SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2022] SC GLW 23

A1548-18

JUDGMENT OF SHERIFF TONY KELLY

in the cause

J. (A.P.)

Pursuer

against

GLASGOW CITY COUNCIL

Defender

Pursuer: Sutherland, Advocate
Defender: Byrne, Advocate

Glasgow, 4 August 2022

The Sheriff having resumed consideration of the cause sustains the defender's plea in law number two and dismisses the action; appoints the cause to a hearing on expenses.

NOTE

[1] In this action the pursuer seeks declarator that she was unlawfully discriminated against by the defender in contravention of the Equality Act 2010. She alleges direct discrimination in terms of section 13 of the Equality Act 2010; being treated unfavourably in consequence of her disability in terms of section 15 of the Equality Act 2010; that the defender has breached its duty under section 29(7)(b) of the Equality Act 2010; and, finally, that it failed to comply with the public sector equality duty in terms of section 149 of the Equality Act 2010.

The pleadings

[2] The pursuer is impaired to the extent that she is unable to carry out normal day to day activities. She suffered from depression. She registered with Glasgow Housing Association and made application to the defender on the basis that she was homeless. On 17 November 2017 the defender decided she was homeless and not intentionally homeless. The defender was aware of the pursuer's disability because an occupational therapy assessment was carried out and a report submitted to it. As a result of deciding that the pursuer was homeless, the defender had a duty to accommodate the pursuer in terms of section 31(2) of the Housing (Scotland) Act 1987.

[3] Because she had previously made application to the Glasgow Housing Association she was already being dealt with in terms of its allocation policy, within Group 5. In this grouping there was a recognition that the pursuer and others within the group had limited mobility. As a result accommodation suitable for those with disability needs was made available to those within this group.

[4] A homeless person not possessing the pursuer's disability would normally be allocated housing in terms of the Glasgow Housing Association's allocation policy in Group 2. In this grouping, properties for those without the pursuer's disability needs would be made available to those waiting to be housed within a period of approximately 12 weeks. By contrast, those within Group 5 would typically require to wait at least six months before they would be able to bid successfully for properties available to those in that group. The accommodation available to those within Group 5 – recognising the limited mobility needs of those seeking to be housed in that group - is generally on the ground floor, with a maximum of three steps and a handrail and a shower over the bath.

Defender

[5] Mr Byrne, for the defender moved the court to sustain the defender's first and second pleas in law, repel the pursuer's first and second pleas in law and dismiss the action.

[6] Counsel essayed the provisions of sections 13 and 15 of the 2010 Act, where the minimum requirements of a relevant claim are to be found. For conduct to be unlawful under section 13 of the 2010 Act, the pursuer required to aver that the defender subjected the pursuer to less favourable treatment *because of* a protected characteristic - not merely treatment *connected to* a particular characteristic.

[7] In terms of section 15 of the 2010 Act, the pursuer required to aver and subsequently prove: (i) that there was a *something* arising in consequence of a disability; and (ii) that the pursuer here was subjected to unfavourable treatment because of that *something*: *Page v NHS Trust Development Authority* [2021] EWCA Civ 255 at [68] and *Pnaiser* v *NHS England and Anr* [2016] IRLR 170 at [31]. Mr Byrne submitted on no view could it be said that these requirements were met.

[8] The pursuer avers treatment at a high level of generality. She makes averments about the waiting time applicable for all properties. The pursuer has left out of account a crucial aspect of the comparison. In order for it to be accurate and specific the comparison must be between like properties i.e. ground floor properties in the pursuer's chosen area. The omission of a specific averment that a person possessing the pursuer's disability is significantly disadvantaged in obtaining an equivalent type of property was fatal. The pursuer is at a disadvantage when compared with a non-disabled person. However, in the comparison made on Record such a person waiting in Group 5 would not have obtained a ground floor property within the period specified by the pursuer. She was treated more

favourably than those on Group 2, where it was more likely she would obtain a ground floor property more quickly than a non-disabled person.

[9] Mr Byrne relied upon section 23(1) of the 2010 Act. In connection with the characteristics of the comparator to be selected, reference was made to section 23(2) of the 2010 Act, *London Burgh of Islington* v *Ladele & Liberty* [2009] EWCA Civ 1357 and *Azmi* v *Kirklees MBC* [2007] ICR 1154 at [49]-[56].

