

Recent developments in disability discrimination law
Seminar by the Employment Law Group of the Murray Stable
27 January 2009, Glasgow.

1 Introduction

- 1.1 In the short time available, it will not be possible to provide a detailed analysis of all recent developments concerning the Disability Discrimination Act 1995 (“the 1995 Act”). I intend to concentrate therefore on just one case which has had far-reaching effects already: the House of Lords decision in *Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening)* [2008] UKHL; [2008] 1 AC 1399; [2008] IRLR 700. I will note some other significant cases at the end of this paper with a brief note on the decision of the court or tribunal.
- 1.2 A copy of this paper will be posted on the Murray Stable website very shortly and may be freely downloaded and reproduced providing that its source is acknowledged.

2 The background to the *Malcolm* case

- 2.1 The first two discrimination statutes (the SDA 1975 and RRA 1976) both distinguished between the types of discrimination now usually termed direct and indirect discrimination. Direct discrimination of course refers to discrimination on the grounds of a person's sex or race etc. Indirect discrimination by contrast occurs where, putting it roughly, the

discriminator applies an apparently neutral criterion or condition etc to all people but that criterion or condition disadvantages persons from a particular group and that application cannot be justified.

2.2 By contrast, the 1995 Act did not have the same distinction when first enacted (but now see Section 3A(5)). Rather, it established two novel concepts of discrimination. The first might be termed disability related discrimination. That is to say the employer or provider of services discriminates against a disabled person if "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 and he cannot show that the treatment in question is justified" (see now sections 3A(1), 20(1) and 22 of the 1995 Act as amended by the Amendment Regulations SI 2003/1673 and the Disability Discrimination Act 2005). It was thought at the time that the Bill was proceeding through Parliament that the circumstances of disabled persons were such that in some circumstances disabled people ought to be treated more advantageously than those without disabilities and that the broad terms of this definition would lead to that result.

2.3 In Parliament, the example given by the government when introducing the Bill was that of a blind person with a guide dog wishing to use a cafe. Suppose that the cafe had a rule prohibiting dogs. That would mean ordinarily that a blind person with a guide dog would not be able to use the cafe. Since the rule would apply to everyone, a direct comparison would mean that the blind person would have no remedy even though s/he, unlike a sighted person had a particular need for the dog, relating to his disability. The effect of the disability related discrimination criterion, it was said, was that the comparator would not be a sighted person with a

dog but other customers, regardless of whether they had dogs. The effect of that would be that the cafe owner would be required to provide objective justification for the rule without which, there would be discrimination against a blind customer with a guide dog who was refused entry to the cafe.

- 2.4 The other form of discrimination introduced by the 1995 Act, which was also novel, was (putting the matter very briefly) discrimination constituted by a failure by the employer (and now service providers etc and premises providers) to make reasonable adjustments where some condition etc placed the disabled person at a substantial disadvantage in comparison with persons who are not disabled (see now sections 4A, 21 and 24A-F of the 1995 Act as amended).
- 2.5 The issue of who is the proper comparator when considering a question of discrimination under the employment provisions was first considered by the Court of Appeal in a well-known case of *Clark v Novacold Ltd* [1999] ICR 951. In that case, the claimant was an employee who had been absent from work due to serious injuries which was expected to keep him from work for about a year. He was dismissed as a result. He claimed that he had been discriminated against on the grounds of his disability. The employer's defence was that there was no discrimination since they would have dismissed any employee who was incapable of carrying out their duties regardless of whether disability was the cause of that inability. In the Court of Appeal, that defence was rejected. The Court of Appeal held that those with whom the comparison is to be made are not those who are in the same or not materially different circumstances, which is the condition contained in the 1976 and 1975 Acts. Rather, the comparison is with any other person who was in employment with the same employer

and able to carry out their duties. The effect of that liberal construction of the statute was of course to render the comparator requirement extremely easy to satisfy. All that the claimant had to do was point to some other person employed who had not been dismissed, and was able to carry out his/her duties, and the comparator condition was satisfied.

- 2.6 Given the similarity in the wording between the provisions relating to employment discrimination and that relating to discrimination in the field of provision of premises, it was thought that the same reasoning would apply in that field. The decision in *Novacold* stood unchallenged until the decision in *Malcolm*.

