Neutral Citation Number: [2019] EWHC 1263 (QB)

Case No: QB/2018/0226

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Leeds Combined Court Centre,
1 Oxford Row, Leeds, LS1 3BG

Date: 23/05/2019

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

LONDON AND QUADRANT HOUSING TRUST	**Claimant and Respondent**
- and –	
MR ROBERT AUBREY PATRICK	**Defendant and Appellant**

- -
- -

Annette Cafferkey (instructed by **Devonshires Solicitors**) for the **Claimant and Respondent**
Nick Bano (instructed by **Charles Allotey & Co**) for the **Defendant and Appellant**

Hearing date: 7 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. Robert Patrick lives at Kingsley Point, Hinton Road in Herne Hill, London. He took up residence there on 2 July 2009 under an assured shorthold tenancy which automatically became an assured non-shorthold periodic tenancy one year later. The Trust is his landlord. For the sake of convenience and for ease of reference, in this judgment I will continue to refer to the appellant and the respondent as "Mr Patrick" and "the Trust" respectively.

2. Things did not go well. Mr Patrick was aggressive and intimidating on a number of occasions to the Trust's staff and to one neighbour in particular, Ms Marilyn Long. Accordingly, on 20 October 2017, the Trust applied to the court for an injunction under the provisions of the Anti-social Behaviour, Crime and Policing Act 2014 in the hope of putting a stop to his anti-social activities. This application was granted on 23 October 2017.

3. Mr Patrick lost no time in breaching the terms of the injunction. By way of example only, within two or three days of the making of the order against him, he made repeated and unfounded complaints to Ms Long that she was sexually harassing him. These accusations were wholly untrue and predictably upsetting. She felt stressed and intimidated and went to see her general practitioner for help and advice. On 2 November 2017, the Trust brought committal proceedings against Mr Patrick for breaching the terms of the injunction.

4. The matter came before HHJ Saggerson on 14 December 2017. At the hearing, Mr Patrick admitted, in part, the allegations against him and was duly sentenced to serve a sentence of imprisonment of four weeks suspended for one year.

5. This hearing had further important consequences. The Trust had already commenced parallel proceedings for possession of the premises on discretionary grounds. However, Mr Patrick's breach of the injunction brought him within the scope of ground 7A of Part 1 of Schedule 2 to the Housing Act 1988 which equipped the Trust to strengthen and supplement their existing claim for possession by amendment to include reliance upon this further and mandatory ground. Permission to amend was granted on 28 May 2018.

6. On 13 June 2018, Mr Patrick filed and served an amended defence in which it was pleaded, for the first time, that he suffered from a mental impairment the nature of which was not further particularised. He alleged that the Trust had unlawfully discriminated against him under section 15 of the Equality Act 2010 and had failed to comply with its Public Sector Equality Duty ("PSED") under section 149. Despite the fact that he had been represented by counsel and solicitors throughout the earlier stages of the proceedings, there had been no previous reliance on the provisions of the 2010 Act. No medical evidence was provided in support of the contentions made by way of the new amendment.

7. It was not until about 5:00pm on Tuesday 26 June 2018 that Mr Patrick's solicitors first served medical evidence concerning his mental health upon the Trust's solicitors. The matter had long been listed for hearing on Thursday 28 June 2018 before HHJ

Saggerson. This late evidence revealed that Mr Patrick had a history of schizophrenia. The lateness of the disclosure of Mr Patrick's medical evidence must also be seen in the context of two letters from the Trust's solicitors to Mr Patrick's solicitors dated 9 April 2018 and 8 May 2018. The Trust wished to send in contractors carry out certain works to the flat but Mr Patrick was being uncooperative and his solicitors had raised the issue of his mental health. In each of the two letters, the Trust asked for medical evidence to substantiate this claim but none was forthcoming.

8. At the hearing, the Judge considered the parties' pleaded cases, skeleton arguments, the appellant's medical evidence and submissions from counsel. The decision which he was called upon to make was whether or not to determine the case there and then or to give case management directions for the further procedural progress of the claim. The question he was required to resolve, pursuant to CPR 55.8, was whether the claim "is genuinely disputed on grounds which appear to be substantial". The Judge found that there were no such substantial grounds and made an order for possession. This was suspended for six weeks to take into account Mr Patrick's disability. It is this order against which Mr Patrick now appeals.

9. Subsequently, one Mr Salmon on behalf of the Trust carried out the exercise of making a detailed written Public Sector Equality Duty ("PSED") assessment dated 24 September 2018 which concluded that the Trust would be justified, even having regard to its duty under section 149, to enforce the possession order. This assessment takes into account further medical evidence supporting Mr Patrick's diagnosis of paranoid schizophrenia, identifies the potential impact of eviction and records a further incident of alleged anti-social behaviour.

10. The sole ground of appeal to survive the permission stage is that: "The judge was wrong in law in that he rejected the defence under section 149 of the Equality Act 2010".

