

Public Sector Equality Duty and Possession Claims

Lessons learnt from 2019

The Court of Appeal judgment in Powell v Dacorum Borough Council [2019] EWCA Civ 23 was handed down on 24 January 2019. In this article one of the barristers that was involved in the case, Andy Lane of Cornerstone Barristers (who led Ruchi Parekh), gives his view on the case and the lessons that can be learnt from it.

Introduction

Nobody can seriously dispute the significance of the public sector equality duty (PSED) (see Endnote) on the functioning of public authorities and those exercising public functions. It is also not a concept of recent construction, replacing as it does section 76A of the Sex Discrimination Act 1975, section 71 of the Race Relations Act 1976 and section 49A of the Disability Discrimination Act 1995.

However, it has fallen into some “mis-use” and rather become a frequent and ill thought out “add-on” in many housing cases at first instance, in particular in defences to possession claims, in a manner that has led to some confusion as to its proper treatment.

This article seeks to address the impact of the recent Court of Appeal decision in *Powell v Dacorum Borough Council* [2019] EWCA Civ 23 (“*Powell*”) on the approach landlords should take to such arguments.

Approach to the PSED

I do not propose to go into any detail on this issue and will instead simply rely on the summary of the Divisional Court in *R.(on the application of Danielle Johnson, Claire Woods, Erin Barrett, Katie Stewart) v Secretary of State for Work and Pensions* [2019] EWHC 23:

“66 ...In broad terms, the duty is a duty to have due regard to the specified matters, not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters having regard to the substance of the decision and the authority's reasoning. The absence of a reference to the public sector equality duty will not, of itself, necessarily mean that the decision-maker failed to have regard to the relevant matters although it is good practice to make reference to the duty, and evidentially useful in demonstrating discharge of the duty (see, e.g., Baker at paragraphs 36 to 37, and Bracking at paragraph 26). As Lord Neuberger observed at paragraph 74 of his judgment

in Hotak v London Borough of Southwark [2016] A.C. 811 "the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment".

Housing Context – the higher courts

Whilst much of the application of the PSED is by way of challenge to Central Government or local authority policy – to give 2 recent examples, see *Johnson, Claire Woods etc* (supra, re calculation of universal credit payments, where the Divisional Court held that the Secretary of State had complied with the PSED though lost on other grounds) and *R.(on the application of YG) v Hillingdon LBC* [2019] HLR 4 (where the PSED formed one of a number of challenges to the residence requirement and uplift of a local authority's allocation policy) – there are numerous examples of it applying to individual housing decisions.

That was seen most recently in *Kannan v Newham LBC* [2019] EWCA Civ 57 which concerned an applicant's suitability challenge in a homelessness case. Indeed, at an appellate level, homelessness is one area where the PSED has often arisen: *Lomax v Gosport BC* [2018] HLR 40; *Panayiotou v Waltham Forest LBC* [2018] QB 1232; *Hackney LBC v Haque* [2017] HLR 14; *Birmingham City Council v Wilson* [2017] HLR 4 and *Hotak v Southwark LBC* [2015] UKSC 30 to give 5 well known examples.

Powell – the facts

The possession claim in *Powell* was in many respects not unusual or controversial. It arose from matters concerning rent arrears and the growing and possession of cannabis and though a defence drafted by counsel was filed (raising Mr Powell's medical position but not the PSED), a possession order, suspended on terms, was agreed by the parties and thereafter ordered by the judge.

The authority alleged breaches of the terms of the suspended order and sought a warrant of possession (having first obtained a closure order). This was issued and Mr Powell submitted an application for a stay of execution. This was heard and determined over 3 days.

The application was rejected on the facts and submissions on reasonableness, as were the arguments as to indirect discrimination, and Mr Powell appealed against this order on a number of grounds. He only received permission on one, concerning the PSED and Equality Act aspects of the authority's ASB policy. HHJ Bloom rejected the appeal and the second appeal was submitted.

Court of Appeal

Lord Justice McCombe, in delivering the main judgment of the court, set out the ambit of the appeal at [31]:

“31 As indicated already, the appeal to us is confined to the question of whether the findings below that there was no breach of the PSED or of the Council's own ASB policy, so far as it relates to Equality Act issues, was wrong, and whether, if there were any such breaches, they were capable of remedy and were remedied by the proportionality assessment made in February 2017. Further, and in any event, under its Respondent's Notice, the Council argues that, irrespective of any breach of the PSED that may have occurred, the Deputy District Judge was entitled to dismiss the application in any event, because a full consideration of the PSED by the Council would not have affected its decision.”

[It may not have escaped some of the readers' notice that Lord Justice McCombe delivered the main judgment, often cited in defence skeleton arguments (as here), in Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345]

His conclusions, in rejecting Mr Powell's appeal, can be summarised as follows:

1. **Context** - Caution must be exercised by defendants in simply reciting previous PSED decisions [44]:

“In my judgment, the previous decisions of the courts on the present subject of the application and working of the PSED, as on all subjects, have to be taken in their context. The impact of the PSED is universal in application to the functions of public authorities, but its application will differ from case to case, depending upon the function being exercised and the facts of the case. The cases to which we have been referred on this appeal have ranged

across a wide field, from a Ministerial decision to close a national fund supporting independent living by disabled persons (Bracking) through to individual decisions in housing cases such as the present. One must be careful not to read the judgments (including the judgment in Bracking) as though they were statutes. The decision of a Minister on a matter of national policy will engage very different considerations from that of a local authority official considering whether or not to take any particular step in ongoing proceedings seeking to recover possession of a unit of social housing.”

