

Judicial Review Masterclass: The Public Sector Equality Duty

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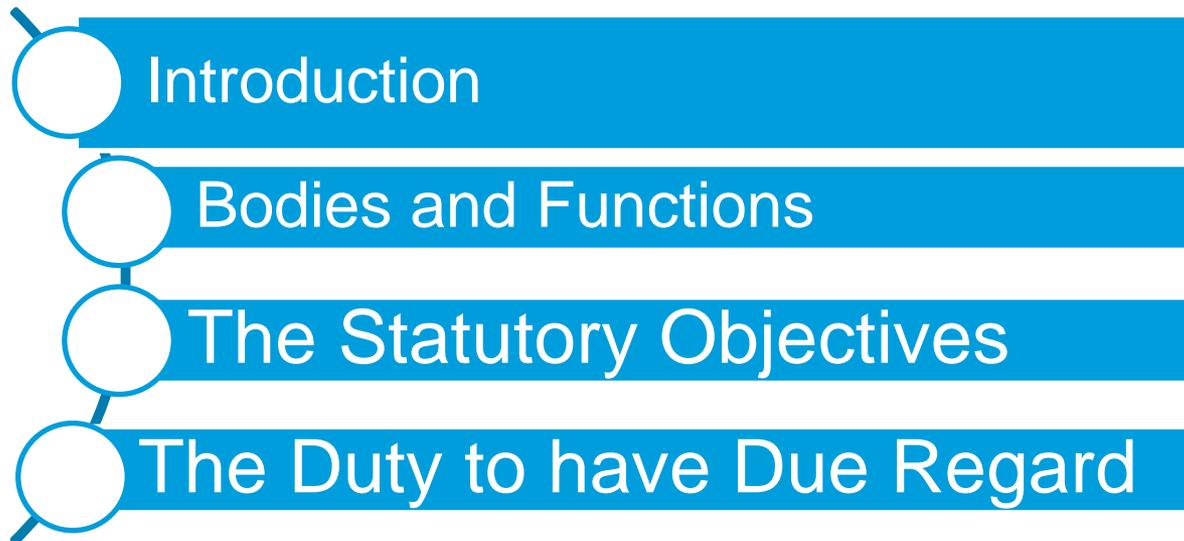
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After the webinar we will send a link to the recording and a PDF set of the slides to everyone who registered for it.

If you have a question, please submit via Q&A.
There will be time devoted to questions after the presentations.

Feedback – we will be sending a link to a feedback survey following the webinar.
We would be grateful if you could spare a few minutes to complete, we value your feedback.

Structure



1. Introduction

Introduction: The importance of the PSED

***R (Bridges) v Chief Constable of South Wales Police* [2020] 1 WLR 5037, para 179:**

The reason why the [public sector equality duty] is so important is that it requires a public authority to give thought to the potential impact of a new policy which may appear to it to be neutral but which may turn out in fact to have a disproportionate impact on certain sections of the population

Introduction: success rate of challenges

- 2010-2012: 50% of PSED challenges that reached a substantive hearing succeeded
- 2017-2022: 10-20% of such PSED challenges successful
- Likely reasons for decrease:
 - Improvement in decision-making
 - Courts less sympathetic
 - Section 31(2A) Senior Courts Act 1981

Introduction: Codes of Practice and Guidance

- EHRC has the power to issue a statutory Code of Practice but none issued
- EHRC has the power to issue guidance:
 - *Technical Guidance on the PSED*, England and Wales
 - Out of date
- Public authority's own guidance
 - Failure to act in accordance without good reason may be unlawful: *Munjaz* [2006] 2 AC 148, para 21

Introduction: Other related duties

- Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353)
- Equality Act 2010 (Statutory Duties) (Wales) Regulations (SI 2011/1064)
- Section 1 Equality Act 2010: socio-economic inequalities
 - In force in Wales (and Scotland) but not England
 - Applies to “strategic decisions” about how functions are exercised
 - Guidance: *A More Equal Wales: The Socio-economic Duty Equality Act 2010: Statutory Guidance*

