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The cost of getting it wrong - ASB and the Equality Act 2010

Presenters: Sarah Salmon and Alistair Cantor



Welcome & Introduction

Overview



- *Rosebery Housing Association Ltd v Williams & Anr*
- Guidance from the case for social landlords
 - Recognising when EqA is engaged
 - Assessing disability
 - Proportionality
 - Public Sector Equality Duty
 - Objectivity
 - Case Preparation
 - Liabilities

• • • *Rosebery Housing Association Ltd v Williams &*
• • •
• • • *Anr (2021) EW Misc 22 (CC)*

The claim



- LL's claim was for an anti-social behaviour injunction against T
- Initially relied on 123 allegations – reduced to six for trial
- ASB relied on at trial consisted of:
 - Verbal abuse
 - Taking photographs of neighbour
 - Noise nuisance
- Broader factual context was T filming neighbours and driving up and down road

The counterclaim



- T suffered from obsessive compulsive disorder – its manifestations included:
 - Obsessive filming of surroundings
 - Driving up and down and/or sitting in her car to calm herself
- Brought CC under various sections of EqA 2010 – primary claim was that LL by bringing and continuing claims for an injunction had unlawfully subjected T to a detriment because of something arising in consequence of her disability

Decision on the claim: dismissed



- Five out of six allegations of ASB not proven as:
 - Evidence in support either absent entirely, hearsay only or unreliable.
 - T had good reason for photographing her neighbour = *“nowhere near”* ASB
- Sixth allegation of noise nuisance proven – but *“no hesitation”* in finding not just and convenient to grant as brief, historic and with no ongoing issues

Decision on the counterclaim: granted



Unfavourable treatment due to disability

- LL accepted T was disabled (expert evidence provided)
- Pursuit of proceedings = detriment
- Due to something arising from T's disability – filming more than a “trivial part” of the “reason why” LL was seeking injunction

Not proportionate means of achieving legitimate aim

- LL's aims were legitimate – but proceedings were not proportionate:
 - Allegations not put to T in timely fashion
 - Did not seek medical advice to understand T's disability
 - Did not seek to foster understanding between neighbours
 - Did not explore T's offer to move
 - Pursuit of claim to trial despite compelling evidence

Outcome



- Award in damages to T = £27,500
- Trenchant judicial criticism of LL's conduct of the case and claim

• • • Recognising when EqA 2010 is engaged in ASB
• • •
• • • cases

EqA 2010 – relevant provisions



- Protected characteristics: Age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation (s4).
- Main duties:
 - a duty not to discriminate on grounds of disability (sections 13, 14, 15 and 19);
 - a duty to make reasonable adjustments (s20); and,
 - the public sector equality duty (s149).
- Specific provisions for the Housing sector in Part 4 EqA 2010.

EqA 2010 – relevant provisions (cont.)



15 Discrimination arising from disability

(1) *A person (A) discriminates against a disabled person (B) if—*

(a) *A treats B unfavourably because of **something arising in consequence of B's disability**, and*

(b) *A cannot show that the treatment is **a proportionate means of achieving a legitimate aim**.*

(2) *Subsection (1) does not apply if A shows that **A did not know, and could not reasonably have been expected to know, that B had the disability**. (emphasis added)*

EqA 2010 – relevant provisions (cont.)



- Partial reversal of burden of proof – if there are facts from which in absence of any other explanation court could decide discrimination occurred, it must so hold (s136(2)).
- Unless defendant can prove did not discriminate (s136(3)).
- For ‘indirect’ types of discrimination is a defence to prove the conduct complained of is a proportionate means of achieving a legitimate aim

EqA 2010 – when is it likely to be engaged in an ASB context?



- Protected characteristic most likely to be engaged is disability.
- Almost any significant intervention by LL is likely to be potential unfavourable treatment – especially formal warnings, NOSPs, issuing proceedings.
- **Therefore in ASB context EqA likely to be engaged wherever the LL knows or might reasonably be expected to know the tenant has a protected characteristic esp. disability.**

The key questions



1. Does the LL know or are they reasonably to be expected to know that T has the protected characteristic?
2. Is the ASB “*something arising in consequence of*” that protected characteristic?
3. Are the LL’s actions a proportionate means* of achieving a legitimate aim?

