

MALCOLM v LEWISHAM

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11 KBW

1. The House of Lords in Lewisham London Borough Council v Malcolm, Equality Commission Intervening [2008] UKHL 43 [2008] 3 WLR 194 (“Malcolm”) has yet again cleared up a mess created by conflicting Court of Appeal decisions. The House of Lords recognized that it cannot be right that a tenancy, private sector or public sector, cannot be terminated despite the whole of the premises having been sublet and/or no rent being paid, just because the tenant may be schizophrenic or otherwise disabled. The House of Lords approved Floyd v S [2008] EWCA Civ 201, [2008] 1 WLR 1274, in which Mummery LJ delivered the leading judgment in the Court of Appeal.

2. The implications of the decision on the management of premises go far beyond housing law. The House of Lords (by a majority) has overruled (rather than, as the headnote in the Weekly Law Reports puts it, doubted) the Court of Appeal decision, presided over by Mummery LJ, in the employment case of Clark v Novacold [1999] ICR 391.

3. To be liable for disability discrimination, as to the meaning of which the House of Lords approved the EAT decision in Goodwin v Patent Office [1999]

ICR 302 (“substantial” means more than “minor or trivial”), the alleged discriminator must at least know (actually or constructively) of the disability, applying the Court of Appeal employment case, Taylor v OCS Group Ltd [2006] EWCA Civ 702, [2006] ICR 1602; and know (actually or constructively) of the possible connection between that disability and the alleged discriminator’s course of treatment of the person concerned.

4. Nor will the alleged discriminator be discriminating if the same action is being taken as would be taken in the case of someone who is not disabled. There is no duty to treat the disabled more favourably, except in the context of making reasonable adjustments.

5. The latter is an important proviso. At the time of the facts material in Malcolm the duty to make reasonable adjustments had not been extended to the provisions relating to premises. Reasonable adjustments were of course considered by the House of Lords in the employment context in Archibald v Fife Corporation [2004] UKHL 32, [2004] ICR 954. (Reasonableness could also be considered in the possession claim context where the basis for a possession order entails considerations of reasonableness, as in Manchester City Council v Romano [2005] 1 WLR 2775.)

6. The conduct of Mr Malcolm in subletting and ceasing to live in the flat let to him by Lewisham had the effect of destroying the security of tenure he had previously enjoyed and breaching the terms of his tenancy so as to give Lewisham what was, in terms of housing law, an unanswerable claim to possession, not qualified by considerations of reasonableness or discretion. To defeat the claim Mr Malcolm relied, unsuccessfully in the County Court, but successfully before the Court of Appeal, [2007] EWCA Civ 763 [2008] Ch 129, on the terms of sections 22 and 24 in Part III of the Disability Discrimination Act 1995 (“the DDA”), prior to its amendment by the 2005 Act. Clark v Novacold was the first Court of Appeal decision on the DDA.

7. A problem for Lewisham was that if Mr Malcolm could rely on the “less favourable treatment” limb of the DDA, the potential defence of justification was not available on the facts. In relation to premises that justification is very limited. In the employment context it is much broader.

8. However, the House of Lords held that, although Mr Malcolm was at the relevant time a disabled person on account of his mental illness, the treatment to which Lewisham was subjecting him was seeking possession of his flat, because Lewisham, as a social landlord with a limited stock of housing and a heavy demand from those on its waiting list, was not prepared to allow

tenancies to continue where the tenant was not living in the premises demised, and Lewisham's reason for seeking possession - that Mr Malcolm had sublet the flat and gone to live elsewhere - was a pure housing management decision which had nothing whatever to do with, and did not "relate to", his mental disability.

9. The House of Lords held that the correct comparison was with persons without a mental disability who have sublet a Lewisham flat and gone to live elsewhere. Mr Malcolm had not been treated less favourably than such persons. He had been treated in exactly the same way. Mr Malcolm had not been the subject of unlawful discrimination because Lewisham's reason for claiming possession did not relate to his disability and he was not treated less favourably than someone without that disability. Thus Mr Malcolm has no defence to Lewisham's claim.

10. A question has already been raised in Parliament asking whether the Government intend to introduce legislation to amend the DDA in the light of Malcolm. The Minister's answer: the Government are "giving careful consideration" to the judgment and its impact.

11. Meanwhile strenuous efforts will no doubt be made to argue that Clark v Novacold still rules in employment. However, Lord Bingham, at para 15, found it hard to accept that Clark v Novacold was rightly decided, and in any event was satisfied that a different principle had to be applied in the Malcolm context. The difference in context is the breadth of the justification defence that mitigates the consequences of Clark v Novacold, a contrast with a premises case.

12. Lord Scott, at para 32 disagrees with Mummery LJ's approach to comparators in Clark v Novacold, and, at para 32, says that Clark v Novacold was wrongly decided. Lord Brown, at paras 112/113, implicitly overrules Clark v Novacold and makes references to the employment context, though he does not state that it is overruled in terms. Lord Neuberger is very careful to phrase his conclusions on the comparator test in relation to Section 24 of the DDA only (see, for example, para 139). However, at para 159 he concludes that the rationale underlying the majority's decision regarding comparators applies equally to the employment context.

13. However, while Malcolm no doubt now rules in relation to less favourable treatment discrimination, a disabled claimant may nonetheless very well succeed by way of lack of reasonable adjustments discrimination, such

adjustments of course, and importantly, not being confined to physical adjustments, but embracing also policies and procedures, criteria and arrangements. The element of reasonableness has the advantage of allowing a fair balance to be struck between legitimate competing interests, and the extreme implications of the Court of Appeal decision in Malcolm to be avoided without having to go to an opposite extreme.

14. When a reasonable adjustment claim will not succeed, then, unless there is direct discrimination, a disability discrimination claim is currently most unlikely to succeed. “Less favourable treatment” (subject to justification) is a high hurdle. The reach of the DDA, across all its fields, has been much reduced.

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