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DISCRIMINATION BRIEFING

"The moral test of government is how it treats those who are in the dawn of life ... the children; those who are in the twilight of life ... The elderly; and those who are in the shadow of life .. The sick ... The needy ... and the disabled." Hubert H. Humphrey

The protection of vulnerable groups with disabilities

The Public Sector Equality Duty: *Barnsley Metropolitan BC v Norton*

by Ian Clarke

Mr Norton had been employed by Barnsley MBC as a caretaker at a local primary school. Along with the job came the tenancy of a caretaker's house which he was required to occupy for the purpose of his employment. Mr Norton lived in that house, along with his wife and adult daughter, Sam. Unfortunately, Mr Norton's employment came to an end in November 2009 on the grounds of misconduct and the Council, naturally enough, sought and gained an order for possession of the property so that they could house a new caretaker.

There was no issue as to the Council's entitlement to possession; the Norton's had no private law defence to the claim. Rather, the appeal revolved around a public law challenge of the Council's decision to bring and to continue with the possession proceedings.

Mr Norton's daughter Sam was born in 1991 with cerebral palsy and it was common ground that she suffered from a disability under the terms of the DDA. The Council were aware of this having adapted the premises to take into account Sam's disabilities. So, the main question on appeal was whether the Council was in breach of its duty under section 49A of the Disability Discrimination Act 1995. That section provides that:

"(1) Every public authority shall in carrying out its functions have due regard to ...
(d) the need to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons."

As of 5 April 2011 the same duty is imposed by section 149 of the Equality Act 2010. While the Council was aware of Sam's disability it could provide no evidence that when making the decision to seek possession they positively considered her disability.

The Council's position at the appeal was that s49A only need be considered when a public authority was exercising functions that bear on the rights of a disabled person under some other specific legislation. Lloyd LJ rejected this contention, stating at para 15 that:

"In terms, the section is entirely general. It applies to the carrying out of any function of any public authority"

and later at para 17:

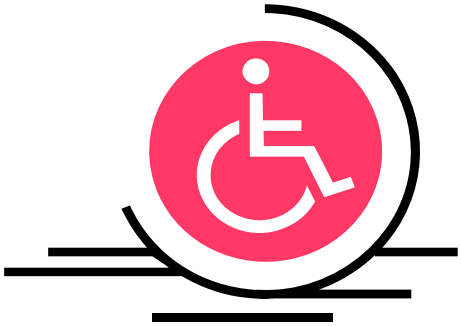
"Given that Sam's position could be critically affected by the Council obtaining an order for possession, it seems to me that the Council was clearly under a duty to have due regard to the need to take steps to take account of her disability .. due regard means such regard as it appropriate in all the circumstances."

As such, the local authority had been in breach of its duty. However, the question then arose as to what order the Court should make: should the possession order be set aside?

Lloyd LJ noted that if the Council's breach had been challenged by way of judicial review, rather than by way of a defence to the possession claim, it would have been open to the Administrative Court to conclude that, despite the breach, the Council's decision already taken should not be reversed if the Court considered that the Council could now be relied upon to exercise the relevant functions properly. So, in this case, if the decision would not have been set aside on an application for judicial review, it should not provide a basis for a defence to the possession proceedings.

The possession order was not set aside. The Council was saved in this case as it could still consider Samantha's disability before enforcing the possession order and when exercising its functions to provide other suitable accommodation, and indeed the Council provided the appeal court with a witness statement dealing with the steps taken since the conclusion of the trial to identify Sams particular needs.

The s.149 duty in the Equality Act is wide and local authorities must be mindful of it when carrying out any function. While the mere fact of a breach of the duty may not lead to a Claimant succeeding in a claim (if the practicalities allow for a local authority to subsequently fulfil its duty, or that such a consideration would have made no difference), it cannot be stressed enough that Barnsley MBC would have been saved a good deal of trouble and expense if they had fulfilled their obligation and moreover, kept a record to show that due regard had been had to Sam's disabilities.



Some guidance as to the assessment of care packages for disabled people: *R v Kensington & Chelsea Royal London BC*

by Thomas Crockett

The Supreme Court has dismissed the challenge to a decision of the Court of Appeal ((2010) EWCA Civ 1109), that the actions of the Royal London Borough ("K") did not violate the article 8 rights of the appellant ("M"). This is a decision constrained largely to discrete facts, however, it offers some guidance as to the correct way for a public authority to approach the assessment of care packages for disabled people under their care.