3 The facts in *Malcolm*

- 3.1 The claimant was the local authority landlord of the defender. The defender rented a flat from the local authority under a secure tenancy. Unknown to the landlord, he suffered from schizophrenia and was receiving treatment for that. The tenancy contained a condition prohibiting subletting without the consent of the landlord. However, the tenant nonetheless sublet the premises. Under English law, the result was that the tenancy ceased to be a secure tenancy and became a contractual tenancy which could be terminated simply by a service of a notice to quit. The landlord, on discovering that the defender had sublet the property served a notice to quit and commenced proceedings for recovery of possession.
- 3.2 Mr Malcolm's defence was that he was a disabled person for the purposes of the 1995 Act and that in bringing possession proceedings, the local authority landlord had unlawfully discriminated against him contrary to section 22 of the 1995 Act so that the court was precluded from making a possession order against them. He claimed that at the time that he had

sublet the flat, he was suffering from active signs of schizophrenia and that the decision to sublet was related to that. Essentially, because the landlord had failed to justify its decision to seek recovery of possession in terms of section 24, and could not (which was conceded by the claimant), Mr Malcolm said that the court was precluded from making a possession order against him.

4 The decision in the House of Lords

4.1 Malcolm was unsuccessful in the County Court but succeeded in the Court of Appeal whereupon the local authority appealed to the House of Lords. There were four issues before the House of Lords which were as follows.

The comparator issue

4.2 The first was who is the appropriate comparator. This involved reconsidering the *Novacold* case. Lord Bingham said as follows:

13 The problem of identifying the correct comparator is one which Mummery LJ examined with care and in detail in *Clark v Novacold Ltd* [1999] ICR 951. The problem can be restated on the facts of the present case, Are "the others" with whose treatment the treatment of Mr Malcolm is to be compared (a) persons without a mental disability who have sublet a Lewisham flat and gone to live elsewhere, or (b) tenants of Lewisham flats who have not sublet or gone to live elsewhere, or (c) some other comparator group, and if so what?

14 As I understand the judgment in *Clark v Novacold Ltd*, the correct comparison is said to be with group (b). But that, I think, is difficult to accept for the reason succinctly given by Toulson LJ, at para 155:

"the complainant is logically bound to be able to satisfy the requirement of showing that his treatment is less favourable than would be accorded to others to whom the reason for his treatment did not apply. For without the reason there would not be the treatment."

The truth of that observation is vividly illustrated by the present case: if a tenant had not sublet and gone to live elsewhere Lewisham would not, in the absence of other grounds, have contemplated seeking possession (or, probably, been entitled to do so), and thus no question of discrimination could ever have arisen.

15 A more natural comparison, as it seems to me, is with group (a). On this analysis the comparison would fall to be made on the bases rejected in *Clark v Novacold Ltd*: with a person who had a dog but no disability or a diner who was a very untidy eater but had no disability-related reason for eating in that way. This, as I have said, seems to me a much more natural comparison, in no way

inconsistent with the statutory language. In this case it would defeat Mr Malcolm's complaint of discrimination, since it is clear that Lewisham would have claimed possession against any non-disabled tenant who had sublet and gone to live elsewhere. The same result would be likely to follow in many cases, with the consequence that the reach of the statute would be reduced. That would make it attractive, if possible, to identify an intermediate comparator group (c) which would avoid absurdity and give fair effect to the statute. But I do not think that any such intermediate comparator group has been suggested, and none is identified by the statutory language. I find it hard to accept that *Novacold* was rightly decided. I am in any event satisfied that a different principle must be applied in the present context.

16 I would accordingly, not without misgiving, hold the correct comparison in this case (on the assumption indicated) to be with persons without a mental disability who have sublet a Lewisham flat and gone to live elsewhere. Mr Malcolm has not been treated less favourably than such persons. He has been treated in exactly the same way.

