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THE LONDON BOROUGH OF LEWISHAM

-v-

COURTNEY MALCOLM

(EHRC intervening)

[2008] UKHL 43

A Summary

By Stephen Evans, Junior Counsel for Lewisham

The case concerned the ability of a person seemingly disabled within the meaning of the Disability Discrimination Act 1995 to defend a claim for possession in circumstances where the landlord had an otherwise indefeasible right to possession, on the grounds that the tenant had sublet his flat and a valid Notice to Quit had been served.

Unanimously, the House of Lords allowed Lewisham's appeal against the Court of Appeal's decision, and reinstated the trial judge's order for possession against Mr Malcolm.

The implications for the law are widespread. As may be seen below, long-established Court of Appeal authority on the so-called 'comparator test' was disapproved by the House, and knowledge of discrimination was held to be vital, so that the decision arguably goes beyond the immediate field of housing management, overturning notions previously ingrained in the fields of employment, education and cases involving service providers.

The DDA

By s.22(3)(c) of the Act it is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises by evicting the disabled person or subjecting him to any other detriment.

By s.24 of the Act, for the purposes of section 22, 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 or would not apply, and (b) he cannot show that the treatment is justified.

Was Mr Malcolm disabled?

Lord Bingham agreed with the Court of Appeal's view that Mr Malcolm was at the relevant time disabled. Their reasoning was "persuasive" and he stated he need not repeat it.

Lord Scott would not have disagreed with the conclusions of Arden LJ that Mr Malcolm was indeed disabled.

Baroness Hale said that the issue of whether Mr Malcolm was rightly or wrongly held to be disabled was not an issue on which her Ladyship would wish to resolve the case. She was not convinced that the trial judge applied the wrong test, or that no judge who applied the right test could have reached the conclusion she did.

Lord Brown was inclined to the view that the Court of Appeal were entitled to find Mr Malcolm disabled at the material time.

Lord Neuberger was of the opinion that the threshold for satisfying the statutory test of disability is rather low. The Court of Appeal were right to interfere with the trial judge's view that Mr Malcolm was not disabled, as she was wrong to conclude that the disability was not "substantial".

What was the treatment complained of?

Lord Bingham said that he agreed with Toulson LJ in the CA that it is artificial to break down the eviction process into different stages. The treatment complained of by Mr Malcolm was Lewisham's conduct in seeking possession of his flat.

Baroness Hale was of the opinion that the treatment complained of is the eviction process as a whole.

Lord Neuberger held that to treat individual stages of a single exercise of eviction as discrete would be artificial and run the risk of unnecessary complication.

What was the reason for the treatment?

Lord Bingham opined that the task of the court is to ascertain the real reason for the treatment, the reason which operates on the mind of the alleged discriminator. This may not be the reason given or the only reason; the test is an objective one. In this case, Lewisham acted as it did because it was not prepared to allow tenancies to continue where the tenant was not living there. This was the real reason and was not inconsistent with the reason so far given (subletting).

Lord Scott was of the opinion that a "reason" does not "relate to" a disability for s.24(1) purposes unless the fact of the physical or mental condition in question has played some causative part in the decision-making process of the alleged discriminator. A "reason" could not "relate to" a physical or mental condition of the person in question of which the alleged discriminator was unaware. If the condition plays no "motivating part in the decision" the reason cannot relate to the disability.

Baroness Hale held that the immediate reason for serving the Notice to Quit was the subletting and parting with possession. The reasons were those set out in the claim form and Particulars of Claim. Neither was done because of Mr Malcolm's disability as such.

Lord Neuberger said that adopting a very narrow approach to "reason" by arguing housing management policy would be inconsistent with the justification for, and indeed would defeat the purpose of, the wider construction in relation to the comparator. Once the comparator test is taken narrowly, the attention to the "reason" for the treatment becomes more focused, and there is less room for uncertainty. The "reason" cannot be confined to the legal ground; one is concerned with the notion that one is concerned with the alleged discriminator's subjective motivation rather than with the objective legal ground. It is therefore not appropriate to look at the landlord's broad policy ground, such as a desire to manage housing stock, or not to have a non-resident tenant, or to enforce its tenants' covenants.

Was the reason related to the disability?

Lord Bingham was of the view that the causal connection required by s.24(1)(a) is "some connection, not necessarily close, between the reason and the disability". Lewisham's reason for seeking possession was a pure housing management decision which had nothing whatever to do with his mental disability. Accordingly, albeit "with some hesitation", he resolved this issue against Mr Malcolm.

