

DISABILITY DISCRIMINATION UPDATE

London Borough of Lewisham v Malcolm & The Equality & Human Rights
Commission [2008] UKHL 43

Introduction

“The Disability Discrimination Act is different from the Sex Discrimination and Race Relations Acts in that employers are required to take steps to help disabled people which they are not required to take for others. The DDA does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination.”

1. This quote is from the head note of Archibald v Fife Council [2004] UKHL 32. It summarises the reach of the Disability Discrimination Act (DDA). It also tells us that the DDA is about more than just equal treatment.
2. In Archibald the court appreciated that people with disabilities are not equal and it is this very lack of equality which the DDA seeks to address. It is a pity that the Law Lords in Malcolm did not have this at the forefront of their minds when they overruled Clark v Novacold.

Relevant Parts of the Disability Discrimination Act 1995 (DDA)

3A. Meaning of “discrimination” under Part 1

(1) For the purposes of this Part, an employer 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.

S 24 Meaning of “discrimination” under Part 3

(1) For the purposes of section 22, 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.

(2) For the purposes of this section, treatment is justified only if—

(a) in A's opinion, one or more of the conditions mentioned in subsection (3) are satisfied; and

(b) it is reasonable, in all the circumstances of the case, for him to hold that opinion.

(3) The conditions are that—

(a) in any case, the treatment is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person);

(b) in any case, the disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent, and for that reason the treatment is reasonable in that case;

(c) in a case falling within section 22(3)(a), the treatment is necessary in order for the disabled person or the occupiers of other premises forming part of the building to make use of the benefit or facility;

(d) in a case falling within section 22(3)(b), the treatment is necessary in order for the occupiers of other premises forming part of the building to make use of the benefit or facility.

(4) Regulations may make provision, for purposes of this section, as to circumstances in which—

(a) it is reasonable for a person to hold the opinion mentioned in subsection 2(a);

(b) it is not reasonable for a person to hold that opinion.

(5) Regulations may make provision, for purposes of this section, as to circumstances (other than those mentioned in subsection (3)) in which treatment is to be taken to be justified.

NB No duty re-adj at time of claim + still no direct discrimination

Indirect

The Facts

3. The Council had granted a secure tenancy to Mr Malcolm. He was disabled as he was suffering from schizophrenia. In a period when he stopped taking his medication he sublet his flat. The sublet was in breach of his tenancy and so the Council sought possession of the flat.

Argument

4. Mr Malcolm relied on the fact that his comparator was someone who was not suffering an incidence of his disability namely the tendency to do confused things such as subletting your flat when you are not allowed to and that the Council could not justify their seeking of possession.
5. The Council argued that it was unaware of Mr Malcolm's disability. The Council maintained that the appropriate comparator was someone who had sublet. It was accepted that it could not rely on a justification defence.

The Decision

6. By a majority the House of Lords found in favour of the Council.

Analysis - Knowledge

7. Clearly knowledge of a disability is important. However the word knowledge can mean many things to a lawyer. The EAT in Heinz Co Limited v Kenrick [1999] UKEAT 1082 found that it was sufficient for the employer

“to have had sufficient knowledge of the manifestations of the applicant's disability”

8. The EAT adopted an objective approach to knowledge going on to say that:

“There is nothing in the statutory language that requires that the relationship between the disability and the treatment should be judged subjectively through the eyes of the employer. The correct test is the objective one of whether the relationship exists, not whether the

employer knew of it. This requires employers to pause to consider whether the reason for some dismissal that they have in mind might relate to disability and, if it might, to reflect on the Act and the Code of Practice before dismissing. Unless the test is objective, there will be difficulties with credible and honest yet ignorant or obtuse employers who fail to recognise or acknowledge the obvious.”

9. Interestingly the issue of subjectivity surfaces again in Richmond Adult Community College v McDougall [2008] EWCA 4, a case I will look at in some detail a little later.
10. The EAT then go on to justify this interpretation by looking at the language of the DDA. The phrase ‘which relates to’ is wide enough to include a manifestation of the disability and not just the disability itself.
11. In the case of Mr Kenrick the manifestation was his being unwell albeit that at the time Heinz did not actually know what was causing it.
12. The reasoning made sense as it prevented the ‘obtuse or the ignorant from acknowledging a person’s disability’.
13. This reasoning was fundamental to the interpretation of the DDA before Malcolm. Tribunals were directed towards the question of justification where knowledge could play a decisive part in determining liability.
14. Looking back and with the benefit of hindsight it is now clear that this approach to knowledge was likely to run into difficulties where a manifestation of a disability might not in fact be easily connected to a disability.

