

The A-Z Of Housing Discrimination Case Law

Powell v Dacorum Borough Council

Iris Ferber KC & James Hoile

Stefan Liberadzki: Welcome to the latest episode of *Home Truths - the 42BR Housing Podcast*.

My name's Stefan Liberadzki.

Iris Ferber KC: And I'm Iris Ferber KC.

Stefan Liberadzki: 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.

Iris Ferber KC: 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*.

Stefan Liberadzki: We'll be covering topics from procedural law to Section 15 and Section 19 claims, reasonable adjustment claims, the public sector equality duty, and positive discrimination.

Iris Ferber KC: Today, we're going to talk about the case of *Powell v Dacorum Borough Council*, which was decided by the Court of Appeal in January 2019.

Stefan Liberadzki: So, we're up to P in the alphabet.

Iris Ferber KC: That's it.

Stefan Liberadzki: Now, in the last episode Iris, you and James introduced the public sector equality duty, the PSED as we usually call

it, and you talked about *Bracking*, which was the first big case about the general principles of the PSED, that wasn't a housing case.

In this podcast, we're talking about *Powell*, which is a Court of Appeal case about the PSED that was a housing case.

So, Iris, what were the facts of *Powell*?

Iris Ferber KC: Okay Stefan, this was in some ways a bog standard possession claim, in the sense that it was a possession based on rent arrears and antisocial behaviour, including a conviction for possession of cannabis.

Mr. Powell had avoided an outright possession order, which is perhaps surprising because the allegations were very serious. Court of Appeal judgment doesn't give us the detail of that, but it seems that the reason for avoiding the outright possession order might have been to do with the fact he had some disabilities, which included, anxiety, depression, and hepatitis C. All of those were connected to the fact that he had an addiction to both alcohol and drugs.

So that was his background, that was what happened in the possession claim, an SPO, a suspended possession order, was made in October 2015, four years before this got to the Court of Appeal.

Stefan Liberadzki: What were the terms of that suspended possession order?

Iris Ferber KC: That's important, Stefan, as it always is in these cases.

The terms were not just that he had to comply with his tenancy agreement generally, but particularly the court order said that the terms about drugs, or not having drugs more particularly, in his tenancy agreement, he had to particularly comply with. And you're going to be amazed to hear, Stefan, that not long after the SPO,

neighbours started to report what looked like drug dealing activity at the property, there was then a police raid. So, remember, the SPO was in October 2015. By January 2016, so within three months, there was a police raid, and the police turned up what the judgment in the Court of Appeal calls a 'collection of drugs paraphernalia'.

Stefan Liberadzki: We might imagine what that looks like.

Iris Ferber KC: Yes, I think it involved a lot of crack pipes and snap bags and the kinds of things that you don't have just lying around the house.

Stefan Liberadzki: Yes indeed.

Iris Ferber KC: Now, that led to a closure order, so a very serious situation.

So a closure order was obtained by *Dacorum Council* from the Stevenage magistrates. Unsurprisingly, council then applied for a warrant to enforce that SPO, and that was done in February 2016.

So, Stefan, surprise us, what happens next after the warrant is applied for?

Stefan Liberadzki: Well, it's very dramatic, Iris.

In March 2016, on the very day that the warrant was due to be executed, and so he was due to be actually physically evicted, he made an application to stay the warrant.

The court listed a hearing the very same day, and in that hearing, he raised a lot of different issues, including his disabilities, which as you've said earlier included anxiety, depression, hepatitis C, and he said he couldn't receive his hepatitis C treatment unless he had stable

accommodation. Now, this application was adjourned for a full day's listing because of the range of issues he'd raised.

In the meantime, that closure order you mentioned expired, so he returned to live in the property, and actually the stay application wasn't properly heard until February 2017 by a deputy district judge. So that's nearly a full year after he's actually made the application on the original day of the execution.