*Proportionality is the main issue as the LL’s aim of addressing ASB will be held to be legitimate



Assessing disability

Assessing disability – the key questions



- Whether suffering an impairment at all
- Whether the impairment has a substantial and long-term adverse effect
- Whether the ASB is something arising in consequence of the disability
- Whether and how the ASB can be addressed

Disability under EqA 2010



- A person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities (s6):
 - “*Substantial*”: more than minor or trivial (s212(1))
 - “*Long-term*”: has lasted or likely to last > 12 months (Sch 1 Para 2)
- Mainly, a question of fact whether test is met in each case.

Sched 1 EqA & Equality Act (Disability) Regulations 2010



Prescribed disabilities & special cases

- Prescribed disabilities:
 - Blindness/partial or impaired sightedness
 - Cancer
 - HIV
 - Multiple sclerosis
- Special cases:
 - Corrective measures
 - Progressive conditions
 - Children < 6yrs of age

Not impairments under EqA 2010

- Addiction to alcohol/nicotine/any other substance
- Setting fires
- Stealing
- Physical and sexual abuse
- Exhibitionism
- Voyeurism
- Seasonal allergic rhinitis
- Severe disfigurements by way of non-medical tattoos or piercings

When is a landlord “*reasonably*” expected to know of the disability?



- TBD on the circumstances of the case.
- PSED imposes duty to make reasonable enquiries:

“The public sector landlord is not required in every case to take active steps to inquire into whether the person subject to its decision is disabled and, if so, is disabled in a way relevant to the decision. Where, however, some feature or features of the information available to the decision maker raises a real possibility that this might be the case then a duty to make further enquiry arises” (London and Quadrant Housing Trust v Patrick [2019] EWHC 1263 (QB))

“Something arising in consequence of”



- Need only be an effective not the sole cause of the unfavourable treatment.
- “...a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor.” (Nagarajan v London Regional Transport [2000] 1 A.C. 501)

“Something arising in consequence of” – points to note



- Complexity may be introduced where there is more than one potential “*cause*” of the ASB and only one engages EqA.
 - For example, a tenant engaging in ASB suffers from schizophrenia (a disability) and alcoholism (excluded). Which is the cause of the ASB?
- Again, the position is probably that the relevant impairment need only be an effective not the sole cause of the ASB.

Assessing disability effectively



- Training
- Record-keeping
- Existing knowledge:
 - What does the housing file show?
 - All entries from initial contact onwards
- Obtainable knowledge:
 - Invite tenant to cooperate
 - Medical evidence
 - PAP/review process engaged?
- Does lack of information/non-cooperative tenant preclude assessing disability?

Expert evidence – when is it necessary?



- EE may be necessary at any time – pre- or post-issue – and will be necessary at some point in most cases
- Can be formal or informal
 - Formal assessments by medical experts
 - Informal opinions e.g. charitable organisations, mental health teams



Proportionality

“Proportionate means of achieving of a legitimate aim”



- This is where most cases are won or lost
- In each case involving a tenant who meets the definition of disability careful record keeping of actions is key
- Ensure that prior to service of the NoSP you have thought about whether you are serving that NoSP because of something arising in consequence of the tenant’s disability. If so, have you interviewed them to ascertain their position; made inquiries of their medical practitioners and considered whether some lesser form of action is appropriate?

Aster Communities Ltd v Akerman-Livingstone [2015] 2 WLR 721



- Lady Hale at Para 31:

“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.”

A structured approach



- “Structured approach” derived from European Union law and stated by *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 Mummery LJ:
 - “First, is the objective sufficiently important to justify limiting a fundamental right?”
 - Secondly, is the measure rationally connected to the objective?”
 - Thirdly, are the means chosen no more than is necessary to accomplish the objective?”

So what does it mean in practice?



As seen in Rosebury more to it than simply considering “lesser measures”:

- Act swiftly in investigating/do not put the onus onto residents
- Attempt to seek medical advice to understand T’s disability
- Look to see whether you can foster understanding between neighbours (mediation? round tables? regular meetings? community events?)
- Explore anything T is suggesting
- Look at lesser measures: support/referrals to agencies, ABCs, CPNs, abatement, injunctions (if the claim is possession), moves
- Keep any polices in mind



Public Sector Equality Duty

Who does the PSED apply to?



- Not just the tenant:

See: *Barnsley Metropolitan Borough Council v Darren Norton, Louise Norton, Samantha Norton* [2011] EWCA Civ 834, (a decision relating to a similar duty under s.49A of the Disability Discrimination Act 1995).

Lloyd LJ at [15] it was said:

“In terms, the section is entirely general. It applies to the carrying out of any function of any public authority. On the other hand, it does not necessarily follow that whenever a public authority is considering or exercising any function, whatever it may be and in whatever circumstances, it must give conscious thought to how it might affect a disabled person.”

