LANDMARK CHAMBERS

The PSED and substantive equality duties in the Equality Act 2010: civil rights and obligations, private vs public law

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THE EQUALITY ACT 2010: SUBSTANTIVE DISCRIMINATION AND THE PSED

Equality Act 2010 (EA 2010) contains two quite different kinds of duty not to discriminate.

- Substantive equality duties: Part 2 sets out "key concepts", such as protected characteristic (age, sex, race, religion etc) and different kinds discrimination (direct, indirect, victimisation, harassment, reasonable adjustments duty, etc). Parts 3 – 8 then impose a duty on different kinds of persons and organisations (service providers and providers of public functions (Part 3), employers (Part 5) etc) not to discriminate in some or all of the ways referred to in Part 2. These are the "substantive equality duties"
- Public Sector Equality Duty (PSED): Section 149 EA 2010 imposes a duty on public bodies only to "have regard" to the need to achieve certain aims, and to avoid certain outcomes, related to discrimination, on public bodies only

Substantive Equality Duties: Private and Public

- Substantive equality duties are imposed equally, and without distinction, on both public and private bodies.
- Part 3 EA 2010 imposes substantive equality duties on all those exercising "public functions" (i.e. all public bodies). But even Part 3 is not limited to this group, since it applies also to "service providers", whose character may be private.
- Parts 4-10 apply to bodies who will often be private but may be public: e.g. employers (Part 5), schools (Part 6 Chapter 1) etc. There is, at least on the face of the Act, no distinction between public and private bodies in terms of how the duties apply.
- The substantive equality duties are for the most part duties owed to private individuals. There are specific exceptions to this e.g. service providers owe a duty to make reasonable adjustments to classes of disabled persons (para 2 of Schedule 2), but the duty is still owed to each and every member of that class (para 21 of Schedule 2).
- In considering whether substantive equality duties are breached, the court does not employ public law concepts such as *Wednesbury*. A court must decide for itself whether e.g. an indirectly discriminary act is "proportionate" (section 19(2)(d)) or whether an adjusgment is "reasonable". Again, no difference between public and private bodies.

Substantive Equality Duties: Enforcement

- Substantive equality duties are in effect "actionable" as a form of statutory tort.
- Part 9 of the EA 2010 creates an exclusive procedural regime for bringing claims relating to breach of the substantive equality duties. Section 113(1) provides:
  Proceedings relating to a contravention of [the EA 2010] must be brought in accordance with this Part
- Sections 114-119, and sections 120 – 135 then confer jurisdiction on, respectively, the county court, and the employment tribunal, to consider claims for breach of substantive equality duties.
- The county court though not the employment tribunal has jurisdiction to grant the remedies available in judicial review. But both have the right to grant damages, and, in the case of the county court, the remedies which the High Court may grant for breach of a "tort" (see section 119(2)(a)). Breaches of substantive equality duties sound, often most importantly in damages.
- In short, the substantive equality duties are a species of *private law right*. They create duties owed to individuals which are given effect to by a right to claim essentially private law remedies, whether against a public or private body.
- All this being so, the substantive equality duties give rise to "civil rights and obligations" within the meaning of Article 6 ECHR.

Substantive Equality Duties: The judicial review exception

- Section 113 prevents enforcement of the private law substantive equality duties other than by county court or employment tribunal claims in accordance with Part 9. Section 113(3) nevertheless sets out some exceptions to this, including, section 113(3)(a):

  (a) a claim for judicial review; …

- This does not create a freestanding right to bring judicial review against private bodies. But it makes clear that, where the body in question is a public body that is otherwise amenable to judicial review, the substantive equality duties may be relied upon.

- This will permit claimants to raise "generic" issues as to the way in which public (but not private) bodies are seeking to comply with their substantive equality duties. Examples include:

  (a) *MM v SSWP* [2014] 1 WLR 1716, where indiviudals sought to argue that the Secretary of State was not complying with his duty to make reasonable adjustments in the way that he dealt with benefits claims by persons with mental health or other cognitive disabilities.

  (b) *R (Osman) v SSWP*, where a blind individual complained of the Secretary of State's failure to comply with the reasonable adjustments duty in the way he communicated benefits outcomes to blind persons.

The Public Sector Equality Duty: section 149 EA 2010

- The PSED is completely different in character. It is found in section 149 EA 2010:
  (1) A public authority must, in the exercise of its functions, have due regard to the need to—
  [eliminate discrimination, advance equality of opportunity, foster good relations] ...
- The PSED is a duty imposed *on* public bodies, but it is not a duty owed *to* any person or individual.
- The PSED is not enforceable by a claim under Part 9 EA i.e. a claim in the county court under section 114 EA 2010 or a claim in the employment tribunal under section 120.
- Section 156 EA 2010 specifies that a breach of the duties in Part 11 (including the PSED) "does not confer a cause of action at private law". There is no right to damages for a breach of the PSED.
- The PSED is, as is repeatedly stated in the case law (e.g. *R (Bracking) v SSWP* [2013] Eq LR 60), not a duty to achieve an outcome. It is a duty to "have due regard". This is in form and substance a classic "public law duty" – section 149 in effect makes the matters it refers to "mandatory relevant considerations" (see *R (Friends of the Earth) v SST* [2021] 2 All ER 967). The decision maker *must* have regard to it, but provided it does so, it is not for the court to reach its own conclusion on what decision should be reached.

The Public Sector Equality Duty: Key characteristics

- So:
  (a) The PSED confers no private law rights and is not "actionable" in private law.

