SHERIFF APPEAL COURT

[2023] SAC (Civ) 26

Sheriff Principal M W Lewis
Sheriff Principal S F Murphy KC
Appeal Sheriff G 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

THE GLASGOW HOUSING ASSOCIATION LIMITED

Defender and Respondent

Pursuer and Appellant: Springham KC and Sutherland, advocate; Fiona McPhail Solicitors at Shelter Housing Law Service
Defender and Respondent: Upton, advocate; Wheatley Housing Group Limited

31 July 2023

Introduction

[1] The appellant seeks declarator that the respondent has unlawfully discriminated against her. She advances claims under four aspects of the Equality Act 2010 ("EqA"):

(i) a failure to comply with a duty to make reasonable adjustments in the exercise of a public function (sections 20 and 21);

(ii) indirect discrimination through the application of the respondent's allocations policy (section 19);

(iii) treating her unfavourably because of something arising in consequence of her disability in terms of section 15; and

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

[2] The appellant raised a separate claim alleging discrimination by the local authority, Glasgow City Council ("GCC"), raised under reference GLW-A1548-18. The issues in the current appeal and the appeal against GCC are based on a similar factual narrative, albeit the grounds of discrimination claimed against each vary. The appeals in both actions were heard consecutively.

Factual background

[3] 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.

[4] 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.

[5] On 28 July 2017 she registered with Home Finder which, at that time, was a system used by the respondent ("GHA") for applications to become a tenant. GHA is a 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.

[6] 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. The

properties were advertised in order that applicants within that group could bid for them. 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 GCC, there were two relevant groupings as respects the appellant. Group 2 included homeless persons and those living in accommodation below the tolerable standard. Group 5 comprised those who had a medical priority for mobility reasons or other medical condition which would necessitate the need for ground floor or level access property. Upon receiving her application, GHA allocated the appellant to Group 5.

[7] In September and October 2017 the appellant notified GCC 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 GCC that the appellant was homeless and not intentionally homeless. Having accepted that, GCC had a duty under section 31(2) of the 1987 Act "to secure that permanent accommodation becomes available" for her occupation.

[8] GCC does not own any housing stock of its own. The manner in which GCC 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. GCC has the ability to object to any policy or practice adopted by GHA which would be unlawful or which would contravene the EqA.

[9] 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. GCC 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 to GHA because it considered the appellant would be offered accommodation more quickly if she remained in Group 5.

[10] Had GCC made a request to GHA, the appellant would have been transferred from Group 5 to Group 2; however, 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.

[11] Had the appellant been a homeless person not possessing a disability, then GCC would have made a request to GHA and the appellant would have been allocated from a different group into Group 2 in terms of the GHA's policy. An applicant within Group 2 was able to apply for properties available 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.

[12] In March 2018 the appellant became aware that no request had been made by GCC to GHA. 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. GHA contends that the appellant suffered no prejudice by not being on the Group 2 list in that period. Between 4 September 2017 and 31 July 2018 ten ground floor properties in the Castlemilk area became available; however, GHA consider none of those were suitable for the appellant's needs. By contrast, the appellant claims ground floor flats were available during that period, albeit not for Group 2 or Group 5 claimants.

[13] The appellant avers that GHA's allocation policy indirectly discriminated against her contrary to section 19 and treated her unfavourably due to her disability contrary to section 15. 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). The arrangements in place between GHA and GCC resulted in her requiring to wait for a much longer period than a

homeless person who was not disabled. The interpretation and application of the policy as well as the number and location of premises suitable for those with mobility issues are in dispute.

[14] 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 sheriff's decision

[15] The sheriff dismissed the appellant's claim under section 15 as irrelevant for the following reasons - (i) She had not pled an appropriate comparator. (ii) Those in the situation of the appellant who possess a protected characteristic of disability cannot seek to be housed in the wider housing stock available to non-disabled persons in Group 2. (iii) In order to assess whether the appellant had been indirectly discriminated against the court required to have an appropriate comparator and "a non-disabled person" was not a relevant comparator.

