

**Lewisham London Borough Council v Malcolm, Equality Commission  
Intervening [2008] UKHL 43 [2008] 3 WLR 194 (“Malcolm”)**

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Commission in Malcolm.**

Views expressed in this paper are those of the author

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## **Background**

### **Distinctive legal concepts for disability discrimination**

- 1.** Traditionally, discrimination law seeks to provide equality of opportunity by following the principle that like should be treated alike (manifested in the prohibition on direct discrimination). It also recognises that inequality can be produced by treating differently situated people in the same way (the prohibition on indirect discrimination).
- 2.** The Disability Discrimination Act 1995 is, as it has been said in any number of cases regarding it, different from the other anti-discrimination statutes.
- 3.** Whilst direct discrimination against disabled people is not uncommon, on the whole the second aspect of equality is of greater importance in relation to disability compared to other grounds -because differences

are more commonly visible and potentially problematic. The disadvantage of a disabled person arises from the interaction of their impairment with the environment and the way in which employment, services etc are organised. To take a simple example, a wheelchair user's problem in accessing a service arises because level access is not provided to that service.

4. Whilst some barriers to equality are experienced in common across a broad cross-section of disabled people (as in the example above all wheelchair users will experience the same problem) many barriers can be highly individualised, because of the wide range of impairments interacting with very specific environments. The extent to which disadvantage arising from a ground is often so individualised also marks disability out from the other grounds.
5. The concept of disability related less favourable treatment (DRD) was designed to address precisely these very specific, individualised barriers to equality of opportunity. It addresses not only the disability itself, but also what may be the consequences of the disability.
6. Whilst the duty to make reasonable adjustments also operates to address such barriers, it is in such a case based on a more artificial concept – is there a provision criterion or practice that puts the disabled person at a substantial disadvantage? – rather than directly addressing the reason for the treatment of the disabled person.
7. In Clark v Novacold [1999] ICR 391 (“Novacold”), the Court of Appeal recognised this unique approach contained in the provisions of disability related less favourable treatment.
8. What prevented DRD from being onerous to employers was the proviso that it could be legally ‘justified’ – that the treatment was for a “material and substantial” reason. This was one of the factors influencing LJ Mummery’s conclusions in Novacold. DRD asked employers etc to examine the reason for their treatment of a disabled person, and, if it was for a reason relating to their disability, to balance other considerations against the need to minimise

disadvantage to the disabled person. With the sole exception of the housing arena the flexibility of the justification provisions provided a satisfactory “control” mechanism for the DRD.

### **The premises provisions**

9. The premises provisions were added to the Disability Discrimination Bill as it was passing through Parliament. They contained no duty to make adjustments; and the ability to justify disability related less favourable treatment was severely curtailed, as a prescriptive list of conditions were set out to be met if a landlord were to succeed in justifying such disability related less favourable treatment S.24(3)and(4)). It was the justification provisions that proved to be the insurmountable difficulty in the Malcolm case.

### **The position of the Equality and Human Rights Commission (“the Commission”)**

10. The Commission recognised the difficulty that the justification provisions placed landlords in. Nevertheless it was of the view that Clark v Novacold should apply throughout the DDA’s provisions and that the solution to the difficulty posed by limited justification was to curtail the ability to resist possession.
11. The Commission’s position in the Malcolm case was as follows:

#### **(i) Possession**

A Court has a discretion to refuse possession where this is necessary to afford an effective remedy to a disabled tenant who is the victim of unlawful discrimination. This was the option for which the DRC had contended in the Court of Appeal.

#### **(ii) Disability**

The Court of Appeal was correct to conclude that the approach adopted by the trial judge was flawed.

**(iii) Whether Lewisham's reason for starting possession proceedings, namely Mr Malcolm's subletting, was "related" to his disability for the purposes of s.24(1)(a) DDA**

The EHRC endorsed the careful consideration given to this by Mummery LJ in Clark v Novacold Ltd [1999] ICR 951 ("Novacold") and contended that this analysis is equally relevant to the premises provisions under Part III. The EHRC did not address the Court on the factual issue as to whether there was the appropriate causal connection between the "treatment" and the Appellant's disability.

