

LONDON BOROUGH OF LEWISHAM (appellant) v. MALCOLM (respondent) and EQUALITY AND HUMAN RIGHTS COMMISSION (intervener)

[2008] UKHL 43

- 1800 Disability discrimination
- 1811.1 Disability-related discrimination – reason related to disability
- 1811.2 Disability-related discrimination – others to whom reason does not apply
- 1855 Discrimination by others than employers – providers of goods, facilities, services or premises

Disability Discrimination Act 1995: ss.22, 24

The facts:

Courtney Malcolm suffered from schizophrenia. His condition was controlled through medication. He rented a flat from the London Borough of Lewisham on a secure tenancy. He sublet his flat on an assured shorthold tenancy for a period of six months. That was a breach of the express terms of his tenancy agreement, which provided that subletting had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one. At the time that he had sublet the flat, Mr Malcolm had stopped taking his medication.

When the council discovered that Mr Malcolm had sublet the flat, it gave him notice to quit. At that time, the council was unaware that Mr Malcolm suffered from schizophrenia. When he did not vacate the flat, the council commenced possession proceedings in the county court. By that time, the council had been informed of his mental health problems.

In his defence to the possession proceedings, Mr Malcolm argued that the council's attempt to gain possession of the flat constituted unlawful disability discrimination contrary to s.22 of the Disability Discrimination Act 1995. He contended that he suffered from a disability for the purposes of the Act; that the reason why the council was seeking possession was because of his disability; and that unless the council could show justification the court was precluded from making a possession order against him. He claimed that he had only sublet the flat because he had not been taking his medication at the time, and this had led to his irresponsible behaviour. The judge in the county court rejected the complaint of disability discrimination and granted the possession order. The Court of Appeal reversed that decision. The council appealed to the House of Lords. The Equality and Human Rights Commission took part in the proceedings as intervener.

Two issues, amongst others, fell to be determined. Firstly, the correct comparators for the purposes of s.24(1) of the Act fell to be identified. There were three options: (a) secure tenants of the council without a mental disability who had sublet; (b) secure tenants of the council who had not sublet; and (c) some other unspecified comparator group. According to the Court of Appeal in *Clark v Novacold Ltd* the correct comparator was (b), but the council submitted that that case was wrongly decided and that the correct comparator was (a). On that basis, Mr Malcolm's discrimination claim would fail, since it was not disputed that the council would have issued a notice to quit and pursued possession proceedings against any secure tenant without a mental disability who had sublet his flat.

Secondly, it fell to be determined whether knowledge of the disability on the part of the discriminator at the time of the alleged discriminatory act was necessary in order to establish that the "reason" for the treatment related to the disability for the purposes of s.24(1). The council argued that it was necessary that the discriminator knew or ought to have known of the disability at the time of the alleged discriminatory act in order to satisfy s.24(1) and establish unlawful discrimination.

Although the issues related to disability discrimination in the

Section 22 of the Act, so far as material, provides:
“(3) It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises (a) in the way he permits the disabled person to make use of benefits or facilities; (b) by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities; or (c) by evicting the disabled person, or subjecting him to any other detriment.”

Section 24 of the Act, so far as material, provides:
“(1) ... a person ('A') discriminates against a disabled person – (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 not or would not apply.”

The House of Lords (Lord Bingham of Cornhill, Lord Scott of Foscote, Baroness Hale of Richmond (dissenting in part as to the reasoning), Lord Brown of Eaton-under-Heywood and Lord Neuberger of Abbotsbury) 25 June 2008 allowed the appeal and restored the decision of the judge in the county court.

The House of Lords held:

1811.1, 1811.2

The Court of Appeal had erred in holding that the council's conduct in seeking possession of the flat constituted unlawful disability discrimination.

(1) The correct comparator for the purposes of s.24(1)(a) is a secure tenant of the council with a mental disability who has sublet his property, a not a secure tenant who has not sublet his property. In that regard, the Court of Appeal decision *Clark v Novacold Ltd* was wrongly decided.

There is no point in asking whether a person has been treated "less favourably than others" if the reason why the disabled person was subjected to the allegedly less favourable treatment cannot apply to those "others". If a person has been dismissed because he is incapable of doing his job, there is no point in making the lawfulness of the dismissal depend on whether those who are capable of doing their job would have been dismissed. If a person has been dismissed because he will be absent from work for a year, there is no point in making the lawfulness of his dismissal depend on whether those who will not be absent from work will be dismissed. If a tenant has been given notice terminating his tenancy because he has sublet in breach of the tenancy agreement, there is no point in making the lawfulness of the action taken by the landlord dependant on whether notice to quit would have been served on tenants who had not sublet. Parliament must surely have intended a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not.

(2) In order for the alleged discriminator's "reason" to "relate to" the disability for the purposes of s.24(1)(a), it is necessary that the discriminator knows of, or ought to know of, the disability, at the time of the alleged discriminatory act. Unless the discriminator has knowledge or imputed knowledge of the disability, he cannot be guilty of unlawful discrimination under the Act.

That interpretation is supported by the fact that s.25(1) provides that a claim based on unlawful disability discrimination may be made the subject of civil proceedings in the same way as any other claim in tort, damages being recoverable. This points towards a requirement of knowledge. Moreover, the grounds of justification specified in s.24 of the Act assume that the discriminator has knowledge of the disability.



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
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www.employmenttribunals.gov.uk

President: Shona Simon

12 April 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

LISTING OF CASE FOR HEARING Employment Tribunals Rules Of Procedure 2004

1. It is proposed to list this case for a Hearing to deal with the case on its merits. If you are aware of any reason why such a hearing should be delayed (for example, there are criminal proceedings pending which relate to the issues raised by this case) you should notify this office of that reason in writing immediately. Otherwise, in order that a date(s) can be fixed which is convenient to both parties and their witnesses the **Employment Judge requires you to complete the attached form in full and return it to this office by 19 April 2011.**

If you are able to agree hearing dates with the other party/parties in the case, within the period specified or in the month immediately following, then please do so and notify the Tribunal office of these preferred dates. Every effort will be made to accommodate this request.

IF IT IS NOT POSSIBLE TO IDENTIFY DATES SUITABLE TO BOTH PARTIES WITHIN THE PERIOD SPECIFIED, A HEARING WILL BE FIXED IN THE PERIOD FOLLOWING IMMEDIATELY THEREAFTER WITHOUT FURTHER CONSULTATION NO FURTHER DATE LETTER WILL BE ISSUED.

EMPLOYMENT TRIBUNALS (SCOTLAND)

5 Case No. S/111150/2010 Pre Hearing Review Held at Edinburgh on 8th April 2011

Employment Judge: Ms S A Craig

10

Mr P T Still
Flat 173b
151 Rowan Drive

Claimant
In Person

15 Blackburn Homeless Unit
Blackburn
West Lothian
EH47 7NZ

20 Tesco Stores Ltd
Carnegie Road
Livingston
West Lothian
EH54 8TB

First Respondent
Represented by:
Mr A Parascandlo
Solicitor

25

Bruce Balberston
C/o Tesco Stores Ltd
Carnegie Road
Livingston
West Lothian
EH54 8TB

Second Respondent
Represented by:
Mr A Parascandlo
Solicitor

30

John Gilcrist
C/o Tesco Stores Ltd
Carnegie Road
Livingston
West Lothian
EH54 8TB

Third Respondent
Represented by:
Mr A Parascandlo
Solicitor

40

John Clenghan
C/o Tesco Stores Ltd
Carnegie Road
Livingston
West Lothian
EH54 8TB

Fourth Respondent
Represented by:
Mr A Parascandlo
Solicitor

45

Guy Henderson
C/o Tesco Stores Ltd
Carnegie Road
ETZ4(WR)

Fifth Respondent
Represented by:
Mr A Parascandlo

Livingston
West Lothian
EH54 8TB

Solicitor

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ORDER OF THE EMPLOYMENT TRIBUNAL

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Whereas the claimant has withdrawn:

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(First) his claim of unlawful discrimination contrary to the Disability Discrimination Act 1995 in relation to all and any matters that arose prior to March 2009; and

(Second) his claim of unauthorised deductions from wages

Orders that those claims are dismissed.