What does the PSED apply to?



- The PSED applies not only to the formulation of policies but also to the application of those policies in individual cases

Pieretti v Enfield LBC [2010] EWCA Civ 1104; [2011] PTSR 565, per Wilson LJ at [26].

- **BUT** evidence matters - s.149 had no material bearing on a case where the evidence of the effects of a defendant's Asperger syndrome was limited.

Swan HA Ltd v Gill [2013] EWCA Civ 1566; [2014] H.L.R. 18

PSED: the duties



- Section 149

(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; (see s. 149(3))

(c) **foster good relations** between persons who share a relevant protected characteristic and persons who do not share it (see s. 149(5)).

(4) The steps involved in meeting the needs of disabled person that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(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.

Equality of opportunity: s.149(1)(b)



- 149(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.

R. (Bracking) v SSWP [2013] EWCA Civ 1345

The “traditional” approach at [25] (McCombe LJ)



1. Important to record the steps taken by the decision maker (DM) in seeking to meet the statutory requirements
2. What matters is what DM took into account and what they knew
3. The DM must be aware of the duty to have “due regard” to the relevant matters
4. The duty must be fulfilled before and at the time when a particular policy is being considered
5. The duty must be “exercised in substance, with rigour, and with an open mind”
6. It is a continuing duty
7. Provided the court is satisfied that there has been a rigorous consideration of the duty it is for the DM to decide how much weight should be given to the various factors informing the decision
8. The PSED involves a duty of inquiry if and as required

Turner J – PSED, Possession & disability LQHT v Patrick [2020] H.L.R. 3 at [42]



1. The PSED is **not a duty to achieve a result** but a duty to have due regard to the need to achieve the results identified in section 149.
2. Duty to make further enquiry if real possibility of disability.
3. Substance not form, **with rigour and open mind** (no tick box).
4. **Ongoing** duty but should be considered when order sought and only later if there has been a material change: cf Paragon v Neville [2018] H.L.R. 39.
5. PSED arises where L knew or ought to have known of disability.
6. Recording the steps taken in compliance will assist evidentially.
7. A conscientious decision maker focussing on the impact of disability **may comply** with the PSED **even where they are unaware** of its existence as a separate duty or of the terms of section 149.
8. The court's role is to be satisfied that the landlord has carried out a sufficiently rigorous consideration of the PSED. Weight is a question for the landlord, not the court.
9. In short, the decision maker must be **clear** precisely what the equality implications are when he puts them in the **balance**, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors.

The cases



1. *Taylor v Slough BC* [2021] H.L.R. 28 – absolute ground for possession
2. *TM v Metropolitan Housing Trust Ltd* [2021] EWCA Civ 1890 – challenge to decision to issue proceedings
3. *Hertfordshire CC v Davies* [2020] EWHC 838 (QB) – permission to issue writ of possession
4. *Luton Community Housing Trust Ltd v Durdana* [2020] H.L.R. 27 – ground 17 (false statement) case
5. *Forward v Aldwyck Housing Group Ltd* [2020] 1 W.L.R. 584 – ASB discretionary grounds
6. *London & Quadrant Housing Trust v Patrick* [2020] H.L.R. 3 – absolute ground of possession
7. *Powell v Dacorum BC* [2019] H.L.R. 21 – application to stay execution of warrant of possession

Rosebery



- Rosebery failed to comply with its public sector equality duty (PSED). Lessons?
- Understand/familiarise yourself with medical conditions and their impact.
- Specialist advice may need to be sought.
- What can be done to help others understand medical conditions.
- Training and learning to ensure staff are equipped to deal with such issues

BUT

“delicate and difficult task”



Case Preparation

Advancing the right allegations (1)



Strong evidence

- Direct evidence
- Witnesses willing to attend court
- “a clear ‘audit trail’”
- Contemporaneous support *e.g.* record of complaint
- Some sort of “independent” evidence/support.
- Clear: dates, times, what happened.

Weaker evidence

- Not witnessed by the person telling you
- No corroborative evidence
- No contemporaneous records
- Unclear as to what happened when/conflicting accounts
- Tit for tat allegations

Advancing the right allegations (2)



- Organisation is a key in marshalling the evidence.
 - Ensure that the court is presented with a clear and consistent account of the behaviour.
 - Provide simple method of capturing information – e.g diary sheets.
 - Keep good interview/telephone notes.
 - Be clear on who ASB has an impact on, and what area is relevant.
 - Develop relationships of trust. Maintain good communication and follow up on information provided.
 - Liaise with police – e.g. CCTV footage, camera stills, police call logs, s.9 Statements.