11. The Judge rejected the contention that the Trust had unlawfully discriminated against Mr Patrick under section 15 of the 2010 Act, finding that the claim for possession was a proportionate means of achieving a legitimate aim. Permission to appeal this finding was refused.

STATUTE LAW

12. Section 89 of the Housing Act 1980, in so far as is material, provides:

> "**Restriction on discretion of court in making orders for possession of land.**
>
> (1) Where a court makes an order for the possession of any land, …the giving up of possession shall not be postponed (whether by the order or any variation, suspension or stay of execution) to a date later than fourteen days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and shall not in any event be postponed to a date later than six weeks after the making of the order."

13. Section 7 of the Housing Act 1988 provides:

> "**Orders for possession.**
>
> (1) The court shall not make an order for possession of a dwelling-house let on an assured tenancy except on one or more of the grounds set out in Schedule 2 to this Act…

14. Part I of Schedule 2 lists the grounds upon which the court must make an order for possession. They include ground 7A Condition 2 which applies to cases where:

> "…a court has found in relevant proceedings that the tenant…has breached a provision of an injunction under section 1 of the Anti-social Behaviour, Crime and Policing Act 2014…"

15. The rationale behind the introduction of mandatory ground 7A is set out at page 63 of the Home Office publication, "**Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers** Statutory guidance for frontline professionals":

> "Purpose
>
> The absolute ground for possession was introduced to speed up the possession process in cases where anti-social behaviour or criminality has already been proven by another court. This strikes a better balance between the rights of victims and perpetrators and provides swifter relief for those victims. The absolute ground for possession is intended to be used in the most serious cases and landlords are encouraged to ensure that the ground is used selectively."

16. It is not disputed that Mr Patrick fell squarely within the parameters of ground 7A. The only issue is as to whether, on this facts of this case, the application of the PSED under section 149 of the Equality Act 2010 should have been found by HHJ Saggerson to have come to his rescue and led to the giving of case management directions rather than an immediate order for possession.

17. Section 15 of the Equality Act 2010 provides:

> "**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."

18. Section 149 of the Equality Act 2010 provides:

"**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;…

(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;…

(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…

(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…disability…"

19. Section 149 replaced pre-existing duties concerning race, disability and sex. It extended coverage to the additional "protected characteristics" of age, gender reassignment, religion or belief, pregnancy and maternity, sexual orientation and, in certain circumstances, marriage and civil partnership. It follows that some of the authorities relied upon by the parties and referred to in this judgment pre-date the

coming into force of the 2010 Act but provide useful guidance to the application of the PSED nonetheless. In so far as duties in respect of disability are concerned, the PSED replaced section 49A of the Disability Discrimination Act 1995 which had been inserted by the operation of section 3 of the Disability Discrimination Act 2005.

20. Issues concerning the parameters and content of the PSED and its statutory predecessors have given rise to a plethora of decided cases the abundance of which is, at least in part, attributable to the elusively broad terms in which it has been cast.

21. As Sales J (as he then was) observed:[1]

> "The very abstract formulation of the duty, which is to "have due regard" to certain matters, should also be noted. What is "due regard"? The statute does not give us much information about that, other than again in very general terms in section 149(3). The practical effect of the combination of a very wide range of application for the duty across all public functions and a very abstract formulation of what has to be done means that the burden of spelling out the practical content of the duty devolves upon the courts."

Thus it is that, in the assistance provided by the decided cases, any court considering the scope of the PSED is provided with an embarrassment of riches.

THE JUDGMENT BELOW

22. In a detailed ex tempore judgment, HHJ Saggerson concluded that the PSED was engaged by reason of Mr Patrick's schizophrenia. A dispute arose between the parties to this appeal as to whether the Judge had found that the PSED had been breached. This is what the Judge said at paragraph 36 of his judgment:

> "…I am fortified in concluding that, even though there is or appears to be a potential breach in failure to engage in consideration of the public sector equality duty, that that failure does not prevent this court from adopting the summary possession procedure."

23. Although it is not entirely clear, I consider that the proper interpretation of this passage is that the Judge was prepared, hypothetically, to assume that a breach had occurred without, however, finally determining the issue. His use of the adjective "potential" would support the suggestion that he had not intended to resolve the issue.

24. Notwithstanding the willingness of the judge to assume, at least for the sake of argument, that a breach had occurred, he considered that such a breach would not be fatal to the Trust's claim for possession.

25. On the nature and degree of Mr Patrick's disability the Judge found:

[1] The Public Sector Equality Duty, Lecture to the Employment Law Bar Association and Administrative Law Bar Association, 13 December 2010.