[16] He also dismissed her claim under section 19 as irrelevant. The EqA defines indirect discrimination. The appellant had to aver the practice, criterion or practice ("PCP") operated to her detriment. She did not do so. The sheriff considered that it was not sufficient for an inference to be drawn from the averments.

[17] The appellant's averments concerning her claim of a breach of the duty to make reasonable adjustments were also found to be irrelevant by the sheriff. Identification of a PCP is a fundamental requirement of section 20(3) of the EqA. The appellant had to specifically aver what PCP put her at a substantial disadvantage. Having failed to do so, her claim under sections 20 and 21 of the EqA was dismissed as irrelevant.

[18] The appellant's claim under section 149 was challenged by GHA as incompetent on the basis that that part of the action was an academic exercise. The sheriff disagreed, concluding

that as the declarator was coupled with a crave for damages the action was not academic; however, he then found that he lacked jurisdiction to hear such a claim due to the terms of sections 114 and 156 of the EqA.

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

The grounds of appeal

[20] There are four grounds of appeal. In respect of each ground there is an over-arching theme of relevancy and specification:

(i) The failure of GHA to make reasonable adjustments (section 20 and 21) is the focus of the first issue. The sheriff erred in finding that the appellant had failed to aver the "provision, criterion or practice" in terms of which a duty arose.

(ii) A similar approach is taken in the second ground of appeal which relates to the indirect discrimination claim (section 19). The appellant contends that the sheriff made a similar error in his assessment of the pleadings in finding that the appellant had failed to aver the "provision, criterion or practice" which put the appellant at a disadvantage.

(iii) His analysis of the claim under section 15 is flawed through (a) his use of a comparator, which is not required (section 23(2)) and (b) his failure to properly construe the appellant's pleadings.

(iv) The sheriff misunderstood the interaction among sections 114, 119 and 149. At the appeal hearing, we were advised that this issue was no longer insisted upon.

The ground of cross-appeal

[21] GHA focuses on relevancy and specification on two matters:

(i) The appellant does not offer to prove that any unlawful failure to give her priority made any practical difference to the outcome. She requires to aver that had the policy of GHA been what she asserts it should have been between December 2017 and July 2018 then suitable accommodation would have been offered to her and accepted. The appellant fails to make such an averment. As a consequence, the appellant's claim is academic and incompetent (*Macnaughton* v *Macnaughton's Trustees* 1953 SC 387).

(ii) The appellant has failed to make any averments of causation to establish that a loss flowed from her grounds of action.

Legislation

[22] 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."

[23] 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."

[24] 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."

[25] Section 19 of the same Act provides:

"19 Indirect discrimination
(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

The protected characteristic here is disability.

[26] Sections 20 and 21 deal with reasonable adjustments. So far as relevant to the appeal, they 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."

[27] Section 23 is concerned 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."

Decision

[28] Although there are common issues in grounds of appeal 1 and 2, we have treated them separately.

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

[29] GHA is a service provider in terms of s. 29(1) of EqA, as was accepted on both sides in this appeal and therefore is subject to the requirements of ss. 20 and 21 of the Act.

[30] At para [20] of his judgment the sheriff correctly held that the identification of a PCP which put the appellant at a substantial disadvantage was a fundamental requirement of section 20(3) of EqA. In the following paragraph he stated that losing the benefit of time waiting in Group 5 on transfer to another group was conceded and that the appellant had construed that as an admission of a PCP. He then agreed with GHA's submission that the appellant had failed to identify the PCP which was the subject of the duty to make a reasonable adjustment. He found the appellant's case to be irrelevant in the absence of that critical averment. As a matter of law the absence of such an averment is fatal to a pursuer's case with regard to reasonable adjustment: section 20(3) EqA. However, the appellant's position is that she has, in fact, averred that GHA operated a PCP in respect of the way that it carried out its allocation procedures in relation to the categorisation of applicants and to its bidding process.

[31] The first question we have to consider is whether that policy is a practice within the meaning of the Act. The "Equality Act 2010 Statutory Code of Practice: Employment" issued by the Equality and Human Rights Commission 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."