2. Bodies and Functions subject to the PSED

Bodies

- Public authorities:
 - Listed in Schedule 19 Equality Act 2010
 - Must comply with PSED in relation to all functions
- Persons who are not public authorities but who exercise public functions: s 149(2)
 - Only need to comply with PSED in relation to “public functions”
 - Exclusion: House of Commons, House of Lords, The National Assembly for Wales: Sch 18
 - *Adiatu* [2020] PTSR 2198: Promotion of Act of Parliament not subject to PSED, cf Secondary legislation

Functions

- Section 149(1): due regard to the need to achieve the statutory objectives “in the exercise of its functions”
 - Construed broadly: *Pieretti* [2011] 2 All ER 642 applying *Hazell* [1990] 2 QB 697
 - Formulation of general policies and individual decisions
 - The carrying out of a common law obligation such a consultation: *Binder* [2022] EWHC 105 (Admin), paras 79-85
 - Sch 18: various statutory exclusions in the context of immigration and education

3. The Statutory Objectives

Section 149(1)(a): elimination of discrimination etc

- Direct and **indirect** discrimination, discrimination arising from a disability, gender reassignment discretion, pregnancy and maternity discrimination, failure to comply with duty to make reasonable adjustments
- Victimisation and harassment: eg *Hough* [2022] EWHC 1635 (Admin)

Section 149(1)(b): Advancement of equality of opportunity

- *R (Baker) v SSLGC* [2008] LGR 239, para 30:

promotion of equality of opportunity (and indeed good relations) will be assisted by, but is not the same thing as, the elimination of racial discrimination . . . the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination
- Protected characteristics
- Section 149(3)

Section 149(1)(c): Fostering good relations

- Rarely features in case law: *Karia* [2014] EWHC 3105 (Admin)
- Section 149(5)

4. The Duty to have Due Regard

Introduction

- “Due regard” to need to achieve the three statutory objectives
- Duty not to achieve a particular outcome such as the elimination of unlawful discrimination: *Baker* [2008] LGR 239, para 31
- Process rather than outcome: *MA* [2014] EWCA Civ 13, para 83
- Mandatory relevant consideration?

Bracking [2013] EWCA Civ 1345, para 26

- Sets out “general principles”
- Principles not subject to argument as “uncontroversial”
- Principles should not be “treated as though it were a statute”: *Powell* [2019] EWCA Civ 23, para 44
- Some principles “wrong”: see *DAT* [2016] EWHC 1876 (Admin) (must be aware of duty), *Pritchard* [2020] PTSR 2255 (required to assess how to eliminate risk of adverse impact)

Discharging the duty to have due regard

- “Due regard” regard that is “appropriate in all the circumstances”: *Baker* [2008] LGR 239, para 31
- Supreme Court in *Hotak* [2016] AC 811, para 74 recognised that this was not particularly helpful but said it was not possible to be more precise or prescriptive
- Highly fact sensitive
- Some decisions: No regard necessary: *Lewisham* [2013] ELR 281, paras 145-148; *End Violence against Woman* [2021] EWCA Civ 350

Being aware of, and understanding, the legal framework

- Normally need to be aware of the existence of the PSED:
 - see *Brown* [2009] PTSR 1506, *Bracking*, para 26(5)(i) but cf *Baker* [2008] EWCA Civ 141
- An incomplete or erroneous understanding of the statutory objectives is likely to render the decision unlawful:
 - *Bailey* [2011] EWCA Civ 1586: failure to understand indirect discrimination
 - *DAT* [2016] EWHC 1876 (Admin) decision makers directed to “keep the welfare of service users and their families at the forefront of their mind, particularly those that are most disadvantaged”

Gathering relevant information (1)

- A public authority must direct itself properly as to the facts and to do so it may need to take reasonable steps to obtain relevant factual information: *Bridges* [2020] 1 WLR 5037, para 181
- “relevant information” will usually include information as to the likely impact that the proposed exercise will have on achieving the statutory objectives: *Bridges*, para 181
- For the public authority to determine the manner and extent of the enquiry subject to irrationality review by the court: *Sheakh* [2022] PTSR 1315, para 73

Gathering relevant information (2)