"10. The reason why there has been this change in emphasis is that as recently as Tuesday of this week, that is some 48 hours ago, those acting on behalf of the defendant served on the claimant information from the defendant's medical records…What those medical records or the medical information reveals is that back in May 2006, that is some three years or so before the starter tenancy was granted to the defendant, the Housing Department is written to by Dr Hannah Ingram Evans to the effect that this defendant had a history of severe mental health problems and had previously been an inpatient with schizophrenia. Whoever actually received this letter at the Housing Department and whatever the state of the defendant's mental health was on or about 12th May 2006, it is clear from the medical information accepted by the claimant that this defendant suffers from mental impairment in the sense that as long ago as 1983, as a young man, he was diagnosed as suffering from schizophrenia.

11. The medical evidence also discloses that there appear to have been two florid episodes of schizophrenia, firstly, when the defendant was still a teenager and seems to have been exam stress related, and then, secondly, in 2000, where he was once again unwell due, it would appear, to some family difficulties, the details of which are not important for present purposes. From the year 2000 until about the middle of 2017, it would appear that the defendant had been tolerably well but his family did express further concerns to the effect that his mental health was deteriorating in or around the middle part of 2017 and as a result of that the defendant's general practitioner did refer him to mental health services, who endeavoured to engage with the defendant.

12. Mental health services did not consider in all the circumstances that the defendant's mental health during the course of 2017 required his admission to hospital and in due course, despite having offered various forms of assistance, they reported as recently as 21st March 2018 to this effect (I am reading a short extract from a letter that appears at page 385 of the hearing bundle):

> "Mr. Patrick's engagement with mental health services has been poor and initially he was hostile and irritable refusing all contact. Mr. Patrick's engagement has continued to be poor, not attending appointments, or attending at unscheduled times. Mr. Patrick has been offered a range of interventions and has declined any

input from the promoting recovery services. Mr. Patrick appears to have ongoing chronic paranoid symptoms, however, he has had two Mental Health Act assessments where he was found not to be detainable and his current presentation would not warrant a further assessment. Mr. Patrick has been able to clearly express that he does not want the support from secondary mental health services."

13. It also appears from this background that Mr. Patrick is studying, at least on an intermittent basis, at the Lambeth College and harbours ambitions to secure an accountancy qualification for himself and has held down part-time work most recently in a warehouse for something like 21 hours a week.

14. On page 391 of the hearing bundle there are records from the general practitioner and of most recent relevance, starting at the middle of the page, from 27th February 2018, one reads that Mr. Patrick denies having any mental health issues but was reporting some abuse when he was a child. Reference is then made on 28th February to one of the assessments under the Mental Health Act, determined not to be detainable, and a missed appointment. On 21st March, we see the note to the effect that he was discharged due to non-engagement.

15. All this information came to the focused attention of the claimant on Tuesday of this week and as a result of that information it is accepted that the defendant does suffer from a mental health problem directly attributable to his diagnosis of schizophrenia and that, accordingly, he is suffering from a disability. It is also accepted that the nature of the difficulties that this defendant has caused to his neighbours, particularly Miss Long, one of his nearest and the most affected, and traumatised neighbour, may well be something that has arisen in consequence, at least in part, of the disability derived from his schizophrenia."

26. On the impact of Mr Patrick's conduct on his neighbour, Marilyn Long, the Judge observed:

"20. Before I proceed further with how I intend to proceed with this matter, it is worth noting, again only by way of summary, the position of Marilyn Long, the close neighbour most directly affected by the defendant's admitted antisocial behaviour and breaches of the antisocial behaviour injunction. There is a suggestion

> that I have not engaged in any trial of these issues and that allegations of continuing antisocial behaviour are ongoing. Whether that is the case or not remains to be seen but it is sufficient to note that not only was the antisocial behaviour order made, it was breached, it was proved to have been breached, and a suspended prison sentence was imposed. The reason all that happened during the currency of the possession proceedings was because Miss Marilyn Long was someone whose life was being made miserable by this defendant's behaviour and such enforcement action was necessary and proportionate in an effort to bring such behaviour to a close. The material available from Miss Long herself demonstrates that she is unwell, or has been significantly unwell, for a long period of time and it is, therefore, not surprising also to read that as a result of the proven allegations in the contempt proceedings that touch and concern her that her road to recovery and her reaction to treatment has not been easy in the context of the stress caused by the defendant to the extent that Miss Long has to take evasive action to try and avoid encountering the defendant as best she can. Apparently the only assistance the police can give her is to offer her advice to avoid the defendant, which I have no difficulty in concluding is easier said than done given the close proximity of their accommodation. It is important to bear in mind this factual background has already been proved in the contempt proceedings when considering whether this case can properly be dealt with summarily."

27. On this appeal, Mr Bano on behalf of Mr Patrick does not seek to challenge any of the Judge's findings of primary fact and, following a brief exchange with me during the course of his oral argument, has since expressly disavowed any ambitions to argue points not raised in his skeleton argument.

TWO RECENT CASES

28. In ***Powell v Dacorum BC*** [2019] EWCA Civ 23, the claimant had sought an order for possession against the defendant on discretionary grounds based, in part, upon the defendant's anti-social criminal conduct involving illegal drugs. The defendant contended, unsuccessfully, before the Deputy District Judge that the order should, by the application of the PSED, be suspended because of his disability. An appeal against this decision was dismissed by the Circuit Judge. A further appeal found its way to the Court of Appeal.