4.3 Lord Scott said as follows disagreeing with the *Novacold* decision:

32 My Lords, I must respectfully disagree. Mummery LJ's conclusion emasculates the statutory comparison. What is the point of asking whether a person has been treated "less favourably than others" if the "others" are those to whom the reason why the disabled person was subjected to the complained of treatment cannot apply? If a person has been dismissed because he is incapable of doing his job, what is the point of 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, what is the point of making the lawfulness of his dismissal dependant 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, what is the point of making the lawfulness of the action taken by his landlord dependant on whether notice to quit would have been served on tenants who had not sublet? Parliament must surely have intended the comparison directed by section 5(1)(a), or by section 24(1)(a), or, for that matter, by section 20(1)(a) where the directed comparison is in identical terms, to be a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not

4.4 And continuing, in rather emphatic form, in relation to the blind man with the guide dog example, he said:

35 ...The blind man with his dog is refused entry. Would that refusal be unlawful discrimination for the purposes of section 20(1)(a)? The problem with most hypothetical cases is that the facts are incomplete. Would the blind man without his dog have been refused entry? Almost certainly not. The problem was the dog. The dog was the reason for the refusal of entry. That reason was causally connected to the disability, but the disability would have played no part in the mind of the restaurant manager in refusing entry to the dog. The problem, I repeat, was the dog. The restaurant manager's reason for refusing entry to the dog would not, in my opinion, have related to the blind man's disability for section 24(1)(a) purposes. If that be wrong, and the manager's reason for refusal of entry would have related for section 24(1)(a) purposes to the disability, would "others" to whom that reason would not have applied have been refused entry? The "others" would, in my opinion, have been persons, whether blind or sighted would not matter, unaccompanied by dogs. They would not have been refused entry; the blind man with his guide dog would have been treated less favourably. Discrimination would have been established. Confusion regarding the blind man and his guide dog example has, I think, crept in because of the over-concentration on the refusal to admit entry to the dog. The dog is not a potential beneficiary of the 1995 Act. It is the blind man who is. If he is refused entry it is not because he is blind but because he is accompanied by a dog and is not prepared to leave his dog outside. Anyone, whether sighted or blind, who was accompanied by a

dog would have been treated in the same way. The reason for the treatment would not have related to the blindness; it would have related to the dog

4.5 Lords Neuberger and Brown reached similar conclusions, noting the potentially disastrous effects on landlords if the contentions advanced on behalf of *Malcolm* were right.

4.6 However, Baroness Hale, in a minority of one, took a rather different view. Surveying the Parliamentary history, she noted that the terms of the sections defining discrimination were introduced precisely in order to extend the scope of comparators beyond that which applied in the field of race and sex discrimination. She referred to a debate in the Lords where Lord Henley said as follows:

79... "Currently the comparison is with the treatment of a person who does not have the disability in question. For example, there may be two employees who cannot type—one because of arthritis and one (who is not disabled) because he has never been taught. Both would argue that he is not treating the disabled person less favourably than someone without that disability. He is treating all people who cannot type in the same way. That argument may well succeed and the person with arthritis would have no ground for complaint, even though the employment was refused for a reason relating to disability. Amendment No 21 would ensure that the comparison is made with people to whom the reason in question does not apply. It correctly reflects the need to show that the treatment was for a reason relating to the disability and not necessarily the mere fact of disability. Thus if the employer is rejecting people who cannot type he will be treating more favourably those who can. The person with arthritis who did not get the job can show that he or she was treated less favourably than the person with typing abilities who did. The employer may well be able to justify that treatment ... But at least the disabled person would have to be given the consideration due under the Bill"

4.7 Having read the speeches of the other members of the Committee who were in favour of the appeal succeeding, Baroness Hale stated that she was

sorry that the settled understanding of employment lawyers and tribunals is to be disturbed as a result of your Lordships' disapproval of *Clark v Novacold Ltd*. That decision has stood unchallenged for nine years and has not, so far as we are aware, caused difficulty in practice.