Now, by that time, February 2017, there was medical evidence before the court about his conditions, and that said that as well as the other conditions I've mentioned, his mental impairment had developed into a psychotic illness, including paranoia and hallucinations, which he was being treated for, and at that point, that's the first time that *Decorum's* antisocial behaviour officer actually carried out an Equality Act proportionality assessment, and that assessment did refer to the PSED.

The court itself doesn't give judgment until June 2017, and in that judgment, the application for a stay of the warrant is dismissed. The judge in that made quite a number of findings of fact, and the key ones for us are that *Mr. Powell* did repeatedly deal drugs from the property after the suspended possession order had been made, so he breached the order repeatedly, he lied to the court about that when he denied it, and importantly, that his drug dealing was not a direct or indirect consequence of his mental health problems.

The judge did note, however, there had been no repeat of that behaviour since he'd returned home after the closure order had expired, but basically the reasons for dismissing his application were that the judge didn't believe he was going to stop his cannabis use or drug dealing in the future, and the judge thought the neighbours should be protected from the worry and then the behaviour that that would happen again.

Now, there was also an indirect discrimination issue which the judge dismissed and that wasn't appealed, but crucially for us there was the PSED, public sector equality issue, and that was that *Mr. Powell* said the council hadn't considered the PSED when deciding to apply for the warrant, they'd only done that afterwards and only actually just before the stay hearing, which was, as I said, a whole year almost after the stay application was made.

But on that PSED issue the deputy district judge held that the PSED 'did not provide grounds for suspending the warrant.'

So, Iris, that's the judge's original decision.

What happens next?

Iris Ferber KC: Well, bearing in mind that that's really all the judge said in the County Court, that the PSE did not provide grounds for suspending the warrant, unsurprisingly, *Mr. Powell* appealed, there were many grounds of appeal in the original drafted appeal, there was only one ground which was given permission to proceed to a full appeal hearing before a circuit judge. And that was the ground of appeal relating to the way that the deputy district judge had handled the question of the PSED.

The appeal argued that the way the deputy district judge made the decision on the PSED was wrong in law.

There's more to it than that but basically, with lots and lots of detail, that was the one ground of appeal, and the circuit judge, it was Her Honour Judge Bloom in Central London, she dismissed that appeal on that ground and she held on the facts as found by the deputy district judge, which Stefan you've told us about, those key facts, that on those facts there had been no breach of the PSED at all.

Importantly for us in terms of general principles to take away from this podcast, she also held that even if there had been a failure to consider the PSED before the warrant, before the decision was made to issue a warrant, it was enough that *Dacorum Council* had complied with the duty a year later when the ASB officer conducted that proportionality assessment that you mentioned, which did include consideration of the PSED.

And quite interestingly for us sort of law nerds, she relied on a case called *Barnsley Council v Norton*, which was a pre-Equality Act case about something called the disability equality duty, which was in the Disability Discrimination Act 1995, and if you're curious about that, go back and listen to the last podcast that I did with James Hoile, because we talked about the precursor of the PSED, which was the disability equality duty in the Disability Discrimination Act 1995.

Anyway, *Barnsley v Norton*, which was about the disability equality duty, said the court was entitled to apply what *Barnsley* called a practical approach, and the practical approach is basically that the court is entitled to decide the case relating to the PSED based on whether a consideration of then the disability equality duty would have made any difference at all to the decision to seek possession.

Stefan Liberadzki: So, it's sort of saying 'well never mind that the local authority officer didn't actually do a proper proportionality assessment, even if they had, they would have made the same decision to seek possession anyway'?

Iris Ferber KC: It couldn't have made a difference type of argument. And there was a question mark over whether that was permissible as a response to an argument that there'd been a breach of the PSED.

So, Her Honour Judge Bloom said that the court was entitled to look at it in that way, to say irrespective of the merits of a breach of PSED argument, the outcome would have been the same.

So out of all of that, Stefan, what ended up on a second appeal in the Court of Appeal?

Stefan Liberadzki: Well, Iris, it was really on those three questions that you just went through.

So those being: Number one was the original judge's finding that there was no breach of the PSED wrong in law.