29. The Deputy District Judge found that the defendant did indeed suffer from a mental disability which engaged the PSED but pointed out:

> "…a social landlord does not have to accept a tenant who sets out to breach terms of his tenancy and disables the landlord

> from providing accommodation in more deserving cases. Here I also consider it is appropriate to have regard to the effect that drug dealing has had on the Defendant's neighbours, who should not have to put up with it, and they should not have to live with the worry that it will recur."

30. One feature of that case is that evidence of the psychiatric condition of the defendant in the form of a letter from one Dr Sadler was produced *after* the claimant had issued a warrant to recover possession of the property as a result of which the claimant embarked upon the making of a proportionality assessment which specifically addressed the PSED.

31. HHJ Bloom, on appeal, found that, at the time the warrant was issued, the PSED was not engaged because the claimant, despite making sufficient enquiries, did not know of the defendant's disabilities. She went on to find that even if there had been such a breach at the time of the issue of the warrant:

    (i) it had been rectified by the proportionality assessment; and

    (ii) it would have made no difference to the defendant's decision to seek possession.

32. The matter came before the Court of Appeal who cautioned against applying dicta in earlier cases involving ministerial decisions of policy to individual cases of public bodies seeking possession orders. McCombe LJ held at paragraph 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."

33. On the facts of that case, the Court of Appeal concluded, in strong terms, that the claimant had complied with its PSED at paragraph 48:

> "Given what was known to the Council, through Mrs Ashworth, I consider that it would be grotesque in these circumstances to say that the Council had failed to comply with

its statutory duty when it decided to seek a warrant for possession of the Property. The Council was dealing with a person, Mr Powell, who (it had been alleged) had ill-defined health problems in 2015, but who (with legal advice) had agreed to the order made in October 2015, without mention of any alleged non-compliance with the PSED. He was a habitual drug dealer and was continuing to deal in drugs notwithstanding the order. 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."

34. The court went further at paragraphs 50-51:

> "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.
>
> 51. In my judgment, the Barnsley case is not inconsistent with anything said later in the Bracking case, in which I sought to draw together a number of threads from different types of cases. Obviously, local authority landlords have to have proper regard to the duty under s.149 and I would hope that the headings collected together in paragraph 26 of my judgment in Bracking will assist authorities in meeting their responsibilities in these as in other cases. 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."

35. Having found that a breach of the PSED could be remedied by a later compliant assessment, the Court declined to pronounce authoritatively on whether in any given case it would be open to a court to conclude that, even in the absence of any PSED assessment at any stage, such as assessment would have made no difference and thus determine the matter in favour of the public body.

36. However, unbeknown, it would appear, to the Court of Appeal in ***Powell***, very similar arguments had already been raised by Mr Powell's counsel and instructing solicitors

in an earlier appeal, ***Forward v Aldwyck Housing Group*** [2019] EWHC 24. The judge in that case, Cheema-Grubb J, had heard the appeal on 11 October 2018 and, by the time that the case of ***Powell*** had been heard, had not yet handed down her judgment. However, the decision in ***Forward*** was handed down on 11 January 2019 which was about a fortnight before the Court of Appeal handed down judgment in ***Powell***. Regrettably, the Court of Appeal does not appear to have been made aware of ***Forward*** and certainly makes no reference to it in its judgment.

37. In ***Forward***, the court was hearing an appeal from the decision of a district judge rejecting a defence to the making of a possession order which was based on an alleged failure to comply with the PSED. The defendant in that case was alleged to have permitted anti-social behaviour including drug dealing to go on at or near to his home. He argued that he was vulnerable to exploitation by reason of his disability.

38. As was the case in ***Powell***, no formal PSED assessment had been carried out before the possession notice was given but one had been prepared by the time the matter had come to trial. The initial default was far from trivial. As Cheema-Grubb J observed at paragraph 15 of her judgment:

> "During cross-examination the area housing manager Sharon Savage accepted that a PSED assessment carried out by her prior to trial had been inadequate. Amongst her concessions she accepted that she could see when she met him that the appellant has a physical disability, but she had not taken it into account (as she had obtained no medical evidence about it). She had been told that he had mental ill-health but she hadn't paid heed to it for the same reason. She also admitted she had not arrived at the assessment with an open mind because she considered no alternative to the possession proceedings which were already in train."

39. In ***Forward*** both sides sought to adduce further evidence seeking retrospectively to justify their respective stances at first instance. Cheema Grubb J, unimpressed by the quality of this material, declined to admit it in evidence.