**(iv) knowledge**

The EHRC contended that knowledge is not required as a prerequisite for disability related less favourable treatment.

## **The Judgment**

**12.** As is clear from the judgment, the majority of the Lords did not agree with the bulk of the position adopted by the Commission, holding most importantly that *Clark v Novacold* did not apply in the premises context (for more on which see below) - that the comparator for the purposes of the case was an individual who did not have a disability, but who had sub-let, rather than an individual who did not have a disability and who had therefore not sub-let (the latter being the *Novacold* interpretation); and, secondly, that knowledge is required for there to be disability related less favourable treatment.

**13.** There are some specific matters arising from the judgment that I would like to address: in particular, the dog; and indirect discrimination.

**14.** Firstly, the dog. At paragraph 35 of the judgment, Lord Scott refers to the example used by Mummery in *Novacold* – that of the blind man with his dog who is refused entry to a restaurant. He says "Would the blind man without his dog have been refused entry? Almost certainly

not. The problem was the dog. The dog was the reason for the refusal of entry. That reason was causally connected to the disability, but the disability would have played no part in the mind of the restaurant manager in refusing entry to the dog. The problem I repeat was the dog. The restaurant manager's reason for refusing entry to the dog would not in my opinion have related to the blind man's disability for s.24(1)(a) purposes...Confusion regarding the blind man and his guide dog example has, I think, crept in because of the over-concentration on the refusal to admit entry to the dog. The dog is not a potential beneficiary of the 1995 Act. It is the blind man who is. If he is refused entry it is not because he is blind but because he is accompanied by a dog and is not prepared to leave his dog outside..."

15. A guide dog is to a disabled person the same as a white stick, or a wheelchair – it is a mobility aid and guide dog users do not, in effect, have a choice about leaving an expensive, well trained dog who is a mobility aid, outside premises.

16. The approach of the Lords can be contrasted with the approach of District Judge Wood in the case of Glover v Lawford t/a Hannah's café (**Case Number MA 202633**) (paragraphs 21 and 33: "Was this less favourable treatment for a reason that related to Mr. Glover's disability? This must be the case. The reason for Queenie's [the guide dog] presence was to give assistance to Mr. Glover who was a visually impaired person. The evidence of Mr. Andrew Leon of The Guide Dogs for the Blind Association underlines this point. In paragraph 8 of his witness statement he says,

*...Because guide dog owners rely on their dogs to get around safely, refusing to allow a guide dog on to the premises means refusing to provide a service to the owner for a reason relating to their disability..."*

D.J. Wood went to say "...but even if I accept the defendant's evidence that he did offer to accommodate Queenie in the yard at the rear, can the separation of a visually impaired person from his guide dog in these circumstances be justified? It is clear from paragraph 5 of his own witness statement, that the defendant recognised that to implement the solution he put forward would involve Mr. Glover being led to the table, rather than finding his own way with the assistance of Queenie. It is surely the independence afforded by the provision of a guide dog that enables a visually impaired person to carry out normal day-to-day activities that the Act is designed to uphold."

17. Secondly, indirect discrimination and the approach to disability equality. Lord Brown commented at paragraph 114: "I recognise of course that this approach to the section reduces its reach: it confines it largely if not entirely to the proscription of direct discrimination only. But that perhaps is not after all so surprising. Disabilities are too diverse in their nature for the concept to lend itself easily to the notion of indirect discrimination – the imposition of requirements ostensibly neutral but in fact having a disproportionate and unjustifiable impact on those sought to be protected. What indirect discrimination against the disabled would equate to, say a requirement for employees to be at least six feet tall – presumably indirectly discriminatory against both women (sex) and those of Asian origins (race)? The needs of the disabled are rather different and require sometimes to be met by positive action. As I noted at the outset, where Parliament is clearly intent not merely on levelling the playing field for the disabled but in securing positive discrimination in their favour it does so by requiring reasonable adjustments to be made to cater for their special difficulties".