[32] The appellant's pleadings contain the following passages, within condescendence 2, describing GHA's allocation policy:

> "Under the Defenders allocations policy in force between in or about 2012 and in or about November 2018, applicants for accommodation were initially placed into Group 1. Thereafter if they qualified for membership of a different Group (Groups 2 to 7) they would be transferred to that other Group with a date effective from their transfer to that Group from Group 1. Where a person transferred from one of those other Groups to a different Group, their placement in that new Group would be on the basis of the date of transfer between those Groups and not from the date of placement in their original Group… Unlike Group 5, properties selected for Group 2 were not based on any physical need. Group 5 properties included properties considered suitable for disabled persons with mobility needs, but it did not constitute all properties held by the Defenders which might become available and

> would be suitable for disabled persons with mobility problems. Other Groups, including Group 2, contained properties suitable for disabled persons with mobility problems. The number of properties within Group 2 that were suitable for persons with restricted mobility was very low and would become available on an ad-hoc basis. When a property became available for let, it was advertised as being available for let members of a particular Group… Applicants were only able to bid for a property within their allocated Group. If they bid for a property outwith their allocated Group the bid was discounted. … The successful bidder was the person within the allocated Group who had the longest waiting time that had bid for the property. Only where no person bid for an advertised property was it then available for other bidders outside the advertised Group. Applicants within Group 2 would typically wait for approximately 12 weeks before they were able to bid successfully for the tenancy of a Group 2 property. Applicants within Group 5 would typically wait at least 6 months or more before they were able to bid successfully for the tenancy of a Group 5 property. As a result of the low numbers of properties in Group 2 that were suitable for a person with restricted mobility, such as the Pursuer, a person with restricted mobility in Group 2 would require to wait considerably longer within Group 2 for a property than a person in Group 2 who did not have restricted mobility."

In our view the policy specified in these passages is clearly a "practice" on the part of GHA within the meaning of EqA, although the term "provision, criterion or practice" has not been specifically used and therefore that a PCP has been identified by the appellant.

[33] At condescendence 7 the appellant does specifically use the statutory term in the following passage:

> "Section 20(3) specifies that the first such requirement is a requirement that 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. Section 21(1) of the 2010 Act provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments. Section 21(2) provides that 'A' discriminates against a disabled person if 'A' fails to comply with that duty in relation to that person. The Defenders were in breach of their obligation to make reasonable adjustments under Section 29(7)(b) of the 2010 Act. The Pursuer was substantially disadvantaged by the Defenders system of housing allocation which resulted in a disabled homeless person requiring to wait much longer than a non-disabled homeless person before being able to secure that accommodation was made available to them. Separatim, the Pursuer was also substantially disadvantaged by not being permitted to bid on a property advertised for Group 2 whilst homeless but allocated to Group 5."

On a plain reading of this section of the pleadings it is clear that the appellant is contending that GHA's allocation policy was a PCP which is said to have substantially disadvantaged the appellant. The sheriff has erred in holding otherwise, apparently because the language of the statute was not used expressly within condescendence 2. We consider that a PCP has been identified when the appellant's pleadings are read as a whole.

[34] It is also clear from the passages quoted above that the appellant averred that the PCP had caused a substantial disadvantage to the appellant because she had to wait "much longer" than a non-disabled homeless person before she secured accommodation, partly because she was unable to carry over her waiting time in Group 5 when she transferred over to Group 2 and because she was unable to bid for homeless accommodation within the available Group 2 stock while she was homeless but allocated to Group 5.

[35] In her pleadings the appellant has identified a reasonable adjustment which she contends might be made by GHA within condescendence 7, where it is averred that GHA's housing allocation policy could have been adjusted to permit a person in Group 5 who was homeless to be able to bid for any suitable accommodation regardless of the group to which to had been allocated under the policy.

[36] GHA changed its procedures in November 2018 by permitting persons in any equivalent housing group to receive a priority for bidding according to their highest priority of need within the housing allocation property. The court was advised by counsel for GHA that this was the result of a review of the manner in which it operated and was not attributable to the present case. The sheriff did not consider that this change assisted the pursuer in identifying the PCP which required reasonable adjustment. We do not agree. The alteration seems to us to be a clear indication that on review GHA had itself identified a practice which required to be adjusted and had applied an adjustment which it must have considered to be reasonable.