40. She went on to address the very question which the Court of Appeal were subsequently to leave open in ***Powell***, namely, whether it is open to a court to find, in any given circumstances, that the failure to comply with the PSED is not necessarily fatal to the position of a public body where compliance would not have led to the exercise of its functions in a different way. She held at paragraphs 41-45:

> "41. The PSED assessment carried out prior to trial on the respondent's behalf by Ms Savage was plainly inadequate but that does not necessarily result in a successful appeal. The judge knew of its poor quality and earlier admitted failure to have regard to the PSED. If there had been clear evidence of disability and significant impact arising from the disability the judge's conclusion based on proportionality may have been over-turned but there was a substantial body of evidence that the appellant had been complicit in what had been

going on at the flat for a substantial period of time. The judge was entitled to have regard to that evidence. The respondent had engaged with him and steps had been taken to intervene and assist him. The judge carefully assessed the alternative measures, short of eviction, suggested to her and reached rational conclusion on each one. When faced with an intransigent tenant whose behaviour causes distress to fellow residents over an extended period of time it cannot be necessary for the respondent to have tried every single option prior to seeking eviction. References to other agencies, including mental health services, may assist the tenant but such efforts must be seen within context. In this case there was, and remains, minimal evidence of material mental disability.

42. In Regina (West Berkshire District Council and another) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441 the court provided some guidance on the correct approach when a satisfactory PSED assessment was not made at the correct time, before the action was taken which engaged the duty. Should inadequacy lead to the quashing of a decision even if the court concluded that the authority had subsequently complied with the duty? Although it underlined the importance of a proper and timely compliance with the PSED, the court refused to countenance the quashing of a decision based on a subsequent assessment which it considered adequate, as a form discipline against public authorities.

43. The current case provides a more fundamental challenge for the appellant. Although there was no PSED assessment prior to the application for a possession order and the assessment seen by the judge was inadequate, there is nothing in the material before me to suggest that had Ms Savage carried out a proper assessment it would have necessarily reached a different conclusion or, more importantly that there was (or on reasonable inquiry) could have been any evidence on which it could have reached a different conclusion.

44. Equally, I am satisfied that even if the fresh evidence including the medical evidence and diagnosis were to be admitted, a statutorily compliant PSED relying on them would inevitably lead to the same outcome as to the decision to seek eviction.

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."

41. Counsel for Mr Patrick invites me not to follow this decision.

THE NATURE OF THE PSED

42. As will be seen from the extracts to which I have referred from the judgment of McCombe LJ in ***Powell***, counsel for the appellant in that case placed considerable reliance upon His Lordship's earlier observations in the case of ***Bracking v Secretary of State for Work and Pensions*** [2013] EWCA Civ 1345 at paragraph 26. As I have already noted, this prompted McCombe LJ to warn against taking a one size fits all approach to the role of the PSED in ministerial decisions on matters of policy on the one hand and the decision of officers seeking possession of a social housing unit on the other.

    For my own part, and without seeking to dilute the significance of everything contained in the helpful Bracking summary, I consider that it might be useful to list the factors which are likely, at least in many instances, to be the most relevant to be considered in the context of possession cases. This list is not intended to be either comprehensive or definitive and, as always, judicial observations ought not to be treated as if enshrined in statute:

Application of the PSED

(i) When a public sector landlord is contemplating taking or enforcing possession proceedings in circumstances in which a disabled person is liable to be affected by such decision, it is subject to the PSED.[2]

Nature and scope of the PSED

[2] ***Pieretti v Enfield LBC*** [2011] 2 All E.R. 642

(ii) 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. Thus when considering what is *due* regard, the public sector landlord must weigh the factors relevant to promoting the objects of the section against any material countervailing factors.[3] In housing cases, such countervailing factors may include, for example, the impact which the disabled person's behaviour, in so far as is material to the decision in question, is having upon others (e.g. through drug dealing or other anti-social behaviour). The PSED is "designed to secure the brighter illumination of a person's disability so that, to the extent that it bears upon his rights under other laws it attracts a full appraisal".[4]

Making inquires

(iii) 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.[5]

The importance of substance over form

(iv) The PSED must be exercised in substance, with rigour and with an open mind and should not be reduced to no more than a "tick-box" exercise.[6]

Continuing nature of the duty

(v) The PSED is a continuing one and is thus not discharged once and for all at any particular stage of the decision making process.[7] Thus the requirement to fulfil the PSED does not elapse even after a possession order (whether on mandatory or discretionary grounds) is granted and before it has been enforced. However, the PSED consequences of enforcing an order ought already to have been adequately considered by the decision maker before the order is sought and, in most cases, in the absence of any material change in circumstances (which circumstances may include the decision maker's state of knowledge of the disability), the continuing nature of the duty will not mandate further explicit reconsideration.

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[3] ***Baker v Secretary of State for Communities and Local Government*** [2008] EWCA Civ 141 at para 31.

[4] ***Pieretti*** (ibid.) at para 26 with respect to the application of section 49A of the Disability Discrimination Act 1995 but with clear generic relevance to its statutory successor, section 149 of the 2010 Act;

[5] ***Pieretti*** at paras 33 and 35. Note that this is a decision made in the context of seeking possession of a social housing unit and not a challenge to a policy decision which may well attract a higher duty of more general inquiry.