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Orders that the matter shall proceed to a full Hearing on the merits and remedy to be confined to the claims of:

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(First) unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 in relation to the dismissal on ^{Bth} ~~30th~~ May 2010; and

(Second) direct discrimination contrary to section 3A(5) of the Disability Discrimination Act 1995 in relation to the dismissal on ^{Bth} ~~31st~~ May 2010

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REASONS

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1. This matter had been listed for a Pre Hearing Review to determine whether or not it was just and equitable to allow parts of the claimant's claim – which it was accepted were out of time – be allowed to proceed. That concerned allegations of disability discrimination about matters prior to March 2009, the date on which it was agreed a reasonable adjustment had been made.

2. The claimant appeared in person and the respondent was represented by Mr Parascandlo.
3. At the outset of the PHR the claimant explained that he wanted to withdraw that claim and instead proceed only with the claims of unfair dismissal and of direct disability discrimination arising out of that dismissal.
4. That being so the claim that was the subject of the PHR - of unlawful discrimination contrary to the Disability Discrimination Act 1995 in relation to all and any matters that arose prior to March 2009 – is dismissed.
5. Following further submissions the claimant also withdrew his claim of unauthorised deductions contrary to section 13 of the Employment Rights Act 1996 ("ERA"). That claim is also dismissed.
6. The claims are now confined to the following.
7. First, a claim of unfair dismissal contrary to sections 94 and 98 of ERA. The claimant challenges the fairness of the decision to dismiss him as well as the process followed by the respondent.
8. Second, the claim that the decision to dismiss was direct disability discrimination contrary to section 3A(5) of the DDA. The specific allegation is that the respondent included days when the claimant was absent from work because of his impairment. These should not have been included, submits the claimant, and had they not been he would have not have had sufficient service to trigger the respondent's absence management process to the point of dismissal.
9. It was agreed that the matter should be listed for a 4 day hearing and date listing stencils will now be issued for June, July and August 2011.
10. The respondent will lead at the Hearing, and is likely to call four witnesses. The claimant may lead evidence from the representative who accompanied

him to the meeting that led up to, but did not include, the meeting at which he was dismissed. He is to speak to that witness shortly.

11. Witness statements are not to be used.

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12. I directed that there should be a Joint Bundle of Documents lodged for which the respondent is ordered to take responsibility. Once the Notice of Hearing is issued the respondent will have 14 days to draft the Index for the Joint Bundle. The claimant will have a further 14 days thereafter to identify any additional documents that he wishes to found on and that are relevant to the issues to be determined at the Hearing. The Joint Bundle to be lodged with the Tribunal no later than 14 days prior to the Hearing itself.

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13. The claimant was reminded that it falls to him to produce evidence of loss and that he has been taking steps to mitigate that loss. He is ordered to prepare a Schedule of Loss to be produced with the Tribunal (and copied to the respondent) within 14 days of the issuing of the Notice of Hearing.

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Employment Judge *[Signature]*

Date *8th April 2011*

12 APR 2011

25 Entered in Register/Copied to Parties.....

SCHEDULE OF LOSS AND REMEDY

IF CLAIMANT WINS HIS DISCRIMINATION CASE TRIBUNAL TO

- ① MAKE A DECLARATION HE HAS BEEN DISCRIMINATED AGAINST.
- ② AWARDS COMPENSATION.
- ③ MAKE RECOMMENDATIONS AS TO ACTION THE EMPLOYER SHOULD TAKE TO REDUCE THE ADVERSE EFFECT OF DISCRIMINATION.

Basic Award

GROSS WEEKLY PAY = £445.12

SUBJECT TO STATUTORY MAXIMUM APPLICABLE AT DATE OF DISMISSAL, 5 year service

41 year old = $5 \times =$

COMPENSATORY AWARDS

CLAIMANT HAS NOT YET OBTAINED NEW EMPLOYMENT, PAST LOSS OF EARNINGS, DATE OF DISMISSAL 13th MAY 2010 UNTIL TRIBUNAL HEARING 14th JUNE 2011)

INTEREST ON PAST LOSS OF EARNINGS

DATE DISMISSAL AND TRIBUNAL'S CALCULATION DATE

RECEIVED JOBSEEKERS ALLOWANCE FROM 1ST JULY 2010
UNTIL 23RD NOVEMBER 2010, (£65.45 PER WEEK)
EMPLOYMENT SUPPORT ALLOWANCE 10 JANUARY 2011
CONTINUES TO PRESENT DATE, MEDICAL ASSESSMENT
DUE TO HELP ME BACK INTO EMPLOYMENT, LEARN
NEW SKILL, DUE TO BACK PAIN NOT ABLE TO WORK
PREVIOUS JOBS) (£65.45. UNTIL APRIL 2011
£67.50. PER WEEK) MEDICAL SICK LEAVE FROM
DOCTOR FROM 10TH JANUARY 2011 UNTIL PRESENT;

FUTURE LOSS OF EARNING'S = AS TRIBUNAL SEE FIT
(DUE TO HEALTH)

LOSS OF PENSION VALUES
BENEFITS, DEFERRED PENSION =

FUTURE LOSS UNTIL RETIRE
65 years - 24 years age.
41 at dismissal. (TAX FREE)

INJURY TO FEELINGS = AS TRIBUNAL SEE
FIT) INTEREST
INJURY TO FEELINGS
FROM DISMISSAL TO
TRIBUNAL CALCULATION
DATE.

Aggravated Damages = As tribunal See Fit

Injury to Health = As tribunal See Fit

SHARES IN SUCCESS

FUTURE LOSS 3.6% =

YEARLY SALARY (TAX FREE)

UNTIL RETIRE - $24 \times 3.6\%$ OF $\pounds 23,140$.

PRIVILEGE 10% EMPLOYEE

DISCOUNT CARD UP TO $\pounds 700$

DISCOUNT PER YEAR $\times 24$ =

FUTURE LOSS.

ANY OTHER COMPENSATION TRIBUNAL
SEE'S FIT TOWARDS, ALSO UPLIFT
IN TOTAL COMPENSATION AWARD
10% - 50% FOR NOT FOLLOWING OWN
COMPANY POLICY + PROCEDURES

EVIDENCE REGARDING SCHEDULE OF LOSS
WILL BE INCLUDED, AS THEY NEED'S PHOTO
COPYING AND WILL TAKE A FEW MORE
DAYS DUE TO FINANCIAL COST, WHICH IS 5th OF
NOT INCLUDED. BE FORWARDED AS SOON AS POSSIBLE



EMPLOYMENT TRIBUNALS (SCOTLAND)

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President: Shona Simon

Your Ref: 111150

27 April 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

I refer to the above proceedings.

I have been instructed by Employment Judge Craig to write to you and advise that a 4 day hearing will be listed. In the event that the matter concludes in less than 4 days your comment will be taken into account in relation to any issue of cost that might arise.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Squire Sanders & Dempsey
(UK) LLP
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President : Shona Simon

17 May 2011

Case Number: 111150/2010

Claimant

Mr PT Still

v

Respondent

Tesco Distribution Centre
& others

NOTICE OF HEARING Employment Tribunals Rules of Procedure 2004

1. The claim will be heard by an Employment Tribunal at **OET Scotland, 54-56 Melville Street, Edinburgh, EH3 7HF** on **Tuesday, 14 June 2011, Wednesday, 15 June 2011, Thursday, 16 June 2011, Friday, 17 June 2011** at **10:00 am** or as soon thereafter on that day as the Tribunal can hear it.
2. We have set aside 4 days for its full disposal, including remedy if appropriate. If you consider that the hearing is likely to last more than 4 days you must inform the tribunal office within 7 days, telling us how long you think will be required.
3. You are responsible for making sure that all the witnesses you want to call can attend the hearing and know the place, date and time of the hearing.
4. Unless there are wholly exceptional circumstances, no application for postponement due to non-availability of witnesses or for other reasons will be granted. If you do apply for a postponement you must do so in writing and state the full grounds and any other dates when you are unavailable in the six weeks following the above hearing date for hearings of up to one day. For hearings of two days or more, please provide unavailable dates for the three months following the above hearing dates. If at all possible parties should seek to agree dates for the re-listing of the case and advise the Tribunal as soon as possible of those dates. Every effort will be made to accommodate the request.

