

The A-Z Of Housing Discrimination Case Law

AB v Westminster City Council
Iris Ferber KC & Andrew Carter

Andrew Carter: Welcome to the latest series of *Home Truths - the 42BR Housing Podcast*. My name is Andrew Carter.

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

Andrew Carter: 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 to Z of Housing Discrimination case law.

Iris Ferber KC: Because we're starting with the case of *Akerman-Livingston v Asta Communities*, and we're ending with *Z v Hackney London Borough Council*.

Andrew Carter: 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: And today we're going to talk about the case of *AB v Westminster City Council*, which is a High Court case from February 2024.

Andrew Carter: Unusually for this series, this is not an appeal case and it's not a possession claim, it's a judicial review. So the High Court Judge was not considering an appeal from another judge, but was making his own decision on the case.

So, why are we talking about it?

Iris Ferber KC: Well, we're talking about it because it is used as a case authority for how to present claims under Section 19 of the Equality Act, and also how not to present claims.

The judge, in this case, *AB v Westminster City Council*, explains how to set out a Section 19 case properly in the statement of case, in the initial court document, what evidence needs to be presented to the court to prove each part of the legal test. And so it's a really useful, really important case.

First, Andrew, let's have a look at the facts. What happened in this case?

Andrew Carter: So in this case, there were two claimants who were both homeless, because they'd been victims of a drugs gang. They were both very vulnerable. Each of them had complex physical and mental disabilities, and they were still at risk from this gang, which was why their names were anonymised.

They applied to Westminster City council, being homeless and Westminster struggled to find them suitable accommodation, and that was in part because they had a dog who was important to both of them for their mental health and who they needed to be accommodated with.

Iris Ferber KC: There was a judicial review then of the suitability of the accommodation that they were given. Initially, they had been given a hotel just for the first claimant with the dog, and they separate flat for the second claimant on her own in a different part of London because that's all that Westminster could get for them. And then later they were accommodated together at a hotel that was willing to take a dog.

So they were together with a dog, but in a hotel.

And there are interesting questions about why they went for a judicial review rather than a County Court suitability appeal, but we're not going to talk about any of that in this podcast because we're going to focus on the other part of the judicial review in this podcast, which is the claim of discrimination, under the Equality Act.

Andrew Carter: So let's go into a little bit of detail in how they set out their claim, because this case is all about the judge's analysis of how they did that and how they should have done that.

So firstly, this was a claim under Sections 19 and 149 of the Equality Act only. So we're talking about indirect discrimination and a breach of the public sector equality duty.

There was no claim under Section 15 of the Equality Act, and we'll come back to that later. And we're not focusing here on the public sector equality duty claim because there are lots of cases, other cases that we'll be talking about in this series, that deal with PSED claims.

This case is interesting because of what it says about Section 19 claims.

Iris Ferber KC: So, okay, let's start with, what did the claimants say was their Section 19 claim?

Andrew Carter: So, the Section 19 claim was all about the way that Westminster dealt with homeless applicants with pets, and specifically they said that Westminster's policies for dealing with homeless applicants who wanted to stay with their pets was indirectly discriminatory against disabled applicants.

Iris Ferber KC: But that's too general, isn't it, Andrew? That's not enough to make a Section 19 claim good. The precise policy has to be articulated by a claimant that is challenging a policy as discriminatory.

So what actual policy did these claimants challenge?

Andrew Carter: So they identified two policies.

First, that to be accommodated with an animal, a homeless applicant must provide medical evidence of that need. So that's the first policy.

Iris Ferber KC: And Westminster had that policy?

Andrew Carter: That's right.

Iris Ferber KC: Particularly.

Andrew Carter: That's right.

Iris Ferber KC: Okay.

Andrew Carter: And the second is that Westminster failed to secure housing stock which allowed people to have pets.

And initially, at least it seems, from the judgment the two claimants simply argued that those policies were unreasonable but the judge made clear that just because something is unreasonable doesn't make it a valid claim. But he did accept that it was valid to challenge those policies under Section 19 of the Equality Act.

