SHERIFF APPEAL COURT

GLW-A1548-18

Sheriff Principal M W Lewis
Sheriff Principal S Murphy KC
Appeal Sheriff G A Wade KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M W LEWIS

in the appeal in the cause

J (AP)

Pursuer and Appellant

against

GLASGOW CITY COUNCIL

Defender and Respondent

Pursuer and Appellant: Springham KC and Sutherland, advocate; Fiona McPhail Solicitors at Shelter Housing Law Service
Defender and Respondent: Byrne, advocate; Glasgow City Council Legal Services (Litigation)

31 July 2023

Introduction

[1] The appellant seeks declarator that the respondent had unlawfully discriminated against her in contravention of the Equality Act 2010 ("EqA") on four separate grounds:

i) direct discrimination in terms of section 13;

ii) treating her unfavourably because of something arising in consequence of her disability in terms of section 15;

iii) breaching its duty under section 29(7)(b) in relation to the requirements of sections 20 and 21 (reasonable adjustments) and;

iv) failing to comply with the public sector equality duty in terms of section 149.

The appellant seeks damages in the sum of £25,700 in respect of those alleged breaches.

[2] The appellant raised a separate claim alleging discrimination by the housing authority, The Glasgow Housing Association Limited ("GHA"), raised under reference GLW-A1549-18. The issues in the current appeal and the appeal against GHA are based on the same factual narrative, albeit the grounds of discrimination claimed against each vary. Both cases called before the sheriff at the same time and the appeals in both actions were heard concurrently.

[3] Following a diet of debate the sheriff issued interlocutors of 4 and 22 August 2022, in terms of which he (i) sustained the respondent's second plea-in-law and dismissed the cause; and (ii) found the appellant liable to the respondent in the expenses. It is against those interlocutors the appellant now appeals.

Factual Background

[4] Although the factual matrix upon which the appellant proceeds is disputed in a number of respects, her pleadings were taken *pro veritate* for the purposes of the debate.

[5] The appellant was injured in an accident in 2002. Due to that accident she has restricted mobility and is disabled. Prior to July 2017 she resided in a flat which was above the ground floor. She began to develop arthritis in both knees over time and a property above the ground floor was no longer suitable for her needs. She required a ground floor flat.

[6] On 28 July 2017 she registered with Home Finder which, at that time, was a system used by Glasgow Housing Association ("GHA") for applications to become a tenant. GHA is a large registered social landlord ("RSL") in Glasgow. It is the largest provider of social housing in the Glasgow area and owns a substantial stock of property in the Castlemilk area where the appellant wished to be housed. She applied for a ground floor flat.

[7] In July 2017 GHA's policy was to assign all applicants to a respective grouping. There were seven groups. The grouping assigned would be based on the needs and requirements of the applicant. Each group had properties assigned to it to reflect the need of that group. This policy allowed GHA to regulate the allocation of its housing stock to respective applicants. For the purposes of this appeal and the appeal against GHA, there were two relevant groupings as respects the applicant. Group 2 included properties for a number of priority needs groups, including homeless households. Group 5 was a group that contained properties for those with a mobility need. Upon receiving her application, GHA allocated the appellant to Group 5.

[8] However, the appellant avers that GHA held other properties which would also be suitable for disabled persons with mobility problems and such properties could be allocated to those who were placed in Group 2 which prioritised *inter alia* the needs of homeless households.

[9] In September and October 2017 the appellant notified the respondent that she was homeless and made an application in terms of section 28 of the Housing (Scotland) Act 1987 ("the 1987 Act"). On 17 November 2017 a decision was made by the respondent that the appellant was homeless and not intentionally homeless. Having accepted that, the respondent had a duty under section 31(2) of the 1987 Act "to secure that permanent accommodation becomes available" for her occupation.

[10] The respondent does not own any housing stock of its own. The manner in which the respondent complies with the above duty is by making a request to social landlords in terms of section 5 of the Housing (Scotland) Act 2001 ("the 2001 Act") under reference to a pre-existing protocol. The respondent has the ability to object to any policy or practice adopted by GHA which would be unlawful or which would contravene the EqA.

[11] By the time the appellant had been deemed unintentionally homeless she had already been registered with GHA under Group 5. This was as a result of her own application. On

being deemed homeless the appellant made an application to be transferred to Group 2 which gives preference to homeless households. The respondent considered that the appellant had already been placed in the most appropriate group for her needs, namely Group 5. It did not make a request because it considered the appellant would be offered accommodation more quickly if she remained in Group 5.

