



Liability of landlords for harassment and victimisation

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Equality Act 2010

s.26 Harassment

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

- (a) A engages in unwanted conduct of a sexual nature, and
- (b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
- (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
- (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation.

27 Victimization

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
- (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act or rule.

- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (4) This section applies only where the person subjected to a detriment is an individual.
- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause

Anti-social behaviour and housing

- Injunctions; [s.1 Anti-social Behaviour, Crime and Policing Act 2013]
- Possession proceedings [HA 1985; HA 1988];
- Closure Notices/Orders [s.76/80 ABCPA 2013]
- Community remedies/ASB case reviews [Part 6, ss101-105, ABCPA
2013]

[non-exhaustive]

Unlawful eviction

- > Claims in contract/tort; [breach of quiet enjoyment, trespass to land, trespass to person, interference with goods]
- > Protection from Harassment Act 1997;
'course of conduct'
civil and criminal remedies
- > Prosecution under the Protection from Eviction Act 1977
- > Equality Act 2010?/Remedy if established?

33 Disposals, etc.

(1) A person (A) who has the right to dispose of premises must not discriminate against another (B)—

(a) as to the terms on which A offers to dispose of the premises to B;

(b) by not disposing of the premises to B;

(c) in A's treatment of B with respect to things done in relation to persons seeking premises.

(2) Where an interest in a commonhold unit cannot be disposed of unless a particular person is a party to the disposal, that person must not discriminate against a person by not being a party to the disposal.

(3) A person who has the right to dispose of premises must not, in connection with anything done in relation to their occupation or disposal, harass—

(a) a person who occupies them;

(b) a person who applies for them.

- (4) A person (A) who has the right to dispose of premises must not victimise another (B)—
 - (a) as to the terms on which A offers to dispose of the premises to B;
 - (b) by not disposing of the premises to B;
 - (c) in A's treatment of B with respect to things done in relation to persons seeking premises.
- (5) Where an interest in a commonhold unit cannot be disposed of unless a particular person is a party to the disposal, that person must not victimise a person by not being a party to the disposal.
- (6) In the application of section 26 for the purposes of subsection (3), neither of the following is a relevant protected characteristic—
 - (a) religion or belief;
 - (b) sexual orientation.

34 Permission for disposal

- (1) A person whose permission is required for the disposal of premises must not discriminate against another by not giving permission for the disposal of the premises to the other.
- (2) A person whose permission is required for the disposal of premises must not, in relation to an application for permission to dispose of the premises, harass a person—
 - (a) who applies for permission to dispose of the premises, or
 - (b) to whom the disposal would be made if permission were given.
- (3) A person whose permission is required for the disposal of premises must not victimise another by not giving permission for the disposal of the premises to the other.
- (4) In the application of section 26 for the purposes of subsection (2), neither of the following is a relevant protected characteristic—
 - (a) religion or belief;
 - (b) sexual orientation.
- (5) This section does not apply to anything done in the exercise of a judicial function.

35 Management

(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.
- (2) A person who manages premises must not, in relation to their management, harass—
- (a) a person who occupies them;
 - (b) a person who applies for them.

(3) A person (A) who manages premises must not victimise 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.

(4) In the application of section 26 for the purposes of subsection (2), neither of the following is a relevant protected characteristic—

(a) religion or belief;

(b) sexual orientation.

108 Relationships that have ended

- (1) A person (A) must not discriminate against another (B) if—
 - (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and
 - (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.
- (2) A person (A) must not harass another (B) if—
 - (a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and
 - (b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.

109 Liability of employers and principals

- (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
- (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
- (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.
- (4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—
 - (a) from doing that thing, or
 - (b) from doing anything of that description.

110 Liability of employees and agents

- (1) A person (A) contravenes this section if—
- (a) A is an employee or agent,
 - (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
 - (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).
- (2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

- (3) A does not contravene this section if—
 - (a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and
 - (b) it is reasonable for A to do so.

Third party harassment

Conteh v Parking Partners Ltd [2011] ICR 341

EAT

- > Employee subject to racial abuse by employee of another company operating in the environment in which she worked;
- > Brought under the RRA 1976 ['on grounds of' rather than 'related to' [EA 2010]];
- > Claimant asserted a failure to take appropriate steps by her employer and that this created an environment that amounted to harassment;

➤ Held that:

- > *'unwanted conduct'* could include inaction;

- > that the matter of inaction must have been taken on grounds of race, ethnic or national origins if it was to create the environment complained of such that harassment was established within the relevant section;

➤ **Unite the Union v Nailard [2019] ICR 28**
CA

- > Full-time union official raised allegations of sexual harassment against two lay elected officers;
- > Claim brought against the union, for those actions and in that in addition the failure of employed officials to protect her was harassment within s.26;

- > Considered/confirmed liability for actions of lay officials against third party [s.109(2)];
- > In order to establish harassment on the basis of inaction by the employed officials, any inaction had to be 'related to' sex. It is a matter of fact as to whether the conduct [inaction] is related to the protected characteristic.