In other words, those policies indirectly discriminated against disabled applicants, but the judge was very critical of how the case under Section 19 had been presented and he started with his analysis over Section 19 itself.

So Iris, what did the judge say about how Section 19 claims should be presented?

Iris Ferber KC: Well, this is particularly important from a sort of learning/training point of view- what does Section 19 say? What is needed from a claimant to prove a claim under Section 19? And that is laid out really clearly, really comprehensively, in paragraph 56 of this High Court judgment in *AB v Westminster*.

The judge didn't cite any other cases, any case law principles, in support of his analysis of how Section 19 works. He just focused on the wording of Section 19, but for us, employment and discrimination Law geeks, it was very, very close to the way in which many Employment Appeal Tribunal and Court of Appeal cases about employment discrimination have, over the years, laid out what we call the structured approach to dealing with Section 19 claims.

So the judge in this case got to the same point that all these higher judges had got to in these other cases in a field, employment law, where discrimination comes up all the time.

And so it seems to me the reason why this case keeps being reported about and discussed is that it is authoritative. It is a good analysis of Section 19.

Andrew Carter: And it's a case that imports that structured analysis into a housing space as opposed to relying on an employment case in housing context.

Iris Ferber KC: Absolutely. So if you are a defendant saying that a claimant has failed to properly plead their case, this is a good case for you to rely on. And paragraph 56 in particular.

And the judge lists four elements that come from Section 19 itself that the claimant has to prove.

Number one, claimant must identify a provision criterion or practice.

That's what we lawyers call a PCP, and we're going to refer to it that way from now on.

So a provision criterion or practice (PCP), that they seek to challenge. And as well as identifying which PCP, they are challenging, they have to prove that that PCP actually existed at all. That's Section 19.1 of the Equality Act.

Second element, the claimant has to prove that the defendant applied the PCP neutrally.

Neutrally means applied both to people who share the protected characteristic, here disability, and people who don't share a protected characteristic, non-disabled applicants. That's Section 19.2a of the Equality Act.

Then third element - claimant must prove the PCP puts people who share the claimant's protected characteristic at a particular disadvantage in comparison with people who don't share it. So a group disadvantage comparison, that's Section 19.2b.

And finally, section four or element four, the claimant has to prove that the PCP puts the claimant at the same disadvantage as the group that they are part of, the group that shares the protected characteristic, and that's section 19.2c.

Deep breath.

So that's the four parts for a claimant to prove, and only if those four parts are proved by a claimant, does the burden of proof then shift to the defendant to justify having that PCP.

In other words, then the defendant has to prove that having that policy, that criterion or that practice is a proportionate means of

achieving a legitimate aim, that's the definition of a justification in Section 19.2d.

And finally, finally, finally, if a defendant cannot prove that justification, that's the point at which a defendant is found to have acted in a way that is indirectly discriminatory.

Andrew Carter: So let's look at how the judge applied those principles, starting with the first PCP, which is the need for medical evidence before accommodation with pets will be allowed.

We're going to go through this in a little bit more detail than we have in some of the earlier podcasts in this series for two reasons.

First, it's such a clear and helpful analysis from the judge in this case, and it's an excellent example of how to break down a Section 19 claim.

And second, it's important because Section 19 claims are very common, but also it's very common to get them wrong.

So what was the first element in the judge's analysis here?

Iris Ferber KC: Right. Well, you might expect me to say element one from that list. But actually I think the first thing to say that is important about the judge's analysis here is that the judge split the case down the middle if you know what I mean. Well you probably don't know what I mean, I'll explain!

What I mean by the judge split the case down the middle is that he dealt with each PCP, those two PCPs, Andrew, that you listed, he dealt with each of them completely separately, applying each element, each of the four part set of legal tests, to each PCP separately, in two separate sections of his judgment. And that is the way to think about it.