[6] ***R (Brown) v Secretary of State for Work and Pensions*** [2008] EWHC 3158 (Admin) at para 92.

[7] ***Brown*** at para 95.

The timing of formal consideration of the PSED

(vi) Generally, the public sector landlord must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before seeking and enforcing possession and not merely as a "rear-guard action" following a concluded decision. However, cases will arise in which the landlord initially neither knew nor ought reasonably to have known of any relevant disability. The duty to "have due regard" will then only take on any substance when the disability becomes or ought to have become apparent. In such cases, the lateness of the knowledge may impact on the discharge of the PSED. For example, cases may arise in which countervailing interests justify a less formal PSED assessment than would otherwise have been appropriate. Thus a tenant whose anti-social conduct has already been adversely affecting his neighbours for a considerable time but whose disability is raised at the eleventh hour may well find that the discharge of the PSED does not necessarily mandate a postponement of the date or enforcement of a possession order. Of course, the obligation to have "due regard" still arises but the result of the discharge of that obligation may well be less favourable to the person affected where, through delay, the landlord's options have been limited and the rights and reasonable expectations of others have assumed a more pressing character. Each case will, of course, depend on its own facts.

Recording the discharge of the duty

(vii) An important evidential element in the demonstration of the discharge of the PSED is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements.[8] Although there is no duty to make express written reference to the regard paid to the relevant duty, recording the existence of the duty and the considerations taken into account in discharging it serves to reduce the scope for later argument. Nevertheless, cases may arise in which a conscientious decision maker focussing on the impact of disability may comply with the PSED even where he is unaware of its existence as a separate duty or of the terms of section 149.[9]

The court must not simply substitute its own views for that of the landlord

(viii) The court must be satisfied that the public sector landlord has carried out a sufficiently rigorous consideration of the PSED but, once thus satisfied, is not entitled to substitute its own views of the relative weight to be afforded to the various competing factors informing its decision. It is not the court's function to review the substantive merits of the result of the relevant balancing act. The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality

[8] ***R (BAPIO Action Ltd) v Secretary of State for the Home Department*** [2007] EWHC 199 (QB)

[9] ***Hackney LBC v Haque*** [2017] EWCA Civ 4 para 47.

> 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.[10]

DISCUSSION

Was the trust in breach of its PSED?

43. HHJ Saggerson was prepared, at least for the sake of argument, to find that the Trust had acted in breach of its PSED in the circumstances of this case. However, I am not satisfied that such a breach has been made out.

44. Mr Patrick had been legally represented throughout. Requests for his medical records had met with no response. The issue of his disability, unparticularised, was pleaded very late in the day. The actual medical evidence relied upon was not served until two days before the CPR 55.8 hearing. I find that it was only upon receipt of the medical evidence that the Trust could sensibly be expected to engage with its PSED. However, the engagement of the PSED was not a trump card which mandated the giving of directions rather than summary disposal. The regard that is *due* must strike a balance between the legitimate objectives of section 149 and the countervailing factors. The Judge was, rightly, very concerned about the position of Ms Long. Had the issue of Mr Patrick's mental health been sufficiently salient at an earlier stage of the proceedings then a more formal and analytical approach to the performance of the PSED would have been appropriate. The Trust was entitled to consider whether the evidence relating to Mr Patrick's disability was such as to cast any doubt upon the continued appropriateness of its decision to seek a possession order. It took the view that it did not and this approach was mirrored by the Judge. Thus, although the significance of the duty should not be underestimated, it is important that its fulfilment should not be regarded as involving any fixed hoops through which the public body must pass regardless of the stage at, or circumstances under which, the duty is engaged. Otherwise, a litigant seeking to rely upon the PSED could deliberately postpone revealing a disability for tactical advantage to the prejudice of others with a legitimate interest in the outcome of possession proceedings. I do not conclude that the motive behind the late service of the medical evidence in this case was tactical but, for whatever reason, service was so late that it was entirely reasonable for the Trust even taking into account Mr Patrick's disability to take the course that it did in deciding to pursue the possession application without procedural delay. Otherwise the PSED could potentially operate unfairly so as either to frustrate or to postpone the entirely legitimate balancing act to be carried out between the interests of the disabled party and others affected with disproportionately adverse consequences. Such an outcome would be a distortion of the purpose of the duty. Furthermore, the regard which is due must be proportionate to the significance of the step under consideration. In this context, it is relevant to note that, by reason of the continuing nature of the duty, the course taken by the Trust in continuing to press for an order for immediate possession would nevertheless leave open an opportunity for it subsequently to consider the appropriateness of a decision to enforce the order

[10] ***R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills*** [2012] EWHC 201 (Admin) (Divisional Court).

following a more detailed and nuanced assessment. Indeed, this is an opportunity which it took.