15. The instruction to an employer or in this case a landlord to pause and think before taking an action, although good practice, gives rise to what the court in *Malcolm* saw as an unnecessary burden on a landlord.

16. Having reviewed the authorities the Court decided (Lady Hale agreeing with Lord Bingham on this aspect of the decision at paragraph 86):

“that to establish liability for the statutory tort of discrimination against a disabled person, it is necessary to show that the alleged discriminator either knew or ought to have known of the disability (not, of course, that in law it amounted to disability within the meaning of the Act).”

17. Lady Hale also went on to explain that this accorded with the EAT in *Kenrick* as in that particular case the employer knew all the material facts.

18. This may explain *Kenrick* on its facts but *Kenrick* went further and required an employer to ‘stop and think’ before taking an action. Almost requiring the employer to make himself aware of the disability.

19. A simple example demonstrates the difference:

A new employee who is disabled but has not informed the employer turns up to work but goes home early on the first day saying he feels unwell. Before he leaves he is seen by his supervisor who notices that the employee appears confused and disorientated. He fails to attend for the rest of week. The employer hears nothing from the employee and dismisses.

20. The employer has knowledge that the employee reported being unwell and that he was confused and disorientated. *Kenrick* indicates that the employer should make further enquiries before taking a decision to dismiss.

21. Under Malcolm the employer dismisses because the employee did not turn up to work and that is his reason. He does not have to investigate the behaviour and absence. He cannot be said to have knowledge actual or constructive that the employee was disabled.

22. The outcome may be the same applying the different approaches but before Malcolm the employer would have had to get there by justifying the dismissal.

23. Perhaps as the then President Mr Justice Lindsay feared in Kenrick the ignorant or obtuse employer will now escape?

NB Is this indirect discrimination.

Analysis – ‘reason relating to’

24. There are 3 types of discrimination possible in the employment context:

- ✓ Direct
- ✓ Reason relating to
- ✓ Failure to adjust.

25. Direct is easily understood as it is common to other discrimination legislation. It requires a direct comparator in other words someone who does not have the disability of the Claimant. It does not nor is it intended to cover manifestations of a disability.

26. It deals with prejudice and assumptions in respect of disability or the specific disability.

27. The issue was addressed in High Quality Lifestyles Limited v Watts [2006] UKEAT 671 where an HIV positive worker was dismissed after a support worker was seen as a risk to the service users after the risk of broken skin was assessed as high.
28. The EAT held that the correct comparator was someone not HIV positive but who posed the same level of risk to the service users.
29. Using this comparator the employer was correct to dismiss as it treated Mr Watts no differently.
30. 'Reason relating to' was seen as a different type of discrimination. Although the section was not particularly well drafted a pragmatic interpretation by the Court of Appeal in Clark v Novacold Limited [1999] EWCA Civ 1091 appeared to have met the objective of protecting an employee from treatment based on the manifestation of his disability whilst at the same time allowing the behaviour to be justified where the reason for the different treatment was 'substantial and material' in the particular circumstances.
31. The interpretation made it relatively simple to establish less favourable treatment. The employee simply had to point to a manifestation of his disability and then find a comparator who did not have the manifestation.
32. In Novacold it was long term absence. This was a manifestation of his disability and his comparator was someone who did not have the manifestation someone who was at work.
33. Again the emphasis was on the employer explaining the treatment by way of justification. In the case of a long term absentee who was unlikely to return to work in the near future with or without adjustments dismissal would almost certainly be justified.

34. Malcolm established that the comparator had to be far more tightly drawn. Gone are the arguments over manifestation. Now a Tribunal must look at the disability itself and not the incidences of it. – **Direct??**

What about the code of practice on employment matters – 4.30 onwards

35. The comparator is now someone who is absent from work but who is not suffering from the disability of the Claimant. If the employer would have treated the two employees in the same way then no discrimination. Justification never comes into play.

36. A number of commentators have questioned why the Court in Malcolm could not simply apply this to Mr Malcolm? The consensus is that the legislation holds the key to the decision in Malcolm. Put simply the scope for justifying treatment in Part 3 under the landlord and tenant provisions is narrower.

37. There is no general 'substantial and material' justification defence for a landlord. The test is narrower and requires that one or more of the conditions set out under S 24(3) DDA are satisfied. This was crucial in Malcolm as the Council were unable to rely on any of the conditions under S 24(3). The Council could not justify their treatment.

38. The Court was thus faced with a situation where the Council could only succeed if it could show that it had not discriminated against the tenant in the first place. The unfair consequences were obvious.