[10] In the application of sections 13 and 15, it was important that the test was correctly identified. The test was not that the pursuer may have suffered certain consequences "but for her disability". That was a different test, see *R (E) v Governing Body of JFS* [2009] UKSC 15; [2010] 2 AC 728. In reality the pursuer's pleadings did not disclose an allegation of treatment by reason of disability but rather of a suitable policy: that was the basis upon which accommodation was allocated.

[11] Mr Byrne referred to the Services, Public Functions and Associations Statutory Code of Practice at 6.9 - 6.11. The pursuer made detailed averments about the defender's reasons for failing to deal with her request but these fell short of the requirement to aver a particular "thing" and that her treatment arose because of the "something".

[12] The pursuer makes averments about the defender having arrangements between it and the registered social landlord. This did not occur or arise as a result of the pursuer's disability. Reference was made to *Lewisham LBC* v *Malcolm* 2008 UKHL 43; [2008] 1AC 1399. The claims under sections 13 and 15 were irrelevant and ought to be dismissed.

[13] Mr Byrne also submitted the pursuer's averments lacked specification. Those submissions mirrored the attack upon the relevancy of the pursuer's case. The omissions regarding specification were so fundamental, the consequence was that the pursuer's case fell to be dismissed.

[14] Turning to the pursuer's case under sections 20 and 21 of the 2010 Act, the pursuer required to identify a provision, criterion or practice; that is something broader in its application than an individual or particular decision;: *Ishola* v *Transport for London* 2020 EWCA Civ 112 at 38. The provision, criterion or practice, must have been applied to the pursuer and caused her a substantial disadvantage. There were reasonable adjustments that could have alleviated that disadvantage but those reasonable adjustments were not made by the defender.

[15] The defender's practice was not the subject of averment. The pursuer chose to focus instead on Glasgow Housing Association. There was no offer to prove a generalised policy or practice, which was fatal: *R (McDonald) v Royal Borough of Kensington & Chelsea* 2011 UKSC 33; [2011] 4 All ER 881 at 21 and 22. There was no substantial disadvantage, as was required to be averred by the pursuer in terms of section 20(3) of the 2010 Act. That omission meant the pursuer could not lead evidence of a fundamental aspect required for such a claim to be successful. The reasonable adjustments that were subject of averment missed the point – they do not compare materially similar situations.

[16] The public sector equality duty (PSED) in terms of section 149 of the 2010 Act was an obligation of process rather than mandating a specific outcome: *Bracking* v *Secretary of State for Work & Pensions* 2013 EWCA Civ 1345 at 25. The pursuer averments about the specific outcome is not what the duty to have regard to is directed to. When one looked at the pursuer's pleadings it is clear that the defender had due regard to her disability. In any event, the averments in this regard were wholly irrelevant and lacking in specification: *R (on the application of Nur) v Birmingham City Council* [2020] EWHC 3526 (Admin); 2021 HLR 41 at 160.

Pursuer

[17] Mr Sutherland, on behalf of the pursuer explained the allocations policy that applied in connection with the pursuer's application to Glasgow Housing Association. In light of her disability she was placed in Group 5. She was subsequently assessed as being homeless by the defender. This gave rise to a statutory duty to accommodate her in suitable accommodation. In light of the occupational therapy assessment, that meant, in essence, that the property required to be on the ground floor with an accessible bath and handrail. The defender had mischaracterised the pursuer's complaint. Instead of it being a complaint regarding the allocation within Group 5 or between Group 2 and Group 5, it was about the difference in treatment between homeless persons in general and those possessing the protected characteristic of the pursuer.

[18] At Article 5 of condescendence, page 14 of the Closed Record, the pursuer avers:

> "The pursuer suffered from direct discrimination on the part of the Defenders under section 13 of the 2010 Act and discrimination under section 15 of the 2010 Act because she was treated less favourably than a non-disabled person homeless person when the defenders were exercising its public function under section 31(2). In November 2017 a non-disabled homeless person would have been referred to GHA under section 5 and they would have obtained permanent accommodation for the purposes of subsection 31(2) within a period of approximately 12 weeks from the date of reference. The Defenders arrangements with GHA for the exercise of its public functions under section 31(2) did not make provision for a homeless person, who was a disabled person with restricted mobility to be accommodated within the same timescale as a non-disabled person who was homeless. Because the Pursuer was disabled she was required to remain on the GHA waiting list for accommodation within Group 5 where the timescale for waiting for permanent accommodation was significantly longer than it was for a non-disabled homeless person in Group 2."