Baroness Hale was of the view that the causal connection between the disability and the reason must not be too remote. Her Ladyship had great difficulty seeing how the reason for serving the NTQ could have been related to the disability.

Lord Neuberger said the link between “treatment” and “disability” would, at least almost always, be causal, but not in a limited sense. A broad and flexible effect is to be given to the words “relating to”. There would have been a causal connection between reason and disability in this case, but there was no discrimination given the comparator issue.

Who is the relevant comparator?

Lord Bingham said the relevant comparator under s. 24(1) could be in one of three groups. The more natural comparison is with persons without a mental disability who have sublet a Lewisham flat and gone to live elsewhere, a comparison in no way inconsistent with the statutory language. He found it hard to accept that *Clark v Novacold* [1999] ICR 1602 was rightly decided. In any event, he was satisfied that a different principle must be applied in the present context. Accordingly, “not without misgiving”, his Lordship held the correct comparison in this case to be with persons without a mental disability who had sublet a Lewisham flat and gone to live elsewhere. Mr Malcolm had not been treated less favourably, therefore.

Lord Scott said the commonsense answer to the comparator test in this case is that the comparators are tenants of the appellant Council who have sub-let but whose subletting had no connection with schizophrenia or, perhaps, with any mental condition causally responsible for the subletting. Mummery LJ’s conclusion on this issue in *Clark v Novacold* emasculates the statutory comparison. Parliament must surely have intended the comparison directed by (the old) s.5(1)(a) in *Novacold*, or by s.24(1)(a) or for that matter by s.20(1)(a) where the directed comparison is in identical terms, to be a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not. *Novacold* was wrongly decided.

In the hypothetical guide dog example in that case, the problem was the dog; the reason for the treatment would not have related to the blindness as the disability played no part in the restaurant manager refusing entry to the dog. His Lordship was in complete agreement with Mummery in para 57 of *S v Floyd* [2008] EWCA Civ 201 that reason for treatment would normally require the existence of something in and consciously or subconsciously affecting the mind of the discriminator. In deciding this issue against Mr Malcolm, his Lordship stated it was not enough for him to show that, objectively viewed, there was a connection between his schizophrenia and his subletting. He needed to show (and didn’t) that his mental condition played some motivating part in Lewisham’s decision to determine the tenancy and recover possession. Lewisham’s reason was that Mr Malcolm had sublet and moved out. The statutory comparator in this case would be a secure tenant with no mental illness who *had* sublet. There was no less favourable treatment meted out to Mr Malcolm, and therefore no discrimination.

Baroness Hale held that the decision in *Clark v Novacold* makes sense. To take the narrower construction of s.24(1)(a) would mean that only direct discrimination would clearly be covered. The history of the passage of the Bill through Parliament indicated that it intended the comparison to be with someone who did not have the disability. In the light of that, her Ladyship did not think it possible either to hold *Novacold* was wrongly decided or to distinguish it on the ground that the same words mean something different in the context of employment.

Lord Brown was in agreement with Lord Scott that Parliament must have intended a meaningful comparison in order to distinguish between treatment that was discriminatory and that which was not. A meaningful comparison requires also that the treatment cannot be discriminatory unless the supposed discriminator knows of the disability (although he need not know that if it satisfies the statutory definition of disablement).

Lord Neuberger was of the opinion that the comparator test can be satisfied with a narrow or wide view, as either reading of section 24(1)(a) is linguistically defensible. Not without considerable misgivings, his Lordship came to the conclusion that Lewisham's argument for the narrower construction was to be preferred, at least in relation to s.24(1)(a), although the reach of section 22 and its beneficial effect is then very limited.

However, the wider construction would by contrast produce a remarkably extensive and potentially highly invasive result. For example, a landlord might never obtain possession against a tenant for rent default, a licensee might never be evicted and even a trespasser would appear to be immune from suit. Where the wider construction would involve private rights being taken away without compensation in circumstances which could be regarded as extraordinarily and positively penal, the policy arguments were in favour of the narrower construction. This was not one of those rare cases where recourse to ministerial statements was appropriate, as he was in insufficient doubt as to the correct answer to justify looking at the parliamentary material. In any event, no consideration appears to have been given in parliament to the meaning or effect of the reworded s.24(1)(a) of the Act.