Number two, if there was a breach of the PSED, could that be remedied by the proportionality assessment a year after the council had applied for the warrant? And they made that assessment, as we said, just before the stay hearing.

And then number three, was the judge entitled to dismiss the stay application on the basis that whether or not there had actually been a breach of the PSED, a proper consideration of the PSED would not have affected the decision anyway.

So that's the last point we just talked about, would it have made a practical difference?

So, this appeal is heard by three Court of Appeal judges, including Lord Justice McComb, who gives the lead judgment. Now, that's the same judge, interestingly, who'd given the lead judgment in the *Bracking* case we mentioned earlier.

So, Iris, what does the Court of Appeal say in their judgment about this first part of the appeal, the finding that there was no breach of the PSED in the first place?

Iris Ferber KC: Well, before I answer that Stefan, before I tell you what the Court of Appeal said about it, let me say that in the Court of Appeal's judgment, there was a really interesting discussion of the cross-examination, or a part of the cross-examination of the key counsel witness, the ASB officer, the woman who had prepared the proportionality assessment.

And unusually, in the Court of Appeal judgment, there is a transcript about a page and a half, of a part of the cross-examination as a sort of script really setting out the questions and the answers that had been asked and answered under cross-examination, and it turns out when you read the judgment, that the reason the Court of Appeal included that transcript was because the court was really thoroughly unimpressed with counsel for *Mr. Powell*, who had subjected the witness, poor old ASB officer, to a sort of law exam under cross-examination about the various elements, the wording of the duty in Section 149, the PSED duty.

Stefan Liberadzki: That sounds like a local authority officer's worst nightmare.

Iris Ferber KC: Well, yes and no, and I'm sure in the moment it was, but the Court of Appeal said, 'look, the question is not whether the person can recite Section 149, actually the question is whether, in substance, the witness understood what she was supposed to be doing', and the Court of Appeal thought she did understand, because if you looked at the contents of the proportionality assessment that she completed, she did all of the things that Section 149 needed her to do.

Stefan Liberadzki: So, she doesn't need to be able to give you chapter and verse on what the duty says and the legal interpretation is, it's have you actually done it in practice?

Iris Ferber KC: Yes, I'm sure it would have been easier for her in the moment to have been able to answer those questions, but ultimately, that's not what the test is about. It's not about being able to reel off the words of the statute, it's about understanding the substance of what you're supposed to be doing.

Stefan Liberadzki: Which is about having due regard to the need to eliminate discrimination, et cetera, et cetera.

Iris Ferber KC: Exactly, absolutely. And in the podcast that James and I recently recorded, we go through all of the elements of the PSED and what is required. So, if you're not sure about any of that, go and listen to our podcast about the case of *Bracking* that sets all of that out.

Okay, so the Court of Appeal said, in relation to the first issue on appeal was there a breach of the PSED at all? They said the following, and this is the takeaway partly from the case of *Powell*.

'Although the PSED applies universally to all functions of public bodies, how it is actually applied is going to differ from case to case, and that is because it depends on two things. It depends on the particular function that is being exercised by the public body', and obviously for us lawyers, 'it depends on the facts of the case' and the Court of Appeal specifically highlighted in *Powell* that the *Bracking* decision had been about a ministerial decision to close a national fund, whereas other more ordinary cases like this housing case are about individual decisions in individual cases about particular people.

Now, the considerations, this is not a surprising point to make, but it's a useful one.

Stefan Liberadzki: It's kind of obvious, isn't it?

Iris Ferber KC: The considerations that are relevant for a government minister making a national decision are not the same as the

considerations that are relevant for a housing officer deciding whether or not to recover possession against one social housing tenant.

Stefan Liberadzki: Now, Iris, the Court of Appeal did also mention the Supreme Court's case of *Hotak v Southwark*, which was a homelessness case, is that right?

Iris Ferber KC: Yes, we're avoiding that studiously Stefan, because it's incredibly complicated case, which is mostly about things that are not the PSED, but *Hotak v Southwark* did deal with the PSED, and it upheld *Bracking*, it said that the way that *Bracking* had described the PSED was correct.