This was sufficient to meet the requirements of both sections 13 and 15 of the 2010. The pursuer had identified the correct and appropriate comparator.

[19] Mr Sutherland did not take any issue with the statements of general principles

regarding the construction of the 2010 Act in the case law referred to by Mr Byrne. He referred to *JFS*, and the excerpt at paragraph 59 from the speech of Lord Goff of Chievely in *Birmingham City Council ex p Equal Opportunities Commission* [1989] 1 AC 1155. This was the correct characterisation of the manner in which the pursuer was treated here. She was left unhoused by the defender for a considerably longer period as a result of the protected characteristic in Group 5. Those in an identical situation found to be homeless without the protected characteristic of the pursuer's disability would have been housed within a 12 week period. That disadvantage meant that the pursuer was treated less favourably. The pursuer had averred sufficient by way of comparator to allow the matter to proceed to proof.

[20] Mr Sutherland turned to the defender's written submissions and paragraph 18 in particular. Referring to Articles 2 and 3 of condescendence, Mr Sutherland's submitted that the pursuer had averred a sufficiently specific case - that she was treated less favourably than others who did not possess a disability.

[21] In connection with sections 20 and 21 of the 2010 Act, Mr Sutherland accepted that the pursuer required to identify a provision, criterion or practice. In Article 3 of condescendence, at page 7, the pursuer deals with the relationship between the defender and Glasgow Housing Association. This referred to a protocol between the defender and registered social landlords. The pursuer also averred how "the defenders would normally fulfil its obligations…". The pursuer also relied upon averments in Article 6 of condescendence that:

> "The pursuer was substantially disadvantaged by the defenders practice of requiring a person in GHA's Group 5 to remain there without seeking secure for them the same priority of housing allocation in the same timescale for being able to bid successfully in a property that a non-disabled person had in Group 2…

> Since in or about November 2019 GHA has operated an allocations policy which allows persons in the equivalent to Group 5 to be given a priority equivalent to Group 2".

This latter averment offered to prove that the policy had changed. This was an important context that identified a provision, criterion or practice.

[22] In connection with the public sector equality duty Mr Sutherland focused on Article 7 of condescendence. Mr Sutherland said this was not an averment of an outcome but properly construed was a sufficient and specific averment regarding a breach of section 149 of the 2010 Act.

[23] For Mr Sutherland the case of *Nur* was not helpful to the Court. It dealt with a separate and different set of circumstances regarding allocations policy in respect of the housing and the failure to identify sufficiently those with protected characteristics. The pursuer sought proof before answer with all preliminary pleas standing.

Reply

[24] Mr Byrne reiterated the requirements in section 23 of the 2010 Act of the comparator selected requiring to be of no material difference. The pursuer had failed to identify such a comparator. The pursuer ought to have been comparing her circumstances with a non-disabled person seeking a ground floor flat. Mr Byrne did not accept the 'but for' test. This was what concerned the court in *JFS* rather it was clear that the "cause of" test was the appropriate one in the circumstances.

Decision

[25] For a plea of relevancy to succeed, the defender requires to satisfy the court that on

no view, taking the pursuer's averments *pro veritate*, is the pursuer able to succeed*: Jamieson v Jamieson* 1952 S.C. (H.L.) 44 per Lord Normand at 30.

[26] Section 13 of the Equality Act 2010 provides:

> "13 Direct discrimination
> (1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
> (3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."

[27] When assessing whether discrimination has occurred the court has to determine whether the defender treated the pursuer less favourably than it has treated another person in not materially different circumstances. The further and consequential question is whether that differentness in treatment was on the grounds of disability. At this juncture, the parties' submissions are upon the prior question and assume the pursuer will be able to prove all that she has stated in her pleadings. The approach of the court is to ask whether it will be able to, on the factual matrix outlined by the pursuer, make findings in fact compatibly that would be sufficient to meet the test set out in the 2010 Act. The defender says the pursuer's circumstances are too distant or remote from those of the comparators. The pursuer says she need go no further than point to the difference in treatment that she has averred to make out that the treatment is less favourable and that the circumstances of those selected by her for comparison purposes are not materially different from her own. Mr Sutherland did not demur from the proposition that the comparator to be identified for the purpose of assessing the relevancy of the pursuer's case under section 13 of 2010 Act must not be materially different from the pursuer's circumstances. That is clear as a matter of logic. There is little point when assessing whether discrimination has taken place between individuals or

circumstances, for the comparison to take place between divergent facts such as would deprive the assessment of any meaningful content. It is made clear from the relevant case law ('comparing like with like', *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337; *Showboat Entertainment Centre Ltd v Owens* [1984] ICR 65) and on the face of the statute – section 23 of the 2010 Act.

