



Disability discrimination

A briefing from our Health, Risk and Regulatory team - Feb 2010

The duty of decision makers in public authorities to take account of the disabilities of disabled persons

R (Boyejo and others) v Barnet London Borough Council and R (Smith) v Portsmouth City Council [2009] EWHC 3261 Admin

Local authorities that are considering replacing residential staff employed in sheltered accommodation with non-residential staff should ensure that decision makers have regard to the duty imposed on local authorities under section 49A(1) DDA 1995 to have due regard to the need to take steps to take account of disabled persons' disabilities when discharging their functions. The local authorities in these cases had failed to bring their section 49A(1) duties to the attention of relevant decision makers and could not therefore be said to have discharged the duty under section 49A(1).

The claimants, in conjoined cases, applied for judicial review of the decisions of the defendant local authorities to withdraw resident wardens or staff from sheltered housing schemes.

The claimants submitted that:

1. The local authorities had failed to fulfil their statutory duties under section 49A(1) of the Act, and, in particular, to have due regard to the needs set out in section 49A(1)(d) and section 49A(1) (f).
2. The local authorities had failed to consult or involve residents with disabilities in the way that was set out in their respective disability equality schemes.
3. The conclusions of the respective equality impact assessments were Wednesbury unreasonable.

The Court noted that the withdrawal of resident wardens or staff from sheltered housing schemes was a matter of concern for many parts of the United Kingdom and that the statutory framework placed the responsibility for such decisions firmly upon the local authorities. The question for the Court was confined to whether the decisions had been made in accordance with the law and not with the merits of any decisions.

Failure to have regard to the duty under section 49A(1)

Section 49A(1) imposes a general duty on local authorities when carrying out their functions to have "due regard" to a range of "needs" including the need to eliminate disability discrimination (s49A(1)(a)), the need to take steps to take account of disabled person's disabilities even where that involved treating disabled people more favourably than other persons (s49A(1)(d)), and the need to encourage participation by disabled persons in public life (s49A(1)(f)). It does not impose a duty to achieve results.

The claimants submitted that the local authorities had failed to carry out their duty under section 49A(1) of the Act and in particular to have regard to the need to take account of disabled persons' disabilities and the need to encourage participation in public life. It was clear that neither the Act nor the needs specified in section 49A(1) were referred to in either of the authorities' decisions or the report which informed it.

In order to address whether the local authorities had fulfilled their duty to have "due regard" to the needs listed in section 49A(1), the Court examined a number of authorities and advanced the following general principles:

1. Those in the public authority who have to take decisions that do, or might affect, disabled people must be made aware of their duty to have "due regard" to the identified needs. Thus an incomplete or erroneous appreciation of the needs will mean that "due regard" has not been given to them.



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2. “Due regard” must be paid to these needs before and at the time that a particular policy that will, or might, affect disabled people is being considered by the public authority in question. It involves a conscious state of mind. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty.
3. The duty must be exercised in substance, with rigour and an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of ‘ticking boxes’. The fact that the public authority’s decision making does not make specific reference to section 49A(1) is not determinative of whether the duty under section 49A(1) has been discharged. It is, however, good practice for policy or decision makers to make reference to the provision and any code or other non-statutory guidance in all cases where section 49A(1) is in play.
4. The duty imposed on public authorities that are subject to the section 49A(1) duty is a non-delegable duty. This means that the duty will always attach to the public authority charged with it. Where another body carries out activities on the public authority’s behalf, the public authority must maintain proper supervision over the third party body to ensure the public authority’s duty to have due regard to the section 49A(1) needs is discharged.
5. The duty is a continuing one.
6. It is good practice for those exercising public functions in public authorities to keep an adequate record showing that they have actually paid regard to their duties in relation to disability discrimination duties and pondered relevant questions. Proper record keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously.

The Court held that while it is good practice to do so, a failure to refer to section 49A(1) is not determinative of whether the duty has been performed. The Court stated that **“what is required is that the duty is exercised in substance with rigour and an open mind.”** The Court held that there had been a failure in each case to bring the duties adequately to the attention of the decision makers in making these particular decisions. The Court noted that it was likely that decision makers in both instances had a general awareness of the duty, for example through involvement in the DES. However, the Court had a fundamental objection to this general

awareness in that such awareness did not amount to a **“substantial rigorous and open minded approach.”** Although in each case the residents concerned, including those with disabilities, were questioned and consulted, this was part of an approach to residents as a whole. The Court held that it was not possible to discern whether due regard had been given to the need to take account of disabled persons’ disabilities even where that involved treating disabled people more favourably than other persons. Therefore, the Court held that there had been a failure to comply with the duty under section 49A(1) in both instances and in particular a failure to comply with sub-section (d).

