

Legal Services Agency Ltd



EVICTIONS IN SCOTLAND & EQUALITY ACT

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Why would you want to use the Equality Act?



- Already a reasonableness defence in repossession proceedings.
- If can prove direct discrimination, conduct is unlawful.
- Other types of discrimination have tests of proportionality.
- Puts requirement on landlord to show they have done all that can reasonably be expected to accommodate consequences of the disabled person's disability. May shift burden of proof.
- More case law/ guidance in a discretionary area.
- Particularly helpful where there is less security of tenure- SSSTs, private tenancies, common law tenants (i.e. temporary homeless accommodation), non-tenant occupiers (i.e. asylum seekers).

Article 8 ECHR



- Manchester City Council v Pinnock [2010] UKSC 45 and Hounslow LBC v Powell [2011] HLR 23
- “Seriously arguable”- high threshold.
- Thurrock BC v West [2013] HLR 5- even if Art 8 defence established- “where the defendant would otherwise have no legal right to remain in the property, it is difficult to imagine circumstances in which the defence could operate to give the defendant an unlimited and unconditional right to remain.”
- Public authorities only- McDonald v McDonald & Ors [2016] HLR 28
- Riverclyde Homes v Linda Woods

Another option- Article 14 ECHR



- *The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
- Needs to be a public authority.
- Parasitic right- discrimination must be within the ambit of a Convention right.
- Article 8/ Article 1 Protocol 1.
- Other Status.
- Proportionality defence.

Equality Act 2010



Personal Characteristics

Age

Disability

Gender reassignment

Marriage and civil partnership

Race

Religion or belief

Sex

Sexual orientation

(all s4)

Pregnancy and maternity (s17-s18)

Use of Equality Act in practice



- Applies to people who provide goods and services to the public and anyone in the public sector- specifically includes persons who manage premises (i.e. landlords, factors and letting agents) (s35)
- Prohibits both **direct** and **indirect discrimination** (s13 & s19) and **discrimination arising from a disability** (s15)
- Duty to **make reasonable adjustments** (s20)
- Includes a Public Sector Equality Duty (s149)
- Can raise a claim in respect of certain breaches of Act in sheriff court (s114) within **6 months** starting with the date of the act to which the claim relates unless sheriff thinks just and equitable for it to have been raised late (s118)

Management of Tenancies (s35)



- (1) A person (A) who manages premises must not discriminate against a person (B) who occupies the premises—
 - (a) in the way in which A allows B, or by not allowing B, to make use of a benefit or facility;
 - **(b) by evicting B (or taking steps for the purpose of securing B's eviction);**
 - (c) by subjecting B to any other detriment.

Direct Discrimination (s13)



- A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- Requires a comparator.
- Less favourable treatment must be directly because of the protected characteristic- may be difficult to prove.
- Generally cannot be justified- age is an exception.

Indirect Discrimination (s19)



- A person (A) discriminates against another (B) if A applies to B a **provision, criterion or practice** which is discriminatory in relation to a relevant protected characteristic of B's.
- What is a provision, criterion or practice?
- Require a comparator- must be particular disadvantage.
- Not discriminatory if it is proportionate means of achieving a legitimate aim.

Discrimination Arising from a Disability (s15)



- (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...**
- Does not apply if A did not know & could not reasonably have been expected to know, that B had the disability.
- No need to identify any provision, criterion or practice, just unfavourable treatment.
- Rent arrears, ASB, breach of tenancy- if caused/ part caused by disability
- Proportionality test

Definition of a Disability (s6)



- (1) 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.

- Sched 1- Long term-
 - (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.

Reasonable Adjustments (s20)



- An obligation to act, rather than a requirement not to do something.
- Provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled or
- Physical feature puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled
- Take reasonable steps to avoid disadvantage.
- Reasonable steps to provide auxiliary aid.
- Applies to tenants and persons “otherwise entitled to occupy” the premises (Sch 4(4)).
- What is reasonable?- Never reasonable for A to have to take a step which would involve the removal or alteration of a physical feature. (Sch 4(8)).

Burden of Proof (s136)



- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- If there are facts from which court can conclude an eviction is discriminatory, up to alleged discriminator to prove it was not.

Akerman-Livingstone v Aster Communities Ltd [2015] UKSC 15



- **Facts of case:**
 - Diagnosed with Prolonged Duress Stress Disorder or Complex Post Traumatic Stress Disorder
 - Became homeless in 2010
 - Aug 2010 a flat was let to him on a weekly periodic tenancy
 - Joined council's choice-based scheme for allocation of social housing
 - Various offers made and declined- last offer was due to childhood abuse in that street
 - Council discharged duty
 - Served NTQ case went to court

Issues in Case



- Section 15 of the Equality Act- Discrimination arising from a disability.
- Whether the discrimination defence should be treated in the same way as an article 8 defence (proportionality).
- Found that proportionality in these cases is a different test.

Akerman-Livingstone v Aster Communities Ltd



- Lady Hale
- Para 25 “Parliament has... expressly provided in sections 15 and 35, for disabled people to have rights in respect of accommodation which they occupy which are **different from and extra to the rights of non- disabled people**. Landlords may be required to accommodate, or continue to accommodate, a disabled person when they would not be required to accommodate, or continue to accommodate, a non-disabled person.” (emphasis mine)

Akerman-Livingstone v Aster Communities Ltd



- Lady Hale
- Para 31 “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 upon 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” (Malcolm, para 61).”