Stefan Liberadzki: Yes, and so the Court of Appeal in our case, *Powell*, says that based on the way that the Supreme Court in *Hotak* had discussed the PSED, they concluded that a conscientious local authority decision-maker, who considers all the relevant factors in good faith, might comply in substance with the PSED, even if they don't know that that duty actually exists.

And that explains why the Court of Appeal was just so unimpressed with the extensive cross-examination of the housing officer on the legal wording of Section 149 and that law exam they'd effectively been subjected to.

Iris Ferber KC: Right, and the Court of Appeal was saying, you know although *Hotak* was about homelessness, Lord Neuberger makes this statement about a conscientious decision-maker considering all the relevant factors in good faith and in *Powell* the Court of Appeal says that also applies in ordinary possession cases when considering the PSED in a case like *Powell*.

And the Court of Appeal then said that specifically the hypothetical in *Hotak* was exactly what had happened in this *Powell* case, that an SPO had been made, this is sort of breakdown of why this was true in this case. An SPO had been made, *Mr. Powell* had had legal representation at that hearing at which the SPO had been made.

Stefan Liberadzki: So, he couldn't really challenge the SPO itself.

Iris Ferber KC: He couldn't challenge the SPO itself, he couldn't even argue that the PSED wasn't complied with because his legal representatives had not raised that as an issue at the time the SPO was made. Then when considering whether or not to issue a warrant, which was, as we remember, only a few months later because he had breached so quickly after the SPO, the ASB officer had tried, this is important, their findings were included, the findings of fact included, that the housing officer had tried to get information from *Mr. Powell* about his personal and medical situation because she understood the council needed to have that information, and if he needed support, the council should support him and she focused on that in good faith and in a conscientious way.

But what had happened was that *Mr. Powell* had not engaged with her, he had not replied to her requests, he had not given her any information and so on the facts, as a result, having been conscientious, she had no reason to think there was a change in circumstances since the SPO was made.

Stefan Liberadzki: That's interesting because we said earlier, she hadn't done a formal proportionality assessment at this stage before applying for the warrant, but effectively, the court is saying she had done what the duty requires in substance, even though she hadn't put it in the formal document that says proportionality assessment.

Iris Ferber KC: Exactly right. The key was that she had considered the correct things conscientiously, in other words not in a glib way but properly with focus, and had done so in good faith, exactly right.

So, from that discussion, Stefan, you can see can't you, it's a very fact sensitive question, and funnily enough you know, the Court of Appeal said, 'well, there's no error of law,' the deputy district judge and the circuit judge had all the facts, and they found both of them, first instance and then in the first appeal, that there was no breach of the PSED.

And actually, there is a paragraph in the judgment that is maybe surprisingly quite strongly worded about this, they say this, and this is quoting from the Court of Appeal judgment, 'given what was known to the council through the housing officer, I consider 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.'

Stefan Liberadzki: Strong word indeed.

Iris Ferber KC: Very strong.

So okay, that's the first one, no breach. What about the second question then, Stefan, could a breach be corrected by a later lawful consideration of the PSED even if there had been an earlier breach?

Stefan Liberadzki: Yes, so it becomes a slightly hypothetical question because they've already decided there wasn't actually one, and the judge in the first instance was correct to make that finding.

But the second part is maybe the part of the *Powell* case that listeners to this podcast will find the most useful for the takeaway. Lord Justice McCombe to this question said yes, he said that his own judgment in the *Bracking* case, which explained the importance of compliance with

the PSED, should not be read as inconsistent with his finding in this case.

And so, he said even if there had been a breach at the time of issuing the warrant that could, as a matter of law, be remedied by a conscientious assessment of the situation later on when better medical evidence comes to light, and as we know that happened almost a year later and the officer did at that point do a formal equality and proportionality assessment in this case.

