

Introduction To Discrimination Law & When Landlords Discriminate Webinar



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Presenters

Sonia Birdee | Barrister | Garden Court North Chambers

Overview of Equality Act 2010

Sonia is a housing law specialist with over 15 years experience and particular expertise in cases raising discrimination. She also represents claimants in discrimination claims across most aspects of the Equality Act 2010 and is on the Equality Human Rights Commission panel of preferred counsel.

To view Sonia's full bio, please visit: <https://gcnchambers.co.uk/barrister/sonia-birdee/>

Elizabeth Mottershaw | Barrister | Garden Court North Chambers

When Landlords discriminate

Elizabeth's practice focuses on immigration and housing, and her particular interest in vulnerable clients is seeing her develop a growing Court of Protection practice. She also accepts instructions on international human rights law and international humanitarian law.

To view Elizabeth's full bio, please visit: <https://gcnchambers.co.uk/barrister/elizabeth-mottershaw/>



Agenda

- Introductions
- Introduction to Discrimination Law by Sonia Birdee (Garden Court North Chambers)
- When Landlords discriminate by Elizabeth Mottershaw (Garden Court North Chambers)
- Questions

Introduction to Discrimination Law:

A whistle stop tour

Sonia Birdee

Garden Court North Chambers



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Discrimination law in the UK - background

1975

Sex Discrimination Act 1975

1976

Race Relations Act 1976 followed Acts in 1965 and 1968. Amended in 2000 to add public sector duty in respect of race

1995

Disability Discrimination Act 1995

2006

Equality Act 2006 added public sector duty in respect of disability and gender

2010

Equality Act 2010 harmonised previous discrimination law. Royal Assent 8 April 2010. Process began in Feb 2005 - bill introduced into HofC 24.4.09.

Structure of the Act

- 200+ sections and 28 Schedules.
- Part 1: Socio economic Inequalities. Not in force.
- Part 2: Protected characteristics and kinds of prohibited conduct
- Parts 3-7: Sectors where there is a duty not to discriminate
- Parts 8-10: Provisions to put the Act into effect
- Part 11: Positive Action
- Parts 12-13: Rules to ensure travel and premises are accessible to people with disabilities
- Part 14: General exceptions
- Part 15: General and Miscellaneous

Protected characteristics (Part 2, Chpt 1, S4-12)

Age

disability

gender reassignment

marriage and civil partnership

pregnancy and maternity

race

religion or belief

sex

sexual orientation



Who is bound by the duty not to discriminate

Parts 3-7

- Service providers and those exercising a public function (Part 3)
 - Certain types of transport (Part 3)
 - Those disposing of or managing premises (Part 4)
 - Employment and certain non-employment relationships (Part 5)
 - Education providers (Part 6)
 - Associations (Part 7)
- There are numerous exceptions to the application of these Parts of the Act which are set out in the Act itself and its schedules.

Types of discrimination (Part 2, Chapter 2, S4-31)

- Direct discrimination (s13)
- Disability discrimination (s15)
- Gender reassignment discrimination (s16)
- Pregnancy and maternity discrimination (s17)
- Indirect discrimination (s19)
- Failure to provide reasonable adjustments (s20-21)
- Harassment (s26)
- Victimisation (s27)

Direct discrimination: Section 13

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (s13(1)).

The rest of s13 deals with scope.

Direct Discrimination

- A comparator is required – someone (could be hypothetical) without the protected characteristic but in materially similar circumstances who is treated more favourably (s23(1)).
- Less favourable treatment is given a broad interpretation - any disadvantage including non-material disadvantage.
- The less favourable treatment must be because of the protected characteristic – objective test (R(E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others [2009] UKSC 15, para 13).
- If this can be established, the discriminator’s intent or motive does not matter (Nagarajan v London Regional Transport [2000] 1 AC 50).
- There is no defence to direct discrimination except in respect of age which can be justified as a proportionate means of achieving a legitimate aim (s13(2))
- Pregnancy and maternity are excluded from the definition of direct sex discrimination but are protected by sections 17 and 18 and do not require a comparator.
- E.g. A group of people are refused entry to a pub because they are Irish Travellers. Direct discrimination in breach of s29 (services).