Advancing the right allegations (3)



- If you are compiling a schedule choose your strongest allegations.
- Have a checklist of all facts needed to establish your case.
- Have a document checklist to ensure you have the right exhibits before the court.
- Have the right witnesses before the court and if you cannot think about how you present any hearsay.

Hearsay



- CPR 33.1:

“hearsay” means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated...”
- Admissible as evidence in civil courts.
- A common feature of cases of anti-social behaviour.
- Look out for a complete failure to give proper and detailed reasons for why a witness is not willing to give evidence especially in cases where there has been no use or threatened use of violence.
- Remember to file and serve a hearsay notice.

Weight given to hearsay (1)



- In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
- Regard may be had, in particular, to the following—
 - (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
 - (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
 - (c) whether the evidence involves multiple hearsay;

Weight to be given to hearsay (2)



(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

Section 4, Civil Evidence Act 1995

We have been warned before...



“140. While nobody would wish to return to the days before the Civil Evidence Act 1995 came into force, when efforts to admit hearsay evidence were beset by complicated procedural rules, **the experience of this case should provide a salutary warning for the future that more attention should be paid by claimants in this type of case to the need to state by convincing direct evidence why it was not reasonable and practicable to produce the original maker of the statement as a witness.** If the statement involves multiple hearsay, the route by which the original statement came to the attention of the person attesting to it should be identified as far as practicable. It would also be desirable for judges to remind themselves in their judgments that they are taking into account the s.4(2) criteria (for which see [132] above) so far as they are relevant.”

Moat Housing Group - South Ltd v Harris and Hartless [2005] EWCA Civ 287; [2005] H.L.R. 33

Adducing hearsay evidence: anonymous witnesses



- Often, a witness is not willing to give oral evidence at a hearing because they do not want to be identified.
- If that is the reason, efforts should be made to seek a statement from the witness that can be anonymised, e.g. “Witness A”, “Witness B”, “Witness C” etc rather than comments being within a professional witness statement.
- **The statement should explain why the witness is not willing to give oral evidence and wishes to remain anonymous: this needs to be in specific and detailed, rather than general, terms. “Fear of reprisals” is often given short shrift by judges.**

Anonymous statements: Exhibits



- Consider additional sources of evidence: any notes, diary sheets *etc.* which refer to alleged incidents of alleged ASB ought to be exhibited to the statement.
- If there is other contemporaneous evidence of the incident detailed in the statement (e.g. police logs, reports from other neighbours, attendance by police etc) consider how and if that evidence could be adduced.
- Don't forget **redact** anything that could identify the witness. Police call logs can be especially problematic! When in doubt, get a colleague to review.
- It's all in the detail - try to avoid generalised statements and include details of specific incidents where possible, *i.e.* time, date, location, duration.



Keeping matters under review

Keep things under review



- Think about...
 - not being influenced by personal feelings or opinions or “the majority” in considering and representing facts;
 - keeping an open mind – do not have legal proceedings as the “goal”;
 - both sides of the case throughout including keeping disability under review;
 - what items of proof or decisions may be needed at trial;
 - building the right narrative;
 - marshalling good evidence (review the evidence with respect to how much weight any fact or piece of evidence will be given);
 - how to understand how a medical condition contributes to a situation and what might be done;
 - how the poor presentation of a witness may come across;
 - have the circumstances changed during the course of investigations/proceedings; and,
 - seeking early advice in trickier cases.



The cost of getting it wrong

Claims and counterclaims



- If there has been discrimination (under s.13, s.15, s.19) or a failure to make reasonable adjustments, the county court has power to grant any remedy which could be granted by the High Court in proceedings in tort or on a claim for judicial review: e.g. a declaration, damages etc.
- No damages for breach of PSED.
- An award of damages **may** include compensation for injured feelings (whether or not it includes compensation on any other basis).

Claims and counterclaims



- The county court or sheriff must not make an award of damages (for breach of s.19) unless it first considers whether to make any other disposal.
- The county court must not grant a remedy other than an award of damages or the making of a declaration unless satisfied that no criminal matter would be prejudiced by doing so.
- If there is a claim brought under EqA 2010 (including a counterclaim), the power under s.63(1) County Courts Act 1984 (appointment of assessors) must be exercised unless the judge is satisfied that there are good reasons for not doing so: s.114(7) EA 2010.

