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Possession claims and the Public Sector Equality Duty

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What are we going to cover?



- Introduction to the PSED and how it applies in possession claims – Emma Dring
- Case law update, including the Court of Appeal in Luton Community Housing v Durdana – Ryan Kohli and Ruchi Parekh
- 3. The PSED in practice: tips for decision makers– Andy Lane
- 4. Questions and answers

- Introduction to the PSED and how it applies in possession claims by Emma Dring

What is it? Section 149 Equality Act 2010



- (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 <u>protected characteristic</u> 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.

How does it feature in possession claims?



 As a defence to the claim, usually as part of a wider EA 2010 case.

- Often a lack of particularisation.
- At the stage of seeking a PO, or on application to suspend a warrant.

What are the key aspects of the duty, as it applies to possession claims?



- Comply with duty before the decision is made, approach it with an open mind.
- General regard to 'equality issues' is not enough.
 Weigh the factors relevant to promoting the statutory aims against any countervailing factors.
- 3. Substance, not form. No box-ticking.
- 4. You may need to gather information first, if it appears the tenant might be disabled in a way relevant to the reason for seeking possession.



- 5. A continuing duty reconsider as facts change, and at each stage of the proceedings.
- 6. The duty can't be delegated, the person taking the decision must themselves have due regard.
- 7. Creating a record of how the duty has been considered is important.
- 8. Process, not outcomes. Weight to be given to equality implications vs. other factors is for the decision maker.

- Case Law Updateby Ryan Kohli & Ruchi Parekh



- Ms Durdana and husband tenants of LCH. Younger of two children suffers from cerebral palsy.
- When applying for social housing to Luton Council for Homelessness Assistance they lied about (i) where they were living; (ii) that they had been asked to move out of the family home by Ms Durdana's parents; and (iii) their savings/means.
- March 2017 Ms Durdana accepted a caution in relation to the false information provided and her husband was convicted of providing false information to obtain housing
- On 17 May 2017 a NoSP was served relying on Ground 17



- Proceedings defended on the basis that LCH failed to perform its s. 149 EA 2010 duties by properly considering in advance the impact of seeking and obtaining possession on Ms Durdana and disabled child
- At trial, Judge dismissed the claim on the basis that no s. 149 EA 2010 assessment had been carried out and it would be unreasonable to make a possession order
- The Court of Appeal at Para 18 affirmed the principle established by the CA in *Powell v Dacorum Borough Council* [2019] EWCA Civ 23 that the scope for action under s. 149 EA 2010 will vary from case to case depending upon the particular statutory or other function being performed: it is entirely context specific.



- In any case, it is important to consider which part of s. 149 EA 2010 is relevant
- In most possession proceedings it is the need to have "due regard" to advance equality of opportunity between disabled and non-disabled people (s. 149(1)(b)). Specifically, the need to take steps to meet the needs of disabled individuals who are different from non-disabled individuals
- Only in rare cases will it be possible to comply with the duty in ignorance of its terms
- However, following Aldwyck Housing Group Ltd v Forward [2019] EWCA Civ 1334 a Court should refuse to dismiss a possession claim where the breach of s. 149 if the Court is satisfied that it is highly likely that the outcome would not be substantially different if the breach had not occurred



- When considering all the circumstances, the Court recognized that the Respondent's daughter's disability imposed physical limitations on her ability to move freely around and her ability to communicate
- Evidence was that she did not need particular facilities according to the medical evidence and the state of her general health is good.
- Court could not conclude that a move to other accommodation will impact on her disproportionately as a result of those disabilities but there may be some impact which is not irreversible.
- Para 35 of the Judgment: the question is whether the HA, in paying due regard to the evidence and in considering whether it was still appropriate to seek possession, is highly likely to have made the same decision. The Court's view was that it would.

Aldwyck Housing Trust v Forward [2019] EWCA Civ 1334



- Possession claim against an assured tenant who had committed various criminal offences including drug dealing at the property.
 Possession sought under Ground 14.
- D was physically disabled. PSED assessment had been conducted but was conceded to have been inadequate because no medical evidence had been obtained about D's disabilities.
- High Court dismissed appeal against PO on the basis that the carrying out of an appropriate PSED assessment would still have resulted in the possession claim proceeding.

Aldwyck Housing Trust v Forward [2019] EWCA Civ 1334



- CA rejected the submission that once a breach of the PSED was established there was no room for the Court to exercise its discretion to grant relief.
- Cases like Bracking which concerned a failure to to comply with the PSED when deciding to revoke a nationwide benefit cannot be applied indiscriminately to cases affecting an individual tenant.
- In the context of a typical possession action the Court will have available it it
 all the facts of the dispute and may be able to assess the consequences of
 any breach more easily than in the context of a wide-ranging ministerial
 decision.
- Court should look closely at the facts of the particular case and decide if, on the facts, it is highly likely that the decision would not have been substantially different if the breach had not occurred.

