

Lewisham v Malcolm - What does it mean for claims involving Disability Discrimination?

1. The aim of this talk is to look at the effect of the recent case of London Borough of Lewisham v Malcolm (2008) IRLR 700 and its impact in practice in cases involving disability discrimination.

Lewisham v Malcolm – The facts

2. Mr Malcolm suffered from schizophrenia that he controlled with medication. He rented a flat from Lewisham on a secure tenancy. In breach of his tenancy he sublet his flat. At this time he had stopped taking his medication. The Council served a notice to quit and at this time were unaware that Mr Malcolm suffered from schizophrenia. He failed to vacate the flat and possession proceedings were initiated. By this time the Council had been informed of his mental health problems. As part of his defence Mr Malcolm argued that the Council's attempt to regain possession of the flat was unlawful disability discrimination contrary to section 22 of the Disability Discrimination Act 1995.

The Statutory Background

3. As can be seen from the factual matrix this was a housing matter (Part 3 of the Act) and not an employment case (Part 1). However section 24 and in particular the subsection that Mr Malcolm was relying on (s24(1)) is identical in wording to section 3A(1) of the Act which relates to the employment field (disability related discrimination).

4. Section 22(1) (and section 3A(1)) reads:

“For the purposes of this Part, a person 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 Issues in Malcolm

5. The significant issues in Malcolm focussed on two aspects of the statutory definition:

- 5.1 What is the correct comparator for the purposes of determining whether there has been less favourable treatment?
- 5.2 Whether knowledge of the disability on the part of the discriminator at the time of the alleged discriminatory act was necessary in order for the “reason” for the treatment to relate to the disability.

The Comparators

Pre-Malcolm

6. The comparator had previously been defined in the case of Clark v Novacald Ltd (1999) IRLR 318.
7. In Clark the Claimant was dismissed from his job because he would be off work sick for a considerable period of time as a result of a spinal injury and was unable to carry out his duties. It was common ground that this was the reason for the dismissal. At the employment tribunal the employer sought to argue that “*others to whom that reason does not or would not apply*” were employees who were off work long term but were not disabled. This test required there to be a causal link between the treatment and the fact of the Claimant’s disability. If a non-disabled person would have been treated in the same way then there was no discrimination. Mr Clark sought to argue that “that reason” related only to the phrase “for a reason”. In Mr Clark’s case this was the fact that he was on long term sickness absence. He argued that “others to whom that reason does not or would not apply” were therefore others who were not on long term sickness absence. The phrase “related to his disability” was only relevant in determining who could make a claim, namely a disabled person in contrast to someone who was not disabled.
8. At first instance, the employment tribunal adopted the argument advanced by the employer.
9. The Court of Appeal found this to be incorrect and instead adopted the analysis advanced by Mr Clark. Mummery LJ acknowledged that the wording of section 3A(1) (then section 5(1)) of the Act was ambiguous and that it could be read in either of the ways contended for.
10. Although this interpretation of the subsection made the comparison worthless because (as Toulson LJ in the Court of Appeal in Malcolm noted) without the reason relating to the person’s disability there would be no treatment, Mummery LJ considered that the wider definition of “others” was more appropriate, fitted within the context of the Act and what the Act was endeavouring to achieve. He considered that the Act did not require the same comparisons made to be i.e. between different

persons in the same or materially different circumstances as is the case in respect of the SDA 1975 and RRA 1976 and to approach the Act in the same way would be misleading. He considered that in this special case it was more probable that Parliament meant “that reason” to relate only to the reason for the treatment and not to a causal link between the reason and the disability. It was also consistent with the ability of employers to justify direct discrimination which they could not do in cases of sex and race discrimination.

11. Applying this view of the comparator Mr Clark was discriminated against because if he were not disabled he would not have been on long term sickness absence. Other employees who were not disabled, i.e. those for whom the reason for the treatment (namely long term sickness absence) did not apply would not have been dismissed. Therefore Mr Clark was treated less favourably for a reason related to his disability.
12. The practical reality of the wide nature of the comparator was that in cases where there was less favourable treatment of a disabled employee arguments tended to centre on a failure to make reasonable adjustments (which cannot be justified) but where there were no adjustments that could be made arguments would then move to the justification for the treatment. An example of this would be a Clark v Novacald scenario where although there were no reasonable adjustments that could be made to allow Mr Clark back to work, the question would arise whether dismissal had to occur when it did. If this could not be justified then there would be unlawful discrimination.

Mr Malcolm's Argument

13. It was using this comparator that Mr Malcolm sought to advance his case that he had been discriminated against. It was common ground that the treatment Mr Malcolm received was his subjection to possession proceedings. He argued that he had sublet his flat as a result of his disability (it was common ground that he would not have done so had he not stopped taking his medication). Since the treatment that he was being subjected to namely the notice to quit and possession proceedings was related to his disability he argued that he was treated less favourably than others for whom that reason, namely those who had not sublet their flat, did not or would not apply.

Malcolm

14. The majority in Malcolm (Lords Neuberger, Scott and Brown) expressly overruled Clark. Lord Bingham said that he found it hard to accept that Novacald was rightly decided but was satisfied that a different principle must be applied in the present context. Baroness Hale was the only member of the House of Lords to hold that Clark was correctly decided.