[28] In assessing whether the comparator chosen by the pursuer is capable of satisfying the statutory condition of section 23, that there is no material difference between her and the comparator pled, the case law referred to by Mr Byrne provides some assistance. *Ladele* concerned a local authority registrar who objected to officiating at civil partnerships on the grounds of her religious beliefs. The Employment Tribunal considered that two gay registrars were good comparators for the purpose of assessing whether discrimination had taken place. The Employment Appeal Tribunal did not. For Elias J, at para. 64 of the EAT judgment, the proper comparator was another registrar who had an antipathy towards the concept of same sex relationships though not based upon or connected to religious belief (quoted at para. 39 of the judgement of the Master of the Rolls in the Court of Appeal). In *Azmi* the claimant, a devout Muslim, was accustomed to wearing a veil covering her head and face when teaching with male teachers. In assessing whether discrimination on the basis of religious belief had taken place when the local authority suspended her for refusing to remove her veil, the EAT upheld the ET's choice of comparator – a woman who, whether Muslim or not, wore a face covering for a reason other than religious belief.

[29] The choice of comparator is the subject of averment by the pursuer in Article 5 of condescendence. Referring to her case of direct discrimination she states:

> "In November 2017 a non-disabled person would have been referred to GHA under section 5 and they would have obtained permanent

> accommodation for the purposes of section 31(2) within a period 12 weeks for the date of reference. The defenders arrangements with GHA for the exercise of its public functions under section 31(2) did not make provision for a homeless person who was disabled person with restricted mobility to be accommodated within the same timescale as a non-disabled person"

[30] In the cases of *Azmi* and *Labele* the personal characteristics or motivations of the comparators were scrutinised. The view taken by the Court is unsurprising when one looks at what was in issue in each of those cases. As the EAT says in *Azmi* (at para 55) the purpose of the comparison is to illuminate the answer to the question whether there has been less favourable treatment on the grounds of the protected characteristic. The pursuer points to less favourable treatment between disabled and non-disabled persons in the period between referred and being housed. She is aware of the manner in which all applicants were dealt with and why she was allocated to Group 5. Instead of dealing with that approach the pursuer plants her flag firmly on the stated difference in waiting time overall – regardless of group placement. That approach does not illuminate if the difference in waiting time is attributable to the pursuer's protected characteristic. That is because the group as whole – Group 5 and Group 2 – is selected as the comparator. But all members of the combined grouping are not bidding for all properties. The pursuer can only be housed in accommodation suitable or adapted for her needs. Group 2 members can bid for properties which would be wholly unsuitable for the pursuer.

[31] In view of that, it can be seen that the pursuer's approach is simplistic and general. It selects the comparator group as consisting of disabled and non-disabled homeless persons. That is not, of itself, problematic. However, when one examines the ultimate question to be determined - what the pursuer complains of - it is illogical. It ignores the recognition that the pursuer is disabled and why she was allocated to a particular group (Group 5). Leaving

aside a number of factual intricacies such as what the pursuer was told about her grouping and the accumulation of credit for time spent there, the pursuer's comparator is not a helpful one. It includes a group of non-disabled homeless person who were housed quicker than she was. This was because the stock of housing that non-disabled person were able to bid for, or seek to occupy, was necessarily greater. It is not restricted by location, floor level and the like. Comparison with the groupings as a whole is more likely to obscure rather than illuminate why there is a difference in time from referral to being housed.

[32] Mr Byrne did go as far as pointing to other more appropriate groups or methods of assessing whether discrimination had taken place. However, it is not for the court to endeavour to select or point to a more appropriate comparator. The court is not armed with the necessary information about the figures and the fruits of the pursuer's enquires such as to be able to formulate the appropriate comparator with any authority.