2. **Compliance** - The officer was entitled to think that the possession order was enforceable on its terms, and in any event sought “to comply with the PSED *“even if unaware of its existence as a separate duty, or of the terms of section 149”* [47].
3. **Change of circumstances** - There had been compliance and there was a proper analogy with *Paragon Asra Housing Ltd. v Neville* [2018] HLR 39 (which concerned the question of discrimination, and held that unless there was a material change of circumstances this issue did not need to be revisited at the warrant stage) – *“Attempts were made to find out whether circumstances had changed and nothing new was revealed. It seems to me that the situation is*

entirely similar to that considered by Sir Colin Rimer in the Paragon case (supra). There could be no reason for the Council to think that it was no longer entitled to enforce the order in accordance with its terms, whether for want of compliance with the PSED or otherwise” [48].

4. **Ex post facto compliance** – Even if there had not been compliance with the PSED at the time the decision was made to issue the warrant, there was at a later stage [50]:

“It has been held in this court in the Barnsley case, that in proceedings of this type, it is open to a social housing landlord to remedy any defect in compliance with the PSED at a later stage in the proceedings. As I have said, I do not consider that the Council could be said to have been in breach of the duty when it decided to request the warrant, but even if it was in such breach, I consider that it remedied the matter by its assessment of the situation in the light of Dr Sadler's letter and Mr Powell's up-to-date medical condition.”

No difference

Because of the court's conclusions in *Powell* there was no need for it to consider the jurisdictional question of whether a county court was able to “overlook” a public law breach, and that remains for another day.

The authority in its Respondent's Notice had argued in that respect that any breach of the PSED would have made no difference to the outcome of the case, and in that regard placed particular reliance on the Court of Appeal's judgment in *Hertfordshire County Council v Davies* [2018] 1 WLR 4609 (re the Children Act 2004, s.11), where Lady Justice Sharp had commented at [30]:

“As the hearing developed it seemed to me that the breach of the section 11 duty, as the judge found it to be, had no relevance on the facts to the substantive matter at issue in these proceedings, namely whether an order for possession should be made or not. It is notable for example, that no mention was made of the position of the defendant's children in his skeleton argument, and we were referred to no material about them during the course of argument. This lacuna in the defendant's case was at one with the position in the pleaded defence where the defendant failed to particularise how, if at all, consideration of the children's welfare would have made any difference to the ultimate outcome of this claim.”

and at [31]:

“Thus the reality of the position seems to me to be that the issue raised in relation to section 11 was in its own way as theoretical as that raised in relation to the public sector equality duty under section 149 of the 2010 Act. It had no direct or relevant application to this case.”

However, whilst the Court of Appeal in *Powell* were not required to consider this question, I ought to highlight to the High

Court decision handed down on 11 January 2019 in *Mr Steven Forward v Aldwyck Housing Group Ltd* [2019] EWHC 24 (QB), where the PSED defence was being considered at the earlier stage of the making of a (discretionary ground) possession order. It was recorded in the judgment that [12]:

“No Equality Act assessor was appointed before the trial was heard. No PSED assessment was carried out prior to the issuing of the notice but one was prepared by the time of the trial. The author of the assessment was cross-examined. By the closing submissions there was common ground that there had been a failure to have due regard to the respondent's PSED. Nonetheless the respondent continued to seek possession on the basis that the breach was not material, there was no other viable option and the application for possession was the only proportionate response.”

It is fair to say that the trial judge (incorrectly) followed the dicta of Elisabeth Laing J in *Hertfordshire County Council v Davies* [2017] 1 WLR 4395 to the effect that *“a public law defence had to be linked to a private law right in order to defend a possession claim, even though the decision had been overturned by the time of Judge Wood's judgement”* [29].

Mrs Justice Cheema-Grubb DBE ultimately though rejected the tenant's appeal and concluded at [45]:

“In my judgment therefore, whilst of course Judge Wood did not carry out a structured

enquiry, believing that it was unnecessary, her judgment shows that she regarded the enforcement of a possession order as a proportionate means of achieving a legitimate aim. She had to consider the reasonableness of permitting the order, and enforcement if necessary in due course. If she had applied her mind to the broader considerations of s.149 Equality Act she would inevitably have come to the same answer. The failure to have due regard to the important matters set out in s.149 in the structured way required by the legislation was not a material error in this case. Looked at from the other end of these proceedings, it would be wholly unfair and disproportionate for me to allow this appeal because of the errors in Judge Wood's approach when the entitlement of the respondent to seek eviction and the reasonableness of making the order sought, have already been clearly established on the facts of this case. For these reasons I conclude that there is no merit in the appeal and I dismiss it.”

Conclusion

Powell is an important decision because it stresses the contextual approach that must be adopted when considering the PSED [51]:

“However, the decision to seek possession of a social housing unit in respect of which a court has already made a possession order is different in character from the decision under consideration in Bracking.”

It also extends the principal in *Neville* to the PSED, and requires a court therefore to have particular regard to the change of circumstances alleged on behalf of the defendant to that end, and supports the ex

post facto option highlighted in *Barnsley MBC v Norton* [2011] HLR 46.

None of what is said above is intended to diminish or underplay the importance of the PSED, and the focus that should be given to it when decisions are being made by local authorities and, where exercising a public function, housing associations (and para. 26 of McCombe LJ's judgment in *Bracking* remains a useful reference).

What it should do though is give some comfort to those facing arid, technical defences with regard to the PSED with no great thought having first been given to what is in fact being argued, and why.

Finally, I should advise that Ruchi and I have previously prepared a case note on this case which can be found on the Cornerstone Barristers' website.

Endnote:

149 Public sector equality duty

(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;

(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.