39. The discussion of the guide dog in Malcolm succinctly explains why the Court found for the Council on the comparator issue (see paragraphs 35 – 37 of Lord Scott's judgment).

40. A blind man is refused entry because he is accompanied by his dog. This would appear to be an obvious case of 'reason relating to' discrimination. Applying Novacold the result is clear the owner of the premises needs to justify the response.
41. Malcolm says no. The reason the answer is no is that it is not the man's lack of sight but the dog that is the issue. Any visitor be they sighted or not is prevented from bringing a dog onto the premises. It is the dog that is the problem not the lack of sight.
42. What is missing from this analysis is the reason for the dog ban and the knowledge of the landlord.
43. Under Novacold the premises owner would have had to have had a 'substantial and material' reason because the dog would be a manifestation of the disability. The commonsense of such an approach is overwhelming.
44. The premises owner when asked over the phone whether a dog would be allowed entry should ask, "Is it a guide dog?" If the answer is in the affirmative then he knows of the manifestation and the premises owner would have to justify the ban.

Conclusion

45. The impact of Malcolm has been easy to see in the Tribunal. Claims for 'reason relating to' discrimination have all but disappeared.
46. The Equality and Human Rights Commission suggested a middle path in Malcolm whereby the courts would have discretion to order possession after having weighed up the competing interests. A sensible compromise that would mean redrawing the comparator and amending the conditions under S 24 DDA.

47. This would give the Courts the opportunity to properly investigate the closeness of the actions of the landlord to the tenant's disability. The example given in Malcolm being the connection between a tenant's arrears and his disability.
48. Claims in the Tribunal now focus almost exclusively on adjustments. Adjustments are about removing barriers in work. The duty does not apply to dismissal itself as this is not 'a provision, criterion or practice'.
49. The battle ground is now over whether adjustments could have been made to avoid the employee losing the job rather than the loss of the job itself which is simply a consequence of a failure to adjust rather than a failure in itself.

Introduction

50. When this case first came out I took very little notice of it. It had finally sorted out the question of what evidence a Tribunal can look at when determining the likelihood of an event recurring.

51. The decision had brought certainty and that was to be welcomed both by employers and employees.

52. I was wrong the jurisprudence in this case is far reaching and appears to have influenced the House of Lords in Malcolm despite the fact that it was not cited.

Relevant Parts of the Disability Discrimination Act 1995 (DDA)

Schedule 1

Long-term effects

2 (1) The effect of an impairment is a long-term effect if—

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected.

(2) Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring shall be disregarded in prescribed circumstances.

Relevant Parts of Old DDA Guidance

B8 In assessing the likelihood of an effect lasting for a period, account should be taken of the total period for which the effect exists. This includes any time before the discriminatory behaviour occurred as well as time afterwards. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health, age).

The Facts

53. The Claimant had a history of mental health problems. Between November 2001 and February 2002, she was compulsorily admitted to and detained in hospital under the terms of the Mental Health Act 1983. She was then discharged from hospital into the care of a consultant psychiatrist. Subsequently, she applied for a position as a database assistant at the Richmond Adult Community College. She was offered and accepted the position, subject to satisfactory medical clearance and references. Having received a medical report, the college purported to withdraw the offer on the basis that the medical clearance was not available. The Claimant then had a relapse and was readmitted to hospital under the 1983 Act.

The Arguments

54. The Claimant argued that the events after the withdrawal of her offer of employment were relevant to the issue of whether her condition was 'likely to recur'. The Respondent argued that what happened after the discriminatory act was irrelevant

55. Much of the argument in this case was over the applicability of authorities in relation to damages in particular Bwlfa v Merthyr Dare Steam Collieries v The Pontypridd Waterworks Company [1903] 462.

56. The argument was over whether the Court could take into account an outcome that has in fact occurred.

The Outcome

57. The Respondent succeeded and the Court of Appeal decided that events after an act of discrimination were not relevant to the issue of whether a condition was likely to recur.

58. The Court overruled Greenwood v British Airways Plc [1999] UKEAT 867/98 and followed Latchman v Reed Business Information Limited [2002] UKEAT 1303/00.

Analysis

59. A Tribunal faced with a Claimant who is clearly disabled at the time of the hearing is naturally going to take account of what they see in front of them.

60. Wise after the event medical practitioners produce well crafted reports indicating the near certainty that the condition would have recurred or would have continued.

61. Again these reports are written with the benefit of hindsight and a clearly disabled patient.

62. The problem for the employer has always been the person who has only been unwell for a short period of time or whose symptoms had not recurred.

63. An employer would find themselves facing a DDA claim having dismissed 3 months into the commencement of an impairment. After