Akerman-Livingstone v Aster Communities Ltd



- Lord Neuberger
- Para 59 “Provided that a defendant establishes that the landlord is (or at a summary stage, may well be) seeking to evict him “because of something arising in consequence of [his] disability”, the landlord faces a significantly more difficult task in having to establish proportionality than does a landlord who faces an article 8 defence.”

The Structured Proportionality Test



- A legitimate aim- does it justify limiting the defender's rights?
- The measure being taken- eviction- is this connected to the aim, will it achieve it?
- Necessity- is there any action with less interference than eviction that would achieve the aim?
- Are the disadvantages, loss of defender's home, disproportionate to Pursuer's aims?

Birmingham v Stephenson [2016] EWCA Civ

1029



- Decree granted at first calling- successfully appealed
- Noise complaint, schizophrenic tenant
- Lewison LJ- wrong “to treat the question of proportionality as a binary choice between eviction, on the one hand, and doing nothing on the other hand.”
- Goes on to suggest alternative measures.



Case of RSL v O.



- Landlord raised action for eviction based on alleged Anti-social Behaviour
- Alleged behaviour was shouting abuse, making threatening remarks, making false allegations etc
- Client denied much of the behaviour and advised that there was essentially a neighbour dispute
- Defences based on denying ground established, reasonableness and an argument based on Equality Act

Disability



- Argued that she had a protected characteristic under the Equality Act 2010, namely disabilities in the form of mental impairments
- Argued defender's conditions have a substantial and long-term adverse effect on her ability to carry out normal day to day activities in terms of Section 6 (1) (b) of the Equality Act 2010
- Landlord aware of disabilities

Direct Discrimination



- Less favourable treatment due to disability
- Defender's behaviour and functioning is directly affected by her disability
- The Pursuers in seeking an Order for ejection against the Defender are directly discriminating against her in treating her less favourably than they treat or would treat others to whom that disability does not apply

Indirect Discrimination



- Indirect discrimination- by applying discriminatory “provision, criterion or practice” - s19
- Policy about Neighbour Relations applied to all tenants
- Puts disabled persons at a particular disadvantage compared to persons without the protected characteristic of disability as it does not take appropriate account of the social difficulties faced by some persons with disability
- Not proportionate means of achieving legitimate aim.

Discrimination Arising From Disability



- Treating Defender who is a disabled person unfavourably because of something arising in consequence of her disability
- The dispute between the Defender and her neighbours had resulted as a consequence of her disability
- Not a proportionate means of achieving a legitimate aim
- When considering if proportionate- was there a lesser step that could have been taken to achieve the aim?

Duty to make reasonable adjustments



- Must make reasonable adjustments to ensure that their provisions, criteria or practices do not put the Defender at a disadvantage when compared with a person who does not suffer from her disability
- Defender's disability puts her at a disadvantage when considering practice and policy of the Pursuers in approach to disputes between neighbours and allegations of antisocial behaviour

Examples of Adjustments



Could have:

- Assessed Defender's needs
- Had an appropriate policy in place for dealing with persons at social disadvantage because of their disability
- Provided appropriate training to staff
- Ensured the provision of a support package
- Offered alternative accommodation
- Made other adjustments to adopt a more flexible approach to take account of the Defender's protected characteristic.

Outcome



- Did not get a decision as reached a negotiation- however unlikely that negotiation would have been reached without Equality Act Arguments
- Proof sisted for Pursuers to find Defender alternative accommodation
- Defender then moved to a new tenancy
- Same arguments made in 2 other cases still ongoing

Practical Requirements



- Get a copy of any policy on evictions- FIR
- Any documentation evidencing the landlord knew about the protected characteristic.
- If disability will need **expert** evidence and that will need to specifically cover that the behaviour complained of is caused by, or partially by, the disability.

Other Cases



- RSL v V- currently sisted to find accommodation
- RSL v J- no longer in accommodation due to threats
- Cannabis cultivation- cannabis for medical use
- Rent arrears- ability to resolve affected by mental health
- Hoarding cases- later this year, Hoarding Disorder will become a classified mental health condition, and will be included in the 11th ed. of the WHO's *International Classification of Diseases* (ICD-11) publication.
- Also used in defence of an ASBO- if ABSO granted landlord can convert tenancy to SSST by serving notice (H(S)A 2001 s35).

Short Scottish Secure Tenancies



- *SLC v McKenna* (2012 SCLR 384) - reasons needed
- Can challenge these based on Article 8
- Stronger legal challenge if there is an Equality Act defence, given the different proportionality test. Will want to look at whether the disability is a consideration in the reasons.

First Tier Tribunal Housing and Property Chamber



- All private tenancy eviction cases, whether for SATs, ATs or PRTs now go to FTTHCP.
- Should anticipate that Equality Act Defences will be raised, especially relating to mandatory grounds.
- Same arguments can be made for ASB evictions.
- Case law will develop in 2 different forums.

Conclusion



- New legal remedies can be found through strategic litigation.
- Discrimination law can have application in the field of housing.
- Reported decisions to date concerning Equality Act 2010 and evictions all from England so far.
- Early days in Scotland, waiting with interest to see further reported judgements.

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