That is correct and the right way to think about it. If you're arguing a Section 19 claim as a claimant, treat each PCP as effectively a standalone claim in respect of which you have to prove each element.

Okay, so now that I've started with that important point about each PCP has to be approached separately, let's look at what the judge did with the first PCP.

Andrew Carter: So the first PCP is the need for medical evidence.

Now, the judge said that it did exist, that Westminster did require homeless applicants who wanted to live with their pets, they had to show medical evidence of that need. The defendant, Westminster, admitted that.

So first element, satisfied.

Second element, does it apply neutrally? That is to disabled the non-disabled applicants. Yes. Admitted.

And we move on.

The third element. Now this is about group disadvantage. The judge did not accept that there was a particular disadvantage to disabled applicants as a group in comparison to non-disabled applicants.

Iris Ferber KC: Why not? What happened?

Andrew Carter: Well, the claimant's evidence simply didn't deal with this question at all. So there was no evidence that disabled applicants would struggle more to get the medical evidence that they needed as against non-disabled applicants. In fact, the judge thought that disabled applicants might benefit from that policy or practice because it would prioritise disabled applicants over non-disabled ones for pet friendly accommodation.

Iris Ferber KC: Presumably because, sorry to interrupt Andrew, because if you are, I guess you didn't quite spell this out, but if you're disabled, you probably find it easier to get the medical evidence you need than an non-disabled applicant.

Andrew Carter: Yes, yes, that's right, I guess. And the PCP also ensures that those with the greatest disability related need are prioritised over non-disabled people.

Iris Ferber KC: But actually this was all from the judge. Actually there was no evidence either way from the claimants about any potential disadvantage.

Andrew Carter: That's right, and we have to recall that just because disabled applicants are more likely to need pets for whatever reason, does not mean that this particular PCP puts them at a comparative disadvantage.

So, just to underline the point, it might be that disabled applicants will find it easier to get the medical evidence that they need in order to satisfy the terms of the PCP as against non-disabled persons. But this is a very good example of how important it is to work out the correct PCP when you're drafting a claim for indirect discrimination.

Iris Ferber KC: And the claimants here did not do that. This was the wrong PCP, because if anything, it was a PCP that assisted them rather than caused them a disadvantage.

Andrew Carter: Yes, that's right. The fourth element being the claimant's own individual disadvantage, which has to map against the group disadvantage, wasn't proved either.

They had provided their medical evidence to Westminster, and the first claimant had been accommodated with the dog, or even before

that evidence had been provided. So in reality, this PCP caused no disadvantage.

Iris Ferber KC: So it was sort of doubly wrong in a sense, not only did the PCP not cause or there was no evidence that there was a disadvantage to the group, there was not even any evidence of disadvantage to the individual claimants.

Andrew Carter: That's right. Yes.

Iris Ferber KC: And the judge didn't even get on, did he, to what you've just referred to, which is whether the individual disadvantage maps, in other words, is the same as, the group disadvantage because there was no proof or evidence or proof of any disadvantage existing either to the group or to them at all.

Interestingly, and judges do this sometimes, don't they? They sort of move on to say, well, if I had decided it another way, then I'll go on and deal with the rest of the case. And he said, the judge, in the end of this part of the judgment that even if the claimants had succeeded in proving all four elements of the Section 19 test, he would anyway have held that the PCP was justified, because he said the aim of the PCP, so remembering again that this is not about allowing households to have pets, it's about requiring medical evidence of the need for a pet, the aim of that PCP was to give priority in the very limited housing stock that Westminster has that accepts pets, to those in medical need and asking for evidence of medical need in order to prioritise medical need, the judge said, was a proportionate way of achieving that aim.

So, that was not a successful ground for judicial review, we can summarise. And what about the other PCP, Andrew?

Andrew Carter: Well, the other PCP was pleaded as failing to secure housing stock which allows animals.