LONDON BOROUGH OF LEWISHAM (appellant) v. MALCOLM (respondent) and EQUALITY AND HUMAN RIGHTS COMMISSION (intervener)

[2008] UKHL 43

- 1800 Disability discrimination
- 1811.1 Disability-related discrimination – reason related to disability
- 1811.2 Disability-related discrimination – others to whom reason does not apply
- 1855 Discrimination by others than employers – providers of goods, facilities, services or premises

Disability Discrimination Act 1995: ss.22, 24

The facts:

Courtney Malcolm suffered from schizophrenia. His condition was controlled through medication. He rented a flat from the London Borough of Lewisham on a secure tenancy. He sublet his flat on an assured shorthold tenancy for a period of six months. That was a breach of the express terms of his tenancy agreement, which provided that subletting had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one. At the time that he had sublet the flat, Mr Malcolm had stopped taking his medication.

When the council discovered that Mr Malcolm had sublet the flat, it gave him notice to quit. At that time, the council was unaware that Mr Malcolm suffered from schizophrenia. When he did not vacate the flat, the council commenced possession proceedings in the county court. By that time, the council had been informed of his mental health problems.

In his defence to the possession proceedings, Mr Malcolm argued that the council's attempt to gain possession of the flat constituted unlawful disability discrimination contrary to s.22 of the Disability Discrimination Act 1995. He contended that he suffered from a disability for the purposes of the Act; that the reason why the council was seeking possession was because of his disability; and that unless the council could show justification the court was precluded from making a possession order against him. He claimed that he had only sublet the flat because he had not been taking his medication at the time, and this had led to his irresponsible behaviour. The judge in the county court rejected the complaint of disability discrimination and granted the possession order. The Court of Appeal reversed that decision. The council appealed to the House of Lords. The Equality and Human Rights Commission took part in the proceedings as intervener.

Two issues, amongst others, fell to be determined. Firstly, the correct comparators for the purposes of s.24(1) of the Act fell to be identified. There were three options: (a) secure tenants of the council without a mental disability who had sublet; (b) secure tenants of the council who had not sublet; and (c) some other unspecified comparator group. According to the Court of Appeal in *Clark v Novacold Ltd* the correct comparator was (b), but the council submitted that that case was wrongly decided and that the correct comparator was (a). On that basis, Mr Malcolm's discrimination claim would fail, since it was not disputed that the council would have issued a notice to quit and pursued possession proceedings against any secure tenant without a mental disability who had sublet his flat.

Secondly, it fell to be determined whether knowledge of the disability on the part of the discriminator at the time of the alleged discriminatory act was necessary in order to establish that the "reason" for the treatment related to the disability for the purposes of s.24(1). The council argued that it was necessary that the discriminator knew or ought to have known of the disability at the time of the alleged discriminatory act in order to satisfy s.24(1) and establish unlawful discrimination.

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The House of Lords held:

1811.1, 1811.2

The Court of Appeal had erred in holding that the council's conduct in seeking possession of the flat constituted unlawful disability discrimination.

(1) The correct comparator for the purposes of s.24(1)(a) is a secure tenant of the council with a mental disability who has sublet his property, a not a secure tenant who has not sublet his property. In that regard, the Court of Appeal decision in *Clark v Novacold Ltd* was wrongly decided.

There is no point in asking whether a person has been treated "less favourably than others" if the reason why the disabled person was subjected to the allegedly less favourable treatment cannot apply to those "others". If a person has been dismissed because he is incapable of doing his job, there is no point in making the lawfulness of the dismissal depend on whether those who are capable of doing their job would have been dismissed. If a person has been dismissed because he will be absent from work for a year, there is no point in making the lawfulness of his dismissal depend on whether those who will not be absent from work will be dismissed. If a tenant has been given notice terminating his tenancy because he has sublet in breach of the tenancy agreement, there is no point in making the lawfulness of the action taken by the landlord dependant on whether notice to quit would have been served on tenants who had not sublet. Parliament must surely have intended a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not.

(2) In order for the alleged discriminator's "reason" to "relate to" the disability for the purposes of s.24(1)(a), it is necessary that the discriminator knows of, or ought to know of, the disability, at the time of the alleged discriminatory act. Unless the discriminator has knowledge or imputed knowledge of the disability, he cannot be guilty of unlawful discrimination under the Act.

That interpretation is supported by the fact that s.25(1) provides that a claim based on unlawful disability discrimination may be made the subject of civil proceedings in the same way as any other claim in tort, damages being recoverable. This points towards a requirement of knowledge. Moreover, the grounds of justification specified in s.24 of the Act assume that the discriminator has knowledge of the disability.



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President: Shona Simon

Your Ref: **111150**

20 May 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

I refer to the above proceedings and your email dated 18 May 2011.

I have been instructed by Employment Judge Craig to write to you and inform that the respondent is legally represented. All correspondence in which the Claimant has concerning his claim should be sent to the solicitor not to the respondent direct. It is a matter for the Respondents to choose who is to represent them. They have chosen this representative so the Claimant must now refrain from contacting the Respondent direct.

The Employment Judge has already issued directions requiring that the parties cooperate in the production of a joint bundle. Failure to comply with those directions could lead to sanctions being imposed.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals

Et melville st
Edinburgh, 1/6/2011
urgent request to et
judge Susan A Craig,
for claimant Peter Still.

PETER T W STILL
113 GLEBE ROAD,
WHITBURN,
WEST LoTHIAN
EH47 0AX.
1st June 2011
urgent.

et s/111150/2010 Peter Still v Tesco Stores Ltd
+ others

I am the claimant in above which is listed
for full hearing over 4 days - 14th - 15th - 16th - 17th June
2011

I have not yet received the Bundle from
the respondent's solicitor Andrew Pascardillo
which should be provided 14 days before hearing.
I request that the hearing be postponed, and
a pre-hearing review is issued regarding
claimant and changing of claim to (Direct)
disability Discrimination, made by et judge
Susan A Craig at pre-hearing review
8th April 2011, Friday - direction 12th April
2011, I was advised by (eric) never to
put forward that sort of claim as I didn't
understand this DOARS (ie Act) Section
3 A (5) and a claim of unfair dismissal.
I have been put to strict proof since
hearing Colding ET7 90 August 2010 and
case mtg - 1st November 2010, 28th February 2011,
8th April 2011, please put to et judge (above)
kindest regards Peter Still 1/6/2011



EMPLOYMENT TRIBUNALS (SCOTLAND)

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President: Shona Simon

Your Ref: 111150

02 June 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

ACKNOWLEDGEMENT OF CORRESPONDENCE **Employment Tribunals Rules of Procedure 2004**

I refer to your letter dated 1 June 2011, which has been noted and placed on the casefile.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals

Page 161
Absence Overview - P Still
BY RCP PERSONNEL ROBERTS 11/04/09

Period of Absence	No. Days	Reason	% incl back-related	% excl back-related	Outcome	Alternative outcome if excl back-related %	Additional Commentary
1 10/7/07	1	Wife ill	0.76%	0.76%	No Further Action	No Further Action	Demonstrating support for domestic absence
2 10/9/07	14	Flu	13.07%	13.07%	Stage 1	Stage 1	Above 3% absence trigger level excluding back pain
3 11/2/07	6	Ear infection	16.90%	16.90%	Stage 2	Stage 2	Above 3% absence trigger level excluding back pain
4 10/1/08	3	Back pain	19.23%	16.90%	Stage 2	Next Steps	1st set of next steps to support ongoing health issue, as per policy
5 10/7/08	6	Back pain	4.61%	0.00%	Next Steps	Next Steps	2nd set of next steps to support ongoing health issue, as per policy
6 10/8/08	2	Upset stomach	6.15%	1.53%	Stage 1	No Further Action	No Further Action as absence % below trigger level excluding back pain
7 10/9/08	4	Sickness	9.20%	4.61%	No Action	No Further Action	Went absent again before Attendance review meeting could be done
8 10/9/08	28	Spondulitis	30.70%	4.61%	Stage 2	Stage 1	% excl back-related is above 3% trigger
9 11/1/08	1	Child unwell	31.53%	5.38%	Next Steps	Next Steps	Demonstrating support for domestic absence
10 3/11/08	24	Back pain	50.00%	5.38%	Next Steps	Stage 1	2 sets of next steps previously issued for recurring health issue / disability, as per policy, therefore move to Stage 1
11 3/03/09	3	Back pain	43.00%	0.76%	Stage 3	No Further Action	No Further Action as absence % below trigger level excluding back pain
12 3/09/09	34	Anxiety & stress	26.15%	26.15%	Fast-tracked to Stage 3 as 1st time in 2 yr period	Fast-track to Stage 3	Policy states where a member of staff goes onto the stage monitoring process for the 3rd time in a 2 yr period they are fast-tracked to Stage 3
13 3/12/09	2	Supporting grandmother	27.48%	27.48%	No Further Action	No Further Action	Demonstrating support for domestic absence
14 3/01/10	38	Back pain	60.76%	27.60%	Refer to D.O.	Refer to D.O.	Refer to D.O.
15 3/03/10	11	Back pain	56.15%	25.38%	Refer to D.O.	Refer to D.O.	Refer to D.O.

