

Between a Rock and a Hard Place

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Lewisham LBC v Malcolm
[2008] UKHL 43

The Facts

Courtney Malcolm was diagnosed with schizophrenia in 1985. Over a period of five years, he was admitted to hospital on ten occasions, two of which were compulsory detentions under the *Mental Health Act 1983*. However, his condition was stabilised by medication. Throughout the period, Mr Malcolm held down employment, including a position in a housing office.²

In February 2002, Mr Malcolm rented a flat from Lewisham London Borough Council under a secure tenancy for the purpose of section 79 *Housing Act 1985*. He was entitled to exercise the right to buy, which he applied to do in March 2002. The purchase had still not been completed in 2004 when the material events took place.

In 2004, Mr Malcolm had compliance problems with his oral medication, and it was reported that “he became dysfunctional at work, eventually, simply sitting at his desk. He was losing weight, not sleeping or eating.”³ Mr Malcolm was placed on depot medication in July 2004.

During the period of his medication problems, Mr Malcolm secured a mortgage offer and was due to complete the purchase on 26 July 2004. However, on 22 June 2004, Mr Malcolm sub-let the flat on an assured short-hold tenancy which was in breach of his tenancy agreement. Furthermore, by vacating the property, Mr Malcolm lost his secure tenancy by virtue of sections 79(1) and 81 of the *Housing Act 1985*. Once a secure tenancy ceases, it cannot subsequently once more become a secure tenancy.⁴

The Local Authority, Lewisham LBC, exercising its function of managing its housing stock, served a notice to quit upon Mr Malcolm and commenced possession proceedings.

In his defence, Mr Malcolm argued that he was disabled within the meaning of the *Disability Discrimination Act 1995* (‘DDA’), the reason why the Council were seeking possession was related to his disability, and unless the Council could show justification, the Court was precluded from making a possession order against him.

At first instance, the judge granted a possession order. Her principal reason for doing so was that the DDA was not engaged where all security was lost and there was no discretion for the court to exercise. However, she also made findings of fact in case she was wrong. Firstly, she concluded that Mr Malcolm was not disabled within the meaning of the DDA as she was unable to say that his illness had a substantial effect upon his ability to carry out day-to-day activities. Secondly, the decision to sub-let was a planned decision, closely linked to his proposed purchase, not an irrational act caused by his illness.

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2 an indication that Mr Malcolm most probably understood the consequences of sub-letting his tenancy.

3 Per Baroness Hale, *Judgement*, para 49

4 Section 93(2) *Housing Act 1985*

The Court of Appeal⁵ allowed the appeal, dismissed the possession proceedings and declared that the notice to quit and possession action constituted unlawful discrimination contrary to Part III of the DDA. They found Mr Malcolm was a disabled person within the meaning of the Act, there was an “appropriate relationship” between the Council’s actions and his illness, that his treatment had been less favourable than that of other people to whom that reason did not apply, and (by majority) the fact that the landlord did not know of the disability did not preclude a finding of discrimination.

The Law

As a consequence of sections 79(1), 81 and 93 *Housing Act 1985*, Mr Malcolm’s tenancy ceased to be secure within the meaning of that Act. Therefore, he was no longer protected by section 84 *Housing Act 1985* which prohibits the making of order for possession of a dwelling let under a secure tenancy unless one of the grounds in Schedule 2 of the Act applies. Consequently, putting to one side the DDA, Lewisham LBC had an unanswerable claim for possession of the dwelling.

Mr Malcolm sought to defend the claim on the grounds that the actions of Lewisham LBC amounted to discrimination within the meaning of section 22(3) DDA⁶ which states:

“It is unlawful for any person managing any premises to discriminate against a disabled person occupying those premises—

(a)...

(b)...

(c) by evicting the disabled person, or subjecting him to any other detriment.”

Discrimination is defined in section 24 DDA as:

“(1) ...a person (“A”) discriminates against a disabled person if—

(a) for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and

(b) he cannot show that the treatment in question is justified.”

The same wording is used in section 5(1)⁷ of the Act to define discrimination in the employment context, whilst section 20(1) uses this wording in the context of supply of goods and services.

Prior to *Malcolm*, the leading authority on the interpretation of disability related discrimination was the Court of Appeal decision in *Clark v Novacold*⁸ which sought to interpret section 5(1) of the Act. The courts are required to identify a comparator to whom the treatment can be compared. In identifying the comparator, Mummery LJ set out two options in his judgment. A *broad approach* in identifying the comparators focused on the first three words of the provision, “for a reason”. The expression, “which relates to the disability” are words added not to identify or amplify the reason, but to specify a link between the reason for the treatment and the disability which enables the disabled person to complain of their treatment.⁹ The second option was for a *narrow approach* which uses the entire phrase “for a reason which relates to a disabled person’s disability”.

