



## 5 PAPER BUILDINGS

Temple ☐ London ☐ EC4Y 7HB

Telephone (020) 7815 3200 ☐ Facsimile (020) 7815 3201

DX 415 LDE ☐ E-mail: clerks@5paper.com

---

### ***Can Malcolm be confined to its facts?***

---

**By Stephen Evans, Junior Counsel for Lewisham**

The answer to this question is “probably not”. As Richard Kenyon and Nick Thorpe conclude in their article “*Malcolm in a muddle*” (2008) Emp. L.J. No. 93 September, pages 7-9:

“Those who suggest that *Malcolm* is distinguishable in employment cases are probably putting just putting on a brave face.”

#### *A glimmer of hope?*

There can be no doubt that the House of Lords were influenced by the peculiar facts in *Malcolm*, which had not arisen in the previous authorities where disability discrimination had been argued in premises cases: see *Brazier*, *Romano* etc. Lewisham had an unqualified right to possession and Parliament had by virtue of the provisions of the Housing Act 1985 taken away Mr Malcolm’s security of tenure by operation of law when he sublet, leaving his contractual tenancy vulnerable to determination by a valid Notice to Quit (which was duly served).

It is clear that their Lordships, and particularly, her Ladyship, were to a degree in a forked stick. Lord Neuberger had “considerable misgivings” (para 139) about adopting Lewisham’s approach to the comparator test. In a “swings and roundabouts” analysis of the issue of the comparator, he accepted that s.24(1)(a) is linguistically defensible in each of the ways presented by the parties to the case (para 138). This ambiguity had been identified in *Novacold* regarding the employment sections by Mummery LJ at p.962.

Lord Bingham considered the possibility of an “intermediate comparator” (para 15) but noted that neither the parties had suggested one, nor would the statutory language identify one. He therefore held the correct comparison “in this case” to be Lewisham’s comparator.

Baroness Hale pointed to the fact that *Novacold* had not caused difficulty in the field of employment for 9 years (para 81). She also relied on *Hansard* (para. 79) and the introduction of a direct discrimination subsection 3A(5) of the Act as support for her dissenting speech on the comparator issue (para. 81).

Catherine Casserley and Robert Latham in *Legal Action* magazine (September 2008, p.38-42, at 42) suggests that:

“It may be possible to pursue a case to the House of Lords in the employment context arguing that *Novacold* still applies, not least because the narrow interpretation would make the provisions in DDA s.3A(5) and (6) meaningless.”

### *The glimmer extinguished*

Even Baroness Hale, dissenting, accepted that, prima facie, a reading of the comparator test in Mr Malcolm’s favour reduces it to one which will always be met, so “may appear surprising” and “does not fit with our normal assumptions about discrimination”. (para 71).

And there is the nail which has been hit on the head. The comparator test has to be meaningful and commonsense (see Lords Scott at para. 30 and Lord Brown at 113). The man on the *Lewisham* omnibus would think the law bizarre if the construction were otherwise. Only we lawyers could have drafted something quite such a linguistic mess as the Disability Discrimination Act 1995.

The dissenting voice on this issue was full of resignation, her Ladyship sorry that “the settled understanding of employment lawyers and tribunals is to be disturbed as a result of your Lordships’ disapproval of *Clark v Novacold*.” (para. 81).

Nevertheless, her Ladyship did not think it possible to distinguish *Novacold* on the ground that the same words mean something different in the context of employment. (para. 80).

### *Was there ever light at the end of the tunnel?*

In *Novacold* there said to be a straightforward answer (in the affirmative) to the first question whether the disabled person was dismissed for a reason which

related to his disability: p.961H, per Mummery LJ. Accordingly, as noted by Brooke LJ in *Romano* at paragraph 41, the emphasis in *Novacold* was not upon the phrase “for a reason which relates the person’s disability”, but instead the words “to whom that reason does not apply”.

It is arguable that the first question was never correctly answered. The disabled person Mr Clark was arguably not dismissed for a “reason” relating to his disability. The reason was the employee’s incapability of performing the job, in turn caused by absence, in turn caused by disability. As Lord Scott noted at para 33 of *Malcolm*:

“But many decisions are made for a multitude of reasons, some consequential on others, and the decision maker would often be hard put to identify a single determinative reason for the act or omission in question. If the physical or mental condition of the complainant is the only reason for the treatment complained of then the statutory comparison will demonstrate that there has been unlawful discrimination.”

22<sup>nd</sup> October 2008.