L & Q Housing Trust v Patrick [2019] EWHC 1263 (QB)



- Possession sought against assured tenant: Grounds 7A (mandatory) and 14
- Disability raised in Defence; evidence of schizophrenia provided late
- Equality assessment carried out after possession order made

"59. ... The evidence of Mr Patrick's disability was revealed very late in the day as a result of which the steps required to fulfil the duty required considerably less formality than would otherwise have been the case. ... Moreover, the Trust had left itself further time thereafter within which to give more detailed and formal consideration to the regard to be had to Mr Patrick's disability before enforcing the possession order. ... If I am wrong in concluding that the Trust was not in breach of its PSED at the time of the hearing before HHJ Saggerson, I am satisfied both that such breach was superseded by [the later] assessment and that any breach of the PSED would not have led to the making of a materially different decision."

Barnsley MBC v Norton [2011] EWCA Civ 834



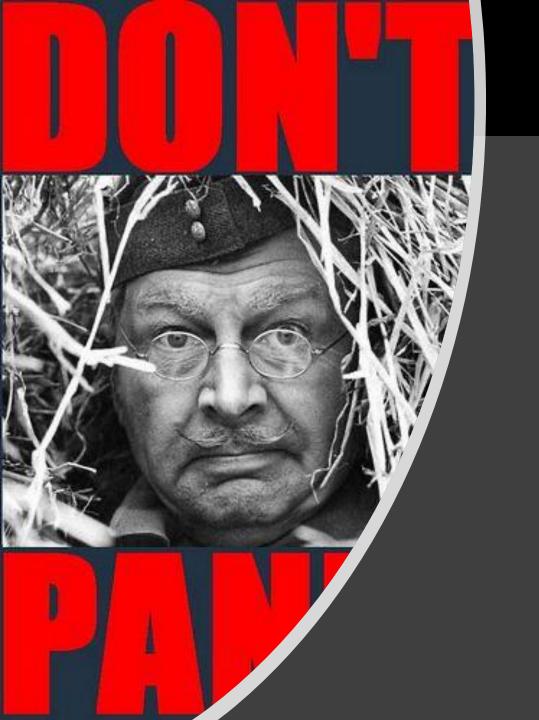
"34. ... Even though, on the basis on which I proceed, the council was in breach of its duty before the proceedings were started, it would be open to it to remedy that breach by giving proper consideration to the question at any later stage, including now in the light of our decision."

- Can late compliance with PSED remedy a prior breach?
- How does Barnsley sit with first principle of PSED?
 - Compliance prior to decision & approach with "open mind"
- Barnsley cited with approval in recent cases, but not explicitly on 'late compliance' point
- "Late compliance" subject of upcoming HC appeal: watch this space!

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Possession Claims & the PSED The Practice

Andy Lane





To start with...

The Court View



19. Consistently with this, s.149 does not amend the statutory powers and functions of a public authority prescribed by other legislation. So in this case it does not limit or qualify the power of a housing authority to seek possession of premises let to persons with a protected characteristic. But in deciding whether to take or continue such proceedings the authority must perform the duty of consideration which s.149 imposes on it.

Patten LJ in Luton Community Housing Trust v Durdana [2020] EWCA Civ 445



Some Questions...



- Do I need to read & understand section 149?
- Do I need to read cases dealing with the PSED?
- Do I need to do a formal 'PSED Assessment' for all my decisions?
- Or, will a proportionality assessment suffice?
- What happens when circumstances change mid-case/process?



...and then some pointers

- Be aware of **why** possession is being sought
- Remember there are <u>9</u> protected characteristics
- Do any of these "come into play"?
- Did you consider whether they merited a different approach than "normal"?
- Could you have done something to make breach less likely?
- Was 3rd party evidence considered or sought?
- What is the prognosis for the defendant if evicted?





Reality strikes back

- Breach may not be fatal: Longmore LJ in Aldwyck Housing Group Ltd v Forward [2020] 1 WLR 584 at [25]
- Context is crucial: McCombe LJ in <u>Powell</u>
 <u>v Dacorum BC</u> [2019] HLR 21 at [44]
- It's not a duty to achieve a particular result: R (Hurley) v SS BIS [2012] EWHC 201 (Admin) at 76 (Elias LJ)





And don't forget therefore...

It's a duty to have due regard

"In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing."

Dyson LJ in <u>R (Baker) v SS CLG [2009] PTSR 809 at [31]</u>

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