

The A-Z Of Housing Discrimination Case Law

Bracking v Secretary of States for Work and Pensions

Iris Ferber KC & James Hoile

Iris Ferber KC: Welcome to the latest series of *Home Truths - the 42BR Housing Podcast*.

My name is Iris Ferber KC.

James Hoile: And I'm James Hoile.

Iris Ferber KC: This series is all about housing discrimination case law. We will review 15 key cases and principles that have guided housing discrimination law over the last decade. We're calling it the *A - Z of Housing Discrimination Case Law*.

James Hoile: And that's because we're starting with the case of *Akerman-Livingstone v Aster Communities*, and we're ending with *Z v Hackney London Borough Council*.

Iris Ferber KC: We'll be covering topics from procedural law to Section 15 and Section 19 claims, reasonable adjustments claims, the public sector equality duty, and positive discrimination.

James Hoile: Today, we'll talk about the case of *Bracking v Secretary of States for Work and Pensions*, decided by the Court of Appeal in 2013.

Iris Ferber KC: Now strictly speaking, James, this is not a housing case, so why are we including it?

We're including it because it is the foundational case about the public sector equality duty, the PSED. The PSED was created by the Equality Act, that was three years before *Bracking* reached the Court of Appeal,

and it is often the case, *Bracking*, which is cited in housing cases as the authority for the various elements of the duty. It had started as a High Court judicial review claim by a group of claimants, including *Mr Bracking* as the lead claimant, the claim was dismissed in the High Court, the claimants appealed to the Court of Appeal, and that's the judgment which is the authority that everybody relies on.

But first, James, should we have a look at the facts?

James Hoile: Yes.

So, this was a case about the closure of the Independent Living Fund.

The Independent Living Fund was a non-departmental government body which operated a discretionary trust. Now, this trust was originally set up in 1988, it was wholly funded by the DWP and managed by a board of trustees. Now, money from the fund was paid out to disabled people with the purpose of helping those people to lead independent lives.

That was done jointly with local authorities under a combination of care packages and direct payments. Now, at the time that this claim reached the Court of Appeal, that being 2013, around 19,000 disabled people were in receipt of money from the fund.

Iris Ferber KC: And before that, in 2010, there was a ministerial statement published which said there was going to be a consultation.

The consultation was going to be about a new model for funding care and support for those wanting to live independently, receiving money from the fund and then after that ministerial statement in 2012, the DWP launched that consultation which the ministerial statement had warned about, with the stated purpose in the consultation of closing the ILF in 2015 and devising a different way of financially supporting

its users, most likely by devolving that function entirely to local authorities.

Now, deep breath, there is a lot more detail than that in the Court of Appeal's judgment about what happened with the Independent Living Fund, but we do not need to go into that in this podcast. We just need to understand the main background effects.

James Hoile: So, what does matter for the purposes of this podcast is that the claimants were disabled people receiving payments from the fund and that their solicitors wrote letters before claim to the DWP, which then formed the basis of a judicial review claim. Now, they were arguing that the consultation was flawed and that the evidence or the information provided in support of the consultation was inadequate.

Now, on that basis, they said that the equality impact assessment conducted in support of the consultation was inadequate, and that that meant there was a failure by the Secretary of State to discharge the public sector equality duty in respect of the protected characteristic of disability.

Once the claim was issued, the Equality and Human Rights Commission was joined to the claim as an intervenor, and they made submissions along the same lines in support of the claim, both in the High Court and the Court of Appeal.

Iris Ferber KC: Now, because this is the first of our podcasts in which we're looking at the PSED, let's start our summary of the law, James, with the duty itself. This isn't something we'll repeat for each of the episodes where we talk about the PSED, but let's have a look at it.

It is in Section 149 of the Equality Act, in terms of its history, very briefly, the duty originated in the Disability Discrimination Act 2005, that was an act which amended the foundational Disability

Discrimination Act of 1995 to add a brand-new disability equality duty, which required public authorities to have due regard to the needs of disabled people when discharging their public functions.

And in 2010, that public duty, that disability equality duty, was expanded to all the protected characteristics in what was then the new Equality Act.

Now, pub quiz question, James, one protected characteristic from the Equality Act does not benefit from the Public Sector Equality Duty.

Do you know which one?

James Hoile: Well, fortunately Iris, I did a bit of research before this podcast, so I suspect the answer is marriage and civil partnership.

Iris Ferber KC: Correct, absolutely.

But other than marriage and civil partnership, all of the other protected characteristics are subject to the Public Sector Equality Duty and what is that?

What is the Public Sector Equality Duty?

Well, there isn't really any substitute for looking at the words of the statute itself. Sometimes that isn't true, sometimes it's easy to paraphrase, but not here. Let's have a look and read what Section 149 actually says.