[33] In *Azmi* the EAT looked at the matter sequentially, dealing first with the instruction to remove the veil. The comparator chosen had to be a person to whom the instruction had also been given and who had refused to comply. That other person (the comparator) had to refuse for a reason other than religious belief. That would be to compare like with like and allow an assessment of the instruction (the trigger of the averred less favourable treatment) alongside the claimant's treatment. In such a comparison exercise, the respective circumstances were not materially different.

[34] If the pursuer had selected a comparison to enable the court to compare like with like that may have looked at the treatment of a non-disabled person in the group to which the pursuer was allocated for housing. In the overall number of homeless person referred to the Glasgow Housing Association ("GHA") by the defender, there would be both disabled and non-disabled persons. The pursuer says in that general group of referred persons she was

not housed as quickly as non-disabled persons. In my view that is not to compare like with like. There is a material difference between those in that general group of referred homeless persons and the pursuer. Those in the group can take any – or virtually any - of the housing stock available. The housing able to be taken up by the pursuer is necessarily limited. The basis of the distinction in treatment is not illuminated by comparing these two groups. The court would not be able to ascertain whether there has been less favourable treatment on the ground of the pursuer's disability.

[35] Section 15 of the Equality Act 2010 provides:

> "15 Discrimination arising from disability
> (1)A person (A) discriminates against a disabled person (B) if—
> (a)A treats B unfavourably because of something arising in consequence of B's disability, and
> (b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

[36] The pursuer here does not require to illustrate discrimination with reference to or comparison others but rather she must point to unfavourable treatment "because of something arising in consequence of her disability". The pursuer makes an assertion to this effect in Article 5 of condescendence. She then makes an averment that this unfavourable treatment was the lengthier period of waiting to be housed.

[37] In *London Borough of Lewisham* v *Malcolm* [2008] UKHL 43; [2008] 1 AC 1399 the tenant had sublet his property and stopped taking his medication for his mental illness, namely schizophrenia. He claimed that he had been discriminated against by the local authority by its termination of his tenancy and seeking repossession. The House of Lords held that the reason for the local authority seeing repossession did not relate to his disability

and thus he was not treated unfavourably as a result of his disability. Lord Bingham put the matter this way at [40]:

> "It was not enough for [Mr Malcom] to show that, objectively viewed, there was a connection between his schizophrenia and his sub-letting. He needed to show, also, that his mental condition played some motivating part in the Council's decision to terminate his tenancy and recover possession of the premises. That he has not done. The fact of the matter is that the Council's reason was that he had sub-let and moved out. His mental condition formed no part of their reason. And even if the Council had known about the schizophrenia and had known that there might be a link between his schizophrenia and his imprudent or reckless behaviour in putting his secure tenancy at risk by sub-letting, there is no evidence that those matters played any part in the Council's decision to take action to recover possession of the flat. Moreover, the statutory comparator, in my opinion, would be a secure tenant with no mental illness who had sub-let. Such a tenant would have received no different treatment from the Council than Mr Malcolm received. There was no "less favourable" treatment meted out to Mr Malcolm and, therefore, no discrimination."

[38] The lengthier waiting period the pursuer complains of does not arise by virtue, or in consequence, of her disability. She does not offer to prove that is the case. I agree with Counsel for the defender that this is what is required for a claim under section 15 of the 2010 Act. It is not necessary to go on to determine whether what in essence the pursuer complains of is the allocation policy. For the purposes of her section 15 claim she has failed to aver unfavourable treatment arises by virtue of her disability. The consequence is that this part of her action cannot succeed.

[39] Sections 20 and 21 of the 2010 Act provide:

> "20 Duty to make adjustments
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
> (2) The duty comprises the following three requirements.
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in

> relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
> …
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
> (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
> …
> 21 Failure to comply with duty
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
> (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

The pursuer submits that she has sufficiently identified the provision, criterion or practice of the defender that has put her at a substantial disadvantage when compared to persons who are not disabled. The pursuer avers the defender breached the obligation to make reasonable adjustments in terms of section 29(7)(b) of the Act – see Article 6 of condescendence at foot of p.16 of the Record.

[40] Identification of a provision criterion or practice is a fundamental requirement of the provision. It is not permissible simply to assert that the pursuer was substantially disadvantaged or that an adjustment should reasonably have been made without first identifying what the provision, criterion or practice was. The court has to assess whether sufficient has been averred capable of identifying a provision, criterion or practice.