(A)

(7)



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www.employmenttribunals.gov.uk

President: Shona Simon

17 June 2011

Case Number 100758/2011

Claimant
Mr PT Still

V

Respondent
Tesco Stores Ltd
& others

Dear Sir

EMPLOYMENT TRIBUNAL JUDGMENT **Employment Tribunals Rules of Procedure 2004**

A copy of the judgment and reasons of the Employment Tribunal is enclosed

Your attention is drawn to the booklet 'The Judgment' which contains important information and can be found on our website at www.employmenttribunals.gov.uk/Publications/publications.htm.

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim

Yours faithfully

R WALKER
For the Secretary of Employment Tribunals

West Lothian
EH54 8TB

5

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

10 The unanimous judgment of the Employment Tribunal is:

(First) that the claims against the second, third, fourth and fifth respondent having been withdrawn by the claimant, the claims against them are dismissed;

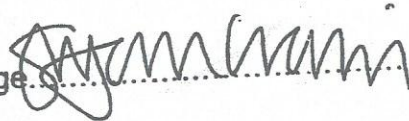
15 (Second) that the claim of unfair dismissal against the first respondent fails, and is dismissed; and

(Third) that the claim of disability discrimination against the first respondent fails, and is dismissed.

20

Oral reasons for that judgment were delivered to parties at the Hearing.

25 Employment Judge.....



Date.....

17 June 2011

17 JUN 2011

30

Entered in Register/Copied to Parties.....

LONDON BOROUGH OF LEWISHAM (appellant) v. MALCOLM (respondent) and EQUALITY AND HUMAN RIGHTS COMMISSION (intervener)

[2008] UKHL 43

- 1800 *Disability discrimination*
- 1811.1 *Disability-related discrimination – reason related to disability*
- 1811.2 *Disability-related discrimination – others to whom reason does not apply*
- 1855 *Discrimination by others than employers – providers of goods, facilities, services or premises*

Disability Discrimination Act 1995: ss.22, 24

The facts:

Courtney Malcolm suffered from schizophrenia. His condition was controlled through medication. He rented a flat from the London Borough of Lewisham on a secure tenancy. He sublet his flat on an assured shorthold tenancy for a period of six months. That was a breach of the express terms of his tenancy agreement, which provided that subletting had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one. At the time that he had sublet the flat, Mr Malcolm had stopped taking his medication.

When the council discovered that Mr Malcolm had sublet the flat, it gave him notice to quit. At that time, the council was unaware that Mr Malcolm suffered from schizophrenia. When he did not vacate the flat, the council commenced possession proceedings in the county court. By that time, the council had been informed of his mental health problems.

In his defence to the possession proceedings, Mr Malcolm argued that the council's attempt to gain possession of the flat constituted unlawful disability discrimination contrary to s.22 of the Disability Discrimination Act 1995. He contended that he suffered from a disability for the purposes of the Act; that the reason why the council was seeking possession was because of his disability; and that unless the council could show justification the court was precluded from making a possession order against him. He claimed that he had only sublet the flat because he had not been taking his medication at the time, and this had led to his irresponsible behaviour. The judge in the county court rejected the complaint of disability discrimination and granted the possession order. The Court of Appeal reversed that decision. The council appealed to the House of Lords. The Equality and Human Rights Commission took part in the proceedings as intervener.

Two issues, amongst others, fell to be determined. Firstly, the correct comparators for the purposes of s.24(1) of the Act fell to be identified. There were three options: (a) secure tenants of the council without a mental disability who had sublet; (b) secure tenants of the council who had not sublet; and (c) some other unspecified comparator group. According to the Court of Appeal in *Clark v Novacold Ltd* the correct comparator was (b), but the council submitted that that case was wrongly decided and that the correct comparator was (a). On that basis, Mr Malcolm's discrimination claim would fail, since it was not disputed that the council would have issued a notice to quit and pursued possession proceedings against any secure tenant without a mental disability who had sublet his flat.

Secondly, it fell to be determined whether knowledge of the disability on the part of the discriminator at the time of the alleged discriminatory act was necessary in order to establish that the "reason" for the treatment related to the disability for the purposes of s.24(1). The council argued that it was necessary that the discriminator knew or ought to have known of the disability at the time of the alleged discriminatory act in order to satisfy s.24(1) and establish unlawful discrimination.

Although the issues related to disability discrimination in the

Section 22 of the Act, so far as material, provides:
“(3) It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises (a) in the way he permits the disabled person to make use of benefits or facilities; (b) by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities; or (c) by evicting the disabled person, or subjecting him to any other detriment.”

Section 24 of the Act, so far as material, provides:
“(1) ... a person ('A') discriminates against a disabled person – (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 not or would not apply.”

The House of Lords (Lord Bingham of Cornhill, Lord Scott of Foscote, Baroness Hale of Richmond (dissenting in part as to the reasoning), Lord Brown of Eaton-under-Heywood and Lord Neuberger of Abbotsbury) 25 June 2008 allowed the appeal and restored the decision of the judge in the county court.

The House of Lords held:
1811.1, 1811.2

The Court of Appeal had erred in holding that the council's conduct in seeking possession of the flat constituted unlawful disability discrimination.

(1) The correct comparator for the purposes of s.24(1)(a) is a secure tenant of the council with a mental disability who has sublet his property, a not a secure tenant who has not sublet his property. In that regard, the Court of Appeal decision in *Clark v Novacold Ltd* was wrongly decided.

There is no point in asking whether a person has been treated "less favourably than others" if the reason why the disabled person was subjected to the allegedly less favourable treatment cannot apply to those "others". If a person has been dismissed because he is incapable of doing his job there is no point in making the lawfulness of his dismissal depend on whether those who are capable of doing their job would have been dismissed. If a person has been dismissed because he will be absent from work for a year, there is no point in making the lawfulness of his dismissal depend on whether those who will not be absent from work will be dismissed. If a tenant has been given notice terminating his tenancy because he has sublet in breach of the tenancy agreement, there is no point in making the lawfulness of the action taken by the landlord dependant on whether notice to quit would have been served on tenants who had not sublet. Parliament must surely have intended a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not.

(2) In order for the alleged discriminator's "reason" to "relate to" the disability for the purposes of s.24(1)(a), it is necessary that the discriminator knows of, or ought to know of, the disability, at the time of the alleged discriminatory act. Unless the discriminator has knowledge or imputed knowledge of the disability, he cannot be guilty of unlawful discrimination under the Act.

That interpretation is supported by the fact that s.25(1) provides that a claim based on unlawful disability discrimination may be made the subject of civil proceedings in the same way as any other claim in tort, damages being recoverable. This points towards a requirement of knowledge. Moreover, the grounds of justification specified in s.24 of the Act assume that the discriminator has knowledge of the disability.

Ian Fraser
USDAW
342 Albert Drive
5 Glasgow
G41 5PG

Fifth Respondent

10 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

15 The claim against the fifth respondent is dismissed under Rule 25(4) of the
Employment Tribunal Rules of Procedure 2004.