Consultation and involvement

The respective disability equality schemes raised a legitimate expectation that disabled persons would be consulted in decisions affecting them, and each of the challenged decisions fell into that category. It followed that a duty to consult arose. Both authorities did choose to consult in these cases. The Court held that any consultation must be carried out properly. This meant that it must be undertaken at a time when the proposals are still at a formative stage and that sufficient reasons must be given to allow those consulted to give intelligent consideration and an intelligent response. There must also be adequate time for such a response.

The Court held that the consultation in Barnet had fulfilled these requirements. The consultation commenced soon after the Cabinet decision to make savings in the sheltered housing budget at a time when proposals were being formulated. The questionnaires to residents, service providers and support groups, including those representing disabled persons, and the involvement of independent contractors amounted to **“robust and substantial consultation.”** Sufficient information was given for the proposals to be considered and responded to and the six week period of consultation and the number of meetings held gave adequate time for that response. The Court held that **“this process went beyond consultation and amounted to the sort of involvement envisaged by the DES.”**

The Court held that Portsmouth, on the other hand, did not include alternative options to the planned change or address the concerns of the residents. The overall impression of Portsmouth’s communications was that it sought to deal with questions about a change that had already been decided upon, rather than consult upon proposals. The Court held that notice of between six and eleven days of meetings gave very little time for residents, particularly those with disabilities of sight or mobility or understanding, to seek appropriate



assistance from family or friends or support services in order to gain an appreciation of the implications of the planned change and to provide a meaningful response. The Court held that the consultation was inadequate and had been carried out when the planned changes had been formulated. Neither did it give sufficient reasons for addressing concerns or as to alternatives nor give an adequate time.

In relation to the issue of whether Barnet or Portsmouth were in breach of a legitimate expectation, raised by its DES, that involvement of disabled persons would take place through a particular mechanism, the Court held that the DES is a necessarily broad statement of principle which seeks to deal with all functions of the public authority concerned. The Court stated that **“the reasonable expectation to which the DES gives rise in the context of this case is that disabled residents should be involved in the decision making process in an effective way and that the duty under section 49A(1) of the Act should be complied with.”** In Barnet residents were involved. However, in the Portsmouth case they were not.

It had also been submitted that there had been a failure to follow the statutory code of practice called ‘The Duty to Promote Disability Equality: Statutory Code of Practice’ (the Code) made by the Disability Rights Commission (now part of the Equality and Human Rights Commission) under section 53A(1C) of the Act. The Court referred to the Court in Brown which accepted the following three propositions:

1. A public authority must take the Code into account when considering disability issues.
2. If a breach of a general duty under section 49A(1) is alleged and it appears to the Court that relevant guidance given by the Code has not been followed without cogent reason, then that may be a powerful factor which leads the Court to conclude that there is a breach of statutory duty.
3. It is for the public authority to explain clearly and convincingly the reason for the lapse.

The Court held that it was clear that the involvement of disabled persons envisaged by the Code in decisions affecting them **“goes beyond mere consultation.”** The Court held that each of the authorities failed to adopt an approach to mainstream disability equality in the decision challenged and in that regard there had been a breach of the Code which the Court stated was **“a factor supporting the conclusion that each is in breach of its statutory duty.”**

Impact assessment

The claimants made no criticism of the decision not to carry out a full impact assessment. The Court held that to find that there was or could be no adverse effect or impact on members of a disability group was unreasonable in the Wednesbury sense. In addition, the answer that resulted from the Barnet assessment only dealt with whether there could be an adverse impact, and did not deal with whether there could be a differential impact, as originally asked. The Court held that, having regard to the risks and possible impacts in the various reports, such an answer was also Wednesbury unreasonable.

The Court held that the failings in each case were sufficiently serious for the decisions to be quashed and for the matter to be reconsidered.

More information

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