The knowledge question

- 4.8 Another issue that required to be decided was whether knowledge by the alleged discriminator of the claimant's disability was necessary before there could be unlawful discrimination. On this question, all five law lords were in agreement that there required to be knowledge. However, they differed as to what type of knowledge was required and whether the alleged discriminator could have imputed knowledge of the disability.
- 4.9 Lord Scott held that since the Council did not know of about the Mr Malcolm's schizophrenia when deciding to serve notice to quit and take possession proceedings against him and since the council's reason for proceeding against him was that he had sublet and moved that, his mental condition formed no part of the reason. Even if the council had known about his schizophrenia, there was no evidence that it played any part in the Council's decision to recover possession of the flat.
- 4.10 Lord Bingham concluded that since a civil tort is created by the Act and since justification in section 24 assumes that the landlord has knowledge of the tenant's disability, knowledge, or at least imputed knowledge is necessary.

Remedy

- 4.11 All five of the law lords held that the 1995 Act may be used to provide a defence to proceedings for recovery of possession regardless of whether the tenant has security of tenure or whether the landlord would otherwise have an unqualified right to recover possession. Lord Neuberger explained at paragraph 60

If the service of the notice to quit in the present case was unlawful under section 22(3)(c), then the court could not give effect to it. If, by seeking an order for possession, a landlord is acting in a way the legislature has held to be unlawful, then, again, the court

cannot make such an order. In either case, the court would be permitting, indeed facilitating, an unlawful act. The fact that the court will not always enjoin an unlawful act (e.g. a trespass) is nothing to the point: it is one thing to refuse to restrain a common law tort; it is another to make an order enforcing a statutorily unlawful claim. Quite apart from this, the balancing exercise involved in exercising the suggested discretion would be very difficult, and there is no statutory or other guidance as to how it should be carried out: it would lead to unpredictability in an area of law where there is quite enough uncertainty already.

4.12 Three of the other Law Lords took the same view.

4.13 However, Baroness Hale took a different view (paragraph 102-104). Following the submissions made by the EHRC, she held that where such a defence was mounted, the court would then have discretion as to whether or not to grant decree for recovery of possession. That is not least because of the ECHR property rights of a landlord. Furthermore, the absolutist possession would be likely to bring the 1995 Act into disrepute. She acknowledged the difficulties of applying discretion in this area.

Causation

4.14 Mr Malcolm failed to satisfy any of the Law Lords on the question of causation. That is to say the relationship between the reason for the action taken by the landlord and his disability. All five held that there must be a connection between the disability and the reason for the action taken by the landlord. There would have to be some link between the treatment of the disabled person and the disability. Baroness Hale suggested that the connection between the disability and the reason must not be too remote but acknowledged that there was no simple test. Lord Neuberger held that:

The words "relates to" suggest that a relatively loose or indirect connection between the reason and the disability would suffice. In agreement with Toulson LJ, at para 146 in the Court of Appeal, I would expect that the link between the "treatment" and the "disability" would always, or

at least almost always, be causal, but not in the limited sense in which that term is used in other fields—e.g. in tort. I find it very hard to conceive of circumstances where the "but for" test was satisfied without the link being established, but I am not prepared to say that such a case could not arise. It may also be that in some cases the link could exist where that test was not satisfied. Given that the comparator required by section 24(1)(a) leads to the section having a relatively narrow ambit, it would be more consistent with the purpose of the 1995 Act, and unlikely to be unfairly prejudicial to alleged discriminators, if a broad and flexible effect is given to the words "relating to".

5 What are the practical and legal effects of the decision in *Malcolm*?

- 5.1 As a general point, it should be noted that the decision in *Malcolm* applies to all cases from the date of the decision. That is, it applies to all cases regardless of whether they were commenced before or after the decision in *Malcolm* and regardless of the date of the alleged discrimination.
- 5.2 So far as claims under the premises provisions of the 1995 Act are concerned, claims that the landlord has discriminated against the tenant due to the tenant's disability may now only be brought where it can be shown that the landlord has acted because of the tenant's disability and where the landlord would not have proceeded against another tenant in similar circumstances, where that other tenants did not have the disability. For example, a landlord decides to seek eviction against the tenant because he finds that the tenant has recently been diagnosed with AIDS.
- 5.3 Alternatively, the tenant might be able to rely on the restricted duties of the landlord to make reasonable adjustments in terms of the amended provisions now contained in sections 24A to 24M of the 1995 Act.
- 5.4 Where the landlord is a public landlord (which may include registered social landlords: *Weaver v London and Quadrant Housing Trust* [2008] EWHC 1377) reliance may also be placed on the terms of the duty to promote disability equality in section 49A.