So, Subsection 1 says the following: '*A public authority must, in the exercise of its functions, have due regard to...*' and then there are three things listed.

'a) - the need to eliminate discrimination, harassment, victimisation, and any other conduct prohibited by the act', i.e., prohibited by the

Equality Act. That's the first thing that a public authority must, in the exercise of its public functions, have due regard to.

The second thing that the public authority must have due regard to is the need to advance equality of opportunity between persons who share relevant protected characteristics and people who don't.

And then the third thing that is listed is the public authority must have due regard to the need to foster good relations between people who share a relevant protected characteristic and persons who don't, so those are the three things.

Then in Subsections 3 and 4, there is a more detailed definition of what having due regard to the need to advance equality of opportunity means, so that's the second of the three things that are listed, and in Subsection 5 of Section 149, there is a more detailed definition of what having due regard to the need to foster good relations means, which is the third thing that is listed.

So that is the duty, James.

James Hoile: Thank you, Iris. And so, turning back to the authority in question, the Court of Appeal laid out what Section 149 said, then they went through the case law from before the Equality Act came into force, dealing with the principles of the old Disability Equality Duty from 2005. They then looked at one High Court case after 2010, which did analyse the PSED, but in an education law context, they then laid out the fundamental principles of the PSED.

As we said at the start of this podcast, this is a case that you can cite as the authority for these principles.

So, Iris, let's get to it, what are the principles?

Iris Ferber KC: Okay.

First of all, Court of Appeal in *Bracking* said that there is a general principle that the PSED imposes a heavy burden on public authorities and it's a two-fold burden. Firstly to discharge the duty lawfully and second, to ensure there is enough evidence available to demonstrate that the duty has been discharged.

What does that really mean?

It means that the considerations, those three considerations that I laid out, that are listed in subsection one of Section 149, have to be considerations that are placed side by side, equally importantly, with all the other pressing public factors, however important they may be, that a public authority has to take into account when making a public law decision.

James Hoile: And then second, some more specific principles. The duty is a duty to have due regard to what's listed in Section 149, that means the duty must be exercised in substance with rigor and with an open mind. In other words, it's not just a tick box exercise, there has to also be evidence of a structured attempt to focus on the details.

In practice, that means keeping good records which demonstrate consideration of the three factors listed in Section 149, it is a continuing duty that cannot be delegated, the person who is the public law decision-maker must comply with it, no one else.

But importantly, it is not for the court to decide what weight the public law decision-maker should have given to those considerations. All the court can do is decide whether there is a conscientious focus, or whether there was a conscientious focus, on all the elements of the duty, if there was, then it is up to the decision-maker to balance all the different factors and make a decision.

So, Iris, put us out of our misery, what happened in this case?

And did the Secretary of State discharge their duty?

Iris Ferber KC: Well, it was, finely balanced, and particularly the court said that it reached its decision with reluctance, and we all know when we hear that phrase that we have lost, don't we?

And indeed, the Secretary of State lost, the appeal succeeded, and the decision to close the Independent Living Fund was quashed and had to be made again.

Why?

Well, it was not because the court was imposing any particular decision on the Secretary of State, it was because there wasn't sufficient evidence that the Secretary of State had been given enough information to understand the possible impact on disabled people of closing the fund. And there wasn't the evidence before the court either that the Secretary of State had actually focused on the detail or asked the questions, those three questions, that Section 149 required her to ask.

So that sounds like success for the claimants, James. Was it?

James Hoile: Well, not exactly.

These are the unavoidable limitations of public law challenges. Ultimately, the claimant failed to achieve their ultimate goal in the end, that being the stopping of the closure of the Independent Living Fund. The Secretary of State simply remade their decision, taking the Section 149 duties properly into account, and the fund was closed as planned in 2015, and now local authorities are solely responsible for independent living payments.

Iris Ferber KC: Right well, I don't know, James, I mean, having been through all of that and worked our way through the case and the facts

and the outcome, it does sound a bit like it's a tick box exercise really, doesn't it?

James Hoile: Well, I don't want to be too cynical, Iris, but in a way, yes, a tick box exercise as far as the final decision is concerned, but it really is a decision for the public authority.

Iris Ferber KC: So, I suppose what we're really saying, aren't we, is that as with all public law decision-making, all the court can ever do is to decide whether the public authority has taken into account everything that it is supposed to, and *Bracking* says that one of those things is the public sector equality duty.

James Hoile: Which I think is what society at large would expect from a competent public body as well as from the courts.

Iris Ferber KC: Well, thank you for joining us on this bite-sized journey through housing discrimination case law, starting at A, *Akerman-Livingstone* and going through to Z, *Z v Hackney Borough Council*.

James Hoile: We do hope you're enjoying this podcast series.

For more episodes, you can find us on Spotify, Apple Podcasts, and the 42BR Chambers website.

Thank you for listening.