The September 2018 Assessment

45. In a report dated 24 September 2018, Mr Salmon, a case manager employed by the trust performed a formal proportionality and PSED assessment and concluded that the trust had acted in accordance with the requirements of section 149 of the 2010 Act. I grant the Trust's application to rely on the witness statements of Mr Salmon and this report on this appeal. The point was made on behalf of Mr Patrick that Mr Salmon had wrongly categorised Mr Patrick's behaviour as harassment and victimisation falling within the scope of the PSED because Ms Long did not have relevant protected characteristic. Other than this, the central criticism of the report was that it had the characteristic of "a rear-guard action following a concluded decision" such as that deprecated by Sedley LJ in ***R (BAPIO and Another) v Secretary of State for the Home Department and the Secretary of State for Health*** [2007] EWCA Civ 1139.

46. This criticism lacks force in the circumstances of the present case. The PSED did not fall to be complied with once and for all at the date of the hearing before the Judge. It was entirely reasonable for the Trust to take the view that, before seeking to enforce the order it had obtained from the Court, it was appropriate to carry out a more formal and analytical assessment. Of course, the risk of confirmation bias arises but such a risk is inherent in the nature of the continuing duty. Furthermore, this is an appeal against the decision of the Circuit Judge and not a judicial review of the Trust's subsequent confirmation of the decision to take possession following the more formal assessment.

47. This, therefore, is not a case in which there was never any consideration of the PSED but one in which the Trust has discharged its continuing duty at appropriate stages in the decision making processes.

Consequences of breach of the PSED

48. It was further argued on behalf of Mr Patrick that where a social landlord is in breach of the PSED, it must follow that the decisions to take possession proceedings and, subsequently, to enforce them are irredeemably flawed. In this case, I have found that the Trust did not act in breach of its PSED in perusing the application for possession but, in case I am wrong, I will consider the position, as did HHJ Saggerson, on the hypothesis that such a breach occurred.

49. In addition to the case of ***Forward***, some guidance on this issue can be derived from the approach of the Court of Appeal in ***Barnsley Metropolitan Borough Council v Norton*** [2011] EWCA Civ 834. In that case, the claimant council employed the first defendant as a school caretaker under a contract which provided that he reside in premises situated in the grounds of the school. He moved into the premises with his wife, the second defendant, and his daughter, the third defendant, who had cerebral palsy. The council's social services department knew of the daughter's disability and adapted the premises to suit her needs. The council subsequently terminated the first defendant's employment and brought summary proceedings for possession of the premises. At trial the defendants contended, inter alia, that the council had, contrary to its duty as a public authority under section 49A(1)(d) of the Disability Discrimination

Act 1995, failed to consider the daughter's disability when deciding to bring and to continue the possession proceedings. The judge, granting the possession order, found that the statutory duty was satisfied and held that any consideration of the daughter's disability would have made no difference to the decision to bring proceedings. The defendants' appeal was dismissed. Lloyd LJ observed:

> "34. Mr Read submitted that the possession order should be set aside and the possession proceedings dismissed. I can see no proper basis for such an order. 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."

50. Reference may also be made to ***R (West Berkshire District Council and another) v Secretary of State for Communities and Local Government*** [2016] 1 W.L.R. 3923. In that case, following a consultation process the Secretary of State, by way of a written ministerial statement in Parliament, made amendments to the National Planning Practice Guidance 2012 in respect of planning obligations for affordable housing and social infrastructure contributions. At the time the statement was made, it had not been thought necessary to consider the public sector equality duty under section 149 of the Equality Act 2010. The Secretary of State later decided to maintain the policy changes following completion of an equality impact assessment. The claimant local planning authorities sought judicial review contending, inter alia, that, in deciding to adopt the new national policy, the Secretary of State had breached the public sector equality duty in section 149 of the 2010 Act. The judge allowed the claim on all four grounds and quashed the Secretary of State's decision to adopt the new policy by way of written ministerial statement. His decision was reversed by the Court of Appeal. One of the bases of challenge was that the equality impact assessment could not be relied upon ex post facto to justify the original decision. This argument was rejected:

> "86. …We have to consider the effect of the failure to consider section 149 at the right time in the light of our conclusion that the eventual equality statement satisfies the statutory requirements. A reading of Buxton LJ's comments at para 49 of C's case [2009] QB 657 might appear to favour the quashing of the decision solely by reason of the fact that the equality statement was not prepared as part of the decision, and post-dated it. However, reference to para 54 of C's case shows that late preparation of the assessment is not necessarily conclusive on the question of whether quashing the decision should automatically follow. There seems to us to be some degree of tension between paras 49 and 54, and there have been situations in which this court has not quashed a decision, notwithstanding a failure to address equality impacts at the correct point in time.