Indirect discrimination: Section 19

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Indirect discrimination

- Section 19(3) excludes pregnancy and maternity from its scope.
- A PCP can include policies, procedures, rules, arrangements, requirements, prerequisites and more whether formal or informal, mandatory or discretionary, general or particular (*British Airways v Starmar* [2005] IRLR 862)
- The PCP must be neutral and applied to a protected person and others without their characteristic alike.
- The comparison must be between groups with materially similar circumstances.
- A particular disadvantage might be obvious or might be shown by way of statistics or expert opinion.
- The application of a discriminatory PCP must be proportionate to be justified. It is not enough to rely on pure cost considerations (*Ministry of Justice v O'Brien* [2013] UKSC 6).
- E.g A disabled woman in receipt of benefits is told by a letting agent that she cannot rent a flat because the agency operates a policy of not accepting housing benefit tenants. This indirectly discriminates against women and disabled people because those groups are more likely to be in receipt of housing benefit subject to argument on proportionality.

Further examples are given in the Code of Practice in Employment (4.11)

Reasonable Adjustments: Section 20

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

The rest of section 20 deals with exceptions and explanations. Parts 3-7 are all accompanied by Schedules dealing with reasonable adjustments.

Reasonable adjustments

- This duty seeks to ensure access and participation for disabled people.
- Those acting under this duty must take reasonable steps to avoid putting disabled people to a substantial disadvantage by changing a PCP, removing or modifying physical barriers or providing auxiliary aids and services
- Although the 'substantial disadvantage' test requires a comparator they do not need to have similar circumstances so that an appropriate comparator might simply be a non-disabled person (Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265)
- Whether a step is reasonable is objectively assessed on the facts. Some examples are given in the Employment Code of Practice (6.28) and the Service, Public Functions and Associations Code of Practice (7.30)
- Some duties are anticipatory (services, public functions and associations), others are subject to restrictions e.g. premises (only triggered when a request for the reasonable adjustment is made) also see work.
- It is not permitted to charge the disabled person for the cost of making the reasonable adjustment (s20(7))
- Failure to provide reasonable adjustments will amount to discrimination (s21)
- E.g. Landlord fails to provide a handrail for a disabled tenant who cannot get out of the bath safely without one. Discrimination as set out in s21 in breach of s36.

Harassment:s26

- Three types of harassment;
 - (i) Unwanted conduct related to a protected characteristic which has the purpose or effect of violating the person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (s26(1))
 - (ii) Sexual Harassment – unwanted conduct of a sexual nature having effect as above (s26(2))
 - (iii) Harassment where the victim has rejected harassment related to gender reassignment or sex (s26(3))
- S26 does not apply to pregnancy and maternity (but consider sex discrimination) or marriage and civil partnership (but consider sexual orientation in latter case)
- Unwanted conduct includes speech, writing, imagery, gestures. No need to object to the conduct.
- The conduct only needs to be related to the protected characteristic so will qualify if it is touched upon it even if it is engaged in for an unrelated reason. No need for comparative treatment. A complainant doesn't have to have the protected characteristic themselves.
- In deciding whether the effect has met the test in s29, regard must be had to the perception of the complainant, other circumstances of the case and whether it is reasonable for the conduct to have had that effect (s26 (4))
- E.g. During induction of students, an employee of the University refers to the local corner shop as the "paki shop". South Asian and white students present complain. Harassment in breach of s91

Victimization: s27

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule



Victimization:s27

- This section protects people seeking to exercise their rights under the Act by trying to prevent intimidation.
- Victimization will occur even where the allegation is made against a third party (s27(2)(d))
- No comparator required.
- Test for detriment is subjective – any loss of opportunity reasonably valued by the person experiencing it (*Chief Constable of West Yorkshire v Khan* [2001]UKHL 48)
- The protected Act does not need to have motivated the discriminator. It needs to cause the detrimental treatment (see Khan)
- E.g. In the example of refusal of entry to the group of Irish Travellers, the manager claims he will allow entry on sight of i.d. but goes on to refuse entry when one of the group threatens to make a complaint under the Equality Act.

Associative discrimination

- A person who does not have a protected characteristic themselves but is associated with someone who does may be victims of direct discrimination, indirect discrimination and victimization
- Question is whether the protected characteristic or act was the reason for the treatment

Additional duties

- Public Sector Equality Duty (s149) requires public authorities, or those carrying out their functions, to have due regard to the need to eliminate conduct prohibited by the Act and to advance equality of opportunity and foster good relations between those with protected characteristics and those without them. See *London Quadrant Housing v Patrick* [2019] EWHC 1263 (QB) for guidance.
- S1 of the Act would extend the public sector duty to socio-economic inequalities. This section is not in force and the Conservative government has made it clear that it has no intention of bringing it into force.