18. Whilst it is true that disabilities and the effect of certain conditions varies, a height requirement would in fact amount to indirect discrimination against those with restricted growth – and there are many examples of “indirect discrimination “ (for example, the “no dogs” rule). In addition, the purpose of the duty to make adjustments is in effect to ensure that disabled people are on a level playing field – it is about substantive and not formal equality.

### **The future – impact and reversal?**

19. With regard specifically to premises provisions, it is clear from the judgment that claims relating to the premises provisions can no longer be brought on the basis of *Novacold*. This means that more emphasis will need to be placed upon (a) the duty to make reasonable adjustments which is now available to disabled people (though very specific conditions must be met in order for the duty to apply) and (b) the duty to promote disability equality (particularly in light of the decision in **R (on the application of Susan Weaver) and London & Quadrant Housing Trust [2008] EWHC 1377 (Admin)** that housing associations can be public authorities for the purposes of the HRA). The draft European directive which has been published by the EU contains in it obligations in relation to both indirect discrimination and a duty to make reasonable adjustments in the premises context. If this were to be finalised in its present form, is likely to require changes to the premises provisions in the UK, particularly in relation to the reasonable adjustment provision

### **Goods and services provisions**

20. Whilst the goods and services provisions were not in issue here, clearly the comments of their Lordships may have an impact. Baroness Hale favoured the *Novacold* approach in any event (although she did indicate that she could see no basis for there being a different interpretation in the different parts of the Act), Lord Bingham confined his narrower approach to the premises provisions. Whilst Lord Neuberger confined his approach initially to premises

(see paragraph 139) he went on to cast doubt on a different meaning in different sections (paragraph 158). However, it is still arguable that a different approach applies in the context of goods and services- for example, whilst the approach to justification is similar to that in relation to premises i.e. specific grounds must be met, the grounds are broader than those relating to premises and in effect give service providers more scope for justifying their treatment of disabled people. In any event, many of the claims currently run as disability related less favourable treatment are also run as – and often better suited to – the duty to make reasonable adjustments.

- 21.** The knowledge comments are likely to impact on certain claims of discrimination, but the majority of claims under the goods and services provisions relate to the duty to make adjustments – and the judgment of Sedley LJ in **Roads v Central Trains Ltd [2004] EWCA Civ 1541** makes clear that the duty to make adjustments in a services context is an anticipatory one that does not rely upon knowledge of the disabled person’s disability.

### **Employment**

- 22.** It is in employment that perhaps the impact may be greatest felt, given that it is in the employment field that the majority of claims under the DDA are brought. There are a number of ways in which the effects of Malcolm can be tackled in the employment sphere.
- 23.** As indicated above (paragraph 20), the Lords were far from unanimous that the narrow approach to the comparator applied outside the premises field. It may be feasible to pursue a case to the Lords in the employment context arguing that Novacold does apply in this arena – not least because otherwise the provisions of s.3A(5) and (6) are meaningless – and issue not satisfactorily addressed by the majority in the Lords.
- 24.** “Direct discrimination” in the DDA context may also take on a broader meaning (and it may be possible to rely on Case C-13/05 *Chacón Navas* [2006] ECR I-6467 in this respect). The case concerned the

definition of disability under the European Employment Framework Directive. The European Court of Justice examined the interaction between direct disability discrimination and the duty to provide reasonable accommodation and stated in effect that an employee could not be dismissed on the basis of capability when reasonable accommodation could be made). There are also doubts raised about the government's compliance with the Employment Framework Directive in light of Malcolm.

**25.** In practice, virtually every disability related less favourable treatment case involves a breach of the duty to make reasonable adjustments. Practitioners will need to be imaginative with the duty and to plead this in addition to drd.