[41] It is difficult from a reading of the pursuer's pleadings to ascertain the basis upon which it can be said that there is a policy, criterion or practice of the defender which falls foul of section 20(3) of the Act. I prefer the defender's submissions on this point. It is not enough for the pursuer to assert that she was the subject of a provision, criterion or practice – she has to identify what is said to have caused the disadvantage or given rise to the requirement to adjust to take account of the pursuer's disability. It does not assist the pursuer in this endeavour to point to a change in the manner in which the defender deals now with such applications. Article 6 of condescendence deals with the averments of duty and makes only passing reference to section 20(3) before moving on to the issue of reasonable adjustments. There is no specific averment of what the provision, criterion or practice is constituted by. That omission is fatal to this aspect of her case.

[42] The pursuer continues in Article 6 of condescendence when stating the reasonable adjustment that ought to have been made:

> "It would have been a reasonable adjustment to the Defenders practice for it to have made arrangements with GHA which permitted disabled homeless persons such as the pursuer to be allocated permanent accommodation on the same timescale as a non-disabled person."

This averment points up the conflation by the pursuer of the approaches of GHA and the defender. She seeks to identify the practice of the defender in "requiring a person in GHA's Group 5 to remain there…" in the context of the reasonable adjustment she suggests.

[43] Article 6 of condescendence continues:

> "The pursuer was substantially disadvantaged by the defenders practice of requiring a person in GHA's Group 5 to remain there without seeking secure for them the same priority of housing allocation in the same timescale for being able to bid successfully in a property that a non-disabled person had in Group 2…

> Since in or about November 2019 GHA has operated an allocations policy which allows persons in the equivalent to Group 5 to be given a priority equivalent to Group 2".

The pursuer says the subsequent change in the operation of the GHA's allocations policy is of some moment.

[44] In this action, cast against this defender, the significance of the change in policy of a third party is difficult to gauge. The pursuer points to a reasonable adjustment for this defender to make – it ought "to have made arrangements with GHA". The interplay between the GHA and the defender is dealt with (in part) in Article 3 of Condescendence. The pursuer avers that the defender did not make requests of the GHA because of the lack of accommodation in the C. area suitable for her. The pursuer thereafter makes a positive averment that there were no existing arrangements between the defender and the GHA to allow homeless disabled persons to secure accommodation in the same timescales as non-disabled homeless persons.

[45] The reasonable adjustment the pursuer seeks to establish is of ensuring the pursuer was treated the same as homeless non-disabled persons. That falls foul of the requirement to identify with sufficient specificity what the policy, practice or criterion is. The reasonable adjustment pointed to is one not capable of being met by the defender – but rather by the GHA. The manner in which that can be mandated by the defender is not made the subject of specific averment. All that the pursuer avers (at the end of Article 3 of condescendence) is that the Code of guidance encourages local authorities and registered social landlords to agree protocols.

[46] The other difficulty – aside from the doubtful basis upon which it can be said that such a course is open to the defender - is that the reasonable adjustment suggested is said to

have the desired effect of bringing the pursuer into line with non-disabled homeless persons as part of the combined Groups 2 and 5. For the reasons outlined above, I do not consider that that equiperation is a fair one.

[47] Section 149 of the 2010 Act provides:

> 149 Public sector equality duty
> (1)A public authority must, in the exercise of its functions, have due regard to the need to—
> (a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> (b)advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> (c)foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Section 114(1) of the 2010 Act provides:

> 114 Jurisdiction
> (1) The county court or, in Scotland, the sheriff has jurisdiction to determine a claim relating to—
> (a)a contravention of Part 3 (services and public functions);
> (b)a contravention of Part 4 (premises);
> (c)a contravention of Part 6 (education);
> (d)a contravention of Part 7 (associations);
> (e)a contravention of section 108, 111 or 112 that relates to Part 3, 4, 6 or 7."

Section 118 of the 2010 Act provides

> "118 Time limits
> (1)…. proceedings on a claim within section 114 may not be brought after the end of—
> (a)the period of 6 months starting with the date of the act to which the claim relates, or
> (b)such other period as the county court or sheriff thinks just and equitable."

Section 156 of the 2010 Act provides:

> "156 Enforcement
> A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law."

