

insight



Newsletter

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Beyond Malcolm:

Disability Discrimination Update

The House of Lords decision in **Lewisham LBC v Malcolm** [2008] 4 All ER 525 changed the comparator test for disability related discrimination (s 3A(1)(a) DDA) in housing cases, overturning the long standing decision in **Clark v TDG Ltd t/a Novacold** [1999] 2 All ER 977. In order to demonstrate less favourable treatment, the disabled person must now compare themselves with someone (ie. without a disability or with a different disability), who is in the same or similar circumstances. Previously all that was required was that the disabled person had to compare themselves with someone to whom the disability related reason for the treatment did not apply. This was relatively straightforward to prove: a disabled person dismissed for lengthy sickness absence was clearly treated less favourably when compared with a person without the disability (and hence any sickness related absence). The case was then effectively determined on whether the employer could justify the treatment (s3A(1)(b)).

Now the disabled person would be compared with a non-disabled person with the same level of sickness absence and in most cases it will be successfully argued that the non-disabled employee would also have been dismissed making it much more difficult to establish less favourable treatment.

The decision has been criticised for making it harder to prove disability discrimination, rendering the comparator test for disability related discrimination effectively the same as for direct discrimination (s3A(5)). This decision has subsequently been applied by the EAT in the employment sphere in the cases of:

Truman v Child Support Agency [2009] All ER (D) 105 and **Aylott v Stockton on Tees Borough Council** [2009] All ER (D) 186. In both cases the stricter test clearly made it more difficult for the disabled person to establish less favourable treatment.

However, to some extent the harshness of **Malcolm** has been ameliorated slightly by the decision in **Walters v Fareham College Corporation** [2009] All ER (D) 102. The EAT was able to bypass the Malcolm comparator test, in holding that the dismissal of a disabled person could amount to a failure to make reasonable adjustments (and hence an unlawful act of discrimination) in circumstances where a claim for less favourable treatment would fail, due to the stricter comparator test. This followed the amendment to the DDA by the Disability Discrimination Act 1995 (Amendment Regulations) 2003 which replaced the old s6 which prohibited a dismissal being a failure to make a reasonable adjustment.

Mrs Walters, a disabled person, was on long term sick leave, and the occupational health advice was that she required a phased return to work. The Claimant's employers dismissed her. It was held by the EAT that the requirement to come back to work without a phased return, was a provision criterion or practice that placed the Claimant at a substantial disadvantage. The comparator group was employees who were not disabled and able to attend work.

The comparative exercise in a reasonable adjustments claim is different to a less favourable treatment claim, as it involves a class or group of non-disabled comparators, not an individual comparator, in very similar circumstances to the Claimant. Mrs Walters did not have to prove that someone in a similar

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position to her, but without a disability, would have been treated any differently.

The Government is committed to reversing the decision in **Malcolm** through legislation – it is included in the Equalities Bill which was in the Queen’s speech on the 20th November 2009. However, there is real pessimism about whether there is sufficient parliamentary time for the bill to make it on to the statute book prior to May 2010, when the general election is expected. The Conservative Party have previously voted against the bill and are unlikely to cooperate to ensure that the bill becomes law before the election.

There is also concern that the proposed Clause 15 of the bill does not in fact adequately reverse the comparator test in **Malcolm**, and further consultation is being sought, with a view to redrafting the clause at the committee stage.

There is clearly a degree of ongoing uncertainty in this case, but it seems likely that the stricter comparator test in disability related discrimination will remain with us for the foreseeable future.

JAMES HURD

To believe or not to believe: EAT Guidance

In the week when the Copenhagen Conference on climate change begins and the saga of the ‘stolen emails’ affair at the University of East Anglia continues, scientific opinion suggests that there is a genuine global warming trend and the so called ‘Naughties’ has been the hottest decade for 150 years. So, what fate awaits an employee treated less favourably on the basis of a belief in climate change? In early November 2009 the EAT gave guidance on the approach to such a question in **Grainger Plc v. Nicholson UKEAT/0219/07**.

