

Discrimination

Blame it on the dog

How has *Malcolm* redefined the test for disability related discrimination? **Spencer Keen** reports

IN BRIEF

Post *Malcolm*, the test for discrimination for a reason related to disability is as follows:

- identify the subjective reason for the treatment;
- identify whether the respondent knew or should have known of the claimant's disability or that its act was actually or potentially discriminatory;
- consider whether the reason for the treatment was related to the disability; and
- identify whether there has been less favourable treatment by comparing the treatment of the claimant with a non-disabled person in the same situation as the claimant.

In the recent case of *London Borough of Lewisham v Malcolm* [2008] UKHL 43 the House of Lords has radically changed the long established approach to disability-related discrimination under s 24(1) Disability Discrimination Act 1995 (DDA 1995) by overruling the long standing case of *Clark v Novacold* [1999] IRLR 318, [1999] 2 All ER 977. Although this was a housing decision it has important ramifications for employment law since DDA 1995, s 3A (1) (reason related to discrimination against employees) is identical to s 24(1).

The facts of *Clark v Novacold* and *Malcolm*

In *Clark v Novacold* Mr Clark was employed as a process operator by Novacold. After an injury at work he commenced sick leave. The company obtained medical reports which anticipated an improvement over 12 months but the medical opinions were unable to give an exact time for his return to work. Mr Clark was dismissed in January 1997. The reason given for the dismissal was that he was unable to work.

In *Malcolm* the London Borough of Lewisham had let a flat to Mr Malcolm. Mr Malcolm suffered from schizophrenia which he controlled with medication. Mr Malcolm applied to exercise his right to buy the flat. However, before

the transaction was complete he sublet the flat and moved out. This breached his tenancy agreement and had the effect of automatically terminating his secure tenancy. The council commenced possession proceedings. Mr Malcolm argued that the council was seeking possession from him for a reason related to his disability because his schizophrenia had played a part in his decision to sublet the flat. At the time he had sublet he had forgotten to take his medication.

The House of Lords in *Malcolm* overturned the long established approach to discrimination for a reason related to disability that was set out in *Clark v Novacold*. In giving its judgment in *Malcolm* the House of Lords considered the issues of when the reason for treatment could be said to relate to a person's disability, whether a respondent must have knowledge of the disability; and how to identify the comparator for establishing whether there has been less favourable treatment.

The reason and the comparator

Establishing the reason for the treatment is important on two counts:

- the reason must be identified so that the tribunal can say whether it is related to the disability;
- the "reason" that is identified forms the basis of the comparison exercise because the claimant's position must be

compared with a person to whom "that reason" does not apply.

What is the reason? This is not a simple question. In *Clark v Novacold* Lord Justice Mummery set out two options a "broad" interpretation and a "narrow" interpretation and adopted the "broad" interpretation. Using the broad interpretation "that reason" refers only to the first three words of s 3A(1)(a): "for a reason". The subsequent words "which relates to a disabled person's disability" are not included in "that reason".

Applying this interpretation to the facts in *Clark v Novacold* the reason for the treatment was that the claimant was no longer capable of carrying out the main functions of his job and so the others to whom "that reason" would not apply were persons who were capable of carrying out the main functions of their job. Using this comparator the claimant had been subjected to less favourable treatment.

Using the narrow interpretation "that reason" refers to the entire first phrase in s 3A(1)(a)—"for a reason which relates to a disabled person's disability".

Applying this interpretation to the facts in *Clark v Novacold* the reason for the treatment is that the claimant is disabled and incapable of carrying out the main functions of the job.

The others to whom "that reason" would not apply were persons who were also incapable of carrying out the main functions of their job but for a reason which did not relate to disability. Using this comparator the claimant would not have been subjected to less favourable treatment than the comparator.

In *Malcolm* three possible comparators were identified:

- persons without a mental disability who had sublet a Lewisham flat and gone to live elsewhere;
- tenants of Lewisham flats who have not

sublet or gone to live elsewhere;
(iii) some other comparator group.

The House of Lords considered that *Clark v Novacold* was wrongly decided and that the narrow interpretation of “that reason” was correct. Consequently their lordships used comparator (i).

Knowledge

The most difficult aspect of *Malcolm*, and which still requires clarification, is how to assess whether a reason is related to disability. It is unclear whether the assessment is entirely subjective, entirely objective or a mixture of both.