[12] Had the respondent made a request, the appellant would have been transferred from Group 5 to Group 2. The respondent considered a Group 2 property would not cater for the appellant's needs. Moreover, transfer to Group 2 would mean the appellant would have lost any credit for the period she had already spent waiting on the Group 5 list.

[13] Had the appellant been a homeless person not possessing a disability, then the respondent would have made a request and the appellant would have been allocated from a different group into Group 2 in terms of GHA's policy. An applicant within Group 2 was able to apply for properties available within that group within 12 weeks of applying. By contrast, those within Group 5 typically had to require to wait at least six months before having the ability to bid for suitable properties.

[14] In March 2018 the appellant became aware that no request had been made by the respondent to GHA. She offers to prove that she made a further request for this be done. That is disputed by the respondent.

[15] The appellant raised this action against the respondent in December 2018. She contends that the respondent would have referred a non-disabled homeless person to GHA, as required by their duty under section 5 and that a non-disabled homeless person would have obtained permanent accommodation within a period of approximately 12 weeks from the date of referral.

[16] The request was not ultimately made until 20 June 2018 and on that date the appellant was placed on the Group 2 list. The appellant lost the credit she had accrued for the period

17 November 2017 to 20 June 2018. The respondent contends that the appellant suffered no prejudice by not being on the Group 2 list in that period as no suitable property came up for offer. However, the appellant claims ground floor flats were available during that period, albeit not for Group 2 or Group 5 claimants.

[17] The appellant avers that the respondent had no existing arrangements in place with GHA that would allow homeless persons who were disabled to secure accommodation within the same timescales as persons who were homeless but were not disabled. That is the crux of her case.

[18] She claims she was discriminated against because she required to wait longer than a non-disabled homeless person would have (i.e. a non-disabled person would have been placed in Group 2 and would have been able to apply 3 months earlier).

[19] Since about November 2018 (after the instant action was raised) GHA has operated an allocations policy which allows persons in the equivalent to Group 5 to be given priority equivalent to Group 2.

The grounds of appeal

[20] Although there are five issues raised in this appeal, there is a theme which permeates them all: the relevancy and specification of the pleadings. The grounds of appeal are these:

(i) The appellant asserts that in considering her claim for direct discrimination under section 13, the sheriff failed to consider the respondent's "refusal to make a section 5 referral";

(ii) She also challenges his conclusion that the wrong comparator had been selected in relation to the section 13 claim;

(iii) Separately, the appellant contends in relation to her claim under section 15 that the sheriff erred in concluding that the length of waiting time for a property did not arise by virtue of her disability. There is much overlap with the first ground of appeal in relation to the factual matrix and the legislative provisions;

(iv) The failure of the respondent to make reasonable adjustments (section 20 and 21) is the focus of the fourth issue. The sheriff is said to have made a series of errors namely concluding that the pleadings were irrelevant, that the proposed adjustment is not capable of being met by the respondent but rather by GHA, and by the introduction of a comparator; and

(v) The final issue relates to a failure to comply with the PFED in terms of section 149. At the appeal hearing, we were advised that this issue is no longer insisted upon.

Legislation

[21] This case involves the interaction between the provisions of the Housing (Scotland) Acts 1987 and 2001 and the Equality Act 2010. The starting point is the duty in section 31(2) of the Housing (Scotland) Act 1987 which provides:

> "**31 Duties to persons found to be homeless.**
> (1) This section applies where a local authority are satisfied that an applicant is homeless.
> (2) Where they….. are not satisfied that he became homeless intentionally, they shall,……. secure that permanent accommodation becomes available for his occupation."

[22] Section 5 of the Housing (Scotland) Act 2001 provides:

> "**5 Duty of registered social landlord to provide accommodation**
> (1) Where a local authority has a duty under section 31(2) (duty to persons found to be homeless) of the 1987 Act in relation to a homeless person, it may request a registered social landlord which holds houses for housing purposes in its area to provide accommodation for the person.
> (2) In deciding whether to make such a request, the local authority must have regard to the availability of appropriate accommodation in its area.
> (3) A registered social landlord must, within a reasonable period, comply with such a request unless it has a good reason for not doing so."

[23] 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."

[24] Section 15 of the same Act goes on to provide:

"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."