- 5.5 In cases under the premises provisions of the 1995 Act, it will be necessary to show that the defender or respondent knew of the disability, or had imputed knowledge of the disability and that knowledge played at least some part in the decision to take the disputed action.
- 5.6 The decision in *Malcolm* did not deal with goods, services and facilities cases. In such cases, most concern the duty to make adjustments. It is the case that the duty to make adjustments in relation to the provision of goods and service etc is an anticipatory one which does not rely on the knowledge of the provider of the actual disability and probably, the duty does not require actual knowledge by the provider of the pursuer's actual disability. In other words, the duty is a general one which is to be fulfilled in the expectation that there will be some people with disabilities who will use the services etc and the duty is to take action in relation to anticipated difficulties before they arise in practice: see *Roads v Central Trains Ltd* [2004] EWCA Civ 1541.
- 5.7 Of course, given that the majority of disability discrimination cases arise in the field of employment, it is in such cases that the effects of the *Malcolm* decision are likely to be greatest. Although it might be suggested that the decision in *Malcolm* was one that should be restricted to the field of discrimination in the provision of premises only, and a close textual analysis of their lordships speeches might give one material to support such a view, in my view, that result is unlikely. In my view, the reasoning of the House of Lords in relation to the comparator issue is likely to apply equally to employment cases and the discrimination provisions in Part II of the 1995 Act. The effect of that is that the claimant in an employment case who wishes to establish discrimination in terms of section 3A(1) of the 1995 Act as amended would have to choose as a comparator somebody who is in

the same circumstances as him but for the disability. So for example in the *Novacold* case, the comparator would now be as was proposed by the employer, that is a person who was incapable of carrying out his/her duties for a reason other than disability. The employer would then argue that they would have dismissed that other person in the same circumstances for the same reason and therefore the question of disability does not arise.

5.8 However, it is probably also the case that the reasonable adjustments duty is one that arises in the majority of employment disability cases. That duty in terms of section 3A(2) and 4A of the 1995 Act is unaffected by the *Malcolm* case. Thus, it is thought that in many cases, it may be possible for the claimant to plead his or her case directly on that failure to carry out reasonable adjustments even if he is unable to demonstrate either disability related discrimination or direct discrimination within the meaning of section 3A(5) of the 1995 Act.

5.9 The decision in *Malcolm* does definitively establish that in premises cases, a failure by the landlord to comply with the terms of the 1995 Act may in suitable cases be pled as a defence. The reasoning of the Committee was not limited to premises cases and in principle it is thought that the 1995 Act may be pled as a defence in any other type of case where the defender seeks to bar a claim by a pursuer on the grounds that the pursuer has breached its 1995 Act duties to the defender.

6 Legislative change

6.1 The decision in the *Malcolm* case came as a great surprise to many people, the Government included I think. Action has commenced by the Government in relation to proposals to amend the law.

- 6.2 In the November 2008, the Office for Disability Issues launched a consultation entitled "Improving Protection from Disability Discrimination". The consultation period ended earlier this month and the responses to the consultation will be published in April 2009 in a report on the consultation which will summarise the responses and the action that the Government will take as a result of them. It is anticipated that amendments will be introduced in the Equality Bill later this year.
- 6.3 The government proposes to adopt the concept of indirect discrimination for the purposes of disability discrimination. Once a *prima facie* case of indirect discrimination has been made, it will be possible for a person who imposed the provision criterion or practice to show that it was objectively justified to defeat the claim. Further, the government intends to introduce a requirement that before indirect discrimination can be justified, the alleged discriminator also make any reasonable adjustments that are required under the legislation. That provision will replicate what is presently the position as regards the employment provisions in the 1995 Act. An important driver for the proposed changes is a proposal which was made in July 2008 by the European Commission for a further anti-discrimination Directive. That Directive would provide protection of discrimination based on a variety of grounds and in areas beyond employment. The proposed Directive sets out separate and distinct provisions covering indirect discrimination.
- 6.4 Thus, if and when the equality Bill is enacted with provisions in relation to indirect discrimination in all fields of disability, the effect will not be to overturn *Malcolm*. Rather, it will put in place a new test altogether bringing disability discrimination law more closely into line with discrimination law in other areas.

