

BRIEFING

Discrimination and Housing Law Briefing

Introduction

The Disability Discrimination Act (DDA 95) of 1995 and the subsequent Disability Discrimination Act (DDA 05) exist to ensure that people with disabilities are not discriminated against. The DDA 95 defined a disabled person and makes it unlawful for a person (landlord) who manages premises to discriminate against a person with a disability who occupies those premises, 'by evicting him or subjecting him to any other detriment. The previous Court of Appeal cases *Brazier v North Devon Homes* and *Manchester City Council v Romano* have sought to establish the interface between housing and disability law. These cases have only considered the position where the court had discretion as to whether to make a possession order. In the latter case the court determined that, if the tenant can show that the landlord's conduct amounted to unlawful discrimination under the DDA 95, that factor should be taken into account where determining the reasonableness of the order. In a recent Court of Appeal case, *Lewisham versus Malcolm*, however the court did not have such discretion. In that case the Court of Appeal held that the landlord who had served a notice on a tenant who had lost security of tenure had unlawfully discriminated against the disabled tenant, and dismissed the possession proceedings.

Background

Mr Malcolm who was diagnosed with schizophrenia had a local authority secure tenancy. He exercised his right to buy but before the purchase was complete he sublet his flat. Lewisham Council served a notice to quit as he had lost his security of tenure and the County Court gave a possession order.

Court of Appeal Judgement

The Court of Appeal held that Mr Malcolm was disabled as his mental health did have a substantial adverse effect on his ability to carry out normal day-to-day activities. Mr Malcolm could therefore rely on the DDA 95 in the possession proceedings, even though the court has no discretion not to make the possession order. The court held that it should dismiss the proceedings if it is satisfied that their pursuit is unlawful under the provisions of the DDA 95. The Court of Appeal held that the County Court should have found that there were an appropriate relationship between Mr Malcolm subletting and his disability, even though it was not shown that his disability caused him to enter into the subletting. Lewisham's lack of knowledge of Mr Malcolm's disability did not preclude a finding of discrimination.

What is now unclear is the status of Mr Malcolm's occupation. If the notice to quit served by Lewisham is lawful he will be a tolerated trespasser as the notice has terminated his tenancy. If the notice to quit is unlawful he will still only be a contractual tenant having lost his secure tenancy agreement on subletting his property. Either way he will have presumably lost his right to buy along with other rights enjoyed by secure tenants.

Implications of the case

This case raises issues for both private and social housing providers in particular for those providing supported housing. A natural extension of this judgment is that the DDA 95 can also be used as a defence for other possession proceedings where the court has no discretion under housing law. In *Community Housing Association v Wye* (2007) the landlord served a s21 notice as a result of the defendant's nuisance. The defendant defended the possession action counterclaiming for damages and an injunction on the basis he was a disabled person and the possession claim was discriminatory and unlawful. The District Judge found the evidence did not establish the defendant was a danger to anyone other than himself and there was not evidence to show why the possession order was necessary to protect identified persons from risk. The Judge found that the possession proceedings were unlawful and whilst not allowing damages gave an injunction preventing the landlord from continuing with the claim. It follows that this would also apply when mandatory grounds, for example ground 8, are used on an assured tenancy or if an assured tenant loses their assured status by subletting their flat.

The issues for supported housing providers appear to be three fold:

- Providers are concerned that this will increase the tensions already present in private sector leasing. A knee jerk reaction to the Lewisham case may cause both social and private landlords to be cautious about letting to people with disabilities
- The possession of a tenancy may be prevented if a mandatory avenue is pursued, for example, the tenant is not engaging with support or does not want to move-on
- This will increase the raft of tolerated trespassers in the sector. The CLG has recognised the problems caused by large numbers of existing tolerated trespasser and is consulting the sector.

It is early days for the long term effects of this judgment to become clear, and an appeal may go to the House of Lords, so landlord concerns may be unnecessary. For the ruling to apply, firstly there has to be a relationship between the disability and the reasons why the notice was served. For example, if a notice has been served because a resident with a disability was being required to move out of short term accommodation, there is unlikely to be an issue because all residents are expected to move out when their stay comes to an end. It would be difficult to see how the court would find this discriminatory. It may be more complex however, if a tenant with a disability does not engage with support. The court could consider that the tenant's non engagement is related to their disability. What will become more critical is whether the tenant can be offered suitable alternative accommodation, as this should circumvent the need for possession proceedings. If the resident refuses to move, again it would be difficult to see how this would be found to be discriminatory.

The positive implications of the case is that all social landlords especially those managing supported housing will have to be fully accountable for their actions

concerning those with disabilities, even where reasonableness does not have to be proven. What providers should be doing is reviewing their policies and procedures in line with this decision. Providers may find it helpful to assess the disability impact of their policies, procedures and practices. Good needs and risk assessments undertaken at referral stage can identify areas where service users need support to maintain their tenancy due to their disability. The support put in place should avert the need for possession action or where possession action is taken clearly demonstrate that the accommodation cannot meet the service users' needs and possession action is reasonable. Providers should continue to work with private sector leasing in order to promote letting to those who are vulnerable. Where landlords express concerns about letting to people with disabilities, providers should demonstrate that with robust support arrangements, letting to vulnerable people should represent no higher risk than general letting. Providers should also be ready to support service users who believe that they are not being considered for private sector leasing because of their disability as this is in contravention of the Disability Discrimination legislation.

Sitra has been advised that this case will be appealed to the House of Lords but this could take some time. In the intervening time and whatever the result, we would encourage landlords to use discretionary grounds rather than mandatory grounds in cases of nuisance especially given the result in the Community Housing Association case. The current disability case law on discretionary grounds has allowed possession when it is justified because of the effect on other tenants.