Time Limits

Civil courts

- (i) Six months (minus 1 day) from the act for claims brought under s114 (Parts 3, 4, 6 and 7)
- (ii) Extended to 9 months in Education cases where the act is referred to the student complaints scheme within 6 months.

Employment tribunal

- (i) Three months (minus 1 day) for complaints within s120 (Part 5 and associated provisions)
- (ii) Six months (minus 1 day) for Armed forces cases within s121(1)

Courts have the discretion to extend time limits when it is 'just and equitable' to do so.

Remedies

Civil Courts

- The court can grant any remedy available in tort or judicial review proceedings (s119(2))
- An award of damages can include compensation for injured feelings (s119(4))
- In an indirect discrimination case, if the discriminator did not intend to discriminate against the complainant, the court must consider alternative to damages first (s119(5)(6))

Employment tribunal

- The tribunal can make a declaration, recommendation and/or make an order compensation (s124(2))
- Same restriction on awarding damages in Indirect discrimination cases (s124(5))

Damages

- Bands of value for compensation in discrimination claims were set in *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871. These are updated by the presidents of the employment tribunals (England, Wales and Scotland)
- New presidential guidance came into force on 6 April 2020 updating bands;
 - (i) £900 - £9,000 for lower band offences (one-off incidents e.g. single discriminatory insults);
 - (ii) £9,000 - £27,000 for middle band offences (more serious cases which are not appropriate for the upper band); and
 - (iii) £27,000 to £45,000 for upper band offences (most serious cases such as lengthy campaigns having a significant impact on the victim).

When landlords discriminate

Elizabeth Mottershaw

Garden Court North Chambers



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Equality Act 2010: prohibitions on discrimination

“(t)he courts cannot be required to give legal effect to acts proscribed as unlawful”
London Borough of Lewisham v Malcolm [2008] UKHL 43, House of Lords, at [19].

“Whereas treating a man equally with a woman usually means treating him in the same way as a woman is treated, treating a disabled person equally with a non-disabled person may mean treating him differently from a non-disabled person. This is in order to ensure that he can play a full part in society despite his disabilities.”
Akerman-Livingstone v Aster Communities Limited [2015] UKSC 15, at [2].

Section 35: Management

- (1) A person (A) who manages premises must not discriminate against a person (B) who occupies the premises—
- (a) in the way in which A allows B, or by not allowing B, to make use of a benefit or facility;
 - (b) by evicting B (or taking steps for the purpose of securing B's eviction);
 - (c) by subjecting B to any other detriment.

Section 15: Discrimination arising from disability

15 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.

Section 6: Disability

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Resources

EA 2010 Sch 1

Equality Act 2010 (Disability) Regulations 2010

Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability, Office for Disability Issues (now called the Disability Unit)

A treats B unfavourably because of something arising in consequence of B's disability

- unfavourable treatment: and no more
- because of something: identify C's reasons
- arising in consequence of ... disability
- the link between the cause of the unfavourable treatment and the disability can be one or more of a "range of causal links" and "may include more than one link" (*Pnaiser v NHS England and another* [2016] IRLR 170 at [31])
- "discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor ... If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out" (*Nagarajan v London Regional Transport* [1999] UKHL 36, [2000] 1 AC 501)
- "if the legitimate impairment was a reason and thus an effective cause of the less favourable treatment, then prima facie discrimination is made out notwithstanding that the excluded condition also forms part of the ... reason for that treatment" (*P v Governors of a Primary School* [2013] UKUT 154 (AAC) at [52])

Examples

- not dealing with correspondence, benefits, not engaging
- changes to benefits due to physical disability
- aggressive behaviour; noisy behaviour
- cuckooing
- hoarding; refusing access

Proportionate means of achieving a legitimate aim

15(1)(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

“The impact of being required to move from this particular place upon this particular disabled person may be such that it is not outweighed by the benefits to the local authority or social landlord of being able to regain possession.”

“Section 15(1)(b) of the 2010 Act requires the claimant to show that the eviction strikes a fair balance between its need to accomplish its objectives and the disadvantages thereby caused to the defendant as a disabled person.”

Akerman-Livingstone v Aster Communities Limited [2015] UKSC 15, at [30] and [73]

Summary: Section 15: six considerations

Instructions; pleadings; disclosure; evidence (medical, witness, expert)

- Applicability - section 35; manager of premises
- Disability - section 6; all the components
- Unfavourable treatment
- Link - section 15: because of something arising in consequence of B's disability
- Proportionality - the disadvantages to T as a disabled person; the steps taken by C
- Knowledge - how and when did LL know or could reasonably be expected to know of the disability

Any Questions?

Thanks for watching!

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