**26.** The key issue of contention is likely to be that of damages; it will be important where appropriate to demonstrate that loss flows from a failure to make reasonable adjustments as opposed to what would otherwise have been a discriminatory dismissal (and Lord Justice Mummery said in *Novacold* on this issue: "There may well be cases (but this is not one of them) where a person who has been dismissed complains of both section 5(1) discrimination by unjustified dismissal and also of section 5(2) discrimination by pre-dismissal breaches of section 6 duties while he was still in employment. There is no reason why an employee should not be able to pursue both claims: they are separate acts of discrimination and the fact that the employee has been dismissed does not deprive him of the right to complain of a wrong committed against him while he was still employed in the employer failing to comply with the duty to make reasonable adjustments to arrangements and to premises. I would add that, in an appropriate case, there is no reason why the compensation recoverable for a section 5(2) case should not include compensation for the loss of a job which flows from the failure to make the reasonable adjustments, though I would normally expect such compensation to be awarded on a successful claim for section 5(1) discrimination rather than under section 5(2).")

**27.** On the issue of knowledge: very few cases in reality turn on knowledge, particularly as knowledge – or imputed knowledge – is required in order for the duty to make reasonable adjustments to apply. However, those advising disabled individuals will no longer be able to say that the disability related less favourable treatment provisions can apply even if they do not disclose disability.

### **Education**

**28.** The education provisions are different depending on whether pre-16 or post-16 provision is being dealt with, although both have a concept of disability related discrimination. The majority of the post-16 provisions were amended by the 2006 regulations (The Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations SI 2006/1721) to introduce a concept of direct discrimination and to remove the possibility of justifying a failure to make reasonable adjustments, and are thus very similar to the employment provisions. They received no mention in the Malcolm judgment though. Given this fact, and that the amendment regulations were introduced so recently, it may be possible to run the same arguments on the applicability of Malcolm as mentioned above in relation to employment – and it may stand a greater chance of success. Reasonable adjustments are a broad concept and should be used to their full effect, as well as direct discrimination and harassment.

**29.** The pre-16 provisions contain no direct discrimination provisions and are reliant upon disability related discrimination and the reasonable adjustment duties (which are subject to justification). “reasonable adjustments” will be key to these cases, as well as the possibility of arguing that Malcolm does not apply (although there is less ammunition here than in relation to post-16).

### **The future – reversal?**

**30.** There has been much concern about the impact of Malcolm and its effect on the scheme of disability discrimination. In particular, there

are many situations where a “direct” comparator will not be available in the disability sphere. For example: a person with a severe stammer applies for a job. The stammer particularly arises in stressful situations. The interviewers agree that the candidate had not performed well and gave the job to another candidate who on paper had less experience and qualifications.

- 31.** In a direct discrimination claim (and post-Malcolm DRD) the question to be asked is: would somebody else in a comparable situation have been treated in the same way? Just as with pregnancy discrimination it is difficult to construct an appropriate comparator. The interviewers would have treated any one who stumbled over their words in a similar manner – and it is in reality only likely to be a person with a stammer who would do this.
- 32.** Under pre-Malcolm DRD, once it is accepted that the reason for denying the job was the stammered performance at interview, the focus of analysis is whether that decision could be justified. Does the job require clear speech in situations of pressure (like a news broadcaster) or not (for example a computer programmer)?
- 33.** Indirect discrimination – and indeed the duty to make adjustments - would formulate the question in an artificially complex manner: it would try to identify a ‘provision criteria or practice’, then there would need to be a comparison between the group to which the disabled applicant belonged (people with a severe stammer) and others, in order to establish whether the condition or practice placed that group at a particular disadvantage (or, in the case of reasonable adjustments, the identification of substantial disadvantage compared with others). Only then would the question of whether the interviewers were justified in their decision be reached.
- 34.** In this case identifying the relevant groups for the purpose of comparison is fairly easy. However, this will often not be so, because of the individualised nature of many impairments.

- 35.** It is likely that the government will be consulting on how to deal with the effects of Malcolm in the context of the single equality bill, and the necessity of implementing the Discrimination Directive which is currently under consideration by the member states. In reality, it is likely to be far quicker to change the law than it is to wait for another Lords decision on Malcolm and employment/education/goods and services.
- 36.** One option to remedy Malcolm would be the introduction of indirect discrimination, though it is likely to need considerable work before it would be fit for purpose. Another, and more straightforward option, would be to re-introduce the concept of disability related discrimination, without a comparator. It remains to be seen what the government will propose.

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