Iris Ferber KC: Okay, so really the Court of Appeal is saying even if at an earlier decision point there is a breach of the PSED, so long as by the time the court is looking at it that has been remedied, that may well be sufficient to fully respond to an allegation of a breach of the PSED.

Stefan Liberadzki: Exactly.

Iris Ferber KC: Okay, understood.

And then, Stefan, what about the final part of the appeal that you listed earlier on in this podcast?

Was the judge entitled to dismiss the stay application irrespective of whether or not there was a PSED breach purely on the basis that a proper consideration of PSED couldn't have affected the decision anyway?

Stefan Liberadzki: Well, Iris, this gets even more hypothetical as listeners can see, because they've already said there's no breach, and they've already said that you could cure an earlier breach by doing the proper consideration later on, which they didn't need to do anyway.

So, this third part is very hypothetical, and perhaps unsurprisingly, the Court of Appeal said, we're not going to decide that because there's no breach in the first place.

So, they left that question somewhat hanging open. But listeners, you might want to tune into some of the upcoming episodes of this podcast because the High Court, and indeed the Court of Appeal, have since returned to that question in a number of cases since *Powell*, and we do have an answer to it.

Iris Ferber KC: Well, we won't tell you what that is yet, will we, Stefan? We'll keep that for later podcasts.

But what have we learned from this case, Stefan?

How is it useful for landlords and tenants dealing with cases involving the PSED?

Stefan Liberadzki: Well, Iris, when you have these cases, usually where possession is sought and a defence is raised around alleging breach of the PSED, the key point is just how fact sensitive these challenges are and also to understand why the total lack of a formal PSED assessment in this case actually didn't matter in the end, it made life harder for the officer in cross-examination, but it didn't lose the case for the council ultimately, despite the witness not knowing Section 149 and the wording of it.

You really have to dig into the facts here to understand why, as we've gone through: There wasn't any argument in the original possession hearing where the SPO was made that seeking a possession order breached the PSED.

There was, after the SPO, really serious and persistent ASB quite quickly afterwards.

There was a lack of engagement from *Mr. Powell* when the officer diligently tried to engage with him and help him, and eventually there was a formal assessment, although it had the label of a proportionality test, but it was done before the stay hearing itself.

Iris Ferber KC: So, the facts, the facts, the facts, they really matter.

When you're dealing with these cases, whether it's for a landlord or a tenant, there really is no substitute for a careful analysis of what the facts are at the point when you're either pleading your claim or your defence or a reply to the defence.

If the facts do demonstrate a lack of 'due regard', which is the phrase in Section 149, if the facts demonstrate a lack of due regard to the considerations that are required to be had regard to in Section 149, then no amount of form filling is going to save the landlord. It's the actual due regard that matters.

Stefan Liberadzki: So, it can't be a tick box exercise.

Iris Ferber KC: It can't be a tick box exercise, and if a person is cross-examined, and it turns out that they just wrote what their manager told them to write and never gave it a second thought in fact, and it's done in bad faith, then the form is going to be completely irrelevant.

Stefan Liberadzki: Yes.

Iris Ferber KC: On the other hand, sort of the other side of the coin, if the facts do demonstrate a careful regard for the need to eliminate discrimination and all of the other factors in Section 149 in substance, then a landlord is likely to be able to defend an allegation of breach of the PSED, even without a formal PSED assessment.

Although I don't recommend just ignoring the need for a proper assessment because if you do the job diligently and you've recorded it in writing too, then you're going to have an easy trial.

Stefan Liberadzki: Exactly, and if there's a good template that the local authority has for doing one of these assessments, then that's going to help the housing officer to make sure they've considered everything properly, that they have to do it in a substantive way, as you said, and not just tick boxes.

Iris Ferber KC: Filling it in isn't a substitute for properly thinking about it, but properly thinking about it and filling in the form is the gold standard.

Stefan Liberadzki: Exactly.

Well, that's all for today and I'd just like to say 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*.

Iris Ferber KC: We do hope you're enjoying this podcast series.

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Thank you for listening.