As Lord Brown opened his Opinion, handed down on 6 July 2011, "ill health can be dreadfully cruel". That certainly can be said on the particular facts of this case. M 30 years previously, had been the prima ballerina of the Scottish Ballet before suffering a stroke in 1999 and badly breaking her hip in 2006. Thereafter M had become dependant on the home-based community care package supplied by K. This care package included the provision of a night-time carer. This was necessary as M suffers from a small and neurogenic bladder and requires assistance to use a commode two or three times a night.

Since late 2008, K proposed in a care plan that instead of having a night-time carer, M should use incontinence pads or special sheeting. It was K's case throughout the course of M's appeals against this, that this would provide the appellant with greater safety, (avoiding the risk of injury whilst she is assisted to the commode), independence and privacy. It would have also reduced the cost of M's care by some £22,000 p/a.

It was M's case that as she is not incontinent she should not be treated as such. As Lord Brown's opinion recites, M considered being made to use pads to be "an intolerable affront to her dignity".

The proposal was not implemented, but in its 2009 and 2010 care plan reviews, K repeated that it considered that pads were a practical and appropriate solution.

The issues for consideration by the Supreme Court were:

(i) whether the Court of Appeal had been correct to hold that the 2009 and 2010 care plan reviews were to be read as including a reassessment of M's needs even though there had been no further separate Needs Assessment;

(ii) whether the proposal to provide pads interfered with M's rights Article 8;

(iii) whether K was operating a policy for the purposes of s.21E of the Disability Discrimination Act 1995 ("the 1995 Act"); and

(iv) whether the local authority had had due regard to s.49A of the 1995 Act.

The judgment of the court was not unanimous. Perhaps not unsurprisingly, Lady Hale dissented. Lord Kerr concurred with the majority, (Lords Walker, Brown and Dyson), but for different reasons.

Addressing the issues particularised above, the majority held the following:

The 2009 and 2010 reviews should be construed as including a reassessment of M's needs. The fact there was no additional documentation was irrelevant; care plans should be construed in a practical way against the specific factual background and with the aim of seeking to discover the substance of their true meaning. The local authority had done everything possible to satisfy the requirement to consult with M. The local authority was therefore not bound to continue the same care provision as had been made under the pre-2008 Needs Assessment.

There had been no interference with M's Article 8 rights. K had respected M's personal feelings, and took account of her safety and independence, whilst considering its responsibilities towards other care recipients. Crucially, the Court held that K's proposals regarding the use of pads was proportionate and in the interests of other service users.

K was simply performing its statutory duty and its actions were, in any event, a 'proportionate means of achieving a legitimate aim' within the meaning of section 21D(5) of the 1985 Act. Thus the argument that K's decision to substitute pads for an overnight carer was a 'practice, policy or procedure' within the meaning of s.21E of the Act was hopeless.

Of wider application to public authorities, the Court also held that where a public authority was performing its statutory function to a disabled person, it might be entirely superfluous to make express reference to section 49A of the 1985 Act. It would be an absurdity to infer an omission to do so as constituting or even evidencing a failure to have regard to the general duty under the section.

The dissenter, Lady Hale held that the case concerned the application of section 2(1) of the Chronically Sick and Disabled Persons Act 1970. That provision was intended to create an individual right to services if certain criteria were met. As to the meaning of 'necessary in order to meet the needs' of the disabled person, the need for help to access a commode was different from the need for protection from uncontrollable bodily functions, and the two ought not be confused. Lady Hale based her substantive dissent however, on the submissions of the interveners, Age UK. This was simply, that the decision to give someone who was not incontinent, incontinence pads, was Wednesbury irrational. At paragraph 79, Lady Hale opined:

"As Lord Lloyd put it in Barry 'in every case, simple or complex, the need of the individual will be assessed against the standards of civilised society as we know them in the United Kingdom' (p 598F). In the UK we do not oblige people who can control their bodily functions to behave as if they cannot do so, unless they themselves find this the more convenient course. We are, I still believe, a civilised society. I would have allowed this appeal."

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