The Claimant, N, claimed he was dismissed from his position as Head of Sustainability with the Respondent because of his belief in climate change and the protected disclosures he had made. N made it clear that his belief was not merely opinion but a philosophy by which he lived his life.

The hearing before Mr Justice Burton, sitting alone in the EAT, concerned an appeal by the Respondent of the Tribunal’s finding at PHR that the Claimant’s belief was a belief within the meaning of the Employment Equality (Religion or Belief) Regulations 2003 ‘the Regulations’.

Paragraph 3 of the Regulations provides ‘(1) For the purposes of these Regulations, a person (A) discriminates against another person (B) if ... (a) on the grounds of the religion or belief of B...A treats B less favourably than he treats or would treat other persons.’

The Tribunal at first instance found that ‘the Claimant’s beliefs are or amount to a philosophical belief within the 2003 Regulations. Mr Justice Burton made it clear that the Tribunal could not go that far. It was only possible to state that the *asserted* belief was capable of being a belief for the purposes of the Regulations.

In any event, the issues before the EAT were (i) How far, if at all, the belief said to qualify for protection under the Regulations is required to be similar to a religious belief? (ii) What limits if any should be placed upon the words ‘philosophical belief? The Respondent argued for three limitations in particular, (a) a settled belief (b) philosophical belief rather than political belief and (c) it must not be a scientific belief.

And finally, (iii) Whether the authorities in relation to the ECHR, Article 9 and Article 2 of Protocol 1 are of relevance or indeed persuasive or conclusive in the field. N’s Counsel articulated the belief as ‘*The philosophical belief is that mankind is heading towards catastrophic climate change and therefore we are all under a moral duty to lead our lives in a manner which mitigates or avoids*

this catastrophe for the benefit of future generations, and to persuade others to do the same’.

Mr Justice Burton found that it was necessary in order for the belief to be protected, was for it to have a similar status or cogency to a religious belief.

He accepted that there was a need for limitations upon the definition of ‘philosophical belief’ but refused to accept the limitations suggested by the Respondent. Instead he offered the following guidance at paragraph 24 of his judgment

‘I shall endeavour to set out the limitations, or criteria, which are to be implied or introduced by reference to the jurisprudence set out above:

- (i) *The belief must be genuinely held.*
- (ii) *It must be a belief and not, as in McClintock, an opinion or viewpoint based on the present state of information available.*
- (iii) *It must be a belief as to a weighty and substantial aspect of human life and behaviour.*
- (iv) *It must attain a certain level of cogency, seriousness, cohesion and importance.*
- (v) *It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (paragraph 36 of Campbell and paragraph 23 of Williamson).*

In respect of the final point of the appeal the EAT held that the jurisprudence of the ECHR was directly material to the issues of what can and cannot be capable of being a philosophical belief for the purposes of the Regulations.

The genuineness of the alleged belief will be a matter of fact for the Tribunal to decide after N has been cross-examined on the point but the validity of the belief was not for the Court.

N’s case establishes that a belief as outlined by his Counsel was capable of amounting to a philosophical belief within the meaning of the Regulations; the actual judgment on whether it is or is not, as a matter of fact, will have to wait until the case is heard for full hearing.

It is perhaps a shame that the guidance given was not in the context of a full hearing and subsequent findings of fact after hearing the evidence. However, the guidance given is useful in assisting lawyers to navigate the difficult Regulations and advise clients as clearly as possible.