Now the first thing to say is that unlike the first PCP about medical evidence, Westminster did not accept that there was a failing to secure housing stock which allows animals, so the claimants had to prove it.

Now, Westminster said that there was no such policy or practice. It was just that private sector suppliers of housing to local authorities for homelessness do not generally allow animals in their properties.

So basically that was not because of any policy of practice or practice of Westminster's, it's just a reflection of the market.

Iris Ferber KC: Well, that sounds logical. I can understand why they raised that as a defence. Did the judge accept that?

Andrew Carter: No.

Iris Ferber KC: Right...

Andrew Carter: Okay, what he did was he went and rewrote the PCP. He said that the reality was that there were a series of practices by which Westminster acquires a suitable temporary accommodation to meet its homelessness duties, and that includes seeking out regular providers and ad hoc arrangements with hostels and hotels at short notice.

So the judge stood back and said, well, look, there's a practice, a series of practices by which Westminster gets in housing stock, and that is the practice that marries with the identification of a PCP for the purposes of Section 19.

Iris Ferber KC: So he sort of rewrote the PCP to fit the facts as presented actually.

Andrew Carter: Yes, that's right. And so in the judge's words, he said paragraph 67, *'I see no reason why the defendant's procurement*

arrangements with the private sector taken with the possibility of obtaining property on an ad hoc basis when needed is not a 'practice' within the Equality Act'.

So it's a good example of just how flexible the concept of a PCP can be.

And also, the word of warning for defendants, is that, the PCP may well be found by the judge on the basis of the evidence that's actually before the court, not confined in the strait jacket of what the claimant is arguing, bearing in mind that the claimant was not self-represented in this case, and still the judge went and rewrote that PCP.

Iris Ferber KC: And I suppose the listener might think, well, that's very generous to the claimants for the judge to do that, to rewrite the PCP for them so that it fits the facts. But perhaps it's not quite as generous as it seems because let's talk about what happens next, it depends on what the judge did with it.

So you remember, we've just been talking about the first element only can the claimants prove the PCP actually existed and was applied. We've talked about that.

Second element in this case was easily met, you remember, second element is the PCP applied generally to everybody, and that clearly was the case here. That was a general set of procurement arrangements and ad hoc arrangements for securing temporary accommodation, and that applied to everybody.

But here again, as with the other PCP, the third and fourth elements were the problem - the group disadvantage and the individual disadvantage.

Stepping back, You may say to me, Andrew, but isn't it obvious, do you really even need proof or evidence that disabled applicants are going

to need pet allowing accommodation more than non-disabled applicants?

Well, we can have a disagreement or an agreement about whether or not that's obvious, but that's not even the question that a judge has to answer.

And this is why the structured approach to claims like this is so important, the clear thinking that is required in order to apply the structured approach.

The question is not, 'is it obvious that disabled applicants need to have their pets with them?' The question is whether this particular PCP had this particular group disadvantage.

And let's just remind ourselves this PCP as rewritten by the judge was *'the defendant's procurement arrangements with the private sector taken with the possibility of obtaining property on an ad hoc basis when needed.'*

Right? That's the PCP. There was no evidence presented to the court at all about how the practice of procuring accommodation operated, who it's impacted, good or bad, how it impacted individuals or groups.

And again, for sort of learning purposes, the judge went through in the judgment, some of the useful principles of how group disadvantage could be evidenced because group disadvantage is really difficult to evidence and so very helpfully, the judge gave three ways in which it's possible to evidence group disadvantage.

I mean, these are not the only ways, by the way, you can pull together real life evidence of group disadvantage. But there are some potential shortcuts and the judge went through them.

So the first one that he mentioned was from a case, from 2012 in the Court of Appeal, called *Burnip*, which says that statistical evidence

about how different groups are affected by a policy is useful, but not always necessary.

So where perhaps you might think statistics are an absolute necessity for two groups, and the differential effect on two groups useful but not necessary.

Next, the judge said sometimes the group disadvantage genuinely might be obvious.