[37] In our view the appellant's averments contain details of GHA's policies in relation to applications by non-disabled and disabled homeless people in terms which may be construed as a PCP. They also contain details of a claim of substantial disadvantage in the discrepancy in waiting times and a suggested adjustment to reduce the disadvantage which could be regarded as reasonable. It follows that we consider that the sheriff erred in refusing to admit the appellant's claim under sections 20 and 21 of EqA to probation.

Section 19 – Indirect discrimination

[38] The second ground of appeal is inextricably linked to the first in that it is also directed at the sheriff's treatment of the appellant's averments anent the identification of a "provision criterion or practice" which operated to place the appellant at a disadvantage.

[39] At paragraph 24 of his judgment the sheriff states:

> "The pursuer fails to point to a provision, criteria or practice which she says operates to her detriment. That omission is fatal to this aspect of her case. It is not enough for the pursuer to aver overall what occurred to her and leave to inference what the provision, criterion or practice was. That has to be the subject of specific averment. It is not. This aspect of the pursuer's case is irrelevant."

[40] He goes on to identify that this requires consideration of the provisions of section 19 of the 2010 Act which relate to the issue of indirect discrimination.

[41] We accept that as a general proposition when dealing with section 19 it is incumbent on the appellant (i) to aver precisely the "provision, criterion or practice" which she claims placed her at a disadvantage; (ii) the particular disadvantage which she suffered and (iii) to identify the appropriate comparator in terms of section 23.

[42] Unfortunately in his treatment of section 19 the sheriff has made no reference to the comparator at all, although he does go on to deal with this requirement in relation to his treatment of section 15.

[43] The averments in relation to the provision, criterion and practice "PCP" have already been considered and are to be found in condescendences 2, 4 and 6. There are detailed averments regarding the operation of the policy and what can only be described as the "criteria" applied in order to determine into which group a person should be placed. There is a specific averment in condescendence 4 to the effect that a homeless person who had been referred to GHA by GCC would normally be allocated to Group 2 and the effect of the operation of this allocation mechanism, in terms of the loss of the benefit of waiting time in Group 5 in the event of a transfer to Group 2, is also averred in condescendences 5 and 6. At various stages, particularly in condescendences 2 and 6 there is specific reference to GHA's "allocation policy" and the existence of such a policy is expressly admitted in Answer 2. It is therefore somewhat difficult to accept that for the purposes of proof GHA would not have fair notice of the policy which the appellant was claiming to be discriminatory.

[44] Moving to the requirement to aver the disadvantage suffered it is clear from the face of the pleadings that the focus is on the longer waiting times experienced by those placed in Group 5. The appellant avers in condescendence 6 that "the Defender's allocation policy indirectly discriminated against the pursuer (contrary to section 19 of the 2010 Act)". She goes on to aver in some detail that:

> " A person who was homeless and who did not have restricted mobility would typically wait for approximately 12 weeks before they were able to bid successfully for the tenancy of a Group 2 property. Because of the low number of ground floor properties allocated to Group 2, the Pursuer would have been required to wait significantly longer than a person who was not disabled before she would have been able to bid successfully for permanent accommodation."

This appears to us to be a clear articulation of the perceived disadvantage. This is further signposted by the opening words of the next sentence which explain:

> "This disadvantageous outcome was so well known that GCC staff advised the Pursuer that she was better to remain in Group 5, notwithstanding the smaller proportion of properties allocated to Group 5 when compared to Group 2….."

[45] On the basis of the foregoing it is our view that the sheriff's conclusions regarding the lack of specification as stated in paragraph 24 of his judgment cannot be justified and the averments ought to be admitted to probation.

[46] This will in turn involve a comparator and as with the related appeal involving GCC the identification of the correct comparator is a fundamental plank of GHA's criticism of the appellant's pleadings.

[47] The appellant's averments in this regard are also to be found in condescendence 6:

> "The pursuer was accordingly at a particular disadvantage compared with homeless persons who did not have restricted mobility. She was treated unfavourably in her ability to secure the provision of permanent accommodation from the Defenders compared with a homeless person who did not have restricted mobility."