✓
REASONS

- 20 1. The claimant withdrew his claims against all respondents.
- 2. The Secretary notified the respondents of that withdrawal and applications
were made in writing for dismissal of those claims.
- 25 3. By judgment dated 28 and promulgated on 29 March 2011 the claims
against the first to fourth respondents was dismissed but, as a result of an
administrative oversight, the fifth respondent was not included in that
judgment but ought to have been.
- 30 4. The claim against the fifth respondent is dismissed.

Employment Judge.....*[Signature]*

35 Date.....*17 June 2011*.....

17 JUN 2011

Entered in Register/Copied to Parties.....



EMPLOYMENT TRIBUNALS (SCOTLAND)

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West Lothian
EH47 0AX

Edinburgh
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President: Shona Simon

17 June 2011

Case Number 100758/2011

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& others

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(Third) that the claim of disability discrimination against the first respondent fails, and is dismissed.

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Employment Judge 

Date 17 June 2011

17 JUN 2011

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Fifth Respondent

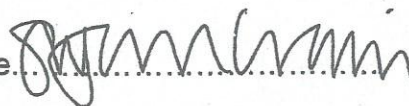
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Employment Judge.....



35 Date.....

17 June 2011.....

17 JUN 2011

Entered in Register/Copied to Parties.....

etc S/111150/2010
Peter Still v Tesco Stores Ltd
+ others.

9/08/2010 - 17/06/2011
ORAL JUDGEMENT (SUSAN A CRAIG)

Peter E. in Still
113 GLEBE ROAD,
WHITBURN, W. Lothian,
EH47 0AX.

(SCOTLAND)
23/06/2011

EMPLOYMENT JUDGE SUSAN A CRAIG, PETER STILL v CLAIMANT ETC S/111150/2010, PETER STILL v TESCO STORES LTD + 4 OTHERS., ETI 9th August 2010, CASE MANAGEMENT, 1st November 2010, PRE-HEARING REVIEW 12/01/2011, CASE MGT 28th FEBRUARY 2011, PRE HEARING REVIEW 8/4/2011, HEARINGS 14th - 15th - 16th - 17th JUNE 2011, ORAL JUDGEMENT, CJJ SUSAN A CRAIG, DOCUMENT PETER STILL REQUEST DATED 23/06/2011. JUDGE SUSAN CRAIG HAVING DEALT WITH PETER STILL CLAIM TO ETC S/111150/2010 REQUEST FOR WRITEN REASONS, ON 17/06/2011, YOU GAVE A ORAL JUDGEMENT, THAT THE CLAIM OF DIRECT DISCRIMINATION, BOUND TO FAIL, ILL-CONSIDERED, COULD NOT AMOUNT TO CLAIM OF DIRECT DISCRIMINATION. MR KENNETH MCGURK, ORAL SUBMISSION 16th JUNE 2011, LEWISTON v MALCOLM, HOWA OF LEWIS, 2008, WHICH TRIBUNAL ACCEPTED PART OF LAW, PHOTO COPY OF THAT JUDGMENT, CONTAINING A CLAIM OF INDIRECT DISCRIMINATION, ASSET DEVALUED, ON 8th APRIL 2011, PRE-HEARING REVIEW, IT WAS JUDGE SUSAN A CRAIG, THAT CHARGED CLAIM TO (DIRECT) WITHOUT ANY OFFER BY CLAIMANT RESPONDENTS, ORAL DATED 12/04/2011

Please can you provide written reasons,
on the 17/06/2011, I was left knowing I
had lost but no reason as expectation
regards submission 16/05/2011 By Kenneth
McGue Advocate, last evening please
could you provide explanation ASAP,

clerk

Peter Seiu 23/06/2011

S/111150/2010

Peter Seiu v Tesco Stores Ltd +
John Gilchrist + Bruce Balbutea
+ John Cleghant + Guy Hardison,

ETJ 9th August 2010, 17/06/2011

Could you please provide copy of ORAL JUD-
GMENTS WHICH WAS AUDIO TAPED BY JUDGE
SUDAN A CARRIS, 17/06/2011 ORAL JUDGMENT,

Kindest regard

Client: Peter Seiu

23/06/2011

ET, EDINBURGH, MELVILLE ST, SCOTLAND,



EMPLOYMENT TRIBUNALS (SCOTLAND)

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President: Shona Simon

22 July 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

REASONS FOR JUDGMENT OF EMPLOYMENT TRIBUNAL **Employment Tribunals Rules of Procedure 2004**

A copy of the employment tribunal's reasons is enclosed.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals

cc Acas



EMPLOYMENT TRIBUNALS (SCOTLAND)

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President: Shona Simon

22 July 2011

Case Number 111150/2010

Claimant
Mr PT Still

v

Respondent
Tesco Distribution Centre
& others

Dear Sir

REASONS FOR JUDGMENT OF EMPLOYMENT TRIBUNAL **Employment Tribunals Rules of Procedure 2004**

A copy of the employment tribunal's reasons is enclosed.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals

cc Acas

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/111150/10 Held in Edinburgh on 14, 15, 16 & 17 June 2011

5

Employment Judge S Craig
Members K Cowan
J Terry

10

Mr P T Still
113 Glebe Road
Whitburn
EH47 0AY

Claimant
In Person

15

Tesco Stores Ltd
Tesco Distribution Centre
Carnegie Road
Livingstone
West Lothian
EH54 8TB

First Respondent
Represented by:
Mr K McGuire
Advocate

20

25

Bruce Balberston
C/o Tesco Distribution Centre
Carnegie Road
Livingstone
West Lothian
EH54 8TB

Second Respondent

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John Gilcrist
C/o Tesco Distribution Centre
Carnegie Road
Livingstone
West Lothian
EH54 8TB

Third Respondent

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John Clenghan
C/o Tesco Distribution Centre
Carnegie Road
Livingstone
West Lothian
EH54 8TB

Fourth Respondent

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Guy Henderson
C/o Tesco Distribution Centre
Carnegie Road
Livingstone
West Lothian
EH54 8TB
ETZ4(WR)

Fifth Respondent

REASONS

Introduction

5 1. On 17 June 2011 a judgment was promulgated in the following terms:

"The unanimous judgment of the Employment Tribunal is:

10 (First) that the claims against the second, third, fourth and fifth respondent having been withdrawn by the claimant, the ~~claims~~ against them are dismissed;

15 (Second) that the claim of unfair dismissal against the first respondent fails, and is dismissed; and

(Third) that the claim of disability discrimination against the first respondent fails, and is dismissed.

20 Oral reasons for that judgment were delivered to parties at the Hearing."

25 2. On 23 June 2011 the claimant made a request for those reasons be issued in writing. These are those reasons.

The claims

30 3. This is a claim of unfair dismissal in terms of section 98 of the Employment Rights Act 1996 ("ERA") and of direct disability discrimination contrary to section 3A(5) of the Disability Discrimination Act 1995 ("DDA").

~~There had initially been a claim for unpaid wages but the sums sought had~~
been paid well in advance of the Hearing so that claim had been
/withdrawn.

5. The claim was brought against the first respondent, the claimant's employer, and also against a number of individuals, all employees of the first respondent.

6. At the outset of the Hearing the claimant withdrew his claims against the individual respondents and the claims against them were dismissed. Hereafter the first respondent is referred to as "the respondent".

The issues

7. It was a matter of agreement that the claimant was dismissed, and that the reason for dismissal was capability – the claimant had been absent from work on a number of occasions and was, for the third time, on the third stage of the respondent's absence management procedure.

8. There was no substantial challenge to that procedure; the challenge was to whether it was fair to dismiss the claimant given the reasons for his absences, a substantial number of which were related to his back condition – spondulitis.

9. By the time of the Hearing it was also not in dispute that the claimant was a disabled person within the meaning of the DDA albeit that it was a source of some frustration to the claimant - perhaps understandably given the extensive medical information available to the respondent - that that concession was not made at an earlier stage.

10. The issues for determination by the Tribunal were whether or not the dismissal was fair or unfair and, if that dismissal was on the ground of his disability, whether the claimant was treated less favourably than a person not having that particular disability but whose relevant circumstances were the same as, or not materially different from, his?