It is conceivable that *Novacold* was right in relation to s.5(1)(a) despite the conclusion reached by his Lordship on s.24(1)(a); however, no party argued for such a conclusion, which was a seemingly realistic stance. Accordingly, the same arguments apply to the wider construction of section 5(1)(a) in relation to employers.

Was the link made out between the disability and the subletting?

Lord Scott agreed with the trial judge's conclusion that Mr Malcolm had shown insufficient connection between his schizophrenia and the subletting to justify a finding that the disability was causally connected /responsible for the subletting.

Baroness Hale held that by the stage of proceedings Lewisham had been told of the illness. Nevertheless, the trial judge found as a fact that the reason for the treatment (subletting) was not causally related to the illness. The judge was in a much better position than anyone else to form a view of Mr Malcolm's thinking and motivation at that time. Her Ladyship could not say the trial judge's conclusion on this point was one to which she was not entitled to come. If Lewisham had addressed their mind to any casual connection, that connection would not have displaced their reasons why they had begun the eviction process.

Lord Brown was inclined to Lady Hale's view that there was no adequate connection between any disability and the subletting.

Lord Neuberger was of the view the Court of Appeal majority ought not to have overruled the trial judge on the factual issue of whether there was a link between the subletting and disability. The word "caused" used by the trial judge did not indicate any higher standard of linkage between the schizophrenia and the subletting than was warranted.

Is knowledge required, actual or imputed?

Lord Bingham was of the view that the wording of both s.25 (remedy) and s.24(3) (justification) reinforced the conclusion that knowledge, or at least imputed knowledge, is needed to be guilty of discrimination.

Lord Scott was of the opinion that the fact of Mr Malcolm's disability played no part at all in Lewisham's decision-making process, and since it was unaware of it, could not have done so. He found it very difficult to accept that Parliament intended that all managers of premises (and further all employers and goods/service providers) were to be subjected to the risk of becoming statutory tortfeasors and liable to substantial damages claims on account of normal actions taken in understandable pursuit of their respective interests against persons of whose disabilities they were totally unaware.

Baroness Hale agreed with Lord Bingham 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). In *Heinz v Kenrick* [2000] ICR 491 the employer knew all the material facts. It was not a case where the alleged discriminator did not know and had no reason to know that the reason for his actions might be related to a disability.

Lord Brown held that, even supposing Mr Malcolm was disabled, and that but for his disablement he would not have sublet, and Lewisham knew this, the possession proceedings were not discriminatory.

Lord Neuberger was of the opinion that it would require very clear words before a statute could render a person liable for damages for discrimination against a disabled person, owing to an act which was not inherently discriminatory and the person had no reason to know of the disability. However, in case such as the present, a landlord could be liable if in all the circumstances he reasonably ought to have been aware of the disability. Because the outcome of the appeal does not turn on this issue, it is not appropriate to give guidance.

Remedies

Lord Bingham expected the result for Mr Malcolm to follow in almost all cases in which any landlord claims possession from a tenant "who has committed a gross breach of the terms of the tenancy.". However, he did not accede to the contention that a claim for possession to which there is no defence under the housing legislation can never be defeated even where the claim is shown to be discriminatory. The courts cannot give effect to acts proscribed as unlawful. He did not expect such a defence to be made out in this field very often.

Baroness Hale said that the legislation does not readily enable Lewisham or the Court to balance competing interests. An unlawful act of discrimination could be a defence to an unbeatable claim for possession. There is nothing to exclude the normal availability of an injunction to restrain a threatened tort in appropriate circumstances. The Act preserves the making of an application for judicial review. The Act therefore contemplates compensation both after the event and by ensuring that unlawful discrimination be prevented from taking place at all.

Her Ladyship agreed with the interveners that a discretion in the hands of the Court would be much the best solution. The easiest way would be for Parliament to expand the list of justifications by regulatory means. In the meantime, it is difficult to find a way to arrive at any discretion.

Lord Brown said that If landlords are to be required to make specific provision for disabled persons over and above what they would ordinarily provide or permit, then in so far as 2005 amendments have not already done so, legislation can be enacted.

Lord Neuberger could not accept an argument for a court discretion as argued by the EHRC. The court cannot make an order enforcing a statutorily unlawful claim, and there is no guidance, statutory or otherwise, as to how the discretion would be exercised. Unpredictability would result.

25th June 2008.