5 [2007] EWCA Civ 763

6 *Lewisham LBC v Malcolm* originated prior to the amendments made by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 SI 2003/1673 and the Disability Discrimination Act 2005. Therefore, all

references to the legislation will be to its original format unless otherwise indicated.

7 Now section 3A(1)

8 [1999] I.C.R 951

9 *Ibid*, per Mummery LJ at p. 962

Following the broad approach, if a disabled employee is absent on long term sick leave because of his disability, the comparator would be an employee who is not on long term sick leave. The comparator using the narrow approach would be an employee who is on long term sick leave but does not have disability. Mummery LJ stated in *Novacold*¹⁰ that the correct approach for identifying the comparator was the broad approach.

Interestingly, Mummery LJ handed down what appears to be a conflicting judgment in *S v Floyd and EHRC*¹¹. This case involved a landlord who sought possession on the grounds of rent arrears. It was alleged that the cause of the rent arrears was the tenant's lack of mental capacity. The lack of mental capacity was a disability and the "reason" for the possession claim was a reason related to the disability. It was therefore argued that the possession claim was an unlawful act. In rejecting this argument, Mummery LJ states at paragraph 48:

*"It is not immediately obvious (a) how the 1995 Act could provide a basis for resisting a claim for possession on a statutory mandatory ground or (b) how a landlord would be unlawfully discriminating against a disabled tenant by taking steps to enforce his statutory right to a possession order for admitted non-payment of rent for 132 weeks. The 1995 Act was enacted to provide remedies for disabled people at the receiving end of unlawful discrimination. It was not aimed at protecting them from lawful litigation or at supplying them with a defence to a breach of a civil law obligation. Like other anti-discrimination legislation, the 1995 Act created statutory causes of action for unlawful discrimination in many areas, such as employment, the provision of goods, facilities and services and the disposal and management of premises, but it did not create any special disability related defence to lawful claims of others, such as a landlord's claim for possession of premises for arrears of rent. The legislation is not about disability per se: it is about unlawful acts of discrimination on a prohibited ground, i.e., unjustified less favourable treatment for a reason which relates to the disabled person's disability."*¹²

Whilst prior to *Malcolm*, *Novacold* remained the leading authority, here there was conflicting Court of Appeal authority, which on the facts aligned itself more favourably with the facts which existed in *Malcolm*.

If it is established that the actions are regarded as potentially discriminatory under section 24(1)(a), potentially they can be justified under section 24(1)(b) DDA. However, there is an exhaustive list of justifications in section 24(3) DDA including, inter alia, treatment necessary not to endanger the health or safety of any person, and that the disabled person is incapable of entering into an enforceable agreement. It was common ground that none of these would apply in *Malcolm*.¹³

However, section 5(3)¹⁴ DDA meant that, in the employment context, the actions are justified if they are both material to the circumstances of the particular case and substantial. In other words, it is open for an employer to raise any justification which satisfies this criterion.

The Decision

The House of Lords unanimously upheld the appeal, although they were far from unanimous in their reasoning for doing so.

10 *Ibid*, p.964

11 [2008]EWCA Civ 201

12 A point noted by Lord Scott in *Malcolm* at para 37 of the Judgment

13 Per Baroness Hale, Judgment, para 60

14 Now section 3A(3)

The Lords upheld¹⁵ a long established meaning of ‘disability’ as a physical or mental impairment that has a substantial adverse effect on an individual’s ability to carry out normal day-to-day activities. ‘Substantial’ means “more than minor or trivial”.¹⁶

There was unanimity in that knowledge of the disability is required for there to be a claim under the DDA although the Lords differed as to the extent of that knowledge. Lord Bingham, with Baroness Hale in agreement¹⁷, stated that “knowledge, or at least imputed knowledge, is necessary.”¹⁸ Lord Scott however, in agreement with an earlier Court of Appeal judgment¹⁹, considered that the disability must play a motivating part in the mind, whether consciously or subconsciously, to establish discrimination.²⁰

There was unanimous agreement that Lewisham LBC’s actions did not relate to Mr Malcolm’s disability. Lord Bingham stated that “relates to” denotes “some connection, not necessarily close, between the reason and the disability”²¹, whilst Baroness Hale stated that “[t]he connection between the disability and the reason must not be too remote”²²

By a majority of 4:1 (Baroness Hale dissenting) the Lords found that the correct comparator in disability related discrimination is a person who to whom the underlying reason still applies. In other words, the Lords preferred the *narrow approach*. However, there was disagreement as to the extent to which this comparison should apply. Lords Scott²³ and Brown²⁴ found that *Novacold* was wrongly decided. Lord Bingham, whilst not explicitly overruling *Novacold*, found it hard to accept that it was “rightly decided”.²⁵ Lord Neuberger limited himself to the premises provisions of the DDA.²⁶