The crucial difference between the broad and narrow interpretations is whether or not the reason includes the element “which relates to a person’s disability”. The now defunct broad test separated the “reason” for the treatment from the element “which relates to” disability. This separation was consistent with the existence of an objective test for whether the “reason” related to disability. The employer could discriminate without knowing that the person was disabled. As we shall see the narrow test treats the element “for a reason which relates to a person’s disability” as a single phrase. This is more consistent with the new requirement for the disability to play some part in the respondent’s reasons for the treatment.

According to *Clark v Novacold* a person could be guilty of discrimination for a reason related to disability even if they did not know of the disability. Take for example a restaurant manager who refused, over the telephone, to allow a person to bring his dog into the restaurant. The person was blind and the dog was a guide dog. The reason the manager refused entry was simply because he does not allow dogs in the restaurant. However, according to *Clark v Novacold* this refusal could be linked to the claimant’s disability because the dog was a guide dog which the claimant needed to move around the restaurant safely. The manager’s knowledge was irrelevant to the objective question of whether the reason was “related to” the disability so the reason for the treatment could be related to disability even if the claimant did not tell the restaurant manager that he was blind and that the dog was a guide dog.

Post *Malcolm* the disability must play some motivating part in the respondent’s reasons treating the claimant as it did before it is guilty of discriminating against him. In the above example it would not

matter whether the claimant had been subjected to less favourable treatment since the respondent was unaware that the claimant was disabled. If the respondent knows about a person’s disability, but the physical or mental condition plays no part in the decision to inflict the treatment on the disabled person then the reason for the treatment is not related to the disability. Accordingly the tribunal must ascertain as a matter of fact the subjective motivation for the treatment. It is insufficient to examine the respondent’s policy or general practice; the tribunal must examine the specific motivation that applied to the particular case.

How much must the respondent know of the relationship between the disability and the treatment before his motive can be described as being related to disability? Lord Scott held that a reason cannot “relate to” a claimant’s disability if the disability has played no “motivating part” in the decision to inflict the treatment on the disabled person. It was not enough, according to Lord Scott, that in *Malcolm*, objectively viewed, there was a connection between the claimant’s disability and his subletting. Lord Bingham agreed with Lord Scott’s interpretation because, even though he accepted that Mr Malcolm would probably not have sublet his flat but for his illness, he held that the council’s decision to evict Mr

entry to a blind person with a dog; the refusal of service to a customer with eating difficulties; and the dismissal for slowness of a one legged postman.

Lack of clarity

The lack of clarity on this point was reflected in the majority judgment of Lord Neuberger. At para 170 his lordship stated that the “reason” for the eviction in *Malcolm* would have been related to the disability if the subletting was in some way linked to Mr Malcolm’s disability. This test appears to identify what the subjective reason for the treatment is and then to apply an objective test as to whether that reason was related to the disability. Further clarification is required on this point. In the meantime it would appear likely that Lord Scott’s approach, with which Lord Brown and Lord Bingham agreed, will be taken.

Application to employment law

While the similarity of the ss 3A9(1) and 24(1) DDA 1995 is a sound reason for interpreting them in the same way there are other reasons for arguing that the *Malcolm* interpretation should not be used in an employment context.

It may be possible for claimants to argue that the employment provision (s 3A(1)(a), DDA 1995) should be interpreted in a different way to *Malcolm* in order to comply

“ The Framework Directive requires member states to protect disabled employees from both direct and indirect discrimination ”

Malcolm was a pure housing decision that had nothing to do with his mental disability. Lord Bingham required “some connection, not necessarily close, between the reason and the disability”. Lord Brown agreed with Lord Bingham and Lord Scott.

One man and his dog

Interestingly Lord Bingham and Lord Scott did not agree on the approach to the scenario where a restaurant owner prevents a blind person from bringing his dog into his restaurant. Lord Scott stated in surprisingly stark terms, that if the owner merely wished not to have a dog in his restaurant then his reason for prohibiting entry would be the dog and not related to the disability. Lord Bingham on the other hand gave a list of examples in which he considered there would be a connection between the reason and the disability which included: the refusal of

with Council Directive of 27 November 2000 establishing a General Framework for Equal Treatment in Employment and Occupation 2000/78/EC. The Framework Directive requires member states to protect disabled employees from both direct and indirect discrimination. Since UK courts are required to give a purposive interpretation to DDA 1995 so that it complies with the Framework Directive a claimant could well argue that the *Clark v Novacold* interpretation of DDA 1995 is the only interpretation consistent with providing protection against indirect discrimination in accordance with the Directive and that it would be contrary to the Framework Directive and the general principle of equality in EC law to interpret s 3A(1)(a) in the way envisaged in *Malcolm*.

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