Case Note: TM v Metropolitan Housing Trust Limited

Background

TM suffers from various mental health difficulties, and is a disabled person within the meaning of the Equality Act 2010. He lives in a property owned by Metropolitan.
On a number of occasions, TM behaved in a violent or offensive way towards others. These included assaults on housing officers in May 2016 and May 2018. Following the 2018 incident, Metropolitan's anti-social behaviour officer, P, considered whether to issue possession proceedings. Having undertaken various steps to assess the proportionality of bringing possession proceedings, P decided to commence proceedings. These were resisted on numerous grounds, including an allegation that Metropolitan had breached the public sector equality duty ('PSED'), set out in section 149 of the Equality Act, and a claim that the decision to commence possession proceedings was discrimination arising from disability, contrary to section 15 of the Equality Act.

At the point that proceedings were commenced, P had been unable to obtain evidence from TM's psychiatrist. However, in October 2018, after proceedings had been commenced, the psychiatrist produced a report, in which she confirmed that TM had severe mental health problems, and lacked capacity to conduct litigation.

P did not carry out a further assessment of the appropriateness of seeking possession after receiving this medical evidence. When the matter came on for trial in September 2019, P agreed in cross-examination that had he had the medical evidence at the time that he made the initial decision to seek possession, he would have taken a different approach, and would have considered alternatives to eviction. However, he also said that he still considered the decision to seek possession to be proportionate.

First instance decision

Following a three-day trial, the recorder made a possession order, but stayed enforcement in order that suitable alternative accommodation could be obtained for TM. As regards the PSED defence, the recorder found that Metropolitan had complied with this at the time of the decision to seek possession, but had breached it by subsequently failing to review this decision in light of later medical evidence. Nonetheless, he concluded that this should not result in the dismissal of the possession claim.

As to the allegation that the decision to seek possession was discrimination arising from disability, the recorder accepted that seeking possession amounted to unfavourable treatment of TM, that this unfavourable treatment was because of TM's conduct, and that TM's conduct was a consequence of his disability. As such, a *prima facie* case of discrimination was made out. However, the recorder went on to find that the decision to seek possession was a proportionate means of achieving a legitimate aim, and therefore not unlawful. All defences were accordingly dismissed.

The appeal

TM appealed against the dismissal of his PSED and discrimination arising from disability defences. Mr Justice Johnson dismissed both grounds of appeal. As regards discrimination arising from disability, he upheld the recorder's decision that the decision to seek possession was a proportionate means of achieving a legitimate aim. In making this decision, he applied the decisions of the Supreme Court in *Aster Communities Limited v Akerman-Livingstone* [2015] AC 1399 and of the Court of Appeal in *Birmingham City Council v Stephenson* [2016] HLR 44, which indicate the need to consider alternatives to eviction. However, Johnson J concluded that on the recorder's findings there were no alternatives to a possession claim – the only alternative identified by TM had been tried following a previous assault on a housing officer, and had not worked.

In addressing the PSED arguments, Johnson J applied the Court of Appeal decisions in *Barnsley MBC v Norton* [2011] HLR 46 and *Forward v Aldwyck Housing Group Limited* [2019] HLR 47. He agreed with the recorder that, while Metropolitan had breached the PSED, this breach had been remedied when P considered the matter afresh in the course of his evidence. Moreover, Johnson J held that even if the breach had not been remedied, the decision would have been highly likely to be the same, whether or not the breach had occurred. He had regard to subsection 31(2A) of the Senior Courts Act 1981, which provides that when a breach of a public law duty has made no difference to a decision, relief should be refused. Taking this into account, Johnson J held that any breach that had not been remedied was insufficiently material to justify the refusal of a possession order.

For these reasons, the appeal was dismissed.

An application by TM for a certificate authorising a leapfrog appeal to the Supreme Court has been refused. TM has sought permission to appeal to the Court of Appeal.

Points arising

While the appeal did not succeed, it nonetheless illustrates various points to which all social housing landlords should have regard. In particular, the decision concerning discrimination arising from disability illustrates the need to consider alternatives to eviction, and the risk that a failure to take alternative steps may result in a finding that unlawful discrimination has occurred.

As regards the PSED, Metropolitan was fortunate that its decision-maker was able to carry out a sufficiently thorough review of his earlier decision from the witness box. As both the recorder and Johnson J noted, the decision to evict should have been reconsidered at an earlier stage. Social housing landlords carrying out evictions where the tenant is or may be disabled would be well-advised to keep the decision to seek possession under ongoing review, particularly when new relevant evidence presents itself, and it is advisable that in such cases a further review be conducted prior to trial in any event. In all such reviews, regard should be had to the PSED, and a detailed written record of the decision, and the reasons for it, should be kept. Not all landlords will be able to argue, as Metropolitan were, that the decision would have been the same regardless of compliance with the PSED. Those who cannot successfully advance this argument may lose winnable possession claims.

A point that remains unresolved is whether a court would be entitled to make a possession order even in the event of an unremedied material breach of the PSED. This issue was raised in Metropolitan's Respondent's Notice, but in light of the conclusions that he reached, Johnson J did not consider it necessary to address it. The question of the extent of the court's residual discretion to refuse a remedy for a material breach of the PSED (also raised, and not dealt with, in *Forward v Aldwyck Housing Group*) must await determination on another occasion.

Postscript

Since the judgment in *TM*, the Court of Appeal has handed down its judgment in *Luton Community Housing Limited v Durdana* [2020] EWCA Civ 445, yet another case concerning the PSED. In *Durdana*, the landlord's appeal was allowed, in circumstances where a judge had dismissed a possession claim for breach of the PSED, without considering whether the outcome would have been highly likely to be the same, even had there been no breach.

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Liam Varnam (2007 call) is a member of Chambers' property group. Along with other group members, he has extensive experience of acting in possession proceedings for private and social landlords, as well as tenants, including those claims where defences arise under the Equality Act.