There was unanimous agreement that the DDA provided a defence, where there would otherwise be none, the Lords’ reasoning being that the courts would not give legal effect to unlawful acts. However, Lord Bingham stated that he “would not expect such a defence, in this field, to be made out very often.”²⁷

Comment

This decision, whilst made in the context of housing, potentially has a huge effect on the application of disability discrimination legislative provisions as it effectively neutralises any indirect disability discrimination claim. The controversial part of the judgment relates to the comparator to be used in a claim for disability related discrimination. Lord Neuberger stated:

“This appeal raises a number of points relating to the scope and the meaning of the provisions of Part III of the Disability Discrimination Act 1995 (“the 1995 Act”) insofar as they apply to “Premises”. In particular, the competing arguments appear to require a choice to be made between two interpretations of the definition of discrimination in section 24, one of which (supported by the appellant, the London

15 Dissenting, Baroness Hale upheld the finding at first instance that Mr Malcolm was not a disabled person within the meaning of the Disability Discrimination Act. Whilst “it would seem very surprising if a person with chronic schizophrenia, who needed regular anti-psychotic medication if he was to live a normal life in society, did not fall within the definition of disabled within the Act...the judge did correctly direct herself on what the Act required...I am not convinced that she applied the wrong test, or that no judge who applied the right test could have reached the conclusion she did.” (Judgment, para 67)

16 *Goodwin v Patent Office* [1999] ICR 302, EAT

17 Judgment, para 86

18 *Ibid*, para 18

19 *Taylor v OCS Group Ltd* [2006] ICR 1602

20 Judgment, para 39

21 *Ibid*, para 10

22 *Ibid*, para 83

23 *Ibid*, para 34

24 *Ibid*, para 112

25 *Ibid*, para 15

26 *Ibid*, para 139

27 *Ibid*, para 19

Borough of Lewisham) would give the anti-discrimination provisions of section 22 an unattractively restrictive effect, and the other of which (supported by the respondent, Mr Courtney Malcolm) would give those provisions an extraordinarily far-reaching scope.”²⁸.

It is apparent that the Lords were caught in a difficult position as judgment either way would have had a major impact on anti-discrimination law. The Lords were required to balance the interests of private law rights against the interests of disabled people not to be treated less favourably.

What appears to underpin the majority judgments is the fact that the *Novacold* interpretation would effectively have meant entrenchment of the disabled person’s tenancy. Disabled persons could not be evicted if the reason had some causal connection to the disability.

The apparent problem highlighted by *Malcolm* is the limited grounds of justification contained in section 24(3) DDA.²⁹ This could be the reason why *Novacold* remained unchallenged for 9 years and has not caused difficulty in practice. Disability related discrimination in the employment field can be justified if “the reason for the failure is both material to the circumstances of the particular case and substantial.”³⁰ As such, there are many circumstances where an employer can justify otherwise discriminatory actions. Each case must be judged on its facts with regard to the Code of Practice.³¹ In practice, the justification point is a low threshold and “there is considerable leeway afforded to employers when the issue of justification is under scrutiny.”³² Evidence can also be found in a housing context. In *Manchester City Council v Romano*³³ the Court Of Appeal found that the tenants had not been unlawfully discriminated against because the landlord’s actions were objectively justified by the need not to put the health of a neighbour at risk.³⁴

The problem in the housing context is that there is an exhaustive list of justifications contained within section 24(3) which, inter alia, includes treatment necessary not to endanger the health and safety of any person, or that the disabled person is incapable of entering into an enforceable agreement. As sub-letting and rent arrears could not fit into this list, a tenant would always succeed.

The decision in *Malcolm* was unavoidable given the legislative framework. Whilst Baroness Hale set out a strong argument that Parliament intended the broad interpretation to be used,³⁵ the Court was not going to give a judgment which would allow people to effectively breach their tenancy agreement and have a cast iron defence, thus infringing the lawful rights of others. The consequences could have potentially seen some tenants living rent-free. Parliament’s implicit approval of *Novacold* can be attributed to the fact it was made in an employment context, and therefore the problems had not materialised. It is from this point of view whereby we can understand Lord Scott’s statement:

“Parliament must surely have intended the comparison...where the directed comparison is in identical terms, to be a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not.”³⁶

The decision in *Malcolm* could have been limited to the housing provisions of the DDA. Only two of the

28 *Ibid*, para 119

29 These views were expressed by Michael Connelly, ‘The House of Lords narrows the meaning of disability related discrimination’, *Emp. L.B.* [2008] 1