- A public authority must comply with the PSED regardless of whether it is drawn to its attention: *Baker* para 29
- If an individual raises a possible adverse impact but the public authority fails to consider this possible adverse impact, this may well mean that there has been a failure to have due regard: *Ward* [2019] PTSR 1738
- Summary of factual information must be fair and accurate not Panglossian: *Bracking* paras 26(7), 62 and 70
- Consultation generally not required to comply with PSED, *Hollow* [2019] PTSR 1871, paras 83-84 but if carried out properly likely to be sufficient to discharge the duty of inquiry

Consideration of all the circumstances (1)

- In relation to the need to achieve the statutory objectives the public authority must consider “all the circumstances”:
Baker para 31
- Circumstances will depend on the individual case but may include the nature of any existing discrimination, the nature of any existing equality of opportunity and the likely impact of the public authority’s proposed exercise of the function
- Can consider the broader picture: *West Berkshire DC* [2016] 1 WLR 3923, para 84

Consideration of all the circumstances (2)

- Consideration needs to be “reasonable and proportionate”; public authority not required to consider every potential ramification *Bailey* [20212] LGR 530
- Is there a need to assess ways in which the risk of any adverse impact may be eliminated before the function is exercised: *Kaur* [2008] EWHC 2062 (Admin) para 23, See also *Bracking* para 26(4)
- No *Bracking* is wrong on this: *Pritchard* [2020] PTSR 2255, paras 87-88

Approach of the court on review

- 2 Options:
 - Irrationality standard: *D and S v Manchester CC* [2012] EWHC 17 (Admin), *S* [2013] 1 All ER 66
 - Court determines for itself: *Meany* [2009] EWHC 559 (Admin), para 79; *Boyejo* [2009] EWHC 3261 (Admin)
- Weight of authority: court determines whether public authority has, in fact, had due regard. More consistent with *Bracking* and *Hotak*

The stage at which due regard must be had

- Before the function exercised
- “the duty is a continuing one” *Brown* [2009] PTSR 1506
- What does this mean?
- When drawing up policy but also when applying it
- If limited information initially available, monitor impact: *Unison* [2016] 4 All ER 25
- Post decision consideration: *C* [2009] QB 657; cf *Metropolitan Housing Trust Ltd* [2022] 1 WLR 2161, paras 41-51

Who must discharge the duty?

- “PSED is “non-delegable”, see *Brown* para 94
- What does this mean?
- Does not prevent:
 - contracting out: *Panayiotou* [2018] QB 1232
 - Delegation or Ministerial functions being exercised by officials pursuant to *Carltona* doctrine
- Decision-maker who is exercising the function must apply his or her mind to the duty him or herself, see *Hunt* [2013] EWCA Civ 1320 and *National Association of Health Stores* [2005] EWCA Civ 154

Extra-territorial reach of PSED

- Section 149(1)(a): eliminate discrimination etc. Equality Act 2010 generally only applies to discrimination etc within the United Kingdom. So generally not need to have due regard to the statutory objective in s 149(1)(a) when persons affected are outside the UK: *Hoareau* [2019] 1 WLR 4105
- Section 149(1)(b) and (c) contain no such similar limitation. CA in *Turani* [2021] 1 WLR 5792 only need to have due regard to advancement of equality of opportunity of persons located in the United Kingdom

Equality Impact Assessments

- What is an EIA?
- No requirement to carry out an EIA (unless public authority has a policy requiring one)
- Generally a good idea where promulgating policies or where decisions may have an adverse impact on a significant number of individuals who have protected characteristics
- An EIA not necessarily sufficient to discharge the PSED

Evidential matters

- EIA not only way of demonstrating compliance with the PSED: transcript of debates and text of decision: *Jewish Rights Watch Ltd* [2018] 4 All ER 1040, paras 35-39
- Good practice to keep contemporaneous records of steps taken to comply with the PSED, *Bracking* para 26(5)(iv)
- Such record-keeping encourages transparency and helps to ensure decision maker consciously complies with PSED: *Brown*, para 96

Consequences of breach

- *R (C) v SSJ* [2009] QB 657: normal remedy: decision quashed
- *Aldwyck Housing Group Ltd v Forward* [2020] 1 WLR 584: no general rule that decision must necessarily be quashed
- Broad discretion as to remedy
- Section 31(2A) Senior Courts Act 1981

Q&A

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