[25] Section 23 deals with the issue of comparators. It provides:

"23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include a person's abilities if—
(a) on a comparison for the purposes of section 13, the protected characteristic is disability;
(b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability."

[26] The relevant parts of sections 20, 21 and 29 of the Equality Act 2010 are in these terms:

"**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.
…
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.
…
29 Provision of services, etc
(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
…
(7) A duty to make reasonable adjustments applies to-
(a) a service-provider …
(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public."

Decision

[27] The essence of the appellant's case is that as a homeless person who is disabled, she was treated differently from a homeless person who was not disabled in two respects:

(i) The respondent did not make a reference/request under section 5 as requested because they considered she was already in the appropriate group on account of her disability. The reason was accordingly due to her disability or something arising in consequence of her disability as a referral would have been made in respect of an able bodied homeless person;

(ii) The arrangements in place between the respondent and GHA resulted in her requiring to wait for a much longer period than a homeless person who was not disabled.

[28] In order to succeed in establishing that there had been direct discrimination the appellant requires to aver (and ultimately prove) that:

(i) the treatment which she experienced was different from that of another person;

(ii) the treatment she received was less favourable than that afforded to another; and

(iii) the less favourable treatment was because of a protected characteristic.

[29] The "treatment" upon which the appellant relies in this case was said to be the so called "section 5 referral" because a non-disabled person would have been made the subject of such a referral while she was not.

Failure to consider the respondent's "refusal to make a section 5 referral"

[30] The first ground of appeal is that the sheriff failed to deal with the appellant's argument to the effect that the respondent failed "to refer" her to GHA because the respondent believed she was more appropriately placed in Group 5. It is argued that placing the appellant in this group is a proxy for her protected characteristic, namely her disability.

[31] In the first instance the wording of section 5 of the 2001 Act makes no reference to "a referral." The section is concerned with the duty on the registered social landlord to provide the homeless person with accommodation. It does not impose a duty on the local authority to make a referral but provides that the local authority "may request" the registered social landlord, in this case GHA, to provide accommodation for the person. In deciding whether to make such a request, the local authority "must have regard to the availability of appropriate accommodation in its area."

[32] Thus it is clear that section 5(1) is permissive and gives the local authority discretion as to whether or not to make a request to the registered social landlord and section 5(2) places a mandatory requirement upon the local authority to have regard to the availability of appropriate housing stock when deciding whether or not to make the request.

[33] Accordingly, on a proper construction of section 5, the respondent had discretion as to whether or not to make a request. It exercised that discretion having regard to its statutory duty to consider the availability of appropriate accommodation, in this case ground floor accommodation of a certain size and with necessary adaptations in the Castlemilk area.

[34] The appellant asserts that the sheriff did not consider the respondent's decision not to make a referral to GHA on 17 November 2017. He only dealt with the longer waiting time experienced between persons in Group 5 and those in Group 2.

[35] The sheriff has indeed focussed on the differentials in waiting times between disabled and non-disabled homeless persons. The suggestion that the respondent failed to refer the appellant to GHA suggests that they had a duty to do so. However the section is merely permissive and allows the respondent to make a request but that is qualified by the need to have regard to appropriate accommodation. The respondent, in the exercise of that discretion, deemed that Group 2 was not the most appropriate group for the appellant to be in. On the contrary, Group 5 was having regard to her needs and demands. A non-disabled homeless person who was made the subject of a request and was therefore placed in Group 2 by GHA would not be able to demand or indeed expect a specially adapted, ground floor property. Such a person would be accommodated from the general housing stock. Throughout his judgment the sheriff has made this point. He did approach the matter somewhat pragmatically by looking at the pleadings to identify whether the appellant could establish that had she been in Group 2 rather than Group 5 she would have had less time to wait for a property to become available. While that approach is understandable he is looking at the consequences of the failure to refer rather than the failure to refer in and of itself in determining whether the pleadings should be admitted to probation. He has, to some extent at least, determined the matter as one of fact without having heard evidence which either supports or refutes the appellant's assertions.

[36] The respondent emphasises that the appellant cannot and does not aver with the requisite specification that there were any suitable ground floor properties which became

available during the relevant period. However, the appellant does aver in Article 2 of Condescendence that:

> "There were ground floor properties that were suitable for the Pursuer in Castlemilk which became available for letting during the period 17th November 2017 and 23rd July 2018, but which were not available to persons bidding for properties in Group 2 or Group 5 of the GHA system."