30 Section 3A(3) Disability Discrimination Act 1995 as amended

31 *Clark v Novacold* [1999] IRLR 318

32 *O’Hanlon v Commissioners for HM Revenue and Customs* [2006] IRLR 840 per Elias J para 43

33 [2005] 1 W.L.R 2775

34 Sections 24(2) and 24(3)(a) DDA

35 *Judgement*, paras 77–80

36 *Ibid*, para 32

five Lords expressly overruled *Novacold*, and therefore it was arguable that it still applied in the employment context. Lord Neuberger left the door open to such argument at paragraph 158:

“It would, on the face of it at least, be very surprising if section 24(1)(a) had a different meaning from the effectively identical worded section 5(1)(a), but it would not be an impossible conclusion. While the 1995 Act has a single definition of “disability” which is generally applicable, it has three effectively identical definitions of “discrimination”, each of which applies in different fields (employment, goods facilities and services, and premises). The combination of the contrast between section 5(3) and section 24(3), and the fact that the wider construction of section 5(1)(a) has been assumed to be right for some years – perhaps together with other factors, such as subsequent parliamentary approval – could conceivably justify the decision in Novacold being correct as to the effect of section 5(1)(a), despite the conclusion I have reached as to the meaning of section 24(1)(a).”

Spencer Keen suggests³⁷ that support for this proposition could be found in the UK’s compliance with Council Directive of 27 November 2000 establishing a General Framework for Equal Treatment in Employment and Occupation 200/78/EC. The Framework Directive requires member states to protect disabled employees from both direct and indirect discrimination. He argues that since the UK courts are required to give a purposive interpretation to the DDA 1995 so it complies with the Framework Directive, a claimant could argue that the *Novacold* interpretation of the DDA 1995 is the only interpretation consistent with providing protection against indirect discrimination in accordance with the Directive.

However, such argument now appears dead following the decision of the Employment Appeal Tribunal (hereafter ‘EAT’) in *The Child Support Agency (Dudley) v Truman*³⁸. In their judgment, the EAT stated that the wording of sections 24(1)(a) and 3A(1)(a) are identical and therefore it would “seem surprising if the comparator in one provision was different from that in the other.”³⁹ Further, the EAT concluded that justification could not impact on the question of who is the appropriate comparator for the purposes of unlawful justification.

It is noted that the Framework Directive was not raised in *Truman* and potentially there is still scope for argument. However, it appears that under the current legislation, the *narrow approach* will be adopted in all fields unless a there is a further ruling from the House of Lords.

Lawyers need to be creative in the use of the reasonable adjustment provisions of the DDA.⁴⁰ Many claims of disability related discrimination in the employment context could also be brought as a ‘reasonable adjustment’ claim as employers will be required to take appropriate action in respect of employees with disabilities. In the context of goods, facilities and services, claims generally relate to a failure on the provider to make reasonable adjustments in any event. The comments in *Malcolm* relating to knowledge should not have an impact as Sedley J confirmed in *Roads v Central Trains Ltd*⁴¹ that the duty to make adjustments in a services context is anticipatory and therefore knowledge of the disability is not required.

In relation to the premises context, it has been suggested⁴² that the draft European Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability

37 Spencer Keen, ‘Discrimination: Blame it on the dog’, 158 NLJ 1216

38 UKEAT/0293/08/CEA

39 *Ibid*, per His Honour Judge Peter Clark, para. 22

40 Sections 4A and 21

41 [2004] EWCA Civ 1541

42 Robert Latham and Catherine Casserley, ‘Disability-related discrimination claims after *Lewisham LBC v Malcolm*’, *Legal Action*, September 2008

age, sexual orientation contains obligations in relation to both indirect discrimination and the duty to make reasonable adjustments. Therefore, it is argued that, if finalised in its present form, it is likely to require changes to the current provisions in the UK, particularly in relation to premises.

In the longer term, it is likely that Parliament will remedy the narrow interpretation. The proposed single *Equality Bill*⁴³ may counter the effect of *Malcolm*. As suggested above, it is arguable that the true problem with disability related discrimination is the restricted justification defences available in the housing context, whilst employment context offers employers' unrestricted justification defences. The Government has stated that it wants to "replace these different justification defences with a single 'objective justification' test which would require that the conduct in question is a proportionate means of achieving a legitimate aim."⁴⁴ However, if the wording of disability related discrimination remains unchanged, the courts will need to re-interpret the legislation, although hopefully they will be able to do so without the all or nothing approach the current legislation seems to demand.

43 Referred to in the *Queen's Speech* on 3 December 2008.

44 *The Equality Bill – Government Response to Consultation*, Government Equalities Office, July 2008, Chapter 11.12