7 Other recent decisions of note

- 7.1 What follows here is a brief note of some of the more significant decisions in the field of disability discrimination decided or reported in the last six months.
- 7.2 In *SCA Packaging Ltd v Boyle* [2008] IRLR 54, the claimant had for some time suffered for from hoarseness and vocal nodes, probably as a result of the extensive use of her voice for singing and acting. When affected by vocal nodes, her ability to speak and socialise was affected. She brought disability discrimination proceedings against her employer. The question arose as to whether she was a disabled person during the relevant period of the claim since during that period, there was no evidence of a reoccurrence of vocal nodes. However, the medical evidence showed that the claimant suffered from a weakness in her vocal capacities which made her susceptible to the development of vocal nodes if her voice was subject to excessive use or abuse and if she did not follow her voice management regime. The medical witnesses disagreed on the exact probability of a reoccurrence of vocal nodes.
- 7.3 The Northern Ireland Court of Appeal held that the tribunal had not erred in law in finding that the claimant was a disabled person during the relevant period. The tribunal also had not erred in finding that the management regime followed by the claimant was capable of constituting measures including medical treatment. The model of disability adopted by the 1995 Act is a medical rather than social one. The medical model locates the problem of disability in the disabled person regarding disability as an individual's impairment and is confined to a consideration of physical symptoms and impairment alone. In terms of schedule 1 to the act, an

impairment which ceases to have a substantial adverse effect falls to be treated as continuing to have that effect if it is likely to recur. This presupposes that an impairment continues to subsist although it does not currently have substantial effect. The tribunal is obliged to take into account measures taken to deal with the impairment and to discount to them. That is what happened in this case.

- 7.4 Importantly, the court decided that the word "likely" is used in the sense of "could well happen" rather than the higher threshold of "more probably than not". That is because the prediction of medical outcomes is something which is frequently difficult; there are many quiescent conditions which are subject to medical treatment for drug regimes and which can give rise to serious consequences if the treatment or drugs are stopped. The serious consequences may not inevitably happen and in any given case it may be impossible to say whether it is more probable than not that this will occur. (See also the case of *Eastern and Coastal Kent PCT v Jocelyn Grey* on this point noted below).
- 7.5 In *Ministry of Defence v Hay* [2008] ICR 1247, [2008] IRLR 928, the claimant began to suffer ill-health suffering from a variety of different symptoms. He was eventually diagnosed with tuberculosis. The question arose as to whether the claimant was disabled. The tribunal found that the claimant had more than one "impairment". As well as tuberculosis, he suffered from a broad spectrum of non-respiratory complaints. The employer appealed contending that the claimant had confined his case on disability to tuberculosis as the sole relevant impairment but that the tribunal had found he had suffered from disability on the basis of a range of impairments. The employer argued that the tribunal had no jurisdiction to consider a case that had not been put to it. The employment appeal

Tribunal dismissed the appeal. It held, on authority, that the term "impairment" bears its ordinary and natural meaning. It may be an illness. It may result from an illness. It is not necessary to consider the cause of it. The statutory approach is self-evidently a functional one directed towards what the claimant can or can no longer do at a practical level. As regards the allegation that the tribunal had no jurisdiction, that appeal was dismissed. The originating application listed a number of impairments. It followed that the claim was one which permitted the tribunal to make the findings that it had. They had been no unfairness to the employer. If there had been, the employer could have and should have remedied that by seeking an adjournment.

- 7.6 In *Coleman v Attridge Law* [2008] ICR 1128, [2008] IRLR 722, a decision of the European Court of Justice dated 17 July 2008, the court considered whether the scope of the Council directive 2000/78/EC which prohibits amongst other things discrimination on the ground of disability also applies where the discrimination is not against the claimant but against a person associated with the claimant. In this case, the claimant alleged that she was being discriminated against by her employer because she was the carer of her disabled son, rather than because she was disabled herself. That of course is not grounds for a claim under the 1995 Act, as amended. The amendments to the 1995 Act were intended to implement the Directive.
- 7.7 The court took a broad and purposive view of the Directive. The intention behind the Directive was to prohibit all forms of discrimination in the field of employment. The Directive should not be interpreted narrowly but should be interpreted so as to protect those who are not themselves disabled but where the reason for the alleged discrimination relates to disability of somebody connected to the employee.