[37] She meets the respondent's averment at the end of Answer 2 to the effect that:

> "as a matter of fact there was no suitable properties available in group 2 during the period 17th November 2017 and being offered permanent accommodation on the 23rd July 2018 which she accepted. Accordingly, the pursuer's claim to have experienced disadvantage is without substance."

[38] We agree that, absent specific averments identifying suitable properties which were available within the time frame, but for which the appellant was unable to bid, it is difficult to see quite how the appellant will ultimately be able prove that she has in fact been disadvantaged. However, in failing to deal with the respondent's refusal to make a referral as a first step, the sheriff has not specifically addressed whether that in itself amounted to unfair treatment. In short, he has jumped a stage in the analysis.

[39] The respondent's duties in terms of the housing legislation clearly require the respondent to adhere to the provisions of the EqA. It is the interaction of these two pieces of legislation which is focussed here.

[40] The authorities to which we were referred by senior counsel for the appellant make clear that the requirement for actual discrimination to be shown is not essential as long as there is demonstrable potential loss of an opportunity which necessarily arises from discriminatory treatment as a result of or in consequence of one's disability. The absence of averments about particular houses for which the appellant might have been able to bid is not fatal to her establishing a potential for disadvantage. What the sheriff has failed to consider is the difference between the appellant arguing that a certain property became available but because

she was in Group 5 she was unable to bid for it and arguing that if a property had become available in the relevant time frame she would not have been able to bid for it because she had not been made the subject of a referral. The distinction is subtle but important.

[41] We therefore accept that, on the existing pleadings, the appellant may struggle to establish actual disadvantage in respect of a particular property; however, when viewed in light of the statutory duty on the respondent to secure that permanent accommodation became available for the appellant the averments sufficiently articulate her complaint that she has been discriminated against because her exclusion from Group 2 meant she was not able to bid for suitable properties that were available to that group.

[42] The sheriff has looked at the point too narrowly in requiring that the appellant avers actual disadvantage before being allowed proof of her averments.

[43] He seems to have accepted the argument that there was simply more accommodation available for able bodied persons than there was for disabled persons; however, that serves to underline the point the appellant makes. If that were an answer to the complaint of discrimination it would in effect drive a coach and horses through the purposes of the Equality Act 2010.

[44] Similar arguments were considered and rejected in *R* v *Birmingham City Council ex p. Equal Opportunities Commission* [1989] AC 1155 at pp. 1193G-1194D, 1196D where the fact that there were fewer places for girls than for boys in grammar schools was not an answer to a question of whether there had been sex discrimination. In that case it was held that it was sufficient to show that the girls were being deprived of a chance.

[45] A similar approach was adopted in *R (Coll)* v *Secretary of State for Justice* 2017 1 WLR 2093 in relation to the limited availability of approved placements for the release of women prisoners when compared with men. That case also established that it was not

necessary that everyone with a protected characteristic would suffer less favourable treatment. Again the applicant was not actually being released at the time of the litigation. She was merely anticipating the fact that she would be likely to be placed in accommodation which was less geographically suitable when compared with her male counterparts.

[46] Because the sheriff has not directly dealt with the failure of the respondent to make a reference as a separate ground of discrimination it is incumbent upon this court to do so. We consider the pleadings are sufficient to allow the appellant to proceed to proof on the basis that the refusal to refer her to Group 2, as she would have been if she were able bodied, potentially amounted to discrimination. Whether any disadvantage in fact arose is quite a different issue and a matter to be determined after proof.

Section 13 – direct discrimination and the selection of the correct comparator.

[47] The second limb of the appellant's argument is that the treatment she received from the respondent was less favourable because it resulted in her being left in a non-priority group with a longer waiting time for accommodation. In this regard the appellant requires to show that she was treated differently from a person who was not disabled and who, she says, would have been made the subject of a referral. That involves selection of the correct comparator in terms of section 23 of the EqA.

[48] At paragraphs 31 and 34 of his judgment the sheriff states that in his opinion the appellant has selected the wrong comparator namely non-disabled homeless persons. Although he does not go so far as to suggest what the correct comparator should be the respondent's submission is that the correct comparator would have been a non-disabled person who for reasons other than that of disability also sought a ground floor property. The sheriff's reasoning relates back to the matters discussed in respect of the first ground of appeal, namely

the limited availability of housing stock appropriate to the appellant's (or indeed any disabled person's) needs. For the reasons already given we consider that approach to be flawed.