The evidence

11. The Tribunal heard evidence from a number of witnesses:

- The claimant
- Guy Henderson, who took the decision to dismiss
- John Clarke, who heard the first stage appeal
- Mark Window, who heard the second stage appeal
- Kara Mathieson, the Human Resources Manager who advised Mr Clarke at the first stage of the appeal

12. The Tribunal was referred to a Joint Bundle of Documents to which various documents were added in the course of the Hearing.

13. There was very little factual dispute between the parties. The Tribunal found all of the witnesses to be honest, truthful and reliable albeit that it had some reservations about the approach adopted by Mr Henderson, for reasons explained hereunder.

14. Based on the evidence which it heard and the documents to which it was referred the Tribunal found the following to be the facts material to the issues before it which were either established or agreed.

Material facts

15. The claimant was first employed by the respondent on 29 November 2004. Earlier in his employment the claimant had been dismissed but then reinstated on appeal.

16. The effective date of termination of employment was 13 May 2010.

17. The claimant was paid five weeks pay in lieu of notice.

18. The claimant was dismissed for reason of his capability.

5 19. The claimant was a disabled person throughout his employment with the respondent.

20. The claimant had spondulitis.

10 21. The respondent operates an absence management procedure which is triggered where an employee is absent for more than 3% of contracted hours in a rolling period of 26 weeks or, alternatively, has three separate periods of absence in that rolling period.

15 22. There are three stages within the procedure. An employee may move up or down the stages depending on whether their level of absence increases or decreases. Each stage lasts 26 weeks from the date of the trigger absence.

20 23. The terms of the respondent's procedure make it clear that should an employee reach Stage 3 a single further absence within the period of 26 weeks of the Stage 3 is likely to result in dismissal.

25 24. Where an employee on Stage 3 has a further absence that employee's line manager may refer the employee to human relations. They will consider the referral and, if appropriate, will then refer the employee to managers specifically appointed to consider whether or not such employees should be dismissed. Those managers are known as "the dismissing officer".

30 25. Essentially the terms of the respondent's procedure give a dismissing officer only two options – dismiss or not dismiss. There is very little room for manoeuvre within those two options.

26. Guy Henderson was a dismissing officer within the warehouse where the claimant was employed.

5 27. An employee that has been through the procedure on two separate occasions which escalated as far as Stage 3 on both occasions who then has a third occasion of absence is automatically fast tracked to Stage 3, skipping Stages 1 and 2.

10 28. An employee placed on any Stage has the right to appeal that decision.

15 29. Over the course of his employment the claimant had a number of periods of absence for a variety of reasons, some, though not all, related to his spondulitis. He had been subject to the absence procedure on a number of occasions, and had twice reached Stage 3. On both occasions there was no further absence during the currency of the Stage 3.

30. The claimant had not appealed any of the decisions to place him on any of the stages of the procedure.

20 31. On 23 September 2009 the claimant returned to work following a 34 day period of absence for anxiety and stress.

32. There was no suggestion that that was not a genuine absence.

25 33. That absence triggered a fast track onto Stage 3.

34. There were four further periods of absence during that Stage 3.

30 35. The respondent did not take any action in relation to one of those absences - which was for two days - and were satisfied with the explanation given by the claimant.

36. The other three absences totalled 55 days between 20 January and 22 April 2010.

5 37. The respondent took action in relation to those absences, and the matter was referred to Guy Henderson.

38. Correspondence was sent to the claimant inviting him to attend a meeting with Mr Henderson. That explained the reason for the meeting, and that it might result in dismissal.

10 39. The claimant was given, but declined, the opportunity to be accompanied to the meeting.

40. The meeting with Mr Henderson took place over two separate days.

15 41. The claimant was given ample opportunity to explain the reason for his absences. He focused instead only on issues that had arisen several years previously, relating to the earlier dismissal and appeal, and which had culminated in an adjustment being carried out to his working practices in
20 early 2009. Those issues were unconnected with the absences that caused the claimant to be placed on the Stage 3 in late 2009.

42. The claimant did not suggest to Mr Henderson that he was a disabled person.

25 43. The claimant did not suggest that he had not been off nor did he challenge the procedure leading up to and including the meeting with Mr Henderson.

30 44. Mr Henderson decided to dismiss the claimant. That was a decision that was open to him in terms of the procedure because of the level of the claimant's absences.

45. Mr Henderson did not know that the claimant was a disabled person.

0202011

LONDON BOROUGH OF LEWISHAM
(appellant) v.
MALCOLM (respondent) and EQUALITY AND
HUMAN RIGHTS COMMISSION (intervener)

[2008] UKHL 43

- 1800 *Disability discrimination*
- 1811.1 *Disability-related discrimination – reason related to disability*
- 1811.2 *Disability-related discrimination – others to whom reason does not apply*
- 1855 *Discrimination by others than employers – providers of goods, facilities, services or premises*

Disability Discrimination Act 1995: ss.22, 24

The facts:

Courtney Malcolm suffered from schizophrenia. His condition was controlled through medication. He rented a flat from the London Borough of Lewisham on a secure tenancy. He sublet his flat on an assured shorthold tenancy for a period of six months. That was a breach of the express terms of his tenancy agreement, which provided that subletting had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one. At the time that he had sublet the flat, Mr Malcolm had stopped taking his medication.

When the council discovered that Mr Malcolm had sublet the flat, it gave him notice to quit. At that time, the council was unaware that Mr Malcolm suffered from schizophrenia. When he did not vacate the flat, the council commenced possession proceedings in the county court. By that time, the council had been informed of his mental health problems.

In his defence to the possession proceedings, Mr Malcolm argued that the council's attempt to gain possession of the flat constituted unlawful disability discrimination contrary to s.22 of the Disability Discrimination Act 1995. He contended that he suffered from a disability for the purposes of the Act; that the reason why the council was seeking possession was because of his disability; and that unless the council could show justification the court was precluded from making a possession order against him. He claimed that he had only sublet the flat because he had not been taking his medication at the time, and this had led to his irresponsible behaviour. The judge in the county court rejected the complaint of disability discrimination and granted the possession order. The Court of Appeal reversed that decision. The council appealed to the House of Lords. The Equality and Human Rights Commission took part in the proceedings as intervener.

Two issues, amongst others, fell to be determined. Firstly, the correct comparators for the purposes of s.24(1) of the Act fell to be identified. There were three options: (a) secure tenants of the council without a mental disability who had sublet; (b) secure tenants of the council who had not sublet; and (c) some other unspecified comparator group. According to the Court of Appeal in *Clark v Novacold Ltd* the correct comparator was (b), but the council submitted that that case was wrongly decided and that the correct comparator was (a). On that basis, Mr Malcolm's discrimination claim would fail, since it was not disputed that the council would have issued a notice to quit and pursued possession proceedings against any secure tenant without a mental disability who had sublet his flat.

Secondly, it fell to be determined whether knowledge of the disability on the part of the discriminator at the time of the alleged discriminatory act was necessary in order to establish that the "reason" for the treatment related to the disability for the purposes of s.24(1). The council argued that it was necessary that the discriminator knew or ought to have known of the disability at the time of the alleged discriminatory act in order to satisfy s.24(1) and establish unlawful discrimination.

Although the issues related to disability discrimination in the field of housing, it was common ground that the same approach would apply to disability discrimination in the employment field.

Section 22 of the Act, so far as material, provides:

"(3) It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises (a) in the way he permits the disabled person to make use of a benefits or facilities; (b) by refusing or deliberately omitting permit the disabled person to make use of any benefits or facilities; or (c) by evicting the disabled person, or subjecting him any other detriment."

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(1) The correct comparator for the purposes of s.24(1)(a) is a secure tenant of the council with a mental disability who has sublet his property, a not a secure tenant who has not sublet his property. In that regard, the Court of Appeal decision *Clark v Novacold Ltd* was wrongly decided.

There is no point in asking whether a person has been treated "less favourably than others" if the reason why the disabled person was subjected to the allegedly less favourable treatment cannot apply to those "others". If a person has been dismissed because he is incapable of doing his job there is no point in making the lawfulness of the dismissal depend on whether those who are capable of doing their job would have been dismissed if a person has been dismissed because he will be absent from work for a year, there is no point in making the lawfulness of his dismissal depend on whether those who will not be absent from work will be dismissed. If a tenant has been given notice terminating his tenancy because he has sublet in breach of the tenancy agreement, there is no point in making the lawfulness of the action taken by the landlord dependant on whether notice to quit would have been served on tenants who had not sublet. Parliament must surely have intended a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not.