So let's think of an example then, Andrew.

Andrew Carter: So let's say that you're a landlord and you have a practice of only ever sending correspondence by way of posted letters. Now that would presumably be disadvantageous to blind tenants by comparison and with tenants who were not blind because obviously the blind tenants can't read anything that the landlord is saying.

Iris Ferber KC: Right. And you would be surprised, wouldn't you, if a judge required a tenant to prove that group disadvantage? It is just obvious that a letter which has no assistance for blind readers is going to disadvantage blind readers. That's an example of something that's so obvious...

Andrew Carter: ...Quite extreme, yes.

Iris Ferber KC: It's an extreme example, but just to illustrate the point that sometimes you can just say it's an obvious disadvantage, but you know, that really does have to be in a situation where it is actually obvious.

And then the third example that the judge gave intriguingly is that, you know, and this feels right to me, but I don't know, you know, where it comes from, that the individual claimant's disadvantage, so the

personal disadvantage to the claimant could be enough for the court to infer a group disadvantage from the individual disadvantage.

Andrew Carter: Yes, it's probably those cases where you think to yourself, actually the circumstances in which this individual finds themselves are probably happening all the time.

Iris Ferber KC: And there's nothing unusual about the this particular disabled applicant's circumstances, if it's happening to him, it's probably happening to others.

Right. So that's the sort of situation where the individual disadvantage might be enough to prove by inference the group disadvantage, but importantly, having set out those three things as possible ways of evidence in group disadvantage, the judge was very clear that none of those applied to this particular PCP.

The disadvantage was not obvious. There wasn't any statistical evidence and although that's not necessary, there needed to be something else. So the disadvantage wasn't obvious, and the the frustrating thing I guess for the claimants here, when they got to court and had all this argued out that what the judge found was that the way the practice was actually being operated by Westminster, so how it was procuring and allocating accommodation, didn't even appear to disadvantage these particular claimants personally because these ad hoc arrangements that Westminster had with hotel chains where they would call up and source dog friendly rooms at short notice for applicants who proved by way of medical evidence that they needed that sort of accommodation, those ad hoc arrangements with the hotels were the mechanism by which Westminster did find these claimants the dog friendly accommodation that they did put them in at short notice.

Andrew Carter: Yes.

Iris Ferber KC: So where was even the individual disadvantage to the claimants from the way the system was operating?

Andrew Carter: Yes. Just pausing there, there's another feature of this case, which was that it was set up as a suitability challenge at the outset, and then different accommodation was provided at some time thereafter which includes the dog and there was no amendment to the pleaded case...

Iris Ferber KC: ...They just failed to appreciate that the situation had changed so much that an amended pleading was needed.

Andrew Carter: Yes, and not only that, but when the accommodation had changed and the facts had changed, the underlying Section 19 claim also lost its power...

Iris Ferber KC: ...and the basis for running it, arguably, that's certainly what the defendant was saying.

The defendant was saying, well, we've accommodated you now and, and with your pet, so where's your disadvantage?

Andrew Carter: Yes, exactly. Exactly. So, so then we're engaged in very much a retrospective analysis of a policy in circumstances where the actual disadvantage to the actual claimant had already been addressed...

Iris Ferber KC: ...and within the policy, there had been no change to sort of outside the policy to do that. So it was pretty fatal to the claim.

Andrew Carter: It was entirely fatal to claim it was, it was entirely fatal.

Iris Ferber KC: Very interesting. I mean, lots to say there as well about keeping on top of your facts and knowing when to amend and when to rethink your case.

Andrew Carter: Yes, yes. And to rethink the causes of action that you're running once the facts underlying do change.

Iris Ferber KC: Okay, so we've talked in a lot of detail there, Andrew, about what the case was about and what the judge's analysis was on Section 19 and how the case went for the claimants, which was badly.

What can we learn from this case about how to present? I was going to say how to present Section 19 claims, but perhaps more widely, how to present a claim in this type of situation on these types of facts, because it's not necessarily going to be a Section 19 claim.