[49] The question for us is whether restricting the criterion for the comparator to someone who is both homeless and seeks a ground floor property necessarily corresponds with the appellant's disability, or using the language in the authorities before us, was a proxy for her disability. Reference was made to *R (Coll)* v *Secretary of State for Justice* [2017] 1 WLR 2093 at paragraphs 29 and 42 and *Essop* v *Home Office* [2017] 1 WLR 1343 at paragraphs 17 and 27.

[50] The question of selection of appropriate comparators, albeit in the context of the Disability Discrimination Act 1995, was considered *Stockton on Tees BC* v *Aylott* [2010] ICR 1278. There the claimant suffered bipolar disorder and as a result required to take a significant period of time off work. He was ultimately dismissed on ill health grounds. The employment tribunal selected a hypothetical comparator. Mummery LJ, in reviewing the authorities, observed that in cases of direct discrimination the essential inquiry is into why the disabled claimant was less favourably treated than a person not having that particular disability. At paragraphs 39-40 he states:

> "The employment tribunal selected a hypothetical comparator. As the identity of the comparator for direct discrimination must focus upon a person who does not have the particular disability, that disability must,……, be omitted from the circumstances of the comparator. In other respects the circumstances of the claimant and of the comparator must be the same 'or not materially different'. The claimant's abilities,….., must be attributed to the comparator."

[51] Under reference to the opinion of Lord Nicholls of Birkenhead in *Shamoon* v *Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 he adds at paragraph 43:

> "…… the question of less favourable treatment than an appropriate comparator and the question whether that treatment was on the relevant prohibited ground may be so intertwined that one cannot be resolved without at the same time deciding the other. There is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? Once it is found that the reason for the treatment

> was a proscribed one, there should be no difficulty in deciding whether the treatment on that ground was less favourable than the treatment that was or would have been afforded to others."

[52] It is of interest that the passage continues:

> "If the evidence establishes that the reason for the treatment is the claimant's disability, then it will usually follow that the hypothetical comparator would not have been treated in the same way and there will be discrimination."

[53] It is clear from the foregoing that if that test is applied in this case and one asks the question "Did the appellant receive less favourable treatment than others?" the answer is in the affirmative because she was not put into a priority group alongside able bodied, homeless people. It is then a matter of considering the evidence to ascertain whether the reason for that difference in treatment was the appellant's disability. In the cases cited before us that issue was more readily determined because evidence had been led.

[54] This approach was in line with that taken by Baroness Hale in *R (E)* v *Governing Body of JFS and another* [2010] 2 AC 728 at paragraphs 64-71 and *Essop* v *Home Office* at paragraph 17 where she states:

> "……this has become treating someone less favourably 'because of' a protected characteristic. The characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment: an example is *Preddy v Bull (Liberty intervening)* [2013] 1 WLR 3741, where reserving double-bedded rooms to 'heterosexual married couples only' was directly discriminatory on grounds of sexual orientation. At other times, it will not be obvious, and the reasons for the less favourable treatment will have to be explored: an example is *Nagarajan v London Regional Transport* [2000] 1 AC 501, where the tribunal's factual finding of conscious or subconscious bias was upheld in the House of Lords, confirming the principle, established in *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155 and *James v Eastleigh Borough Council* [1990] 2 AC 751, that no hostile or malicious motive is required. *James v Eastleigh Borough Council* also shows that, even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used (in that case retirement age) exactly corresponds with a protected characteristic (in that case sex) and is thus a proxy for it."

[55] Having had regard to these authorities the sheriff ought to have approached this matter by asking whether there was a difference in treatment and whether that difference in treatment

was on the grounds of a protected characteristic, namely, the appellant's disability. He did not do so. The requirement for ground floor, specially adapted accommodation does correspond with the appellant's disability, namely her mobility issues and it is therefore difficult to come to any other conclusion than that it is a proxy for it.

[56] Accordingly we are of the view that the sheriff has indeed selected an inappropriate comparator and for the reasons given was premature in dismissing the action without further enquiry as to whether there had in fact been direct discrimination in contravention of section 13.

Section 15 – disability discrimination

[57] In one short sentence Baroness Hale identified a fundamental difficulty in pursuing a claim arising out of discrimination - "Ideally, discrimination ought to be an easy concept, although proving it may be harder." (*Essop* v *Home Office*). The appellant's claim is based on disability discrimination under section 15 of the EqA. It did not proceed to proof: the sheriff concluded that the appellant had "failed to aver unfavourable treatment arises by virtue of her disability", that her claim of unlawful discrimination was irrelevant and fell to be dismissed.