15. The majority considered that the appropriate comparator in Mr Malcolm's case was with other tenants who had sublet. They considered that this interpretation was a more natural interpretation on the wording of the subsection. In order for a meaningful comparison to be made "*others to whom that reason does not or would not apply*" applied to the whole of the first clause namely "*for a reason related to his disability*". The majority considered that there had to be a causal link between the reason for the treatment and the disability and "*that reason*" related to the causal link with the disability i.e. in the Malcolm case the comparison was with others who had sublet their flat and were not disabled rather than others had not sublet their flat.
16. The majority of the House of Lords appear to have based their view on this interpretation being a more natural reading of the provision. They also took the view that Parliament could not have intended the comparison to be meaningless as it was by application of the interpretation in *Clark v Novacald* or that the disability should play no part of the alleged discriminator's reason for subjecting the person to the treatment complained of.
17. The interesting judgment in the case is that of Baroness Hale. She alone considered that *Clark v Novacald* was correctly decided. She pointed out that indirect discrimination is not provided for in the same way in the DDA as it is in the SDA and RRA and this may be because provisions in the same vein may not have gone far enough. The Act was intended to be kinder to disabled people than to others and a level playing field would not have been enough. In the context of section 24 where there is no provision for requiring reasonable adjustments subsection 1 is the only subsection that requires landlords to make adjustments to cater for disabled people. She argued that this would be lost on a narrow interpretation.
18. She also argued that it accorded with the speeches made in respect of the Bill as it passed through the Commons and Lords and the fact that when the Act was amended in 2005 Parliament did not amend the wording of the old section 5 (now section 3A(1)). If a narrow interpretation of the comparator had been its intention then it need only have removed the justification provision rather than adding a direct discrimination provision which could not be justified (section 3A(5)).

Impact of the decision on the comparator

19. In practice the adoption of the narrow comparator by the majority of the House of Lords has effectively made section 3A(1) redundant. It is difficult to envisage a scenario where a Claimant could succeed if the reason for the treatment of an individual is anything other than the fact of their disability. Any treatment would

have to be because the person concerned was disabled which would be a breach of section 3A(5).

20. Clearly in cases concerning section 3A of the Act there is also the duty on employers to consider reasonable adjustments. This is likely to be where argument will be focussed rather than on section 3A(1). Although argument has been centred on this and the justification defence since Clark, there are cases that would have resulted in a finding of unlawful discrimination before but may slip through the net for example where employers make a decision to dismiss because the employee is not able to return to work at that particular time. It may be that the employee is not costing the employer anything as his entitlement to company and statutory sick pay has run out. It may also be that the employee may be able to return to work after a period of time but there are no reasonable adjustments that can be made at that time to allow him back to work. An employer is likely to be able to dismiss in such circumstances and avoid a finding of discrimination where in fact pursuant to the Clark v Novacald test he would have to justify why it was necessary to dismiss at that particular time.

Knowledge

21. It had been the case that an employer did not need to have knowledge of the employee's disability to be liable for disability related discrimination pursuant to section 3A(1) – London Borough of Hammersmith and Fulham v Farnsworth (2000) IRLR 691.
22. The House of Lords (including Baroness Hale) in Malcolm was unanimous that knowledge of the disability was required for an employer to be guilty of unlawful discrimination against a disabled person. Clearly this related to section 3A(1) as well as section 24(1) although as Baroness Hale pointed out given the narrow comparator this aspect would be less critical. Given my view that there is unlikely to be a case that can succeed under section 3A(1) where the reason for the treatment is anything other than the person's disability, this finding by the House of Lords is unlikely to have an impact in relation to section 3A(1).
23. Where this decision may have an impact is in respect of the other forms of discrimination i.e. direct discrimination (section 3(5)) and a failure to make reasonable adjustments (section 4A). Knowledge is required for both of these forms of discrimination but what is not clear from the House of Lords judgment is whether that knowledge has to be actual, imputed or constructive knowledge.
24. Lord Bingham considered that knowledge or at least imputed knowledge is necessary, Lord Scott considered that there had to be something which consciously or subconsciously affected the mind of the discriminator, Baroness Hale considered

that there must be actual or constructive knowledge on the part of the discriminator and this also appears to be the approach of Lord Neuberger.

25. Although the use of the term imputed knowledge is unhelpful, it is likely that the knowledge required of an alleged discriminator can be actual and constructive and that is indeed what Lord Bingham intended.

Conclusion

26. It is unclear why the majority in Malcolm felt the need to overturn 9 years of settled law because it does not appear to accord with what Parliament would have intended. It will almost certainly lead to an emphasis on section 4A and the duty to make reasonable adjustments rather than section 3A(1) but in practice it is likely that most cases that would have succeeded pursuant to section 3A(1) will succeed under section 3(5) or section 4A.

27. The implications of the decision for the general attitude of employers to disability is more difficult to determine. The redundancy of section 3A(1) coupled with the fact that section 3(5) and section 4A require knowledge (actual or constructive) would appear to encourage employers not to make enquiries about the reasons for an employee's absence or lateness because unless it can be shown that they ought to know that this was due to a disability then they will escape liability. Section 3A(1) actively encouraged enquiries precisely because knowledge of the disability was not a factor in determining whether or not there was a breach of the subsection. This may be the more significant impact of the decision.

MURRAY GRANT

29th September 2008

ISSUES RAISED BY LEWISHAM

SITUATION BEFORE LEWISHAM

LEWISHAM

FUTURE – REASONABLE ADJUSTMENTS AND DIRECT