Andrew Carter: Yes, this case really is screaming for a Section 15 claim. A Section 15 claim requires only that there's unfavourable treatment.

Iris Ferber KC: So no comparison required.

Andrew Carter: Yes, no comparison required. And probably there was unfavourable treatment, at least in some way.

Iris Ferber KC: Yes. It could have been broken down on a granular level to individual actions that might have been argued to be unfavourable.

Andrew Carter: Yes.

Iris Ferber KC: We don't know enough about the facts of the case to know how that could be done, but it's much easier than trying to identify PCP.

Andrew Carter: Yes. And a Section 15 claim doesn't require that, as I said, that comparison between the group, the In-group and the Out-group, it simply requires that there is some causal connection between the unfavourable treatment and the disability, and then

generally speaking, that's the easy part. And then it moves to a proportionality analysis. Now, it may well be that because on the facts of this case, that in light of some of the things that the judge said about proportionality, that it might've failed anyway, on Section 15, but certainly the problems that arise on Section 19 simply could have been avoided.

Iris Ferber KC: So, yes, right, absolutely agree with that, Andrew. And one of the things that is so difficult with Section 19 claims that simply doesn't arise in Section 15 claims is pleading, setting out a PCP. Lawyers who do a lot of discrimination work, classically, that's in the employment tribunals, but more and more in housing, this is becoming true too, have to start by working out the PCP.

That's for an indirect discrimination claim and also for reasonable adjustments claims that applies to. You have to start by working out the PCP and insufficient time and effort is spent in drafting claims, in working out what the PCP should be, because once you've chosen a wrong PCP your claim is going to fail.

Andrew Carter: Yes, it's very hard to win if you've starting from the wrong position. Even if the judge does intervene and change it for you, or you apply to change it on the day, you can find yourself really pushing it uphill.

Iris Ferber KC: Yes, absolutely. It is very difficult. Either the judge, if they are a certain sort of judge, will just dismiss the claim because the PCP doesn't work or it doesn't exist, doesn't applied at all, just factually, there is no such policy or practice or where you might think a judge is helping by reformulating the PCP as happened here, actually, what the judge was doing was reformulating the PCP in this case in a way which was highly unhelpful to the claimants because it highlighted the lack of disadvantage, and the claimants had no control

over that because they hadn't pleaded the PCP properly for themselves. They were stuck with what the judge did with it.

The answer to all of that, of course, if you are acting for a disabled claimant or if you are a disabled claimant, just to plead Section 15 because you've got the option of Section 15, if your protected characteristic is a disability.

But in addition to that, if you are running a Section 19 claim, think really, really carefully before you start your claim. What is your PCP? And we were talking earlier, weren't we, Andrew, about the best way to do that. You know, the thing to do is to start with the problem, don't start with what the Section 19 says you have to start with, which is the PCP, start with what is the problem that this claimant, this tenant, has come up against?

Andrew Carter: Yes.

Iris Ferber KC: Once you've worked out the problem, then you can work out what's causing the problem, and if what is causing the problem is some kind of policy or practice or way of working, or way of doing things, or action by the local authority or by the private landlord, then that's your focus. That's where you focus your efforts at formulating a PCP.

So you work backwards from the problem to identify the cause of the problem, and then you label that as your PCP.

And of course, you've got to be extremely careful to make sure that you're not going to end up losing at the first hurdle because the defendant easily shows that no such practice actually existed.

You need to be very careful about making sure you pick something that is actually happening, not something that you would like to be happening so that you can make a claim about it.

Andrew Carter: Yes. Well, Iris, thank you very much for joining me on this bite-sized journey through housing discrimination case law, starting at A – *Akerman-Livingston*, and going through Z – *Z v Hackney Borough Council*.

Iris Ferber KC: You're very welcome, Andrew. We do hope you are enjoying this podcast series. We certainly are.

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