One final point to note is that the Regulations also make reference to a lack of belief. Mr Justice Burton emphasised that the existence of a positive philosophical belief does not depend upon the existence of a negative philosophical belief to the contrary. He found that paragraph 1(d) was intended to protect against a person on the grounds of his lack of belief. He stated *'if the Respondent has his philosophical belief in climate change, and he were to discriminate against someone else in the workforce who does not have that belief, then the latter would be capable of arguing that he was being treated less favourably because of his absence of the belief held by the Respondent.'*

Cases of interest and central to the judgment include, **Eweida v. British Airways plc** [2009] ICR 303, **McClintock v. Department of Constitutional Affairs** [2008] UKEAT/0223/07, **R (Williamson) v. Secretary of State for Education and Employment & Ors** [2005] UKHL 15 and **Campbell and Cosans v. United Kingdom** [1982] 4 EHRR 293.

KAREN BOYLE

Broad Jurisdiction of the Court under Section 153a of the Housing Act 1996

Swindon BC v. Redpath [2009] EWCA Civ943

The scope of the jurisdiction to grant injunctions under section 153A(1) of the Housing Act 1996 and in particular the correct interpretation of "housing-related conduct" was considered by the Court of Appeal who concluded that courts should give a broad interpretation to anti-social behaviour legislation.

Under section 153A(1), a court may grant an anti-social behaviour injunction if the conditions in subsection 3 are met, namely:

"...that the person against whom the injunction is sought is engaging, has engaged or threatens to engage in housing-related conduct capable of causing a nuisance or annoyance to—

(a) a person with a right (of whatever description) to reside in or occupy housing accommodation owned or managed by a relevant landlord,

(b) a person with a right (of whatever description) to reside in or occupy other housing accommodation in the neighbourhood of housing accommodation mentioned in paragraph (a),

(c) a person engaged in lawful activity in, or in the neighbourhood of, housing accommodation mentioned in paragraph (a), or

(d) a person employed (whether or not by a relevant landlord) in connection with the exercise of a relevant landlord's housing management functions.

Housing-related" is defined in section 153A(1) as "directly or indirectly relating to or affecting the housing management functions of a relevant landlord".

The Appellant, Mr Redpath, was the secure tenant of the Respondent local authority. His neighbours, who were private owners and not council tenants, reported him for drink driving which led to his arrest and imprisonment and a feud with the neighbours. Upon his release in May 2003 the Appellant harassed the neighbours by threatening them and damaging their property.

In July 2005 a PPO was made based on the anti-social behaviour and rent arrears. The Appellant continued to act anti-socially. In October 2005 he was convicted of assault against a local pub landlord.

In May 2006 he was convicted of acts of criminal damage. The Appellant was evicted in July 2006 and made the subject of an ASBI for a period of one year. The Appellant breached the ASBI in September 2006 by entering an exclusion zone, leading to the terms of the ASBI being widened.

In March 2007 the Appellant committed further criminal acts leading to imprisonment and a second ASBI being imposed to run until April 2008. The Appellant breached the ASBI in March 2008 leading to an application for committal. On 21st July 2008 a third ASBI was imposed for a period of three years which included the term:

"1. The Defendant is forbidden from engaging in, or threatening to engage in, conduct which is capable of causing nuisance or annoyance to any person residing in Warneage Green, Warnborough, Nr Swindon or to any person engaged in lawful activity in, or in the neighbourhood of, Warneage Green".

The Appellant appealed against the imposition of the ASBI, arguing that the conduct did not directly or indirectly relate to housing management functions given that the Appellant was no longer a tenant of the local authority and the main complainants were private tenants. Further, there was an alternative remedy available to the local authority in the form of an ASBO under section 1 of the Crime and Disorder Act 1998. It was held:

The proper construction of the jurisdiction to grant an ASBI is that it is a broad one (para 40 per Rix LJ) and where "conduct puts any of the landlord's tenants in fear, there is jurisdiction" (para 56 per Rix LJ);

- "Housing-related" should not be narrowly confined to include only statutory or contractual management functions.
- There is no requirement that a Respondent be a local authority tenant;
- A council's "housing-related" functions "embraced concern for its tenants and property" and
- It was sufficient for the Appellant to have engaged in conduct in the past when he was a local authority tenant to give the court jurisdiction to make an order (per Rix LJ para 58).

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