(2) In order for the alleged discriminator's "reason" to "relate to" the disability for the purposes of s.24(1)(a), it is necessary that the discriminator knows of, or ought to know of, the disability, at the time of the alleged discriminatory act. Unless the discriminator has knowledge or imputed knowledge of the disability, he cannot be guilty of unlawful discrimination under the Act.

That interpretation is supported by the fact that s.25(1) provides that a claim based on unlawful disability discrimination may be made the subject of civil proceedings in the same way as any other claim in tort, damages being recoverable. This points towards a requirement of knowledge. Moreover, the grounds of justification specified in s.24 of the Act assume that the discriminator has knowledge of the disability. It would be anomalous if a discriminator needs to know of the disability if

0202011

LONDON BOROUGH OF LEWISHAM (appellant) v. MALCOLM (respondent) and EQUALITY AND HUMAN RIGHTS COMMISSION (intervener)

[2008] UKHL 43

- 1800 Disability discrimination
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There is no point in asking whether a person has been treated "less favourably than others" if the reason why the disabled person was subjected to the allegedly less favourable treatment cannot apply to those "others". If a person has been dismissed because he is incapable of doing his job, there is no point in making the lawfulness of the dismissal depend on whether those who are capable of doing their job would have been dismissed. If a person has been dismissed because he will be absent from work for a year, there is no point in making the lawfulness of his dismissal depend on whether those who will not be absent from work will be dismissed. If a tenant has been given notice terminating his tenancy because he has sublet in breach of the tenancy agreement, there is no point in making the lawfulness of the action taken by the landlord dependant on whether notice to quit would have been served on tenants who had not sublet. Parliament must surely have intended a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not.

(2) In order for the alleged discriminator's "reason" to "relate to" the disability for the purposes of s.24(1)(a), it is necessary that the discriminator knows of, or ought to know of, the disability, at the time of the alleged discriminatory act. Unless the discriminator has knowledge or imputed knowledge of the disability, he cannot be guilty of unlawful discrimination under the Act.

That interpretation is supported by the fact that s.25(1) provides that a claim based on unlawful disability discrimination may be made the subject of civil proceedings in the same way as any other claim in tort, damages being recoverable. This points towards a requirement of knowledge. Moreover, the grounds of justification specified in s.24 of the Act assume that the discriminator has knowledge of the disability. It would be anomalous if a discriminator needs to know of the disability if

46. The claimant appealed - unsuccessfully - through the respondent's two stages of the appeal.

5 47. The claimant applied for and received State Benefits throughout the majority of the time following his dismissal, albeit that he encountered a problem in relation to one signing on period which is in the process of being appealed.

10 48. The claimant is now being medically examined to assess his fitness for work.

49. The claimant has taken reasonable steps to mitigate his losses.

Submissions

15 50. It was the claimant's submission that the respondent knew full well that he was covered by the DDA and that he could not understand why it took them so long to acknowledge that fact to the Tribunal. He did not believe he should have been subjected to the absence management process and that it was unfair that he was.

20 51. Referring the Tribunal to London Borough of Lewisham - v - Malcolm [2008] IRLR 700 Mr McGuire for the respondent submitted that the claim of direct discrimination must fail. In any event, he argued, the formulation of the claimant's claim could never succeed as it could not amount to an allegation of direct discrimination. That claim was, said Mr McGuire, wholly misconceived.

25 2. The claimant had not led evidence about comparators or that any comparator would be treated more favourably than the claimant. Further, said Mr McGuire, the claimant had not put to the witnesses that the dismissal was on the ground of his disability. Given that Mr Henderson did

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not know that the claimant was disabled he could not have dismissed him on that ground.

5 53. In relation to the unfair dismissal claim Mr McGuire submitted that the Tribunal must not substitute its views for those of the respondent. While the claimant had had money issues, those predated the dismissal.

10 54. The respondent had led evidence of a potentially fair reason for dismissal – capability – said Mr McGuire, and the decision to dismiss for that reason was fair. The claimant did not argue that there was any unfairness in the procedures followed by the respondent and he had every opportunity to raise any issues during that process. The only issues he raised were by then historical and unrelated to the issue of the current level of absence.

15 55. If the dismissal was found to be unfair, argued Mr McGuire, any award ought to be reduced in accordance with Polkey -v- AE Dayton Services Ltd 1988] ICR 142.

20 The law

36. Whether or not a dismissal is fair or unfair is determined in accordance with section 98 of ERA. That provides:

25 "98(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

30 (a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

35 (2) A reason falls within this subsection if it -

.....

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

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.....

(4) Where the employer has fulfilled the requirements of sub section (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

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(a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and

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(b) shall be determined in accordance with the equity and substantial merits of the case."

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57. The claimant's claim of direct disability discrimination arises under section 3A(5) of the DDA which provides:

"3A(5) A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person."

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Discussion and decision

58. Turning to the issues before the Tribunal, first in relation to the unfair dismissal claim the first matter to determine is whether the respondent had satisfied the onus on it to establish the reason for dismissal and that it was a potentially fair reason for dismissal.

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59. On the evidence the Tribunal was satisfied that that was established and that the reason for dismissal was capability. There was no substantive challenge to that reason by the claimant.

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60. The second question is whether or not that decision was fair or unfair having regard to the reason given by the respondent. In that matter the onus is neutral, with no burden on either party.

5 61. In considering that issue the Tribunal reminded itself that it must not substitute its view for that of the respondent. Instead it must consider what the respondent in fact did in order to decide if it acted fairly and reasonably. In other words, the Tribunal is not deciding whether it would have taken the same decision in similar circumstances but instead whether or not the
10 decision taken by this employer was one that was open to it.

62. On the evidence the Tribunal was satisfied that it was. It was satisfied that the decision was fair.

15 63. It was not a matter of dispute that the level of the claimant's absences was sufficient in terms of the policy to entitle Mr Henderson to dismiss. The procedure was properly followed and the claimant was given ample opportunity to say why he should not be dismissed. All of his submissions to Mr Henderson concentrated on issues that he had had with various
20 managers over a period of some years previously, but none of which had any relevance to the question of whether or not, as a fact, he had had the level of absences that he had.

25 64. The correspondence relating to the various stages was clear about the consequences of there being further absences. It was clear that the claimant was offered an opportunity to appeal each of the placings onto the various stages but did not do so on any occasion. Accordingly by the time the matter came before Mr Henderson it was the third occasion on which the claimant had been at Stage 3, and was there without any challenge by
30 the claimant to that fact.

65. The claimant's submissions to Mr Henderson, and indeed to both appeal officers, all harked back to the much earlier dispute that had resulted in a

dismissal, and then a reinstatement, and then, some time later again, an adjustment to the claimant's working practices. That all that had occurred did not seem to be in any serious doubt, but none of it had any relevance at all to the issue that was facing the respondent i.e. that the claimant had been through their absence management procedure on two earlier occasions, both times reaching Stage 3 and that, during the currency of the present Stage 3, the claimant had had a further 55 days absence between January and April 2010.

10 66. That Mr Henderson seemed perplexed by the claimant's constant reference back to the earlier matters was understandable. Mr Clarke and Mr Window were similarly baffled. The Tribunal accepted that the claimant appeared to have an honestly held belief that he had been poorly treated on earlier occasions but there was no evidence that any of that earlier treatment in any way infected or affected the decision to dismiss.

15 67. For the purposes of determination of the unfair dismissal claim whether or not the 55 days of absences arising during the currency of the Stage 3 were related to the claimant's disability was not an issue in itself. The issue was whether the employer is entitled to form the view that the claimant was not capable of carrying out his employment. That was a decision that was open to the respondent on the facts and was a fair decision.

20 68. In relation to the claim of direct disability discrimination the Tribunal determined, as a fact, that Mr Henderson did not know that the claimant was a disabled person. However it was persuaded that he ought to have known. There was more than sufficient information within the claimant's HR file, including medical reports and assessments from occupational health that should have alerted Mr Henderson to that fact.