[58] To succeed with a claim under section 15, the appellant must prove the relevant treatment to which the section is to be applied and that the treatment was unfavourable to her (*Trustees of Swansea University Pension and Assurance Scheme Trustees* v *Williams* [2019] 1 WLR 93).

[59] The question which arises for determination is whether the sheriff erred in concluding that the appellant had "failed to aver unfavourable treatment arises by virtue of her disability".

[60] The submissions on this ground of appeal were similar to those made in relation to the section 13 claim. Counsel for the appellant explained that as a disabled homeless person the appellant was not made the subject of a section 5 "referral" until June 2018. That omission

amounts to unfavourable treatment because (i) it denied the appellant the opportunity to bid for Group 2 properties and (ii) there was a failure to meet the positive duty to secure that permanent accommodation became available to the appellant within anything like a comparable timescale to that for non-disabled homeless people. The treatment was unfavourable because she did not receive the priority on the housing list that would have been afforded to those on Group 2 (i.e. non-disabled homeless persons). Furthermore the appellant was treated unfavourably in terms of the timescale of waiting for permanent accommodation.

[61] She criticised the sheriff for relying upon *Lewisham London Borough Council* v *Malcolm* [2008] 1 AC 1399 pointing to the observations of the court in *Stockton on Tees BC* v *Aylott* (at paragraphs 67-69) and in *Trustees of Swansea University Pension and Assurance Scheme Trustees* v *Williams* (at paragraphs 8-11). It is not authority for the proposition that "the lengthier waiting period does not arise by virtue of or in consequence of her disability".

[62] Counsel for the respondent submitted that the question is whether there was a "disadvantage" which arose "because of" a disability (*Pnaiser* v *NHS England and another* [2016] IRLR 170). The sheriff had approached that question by using a comparator - a person seeking a similar ground floor property for non-disabled reasons. In expanding this proposition counsel submitted that the treatment of the appellant was not unfavourable to her by virtue of her disability: providing her with access to ground floor accommodation is an advantage; providing her access to a special group of accessible properties is an advantage. The provision of adapted properties to persons with mobility issues is not unfavourable treatment (*Trustees of Swansea University* v *Williams* at paragraph 28). The treatment which she complains of is not because of her disability but is due to the lack of supply of ground floor properties. There were no suitable ground floor properties available in Group 2 during the relevant period.

[63] We have considered the pleadings of the appellant sequentially and in totality rather than focusing on isolated segments. The averments are to be found in articles 2, 4, and 5. The appellant narrates the housing allocation system and the then applicable criteria, her application for a section 5 request, the outcome of her application, the availability of ground floor properties suitable for the appellant in Castlemilk during the relevant period. The crucial averments are to be found primarily in article 5. The appellant avers that she was treated less favourably than a non-disabled homeless person when the respondent was exercising its public functions 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 section 31(2) within a period of approximately 12 weeks from the date of reference. The defenders arrangements with GHS …. 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."

[64] The appellant reiterated that there are two bases of discrimination - in short the same incidents as for the claim under section 13. We do not propose to repeat our views on those incidents or on the construction and application of section 5 of the 2001 Act. The sheriff selected a comparator: he did not require to illustrate discrimination through a comparison by reference to circumstances (section 23 of the EqA and *McCue* v *GCC* [2023] UKSC 1). He was not invited by the appellant to do so and he based his decision in this respect on an authority which pre-dates the current Equality legislative regime. In our view that exercise led the sheriff to take an unduly restricted view of the pleadings.

[65] We recognise again that the appellant has not identified a particular property which was denied her which may give rise to difficulties establishing actual disadvantage. However, it is a

matter for proof whether all suitable properties were in fact in Group 5 only and whether there would have been accommodation available to the appellant in Group 2 or otherwise potentially available to her. Accordingly, we are persuaded that the pleadings are sufficient to allow this part of the case to proceed to probation.