Housing and harassment

Example:

- Local authority tenant;
- Key required to a communal area in a block of flats;
- Another tenant requires access to that area to read a meter;
- Local authority tenant holds the key;
- He is subject to unwanted racial behaviour when the other tenant seeks access.



10 years of the Equality Act and housing: where next?

Indirect discrimination against tenants and potential tenants

Daniel Clarke

Introduction

- In the 10 years since the EA 2010 came into force, defences to possession claims based on disability discrimination under s15 EA 2010 have become well-established: see e.g. *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15, [2015] AC 1399, *Birmingham CC v Stephenson* [2016] EWCA Civ 1029, [2016] HLR 44
- Similarly, arguments re PSED: see e.g. *Barnsley MBC v Norton* [2011] EWCA Civ 834, [2011] HLR 46; *Forward v Aldwyck Housing Group* [2019] EWCA Civ 1334, [2020] 1 WLR 584; *Luton Community Housing Ltd v Durdana* [2020] EWCA Civ 445, [2020] HLR 27
- Surprisingly limited authority on indirect discrimination in housing context

Section 19 EA 2010: Indirect discrimination

1. A applies a **provision, criterion or practice** (“PCP”) to B
 - Construed widely: “any formal or informal policies, rules, practices [etc]” (EHRC SPFA Code §5.6)
 - May include one-off, but not necessarily: must be way things would generally be done (*Ishola v TFL*)
2. A applies / would apply to persons without B’s PC
3. Puts / would put those who share B’s PC at **particular disadvantage** when **compared with those who do not share B’s PC**
 - Pool for comparison should generally cover all those affected by the PCP
 - Must be no material difference in circumstances of comparator (s23(1))
 - May be hypothetical (“would apply”; see also SPFA §§4.23-4.28 re direct discrimination)
 - Disadvantage *may* be obvious; statistics/ experts *may* help (SPFA §§5.12-5.15)
4. Puts / would put B at that disadvantage
5. A can’t show that **proportionate means of achieving a legitimate aim**
 - (1) Legitimate aim; (2) Rational connection; (3) Least drastic means; (4) Proportionate in all the circs.
 - Burden on A: even if could in theory be justified, A must have the evidence (*Coll, Ward*)
 - Q for court, and justification may be *ex post facto* (but less defence will be shown: *Brewster, Ward*)
 - Where LL is a public body, compliance with PSED is a “significant factor” (SPFA §5.36)

Part 4 EA 2010: Application to premises

- s32 (General application):
 - **Doesn't apply to age or marriage & civil partnership**
 - Nor to accommodation for short stays or only for purpose of public function / service to the public
- Must not discriminate:
 - s33(1) (**disposal**): (a) as to terms of disposal to B (b) by not disposing to B or (c) in treatment of B re persons seeking premises
 - s34(1) (**permission for disposal**): where permission required for disposal, by not giving permission to dispose of premises to B
 - s35(1) (**management**): (a) in the way in which A allows B to make use of benefit or facility, (b) by evicting B or taking steps to secure eviction, or (c) subjecting B to any other detriment
- Other matters, e.g. allocations policies, fall within Part 3 (Services and Public Functions)
- Sch 5 (Premises: Exceptions):
 - §1: Private disposal (w/o agent or advert) by owner-occupier (of whole): s33(1) only applies to race and s34(1) doesn't apply in relation to religion or belief or sexual orientation
 - §3: Small premises (2-3 households and up to 6 people) with shared facilities, part of which occupied by landlord or relative

Cases so far: allocations and letting agents (Part 3)

Allocations

- *R (HA) v Ealing LBC* [2015] EWHC 2375 (Admin), [2016] PTSR 16
Application of residence condition to exclude women fleeing domestic violence was indirectly discriminatory on grounds of sex
- *R (C) v Islington LBC* [2017] EWHC 1288 (Admin), [2017] HLR 32
Effect on women fleeing domestic violence of local lettings policy was justified within scheme as a whole
- *R (H) v Ealing LBC* [2017] EWCA Civ 1127, [2018] PTSR 541
Effect on women, disabled and elderly people of reservation of stock for working households was justified
- *R (TW) v Hillingdon LBC* [2018] EWHC 1791 (Admin), [2018] PTSR 1678
- *R (Ward & Gullu) v Hillingdon LBC* [2019] EWCA Civ 692, [2019] PTSR 1738
Residence requirement (v1 and v2), indirectly discriminated against Travellers (and v2 non-UK nationals) on grounds of race
- *R (XC) v Southwark LBC* [2017] EWHC 736 (Admin), [2017] HLR 24
Effect on women and disabled people of additional priority for working households was justified