25 69. While the Tribunal was satisfied that, subjectively, Mr Henderson did not know that the claimant was a disabled person it considered his approach to someone who was in fact disabled - and who he ought to have known was

disabled - was rather ill-informed and ill-considered. That was particularly so in his questioning of the claimant about his back condition. Some of the questioning suggested that his point of view was that there was something that the claimant could do about his painful back; that the claimant was in some way culpable for not taking those steps.

70. The Tribunal considered that Mr Henderson's approach was rather insensitive given the claimant's well documented medical conditions.

71. Nevertheless that did not amount to direct discrimination of the claimant on the ground of his disability. The claimant led no evidence about a comparator. As such the only comparator would have to be hypothetical, albeit that there was no direct evidence about such a comparator either. However what was plain from the evidence before the Tribunal was that a hypothetical comparator - one whose relevant circumstances i.e. level of absence were the same as, or not materially different from, those of the claimant's - would also be dismissed.

72. That being so there was no evidence at all of there being any less favourable treatment of the claimant on the ground of his disability, and the claim of direct discrimination must fail.

73. In any event, argued Mr McGuire, the claim as formulated was ill-conceived in that what the claimant sought could not amount to a claim of direct disability discrimination. While the Tribunal agrees, that claim is in any event dismissed for the reasons given.

74. Further, and in any event, while the Tribunal was not unsympathetic to the predicament in which the claimant found himself given the number of absences that he had, it was not persuaded that even if the respondent had left out of account the absences that were related to his back that there would have been a different result. The level of non-back related

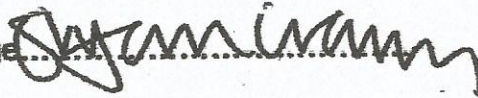
absences were in any effect sufficiently high so that the claimant would have found himself subject to the absence procedure anyway.

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75. That being so the Tribunal was satisfied that both claims fail and are dismissed.

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Employment Judge.....



Date.....

21 July 2011

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Entered in Register/Copied to Parties.....

22 JUL 2011

LONDON BOROUGH OF LEWISHAM (appellant) v. MALCOLM (respondent) and EQUALITY AND HUMAN RIGHTS COMMISSION (intervener)

[2008] UKHL 43

- 1800 *Disability discrimination*
- 1811.1 *Disability-related discrimination – reason related to disability*
- 1811.2 *Disability-related discrimination – others to whom reason does not apply*
- 1855 *Discrimination by others than employers – providers of goods, facilities, services or premises*

Disability Discrimination Act 1995: ss.22, 24

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Courtney Malcolm suffered from schizophrenia. His condition was controlled through medication. He rented a flat from the London Borough of Lewisham on a secure tenancy. He sublet his flat on an assured shorthold tenancy for a period of six months. That was a breach of the express terms of his tenancy agreement, which provided that subletting had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one. At the time that he had sublet the flat, Mr Malcolm had stopped taking his medication.

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There is no point in asking whether a person has been treated "less favourably than others" if the reason why the disabled person was subjected to the allegedly less favourable treatment cannot apply to those "others". If a person has been dismissed because he is incapable of doing his job there is no point in making the lawfulness of the dismissal depend on whether those who are capable of doing their job would have been dismissed if a person has been dismissed because he will be absent from work for a year, there is no point in making the lawfulness of his dismissal depend on whether those who will not be absent from work will be dismissed. If a tenant has been given notice terminating his tenancy because he has sublet in breach of the tenancy agreement, there is no point in making the lawfulness of the action taken by the landlord dependant on whether notice to quit would have been served on tenants who had not sublet. Parliament must surely have intended a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not.

(2) In order for the alleged discriminator's "reason" to "relate to" the disability for the purposes of s.24(1)(a), it is necessary that the discriminator knows of, or ought to know of, the disability, at the time of the alleged discriminatory act. Unless the discriminator has knowledge or imputed knowledge of the disability, he cannot be guilty of unlawful discrimination under the Act.

That interpretation is supported by the fact that s.25(1) provides that a claim based on unlawful disability discrimination may be made the subject of civil proceedings in the same way as any other claim in tort, damages being recoverable. This points towards a requirement of knowledge. Moreover, the grounds of justification specified in s.24 of the Act assume that the discriminator has knowledge of the disability. It would be anomalous if the discriminator needs to know of the disability if

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**LONDON BOROUGH OF LEWISHAM
(appellant) v.
MALCOLM (respondent) and EQUALITY AND
HUMAN RIGHTS COMMISSION (intervener)**

[2008] UKHL 43

- 1800 *Disability discrimination*
- 1811.1 *Disability-related discrimination – reason related to disability*
- 1811.2 *Disability-related discrimination – others to whom reason does not apply*
- 1855 *Discrimination by others than employers – providers of goods, facilities, services or premises*

Disability Discrimination Act 1995: ss.22, 24

The facts:

Courtney Malcolm suffered from schizophrenia. His condition was controlled through medication. He rented a flat from the London Borough of Lewisham on a secure tenancy. He sublet his flat on an assured shorthold tenancy for a period of six months. That was a breach of the express terms of his tenancy agreement, which provided that subletting had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one. At the time that he had sublet the flat, Mr Malcolm had stopped taking his medication.

When the council discovered that Mr Malcolm had sublet the flat, it gave him notice to quit. At that time, the council was unaware that Mr Malcolm suffered from schizophrenia. When he did not vacate the flat, the council commenced possession proceedings in the county court. By that time, the council had been informed of his mental health problems.

In his defence to the possession proceedings, Mr Malcolm argued that the council's attempt to gain possession of the flat constituted unlawful disability discrimination contrary to s.22 of the Disability Discrimination Act 1995. He contended that he suffered from a disability for the purposes of the Act; that the reason why the council was seeking possession was because of his disability; and that unless the council could show justification the court was precluded from making a possession order against him. He claimed that he had only sublet the flat because he had not been taking his medication at the time, and this had led to his irresponsible behaviour. The judge in the county court rejected the complaint of disability discrimination and granted the possession order. The Court of Appeal reversed that decision. The council appealed to the House of Lords. The Equality and Human Rights Commission took part in the proceedings as intervener.

Two issues, amongst others, fell to be determined. Firstly, the correct comparators for the purposes of s.24(1) of the Act fell to be identified. There were three options: (a) secure tenants of the council without a mental disability who had sublet; (b) secure tenants of the council who had not sublet; and (c) some other unspecified comparator group. According to the Court of Appeal in *Clark v Novacold Ltd* the correct comparator was (b), but the council submitted that that case was wrongly decided and that the correct comparator was (a). On that basis, Mr Malcolm's discrimination claim would fail, since it was not disputed that the council would have issued a notice to quit and pursued possession proceedings against any secure tenant without a mental disability who had sublet his flat.

Secondly, it fell to be determined whether knowledge of the disability on the part of the discriminator at the time of the alleged discriminatory act was necessary in order to establish that the "reason" for the treatment related to the disability for the purposes of s.24(1). The council argued that it was necessary that the discriminator knew or ought to have known of the disability at the time of the alleged discriminatory act in order to satisfy s.24(1) and establish unlawful discrimination.

Although the issues related to disability discrimination in the field of housing, it was common ground that the same approach would apply to disability discrimination in the employment field.

Section 22 of the Act, so far as material, provides:

"(3) It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises (a) in the way he permits the disabled person to make use of any benefits or facilities; (b) by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities; or (c) by evicting the disabled person, or subjecting him to any other detriment."

Section 24 of the Act, so far as material, provides:

"(1) ... a person ('A') discriminates against a disabled person – (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 not or would not apply ..."

The House of Lords (Lord Bingham of Cornhill, Lord Scott of Foscote, Baroness Hale of Richmond (dissenting in part as to the reasoning), Lord Brown of Eaton-under-Heywood and Lord Neuberger of Abbotsbury) 25 June 2008 allowed the appeal and restored the decision of the judge in the county court.

The House of Lords held:

1811.1, 1811.2

The Court of Appeal had erred in holding that the council's conduct in seeking possession of the flat constituted unlawful disability discrimination.

(1) The correct comparator for the purposes of s.24(1)(a) is a secure tenant of the council with a mental disability who has sublet his property, a not a secure tenant who has not sublet his property. In that regard, the Court of Appeal decision *Clark v Novacold Ltd* was wrongly decided.

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