- 7.8 Given that the Directive deals not only with discrimination on grounds of disability but other areas as well such as age, sexuality and religion, the effect of this decision is broader than might first appear. It is thought that this decision will be taken into account in the framing of the forthcoming Equality Bill. In the meantime, the case having returned to the employment tribunal, which originally remitted the matter to the European Court of Justice, is now on appeal to the EAT.
- 7.9 In *HM Land Registry v Wakefield* UKEAT/0530/07/ZT, the claimant had a bad stammer which had been held by a previous ET to amount to a disability within the meaning of section 1 of the 1995 Act. He applied for a promoted post. Adjustments were offered to him as regards the interview. The claimant refused the adjustments offered, seeking instead that the employer dispense with an oral interview altogether. The employer refused. The ET held that that refusal was unjustified and upheld a claim of disability discrimination finding *inter alia* that if a disabled employee makes a request for an adjustment, the employer has a duty to provide the adjustments unless they could show that there was a good reason not to make the adjustment. The EAT overturned that decision. The ET had misunderstood an expert report in relation to the adjustment sought, it had misunderstood the requirements of the job and further, it was an error of law to find that the employer was bound to allow the adjustment unless it could demonstrate good reason why it should not be done. Rather, “the tribunal’s task is to decide whether it is objectively reasonable for the employer to have to take the adjustment which is in issueand the assertion by an employee, honestly or otherwise, that a step ought to have been taken does not put any burden on the employer to prove a good reason why it was not taken.”.

7.10 In the very recent case of *Eastern and Coastal Kent PCT v Jocelyn Grey* UKEAT/0454/08/RN, the claimant suffered from dyslexia and was therefore “disabled” within the meaning of section 1 of the 1995 Act. The issue in the appeal was whether the respondent employer was exempted from making adjustments for the claimant during the interview process when the claimant applied for a job with the respondent. The Employment Appeal Tribunal held that the Employment Tribunal erred as it ought to have considered (but did not consider properly) the requirements of section 4A(3)(b) of the Act which means that an employer is exempt from the duty to make adjustments only if *all* four of the following matters can be proved. They are that the employer:-

- does not know that the disabled person has a disability;
- does not know that the disabled person is likely to be at a substantial disadvantage compared with persons who are not disabled;
- could not reasonably be expected to know that the disabled person had a disability; and
- could not reasonably be expected to know that the disabled person is likely to be placed at a substantial disadvantage in comparison with persons who are not disabled.

The EAT remitted the case to the ET. It also added some observations on the meaning of “likely”: see further on this point *SCA Packaging Ltd v Boyle* noted above.

7.11 Finally, although the following case was not decided under the 1995 Act, it may still be of interest to those practising in this area. In *Stringer v HMRC* (previously known as *Ainsworth v HMRC*) on 20 January 2009, the ECJ handed down its Opinion. The case, which had been previously in the House of Lords, concerned the rights of workers who are on sick leave for

the whole of an annual leave year to paid annual leave under the Working Time Directive and associated regulations, despite the fact that they are not actually at work. The ECJ held that it is for the national courts to decide whether the paid leave can be taken during that year or whether it should be carried over to another year. However the employee is entitled to be paid in respect of the annual leave at *some point*. Further, the right to paid annual leave is *not* extinguished at the end of a leave year if the worker was on sick leave the whole of that year or if s/he was absent on sick leave part of the year and was still on sick leave when the then employment terminates.

7.12 The case now returns to the House of Lords which is expected to overturn the decision of the Court of Appeal which in April 2005 decided that the right to paid holiday leave did not accrue during periods of sickness absence.

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January 2009

I acknowledge the assistance in preparing this paper derived from an article by two of the barristers involved in *Malcolm* : Robert Latham and Catherine Casserley: Legal Action Bulletin, September 2008.