Sections 20 and 21 – Breach of duty to make reasonable adjustments

[66] The appellant submitted that the sheriff had erred in finding irrelevant her claim under sections 20, 21 and 29(7) relating to breach of the duty to make reasonable adjustments. Where a pursuer, such as the appellant, maintained that a specific adjustment should have been made, this needed to be raised as an issue so that parties could lead evidence on it and a decision could be made as to whether that was a reasonable adjustment: *Cosgrove* v *Caesar & Howie* [2001] IRLR 653 at paragraphs 6 and 7; *Project Management Institute* v *Latif* [2007] IRLR 579 at paragraphs 28, 53 to 55 and *Jennings* v *Barts and the London NHS Trust* [2013] Eq LR 326 at paragraphs 65 and 91. The sheriff had dismissed this claim because he considered that the appellant had failed to plead a relevant PCP. Counsel for the appellant referred us to passages in the employment case of *Ishola* v *Transport for London* [2020] ICR 1204 at paragraph 28, that the words "provision, criterion or practice" should be interpreted widely and submitted that it had pled the existence of a PCP by averring that the respondent had a practice of making referrals to GHA for homeless persons. No referral was made for disabled persons in Group 5, which meant that such individuals had to remain in a GHA waiting list group in which it would take longer for that disabled person to be housed than a non-disabled person. This demonstrated the existence of a practice and a disadvantage. The respondent ought to have anticipated the needs of homeless persons who were disabled because they knew that they required to wait longer for accommodation than non-disabled persons.

[67] The respondent submitted in reply that the appellant's averments alleging a breach of the duty to provide reasonable adjustments were irrelevant. The sheriff was correct to find that the PCP averred by the appellant (if one was averred) was a policy of the GHA, not the respondent. That being so, the appellant ought to have made averments as to how the respondent could make a reasonable adjustment to the policy of a separate legal entity. The appellant's pleadings failed to disclose a disadvantage and the proposed PCP by the appellant lacked sufficient clarity and specificity. In any event, the scheme operated by the GHA created a benefit, not a disadvantage, to the appellant as Group 5 applicants had a better chance of securing ground floor accommodation in that group.

[68] The appellant's case relies on the first requirement within subsection 20(3) of the 2010 Act. At para [40] of his judgment the sheriff correctly states that the identification of a PCP which puts a disabled person at a substantial disadvantage in comparison to a person who is not disabled is the essential starting point under the subsection. The sheriff decided that the appellant had made no averment of any specific PCP on the part of the respondent; therefore, there could be no breach of s. 20(3) of the 2010 Act as that omission was fatal to this aspect of the appellant's case.

[69] As we noted above, the respondent does not hold any housing stock of its own and fulfils its obligations under section 31 of the 1987 Act by making a request to a registered social landlord such as GHA under s. 5 of the 2001 Act. Thereafter matters are determined by the registered social landlord to which the referral by the respondent has been made. In the light of these considerations the sheriff considered that any PCP which might give rise to a substantial disadvantage in relation to a relevant matter which arose would be that of the registered social landlord and not of the respondent.

[70] The appellant contended that the sheriff had fundamentally misunderstood her position which was that the failure by the respondent to make a request in relation to her as a homeless person, which would led to her being placed within Group 2, was itself a practice which gave rise to a substantial disadvantage because of the discrepancy in waiting times between Groups 2 and 5. It would have been a reasonable adjustment for the respondent to arrange with the GHA for disabled homeless applicants to be allocated housing on the same timescale as applicants who were not disabled. The averments in respect of this ground are to be found within condescendence 6:

> "The Defenders were in breach of its obligation to make reasonable adjustments under Section 29(7)(b) of the 2010 Act. The Pursuer was substantially disadvantaged by the Defenders practice of requiring a person in GHA's Group 5 to remain there without seeking to secure for them the same priority of housing allocation and the same timescale for being able to bid successfully on a property that a non-disabled person had in Group 2. 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 homeless person. Since in or about November 2018 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 Defenders failure to make such a reasonable adjustment amounts to discrimination for the purposes of Section 21 of the 2010 Act."

The practice identified is that of:

> "requiring a person in GHA's Group 5 to remain there without seeking to secure for them the same priority of housing allocation in the same timescale for being able to bid successfully on a property that a non-disabled person had in Group 2".

[71] The first question to consider is whether that is a practice within the meaning of the Act. In *Ishola* v *Transport for London*, which was an employment case, at paragraph 28 the Court of Appeal (Simler LJ) considered the meaning of the expression PCP by reference to the "Equality Act 2010 Statutory Code of Practice: Employment" issued by the Equality and Human Rights Commission which states, at 6.10:

> "The phrase [PCP] is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."