  (b) There is no right to damages

  (c) It is a classic public law obligation, to "have regard", and has been interpreted by the courts exclusively in public law terms and applying public law concepts.

  (d) The court has no role as the decision maker as to what outcome the PSED entails, but only as a reviewing court considering compliance on public law grounds.

  (e) The PSED does therefore not create any "civil rights or obligations" within the ECHR.

  (f) The PSED is however undoubtedly enforceable by judicial review, as innumberable cases show e.g. *Bracking*.

Section 113(3)(a): What is “judicial review”?

- Section 113(3)(a) provides that, notwithstanding that a “contravention of this Act must be brought in accordance with” Part 9, that does not prevent a claim for “judicial review”. The question has arisen as the scope of this exception.
- Many “public law” regimes concerning matters such as planning, rights of way, road traffic rights, public spaces protection, housing and homelessness, provide for a bespoke form of statutory judicial review (“statutory review”), in the High Court or occasionally county court, which replicates judicial review but with different time limits etc. These generally exclude judicial review. This is not offensive to the rule against “ouster” clauses (*R (Privacy International) v IPT* [2020] AC 491) because the substance of judicial review is protected.
- In *Hamnett v Essex CC* [2017] 1 WLR 1155, the Court of Appeal upheld Singh J ([2014] 1 WLR 2562) in saying that this form of statutory review was not “judicial review” within section 113(3)(a) of the EA 2010. This meant that the substantive equality rights could not relied upon despite the similarity between judicial review and statutory review.
- But in *Hamnett* it was assumed by Singh J that this did not prevent him from considering the PSED arguments, because they were not affected by section 113(1). The Court of Appeal did not comment. This approach (again without argument) was taken in *Adesotu v Lewisham LBC* [2019] 1 WLR 5637 and *Sheakh v Lambeth LBC* [2022] PTSR 1315.

PSED in other public law proceedings

- In *Hamnett*, *Adesotu*, and *Sheakh*, it is taken for granted that section 113(1) does not prevent the PSED from being relied upon in statutory review. Why might that be?
- Essentially, though not spelled out in the cases, it would be because a claim or proceeding does not become a "proceeding[…] for contravention of" the EA 2010 just because it *raises* PSED compliance. That reflects the character of substantive equality duties and the PSED:
  (a) The substantive equality duties create private rights, actionable in private law, and a statutory tort. The *purpose* of a claim raising such a right is directly to vindicate the right for its own sake. The *remedy* that is granted, whether damages or something else, flows *directly* from the breach of the substantive equality duty.
  (b) By contrast, the PSED is not a private right, and it is not a duty owed to individuals. No *remedy* flows directly from a breach of the PSED, and in many cases (e.g. an ongoing failure to make changes to reflect the requirements of the PSED) no remedy will be possible at all. If a breach of the PSED occurs, it *may* lead to a remedy if the effect of that breach is to render some public law act unlawful – e.g. a quashing of a decision or set of regulations. So a claim for judicial review, statutory review, or for example a statutory appeal, is not within section 113(1). Section 113(3)(a) is not needed to permit the PSED to be raised in judicial review, and it does not prevent it being raised in statutory review or appeal.

TS v SSWP [2020] UKUT 284 (AAC), [2021] AACR 4

- In this case, the Upper Tribunal held that it did not have jurisdiction in a statutory benefits appeal to consider an argument that a set of benefits was made in breach of the PSED, and fell to be disapplied, although the UT accepted that it does generally have jurisdiction to consier the legality of secondary legislation when determining benefits appeals under its *Foster v CAO* [1993] 2 WLR 292 jurisdiction. The UT held that section 113(1) did cover any proceedings in which the PSED was raised, and hence in effect barred the PSED from being raised in those proceedings. The UT indicated it would have found a breach of the PSED if it had jurisdiction to consider it.
- The UT expressly acknowledged that its conclusion was contrary to the approach in *Hamnett* etc, but said that the point was not argued in those cases.
- The Appellants in *TS* won the case under Article 8 ECHR, so had no reason to appeal.
- *TS* was drawn to the attention of counsel for Lambeth in the *Sheakh* case, but he chose not to argue that it meant that the court had no jurisdiction to consider it.
- The Upper Tribunal's jurisdiction on statutory appeal is indistinguishable here from the jurisdiction of the High Court in a "statutory review" (as in *Hamnett*, *Sheakh*). Either section 113(1) applies to the PSED, in which case it can't be raised in either forum, or it does not, in which case it can be raised in both.

JS v SSWP, Upper Tribunal 3-judge panel pending

- *Hamnett, Sheakh et al*, on the one hand, and *TS v SSWP,* on the other, leave an unsatisfactory position of uncertainty. On the one hand, the courts in *Hamnett* and *Sheakh* are plainly more senior and more authoritative. On the other, the point was argued out in *TS v SSWP,* but not in *Hamnett et al*.
- However, the Upper Tribunal has now granted permission to appeal in another case, "JS", on the basis that this issue should be further considered by the UT. That is likely to be heard in the Autumn and likely before a 3-judge panel, which will include a High Court judge. The "merits" of PSED compliance is in issue so it is theoretically possible the UT will find no PSED breach and hence see no need to decide the jurisdiction issue, but it is likely to want to resolve it.
- The case will be important because it will determine:

  (a) An issue about the fundamental character of the rights conferred by the PSED,

  (b) Whether the PSED can be raised in proceedings outside of judicial review. It cannot be raised in any other proceedings other than in the specific area of immigration (see section 113(3)(b) to (d)). Very far reaching e.g. it is common for the PSED to be raised in certain planning contexts where it may be very important).

Thank you

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