> 87. Nothing we say should be thought to diminish the importance of proper and timely compliance with the PSED. But we have strong reservations about the proposition that the court should necessarily exercise its discretion to quash a decision as a form of disciplinary measure. During the course of argument, Mr Forsdick accepted that if an assessment, subsequently carried out, satisfied the court, there would be no point in quashing the decision if the effect of doing that and requiring a fresh consideration would not have led to a different decision. We think this was a correct concession. The court's approach should not ordinarily be that of a disciplinarian, punishing for the sake of it, in these circumstances. The focus should be on the adequacy and good faith of the later assessment, although the court is entitled to look at the overall circumstances in which that assessment was carried out. In C's case a particularly dilatory state of affairs was identified which was of importance to the exercise of the court's discretion as to remedy. The decision in R (BAPIO Action Ltd) v Secretary of State for the Home Department [2008] ACD 20 appears to represent the other end of the spectrum. The present case falls somewhere between the two on that spectrum. We do not think that C's case necessarily demonstrates that an order quashing the decision must follow.
>
> 88. The judge came to his conclusion based on his assessment that section 149 was not satisfied. We have come to a different conclusion on that issue, and are thus free to consider afresh whether it is necessary to quash the decision as opposed to granting declaratory relief. In the circumstances, where bad faith is not suggested, and where we have concluded that the equality statement was not inadequate, it seems to us that considerations of a purely disciplinary nature are insufficient to warrant the quashing of the decision in this case. Accordingly, we uphold the appeal based on ground 4."

51. I am satisfied that, in the instant case, although Mr Salmon completed his formal assessment after the possession order had been granted, the timing was not such as to undermine the decision to enforce possession. It would have been open to the Trust, in the light of any further consideration of its PSED, to decide not to proceed to take possession. Mr Salmon's assessment, however, provided no basis upon which such a course would be considered to have been appropriate. Even if the Trust were in breach of its PSED, as the Judge below was willing to assume, there is no good reason on the facts of this case to categorise such a breach as being incapable of remedy through subsequent compliance.

52. In the light of my findings above, it is not strictly necessary to go on to consider whether it would be open to this Court to find that, even if the Trust had been in breach of its PSED, compliance would have led to no different outcome and that the decision could thus be upheld in any event. The Court of Appeal in ***Dacorum*** left the point open at paragraph 53:

> "I do not find it necessary, therefore, to determine whether it would be open to the court, having found a breach of the duty, to decide that had it been properly complied with, it would have made no difference to the Council's assessment of the situation. It is not necessary to consider whether the statement in the last sentence of Carnwath LJ's judgment in the Barnsley case is of general application. In that sentence, Carnwath LJ said that the application of "a practical approach" meant that the judge in that case had been entitled to find that even if the disabled child's interest had been properly considered, it would not have made any difference. Neither Lloyd LJ nor Maurice Kay LJ made mention of that "practical approach" in their judgments."

53. For my own part, I am satisfied that even had a detailed assessment such as that carried out subsequently by Mr Salmon had been performed as soon as Mr Patrick's disability had come to light then the decision to seek summary disposal of the possession application would have been taken in any event and would have been unchallengeable. I make it clear that I consider that it would have been impracticable if not impossible for such a step to have been carried out within the timescale of this case and so the question is, necessarily, a hypothetical one.

54. The decision in ***Forward*** is to the effect that where a breach of the PSED is not material then the court is entitled to uphold the decision complained of regardless. Of course, I am not bound to follow ***Forward*** if I consider that it was wrongly decided. However, on the contrary, I consider that the approach of Cheema-Grubb J was entirely right.

55. Of course, where a breach of the PSED is established then the court must exercise the requisite degree of care when concluding that compliance would have made no material difference. Otherwise, there is a risk that the importance of fulfilling the duty may be impermissibly demoted. Nevertheless, where, as in this case, the Judge has very carefully analysed the factors leading to his conclusion on this issue he is entitled, where appropriate, to uphold the decision. Any contrary approach would, in my view, mark the triumph of form over substance and give rise to the risk of serious injustice to those whose interests the original decision, although procedurally flawed, was rightly intended to protect.

56. Furthermore, I observe that section 31 of the Senior Courts Act 1981 (as amended) now provides:

> "(2A) The High Court –
>
> (a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

57. It may be thought anomalous that the effect of a non-material breach of the PSED should automatically frustrate private law claims brought by a public body but, equally automatically, be ignored entirely in the context of public law challenges.

58. I note that the decision in ***Forward*** is under appeal to the Court of Appeal. It is to be hoped that, whatever the outcome, such guidance as may be given will significantly reduce the risk that, in future, possession applications are subject to protracted delays and uncertainty which are highly prejudicial to all of those affected.

CONCLUSION

59. I am satisfied that the Trust in this case complied with its PSED. 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. The Trust had considered Mr Patrick's disability and decided that it was appropriate, in any event, to pursue its claim for a possession order. 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. I am satisfied that Mr Salmon's report was a genuine attempt to continue to comply with the continuing duty and not a cosmetic step to justify a fait accompli. 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 Mr Salmon's assessment and that any breach of the PSED would not have led to the making of a materially different decision.

60. In these circumstances, this appeal is dismissed.