[48] As we have identified the sheriff does not appear to consider the question of the comparator in the context of section 19 at all; however, if we assume his views in that regard are those stated in paras [27] to [29] of his judgment it is clear that he considers the appellant's selection of comparator to be wrong. He concludes that the waiting time differential between Group 2 and Group 5 is attributable to the narrower and smaller number of houses from which those with disabilities can choose. In his view the court is not being asked to compare like with like and would be hampered in its attempt to determine whether there were differences in treatment on the basis of a protected characteristic. It is his view as a matter of law that the appellant's choice of comparator falls foul of the requirements of section 23 (1) because it is materially different from her circumstances.

[49] While there is a superficial attraction to this argument it overlooks the dicta of Baroness Hale in *Essop* v *Home Office* [2017] 1 WLR 1343 at paragraphs 17 and 27. The issue is whether

the requirement for a ground floor accommodation is a proxy for the protected characteristic which in this case is disability.

[50] We are fortified in this view having regard to the comparator selected by Mr Lock KC in *R (Nur)* v *Birmingham City Council* [2021] EWHC 1138 (Admin) at paragraphs 105 to 108:

> "105 It is common ground that the Council's housing allocation policy is relevant 'provision, criterion or practise' for the purposes of s.19 of the Equality Act 2010 (the EA).
>
> 106 A practice is discriminatory under s.19 EA if it would put persons who have a disabled member of their household ('disabled households') at a particular disadvantage when compared with persons who do not have a disabled member of their household ('non-disabled households'). As in all cases concerning discrimination, it is important to identify the comparator. Section 19(1) EA provides: '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.
>
> 107 However, as Lady Hale observed at §13 of *Chief Constable of West Yorkshire v Homer* [2012] I.C.R. 704 (*Homer*) the comparator cannot bet set up by reference to the protected characteristic itself or discrimination law would be self-defeating. Monaghon on Equality Law says at §6.347: 'In general, the pool should comprise all those who may be—or could be—subject to the provision, criterion or practice in issue. In other words the pool must be one which suitably tests the alleged discrimination.
>
> 108 Applying that approach, the comparison must be between persons on the register who are applying for properties and have a disabled person in their households and persons on the register who are applying for properties who do not have a disabled person in their household. Hence some comparators will have children in their households and others will not."

Between paragraphs 109 and 122 Mr Lock KC gives a detailed analysis of the evidence in that particular case and how it justified his conclusion that the Council's policy left disabled households, such as Mrs Nur's household, at a particular disadvantage.

[51] A number of relevant points can be distilled from this decision. In the first place it was conceded that the council's housing allocation policy was a "provision, criterion or practice" for the purposes of section 19 of the 2010 Act. This supports our decision in relation to the question of whether such a PCP has been adequately averred in this case.

[52] Secondly, the comparator selected cannot be set up by reference to the protected characteristic. By factoring in the requirement for a ground floor property GHA are doing just that.

[53] Thirdly, the issue of whether there had in fact been any disadvantage can only be determined after evidence has been heard and assessed. Before coming to the conclusion that he did Mr Lock KC carried out a careful analysis of the evidence about what sort of properties had been available for Mrs Nur to bid for, why she had not been successful and how that compared to persons in a non-disabled household. It is our view that before a full and considered decision can be taken as to whether there was in fact a disadvantage suffered by the appellant a similar exercise will require to be carried out in this case.

[54] It is important to look at the pleadings as a whole and in doing so we are satisfied that the appellant has sufficiently identified not only that the housing allocation policy adopted by GHA was a "provision, criterion or provision" for the purposes of section 19 but also that there are sufficient averments identifying the disadvantage which the appellant claims to have suffered as a result of the operation of that policy. Whether such disadvantage arose in this case is, however, a matter for proof.

[55] For the purposes of proof we are satisfied that the comparator selected by the appellant is appropriate and this ground of appeal should succeed.