The Court returned to the matter in the following passages which were relied on by the respondent:

> "35 The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in the light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the statutory code of practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, I find it difficult to see what the word 'practice' adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means "done in practice" begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be 'done in practice'. It is just done; and the words 'in practice' add nothing.
> …
> 38 In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

[72] We respectfully agree that a "practice" must be something which reflects the way in which things are generally done, although a one-off decision could be one: whether it is or not will depend on the facts of each particular case. The facts averred here are that the appellant applied to GHA directly in July 2017 and was allocated to Group 5. She made an application to the respondent in September and October of the same year and was deemed to be unintentionally homeless. A request on that basis by the respondent to GHA would have

placed her into Group 2 but none was made at that time because the respondent considered that she was already in the group best suited for her needs (Group 5).

[73] In our view the respondent did not "require" the appellant to remain in Group 5; she had applied directly to GHA to be placed in that group by herself. The request which had put her into Group 5 had nothing to do with the respondent. No request was made to GHA by the respondent to place her in Group 2 as a homeless person because the respondent thought that remaining in Group 5 would best suit her needs, particularly as a reclassification into Group 2 would lose her the benefit of the time already spent in Group 5. This decision as averred is properly to be seen as a one-off, discretionary decision made in the particular circumstances in which the appellant had placed herself at the material time and cannot properly be categorised as a "practice" on the part of the respondent which could give rise to a substantial disadvantage. It follows that there can be no duty to make a reasonable adjustment on the part of the local authority. To that extent we agree with the sheriff that no PCP was averred and that the omission is fatal to this aspect of the appellant's case.

[74] The appellant's counsel made a number of submissions on the question of reasonable adjustment. The passages cited by the appellant in the cases of *Latif* and *Jennings* support the contention that what a pursuer is required to do is to suggest what is contended to be a reasonable adjustment for consideration by the court in the light of evidence led; and the defender is not required to rebut all possible adjustments but only to respond to that raised by the pursuer. In *Latif* the EAT made the following statement of the position (at paragraphs 54 and 55):

> "Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could be properly inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.

> 55 We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

The situation was set out succinctly in *Jennings* where the passages cited by the appellant may be summarised in this way, that the burden on the claimant is to do no more than to raise an adjustment for consideration with sufficient specification to allow the respondent to address it (paragraph 65).

[75] The reasonable adjustment which is averred by the appellant is for the respondent:

> "to have made arrangements with GHA which permitted disabled homeless persons such as the appellant to be allocated permanent accommodation on the same timescale as a non-disabled homeless person".

Several issues arise over this averment. It is vague in its terms, specifying only that the respondent should have "made arrangements" with GHA to produce the adjustment. That consideration is a reflection of the most significant difficulty of all, which is that what is averred is not an adjustment which could avoid the disadvantage because the averred disadvantage arose out of the measures in place at GHA which at the time placed disabled applicants into its Group 5 category and homeless applicants into Group 2: that could only be altered by the actions of GHA.

[76] The appellant's position relied upon the existence of a protocol between the respondent and GHA, the "Statement of Best Practice in Joint Working between Glasgow City Council and Registered Social Landlords Operating in Glasgow" (2007). The appellant's averments relating to this protocol are contained within Condescendence 3:

> "The Defenders are able to object to any policy or practice adopted by GHA which would be contrary to Section 20(1)(b) of the 1987 Act, the Equality Act 2010, or is unlawful for any other reason."

In terms of making a reasonable adjustment this is something of a blunt instrument. The respondent's ability to object cannot of itself guide the response of the GHA in any detail, although presumably an inadequate response would give rise to further objection from the respondent. In short, any reasonable adjustment which could avoid the disadvantage would require to be made by GHA and not the respondent. The right to object held by the respondent is too remote from the outcome because it requires something else to be done by another party.

[77] No reasonable adjustment on the part of the respondent could of itself avoid the disadvantage. Accordingly we agree with the submissions made on behalf of the respondent and with the decision of the sheriff that the reasonable adjustment as averred is not capable of being carried out by the respondent but rather by the GHA. The appeal is refused in relation to ground four.

Disposal

[78] We will therefore allow the appeal on grounds one, two and three and refuse the appeal on ground four, and remit to the sheriff to proceed as accords. In the event that parties are not able to resolve the matter of expenses and provide the clerk with a note of their agreed position within 14 days of today's date, further procedure will be assigned.