[48] In a related case raised against GHA (A1549-18) the pursuer made averments about a

breach of the PSED in terms of section 149 of the Act. The defender, in that case, GHA, challenged the averments about a breach of section 149 of the Act on the basis that they were time-barred. As the argument evolved in the course of that diet of debate, the defender eventually came to submit that the averments in that connection were incompetent before the sheriff court. The pursuer was to a certain extent ambushed and had no prior notice that such an argument would be employed by the defender in that case. She was given an opportunity to subsequently state her position in a note. The defender enrolled a motion, not opposed by the pursuer, to have the court consider a supplementary written submission addressing this issue in this action. The pursuer did not duplicate the submission made in the case raised by her against Glasgow Housing Association.

[49] The defender submitted that the court ought to dismiss the action in relation to the alleged breach of section 149 of the 2010 Act by excluding averments relating to that issue from probation. The defender pointed out the questions of fundamental jurisdiction are *pars judicis*.

[50] The defender referred to section 114(1) of the 2010 Act which provides a list of claims where the sheriff has jurisdiction. Section 149, falling under Part 11 of the 2010 Act, is not included in the list. Separately, section 156 provides a private law action is not conferred in respect of a failure to perform a PSED. The defender contends that this is a private law action and, therefore, on a separate basis this exclusion in the 2010 Act renders the pursuer's averments incompetent.

[51] The pursuer reiterated her primary argument that the cause of action under section 149 was not time barred. The pursuer referred to *M v Fife Council* 2016 SC 556 and the observations of Lady Paton at paragraph [54]; Lord Bracadale at paragraph [70] and Lord McGhie at paragraph [84]. The Court had not suggested that section 149 was irrelevant in

an action for damages against a public authority. In that case an appeal was taken from a decision of the sheriff and the PSED was referred to in the course of the appeal. The pursuer argued that the averments in respect of section 149 cause of action could assist the court in its determination about the pursuer's case under section 20 and 29(7) of the 2010 Act. In particular it was submitted that should the pursuer succeed in proving her averments in Article 8 of condescendence it would assist or in establishing a failure by the defender to make reasonable adjustments. A number of powers were made available to the sheriff in these circumstances, see section 119(3)(b). It was open to the court to grant such orders in circumstances of the pursuer's case notwithstanding that a private law action was excluded. There was a close relationship between the duty to make reasonable adjustments and the PSED. The averred breach of section 149 of the 2010 Act was relevant to the action with the pursuer characterised as a breach of duty under sections 13, 15 or 19 of the 2010 Act. The decision in *M v Fife Council* did not contradict the pursuer's case.

Decision: Section 149 of the 2010 Act

[52] The observations regarding the PSED in *M v Fife Council* are strictly *obiter*. It was not argued before the Inner House that the sheriff in that case did not have jurisdiction to determine whether section 149 of the 2010 Act had been breached. Section 149 is referred to in the opinions of their Lordships and Ladyship as a buttress for findings in relation to the main cause of action. The point taken by the defender in this case did not arise for consideration.

[53] On the face of the statute, it is plain that the cause of action under section 149 of the 2010 Act is excluded from proceeding before the sheriff: section 114.

[54] The pursuer does not include averments in her pleadings about the PSED in order to

support other aspects of the case. Rather, she seeks a separate declarator that she has been unlawfully discriminated against by the defender's failure to comply with the PSED: see crave 1e. This is a discrete part of the pursuer's case. It makes no sense for the pursuer to argue that the remedies available to the court in a case involving a breach of the PSED may be pronounced by the sheriff in this case. Section 119 lists the remedies available but expressly says so with reference to section 114 cases. The fundamental problem for the pursuer is that section 149 is not mentioned in section 114. The circuitous restatement of that position is to the pursuer's detriment here. The crave seeking declarator of a breach of section 149 of the 20201 Act cannot proceed before this court.

Conclusion

[55] The pursuer's circumstances are materially different from those selected as comparator for her case under section 13 meaning that her case falls foul of section 23(1) of the 2010 Act. She has failed to aver that unfavourable treatment arises by virtue of her disability in relation to her section 15 claim. She has failed to identify a provision, criterion or practice for her case under section 20. The case under section 149 cannot be adjudicated in the sheriff court. For these reasons the action falls to be dismissed.

[56] As requested to by parties I shall appoint a hearing on expenses. If there is an agreed position then that can be intimated to the sheriff clerk and the diet discharged.