Section 15 – disability discrimination

[56] The sheriff refused to admit the appellant's claim under section 15 to probation because of her choice of comparator. He considered that choice to be flawed because it "is materially different from her circumstances" in contradiction to the requirements of section 23.

[57] Section 23 does not apply to section 15: that ought to have been clear to the sheriff, particularly as he quoted the terms of both sections. The appellant must accept some responsibility for contributing to that error because in her pleadings, particularly condescendence 6, she identifies a comparator:

> "The Defender's allocation policy indirectly discriminated against the Pursuer (contrary to Section 19 of the 2010 Act), and treated the Pursuer unfavourably (contrary to Section 15 of the 2010 Act), in the provision of accommodation to her because of her disability. … Because of the low number of ground floor properties allocated to Group 2, the Pursuer would have been required to wait significantly longer than a person who was not disabled before she would have been able to bid successfully for permanent accommodation. … She was treated unfavourably in her ability to secure the provision of permanent accommodation from the Defenders compared with a homeless person who did not have restricted mobility … Persons in Group 2 were able to obtain accommodation within a shorter period of time than other persons in different Groups with different housing needs, including Group 5."

Perhaps the appellant intended that comparator to be utilised for the purposes of her section 19 claim: unfortunately, her pleadings are not a model of clarity. Insofar as her averments are supposed to target section 15, we simply observe that the appellant did not require to illustrate discrimination through a comparison by reference to circumstances (*McCue's Guardian* v *Glasgow City Council* 2023 SLT 1 at paragraph 57).

[58] The justification for the direction of the pleadings is that although the pursuer does not require to identify a comparator, doing so may help to demonstrate that a person with a disability was subject to unfavourable treatment. This basis of discrimination is similar to that pled in relation to the claim under section 19. We do not propose to repeat our views on the comparison by reference to circumstances, other than to emphasise that in relation to this head of claim (section 15) the court is entitled to look at a comparison between what has happened to the appellant in fact and what would have happened to her in a counterfactual world without the treatment alleged to have been unfavourable (*McCue* at paragraph 55).

[59] Having concluded, incorrectly, that section 23 was determinative of the section 15 claim, the sheriff unfortunately did not consider whether the appellant been treated unfavourably because of something arising in consequence of her disability. 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 at paragraphs 16 and 17 and *McCue* at paragraph 57).

[60] Having regard to the pleadings and not limiting ourselves to condescendence 6, we consider that there are sufficient averments on record to enable the section 15 claim to proceed to probation. We recognise that the appellant has not identified a particular property which was denied to her which may give rise to difficulties in establishing actual disadvantage; however, there are factual issues in dispute between the parties, including whether all potentially suitable ground floor properties are allocated to Group 5 (which GHA avers and which the appellant denies) and that potentially suitable properties were let which were not advertised through Group 5.

Cross-appeal

[61] Counsel for GHA said little more than to adopt the brief submissions in their respective notes of argument. We shall be similarly brief.

[62] The appellant does not need to prove that she would have been offered suitable accommodation and that she would have accepted it. That is not required on any of the bases of claim brought by the appellant. Her claims are not incompetent and they are not academic (*Macnaughton* v *Macnaughton's Trustees* 1953 SC 387). The sheriff identified that the appellant brings a series of complaints to the court which may give rise to a consequence in damages and

that her crave for declarator is not devoid of meaning. We agree. Accordingly the first ground of the cross-appeal fails.

[63] It appears that at debate GHA argued unsuccessfully before the sheriff that as there were no averments of causation to establish a loss the claims were incompetent. The argument before us shifted to a discussion about the relevancy and specification of that part of the pleadings. This ground of cross-appeal also fails. First, no such submission on relevancy and specification was made to the sheriff. Secondly, the submission to us took little account of the nature of the remedies sought - damages for loss, damage and injured feelings as well as the loss of chance. Compensation for injured feelings is a valid head of claim under section 194 of the EqA. Thirdly, we have already concluded that there are sufficient averments on record to enable the section 15, section 19 and sections 20 and 21 claims to proceed to probation. We have arrived at the same conclusion in relation to causation.

Disposal

[64] We will therefore allow the appeal, refuse the cross-appeal, 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.