the PSED should give rise to the grant of relief.

The CA rejected the submission that, as a general rule, a breach of the PSED should necessarily result in relief, para 21.

It was said that it may well be right that major governmental decisions affecting numerous people may be liable to be quashed if the government has not complied with the PSED, para 22. But the situation was different where a decision is made affecting an individual tenant of a social or local authority landlord.

The notion that the court should act as some sort of mentor or nanny to decision-makers was resisted. The CA accepted that the case law did show that relief had only been refused where there was subsequent compliance with the PSED or a convincing undertaking that the duty would be complied with in the future, thus compensating for the earlier breach, para 26. However, it was held that the cases were not authority for the proposition that, as a matter of law, it is only in those categories that there is a discretion to refuse relief, para 31.

It was held that there was only one answer to the claim for possession, and that was for the court to grant possession, para 32.

There was another ground of appeal which concerned whether the High Court judge had wrongly taken account of the fact that F had no mental disability when reaching her decision. The fact was that F's lack of mental disability was irrelevant because he had a physical disability and that was all that was necessary to engage the PSED. The CA rejected this ground on the basis that it did not impact on Grubb J's decision.

Conclusion

This decision severely undermines the PSED. It demonstrates a lack of concern by the CA with respect to breaches of an important part of anti-discrimination legislation. The CA's statement that it did not want to mentor or nanny the PSED is a retrograde step. The courts exist precisely to ensure compliance with primary legislation. It may be that the decision can be confined to social housing, but it is difficult to see why social housing tenants are less worthy of protection from breaches of the PSED than other persons. The EA is supposed to protect all victims of discrimination, not only some. The case is already being used by social landlords to justify breaches of the PSED. They no longer feel the need to even attempt later compliance, or promise later compliance.

F has applied for funding to appeal to the SC. Permission to appeal was refused by the CA. In the meantime, AHG applied for a warrant for possession, which F applied to suspend or set aside. F's application has recently been adjourned to a longer hearing.

Toby Vanhegan
Barrister
4-5 Gray's Inn Square
tvanhegan @ 4-5.co.uk

The author acted for Mr Forward in the High Court and the CA, and continues to act for him in his attempt to appeal to the SC.