(Cases of note re assessors: *Denman v Equality and Human Rights Commission* [2010] EWCA Civ 1279 and *Cary v Commissioner of Police for the Metropolis* [2014] EWCA Civ 987.)

Guidance as to damages



- There has been guidance as to how such damages should be assessed in Employment Tribunal cases based upon *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318.
- In *Vento*, the Court of Appeal identified three broad bands of compensation for injury to feelings awards
- The current “*Vento* bands” (6 April 2021):
 - lower band - £900 to £9,100;
 - middle band - £9,100 to £27,400;
 - upper band - £27,400 to £45,600.

Factors that may be relevant to assessment



- Factors relevant to the level of any award:
 - Particularly rude or insensitive language or treatment
 - Where discrimination is public or in front of a number of members of the public
 - Matters relating to private or intimate aspects of the person's life
 - Where the person becomes depressed or ill as a result of what happened or is happening

Before *Rosebury*?



- *Poplar HARCA v White*, Legal Action October 2015 at 39.
 - Assured tenancy;
 - Defendant single man in his late 20s;
 - Diagnosis of depressive disorder with psychotic symptoms;
 - Possession claim on the basis of rent arrears;
 - Defendant argued that, in seeking possession, the landlord was discriminating against him contrary to the Equality Act 2010 as the rent arrears had arisen as a result of his disability, which caused a failure to manage his affairs properly, including his housing benefit;
 - The landlord had failed to follow its own support and inclusion strategy. In particular, it had failed to refer the case to its vulnerability panel and had, in effect, treated the defendant like any other rent arrears case.
 - Damages of £4,500 awarded and possession claim dismissed.

Why?

- Landlord's failure to follow its own policy.

Before *Rosebury*?



- Claim for possession based on anti-social behaviour in the county court at Coventry.
- The court awarded Equality Act damages of £3,000 to a tenant.
- District Judge Bull - said **erroneous views** advanced in evidence **as to the duties** under the Equality Act 2010 by two housing association staff, and the fact at least one had been trained on the issue, was “**suggestive of systematic failings**” within the Heart of England.
- In that case, the medical expert had concluded that many of the allegations were directly and indirectly connected with the tenant's underlying mental health issues.

Reported on the Local Government Lawyer website, 25 October 2018

Before *Rosebery*?



- *Ratcliffe & Ratcliffe v Patterson & Porter*, County Court at Luton, 17 March 2020 (NearlyLegal)
 - the court awarded damages at the less serious end of the Vento guidelines of £2000, plus *Simmons v Castle* uplift of 10% totalling £2200.
 - Ms P had counterclaimed for compensation for injured feelings for discrimination.
 - There was no evidence that the discrimination was deliberate, and it was only the inclusion of the mandatory ground that was disproportionate.
 - The threat to Ms P's home, however, had caused significant stress, which the mandatory ground could only have made worse.

Rosebury – injury to feelings



- Cara’s extensive written evidence, her compelling oral evidence, the medical expert evidence and the contemporaneous documentation all speak to the very considerable toll the discrimination has taken on her mental health and general wellbeing.
- Her social landlord failed to see her as the victim. It failed to protect her from the anti-social conduct of others.
- Cara had the burden of defending herself with the claim for an injunction hanging over her for some eighteen months.
- Rosebery is only liable for *its* discrimination in subjecting her to *its* unfavourable treatment and for the injury to feelings that *that* has caused.
- “those damages should be significant” ... “just within the lower reaches of the top band”.
- £27,500 awarded.

What has *Rosebury* taught us?



- Do not underestimate the potential for damages
- There is clearly the potential for an award in the middle to top *Vento* bracket, if:
 - the proceedings and/or investigations have been long, or drawn out and/or not carried out effectively
 - if there have been limited or no attempts to assess, understand or, indeed, acknowledge a person's potential disabilities
 - if proceedings have involved disclosure of personal sensitive medical information
 - if proceedings have led to increased stress or depression as a result of the pressure of litigation



Other resources

Cornerstone webinars



- Dealing with vulnerable tenants (litigation friends, capacity and other issues):
<https://www.youtube.com/watch?v=32Xosz7J50E>
- PSED Defence and residential possession claims:
<https://www.youtube.com/watch?v=PwAfl24gl5I&t=887s>
- Dealing with mental health problems/capacity issues in ASB cases:
<https://www.youtube.com/watch?v=OdpyWFTfVlo>

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