Letting agent

- *A Tenant v A Letting Agency* (2020) September *Legal Action* 44 (order with reasons [here](#))
- *Tyler v Paul Carr Estate Agents Ltd* (2020) November *Legal Action* 40
“No DSS” policies — not to let to tenants in receipt of Housing Benefit — indirectly discriminated against women and disabled people

Cases so far: other (Part 4)

Adjustments

- *Plummer v Royal Herbert Freehold Ltd* (2018) September *Legal Action* 43:
Policy of never making adjustments to club premises that did not benefit all members indirectly discriminated against disabled member

Possession

- *Hertfordshire CC v Davies* [2017] EWHC 1488 (QB), [2017] HLR 33
Eviction of caretaker following end of employment did not constitute indirect discrimination on grounds of disability and in any event would have been justified
- *Turner v Enfield LBC* [2018] EWHC 1431 (QB)
Eviction of 73-year-old daughter of original tenants, with significant health problems but no right of succession and under-occupying, did not constitute unlawful discrimination (not appealed to High Court)
- *Forward v Aldwyck Housing Group* [2019] EWCA Civ 1334, [2020] 1 WLR 584
Eviction of tenant for ASB did not constitute indirect discrimination on grounds of disability and in any event would have been justified (not appealed to High Court of Court of Appeal)

Where next: Disability

- Where eviction sought on ground arising in consequence of disability s15 will usually be best option
- However, where eviction sought on ground unrelated to disability, but eviction will have a particular impact because of disability, may be an argument for indirect discrimination (plus reasonable adjustments)
- e.g. successor to tenancy, under-occupying property (Ground 15A) but with significant mental health needs connected to occupation of the particular property — cf. cases (albeit under A8) where no right to tenancy and disability not relevant to *particular property* (*Turner, Holley v Hillingdon LBC* [2016] EWCA Civ 1052, [2017] HLR 3)
- Potentially in other cases where no right of occupation, unless alternative accommodation provided (see *Norton* §29 re PSED)

Where next: Benefits issues

- Women and disabled people more likely to be dependent on HB (see ONS)
- More specifically, benefit Cap disproportionately affects women: see *R (SG) v SSWP* [2015] UKSC 16, [2015] 1 WLR 1449 §61; *R (DA) v SSWP* [2019] UKSC 21, [2019] 1 WLR 3289 §§22,45. Justified at a systemic level (under A14), in part because of availability of DHPs: see *DA* §153
- Similarly, the effects of the Bedroom Tax on e.g. disabled people under-occupying an adapted property justified in part on basis of DHPs (*R (Carmichael) v SSWP* [2016] UKSC 58, [2016] 1 WLR 4550)
- But that does not mean that it will be justified to seek possession on the basis of arrears arising as a result of the BC / BT in an individual case
- Especially where e.g. the landlord is the LA that has refused DHP and/or is accommodating under Part 7 HA 1996 and so is restricted to charging a “reasonable amount” (see *R (Yekini) v Southwark LBC* [2014] EWHC 2096 (Admin))
- Perhaps even arrears caused by chronic delays in benefit system (see PAP §2.6)

Where next: Domestic abuse

- Victims of domestic abuse are disproportionately female (and victims of male perpetrators): see e.g. Baroness Hale in *Carmichael*
- Therefore, may be prima facie indirect discrimination where e.g.:
 - landlord seeks to evict for criminal behaviour of coercive ex-partner
 - landlord seeks to evict for rent arrears as a result of financial abuse
 - landlord accepts surrender or short notice from abusive ex-partner
- Equally, where victim of domestic violence is male or LGBT, are the landlord's policies adequate in this regard, given the particular issues that might arise (see e.g. [CAB 2015 report](#))?

Article 14 ECHR

- Where EA 2010 can't help — e.g. discrimination is on grounds of age or marriage, or on the basis of a status which does not constitute a protected characteristic under the Act — concept of indirect discrimination is recognised under A14 ECHR (*DH v Czech Republic* (2008) 47 EHRR 3)
- Only available where:
 - Landlord is a public authority exercising public function under s6 HRA 1998 (*Weaver v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363)
 - Matter falls within the ambit of another ECHR right:
 - Unlikely to be an issue in relation to existing home, where A8 will be involved
 - But more difficult in relation to prospective tenants (see discussion at *R (JCWI) v SSHD* [2020] EWCA Civ 542, [2020] HLR 30 §§81-111)



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