

## London Borough of Lewisham v Malcolm (2008)

**The statutory comparators which were required to be identified under the then s.5(1)(a), DDA 1995 (now s.3A(1)) as stated by Mummery, LJ in the Court of Appeal in the case of Clark v Novacold Ltd (1999) ICR 951 were wrong and the decision in that case, as regards comparators, is no longer the law, so stated the House of Lords on the 25 June 2008 in the case of Mayor and Burgesses of the London Borough of Lewisham (Appellants) v Malcolm (Respondent) (2008) UKHL 43, wherein their Lordships and Ladyship held that a different definition of statutory comparators applies for the purposes of the Disability Discrimination Act 1995.**

This case is of interest for employment law purposes because one of the issues that the House of Lords had to resolve was whether the statutory comparators, as stated by the Court of Appeal in **Novacold (1999)** and which had been the law for nine years, were the correct statutory comparators.

Prior to the decision by the House of Lords in **Malcolm (2008)**, the judgment of the Court of Appeal in **Novacold (1999)** was settled law that successfully gave effect to the intention of Parliament which was to provide statutory protection to disabled employees against being subjected to unlawfully disability-related discrimination by employers. The Court of Appeal in **Novacold (1999)**, when hearing the appeal against the decisions of the employment tribunal and the Employment Appeal Tribunal, both of which had held that the claimant had not been subjected to unlawful disability-related discrimination, decided to give a purposive interpretation of s.5(1)(a) (which is now s.3A(1)(a)) of the Disability Discrimination Act 1995. The reason the Court of Appeal did that was to resolve a problem which was that s.5(1)(a) was drafted in such a way that it could be read in two ways and therefore open to two different meanings and results.

The statutory provision that caused the problem, namely s.5(1)(a), reads: For the purposes of this Part, an employer discriminates against a disabled person if –

(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and

(b) he cannot show that the treatment in question is justified.

Whichever of the two ways the section is read, the comparator must be a non-disabled person vis-à-vis a disabled person because a comparison has to be made between the reason for the treatment of the disabled person compared to the reason for the treatment of a person who does not have a disability. The employment tribunal, the Employment Appeal Tribunal and the Court of Appeal all agreed that the claimant had been dismissed for a reason which related to his disability. But that reason, by its very nature, being 'a reason which relates to the disabled person's disability,' did not and could not apply to the non-disabled comparator. To put it another way in a different context, if the law was written in the same way but in relation to pregnancy or maternity leave, the reason for

less favourable treatment would be a pregnancy-related or maternity leave absence from work. The reason for the less favourable treatment ‘which relates to the female person’s pregnancy or maternity leave’ could not and would not apply to those not pregnant or absent from work on maternity leave. So the comparison would be with those absent for the same period but not for that specific reason being connected with pregnancy or maternity leave. How would the employer treat these latter comparators? He might dismiss them. If he did and he also dismissed the female employee who had been similarly absent from work but for a pregnancy-related or maternity leave reason, would he be treating both sets of comparators the same? This was the difficult question that vexed, on the one side, the employment tribunal and the Employment Appeal Tribunal and, on the other side, the Court of Appeal, the question they disagreed upon being: By dismissing the claimant, did the employer treat him less favourably than they would treat others to whom that reason would not apply?

The contention that divided the employment tribunal and Employment Appeal Tribunal on one side and the Court of Appeal on the other was the meaning of and application of the phrase ‘that reason’ in s.5(1)(a) that is now s.3A(1)(a).

In **Novacold (1999)**, Mummery LJ analysed the two possible interpretations of ‘that reason’ by posing the first question: *‘Did it simply mean the reason for the treatment and no more? In this case that would mean that the reason was the fact of being absent for the requisite period and thus the comparison would be with someone not absent for that period.’*

(That is to say, by interpreting the phrase this way, the reason that the disabled claimant was dismissed was simply because of the fact that he had been absent from work; the comparator was someone who was not disabled and had not been absent from work and so would not have been dismissed for ‘that reason.’)

Mummery LJ then posed the second question: *‘Or did it mean the reason for the treatment but embracing the causal link to the disability? In this case that would mean that the reason was absence connected to disability and the comparison would be with those absent for the same period but for a reason not connected with any disability. The analysis is crucial. If the first interpretation is correct then there is less favourable treatment because a person not absent for the requisite period will still receive full pay. If, on the other hand, the second approach is right then there is no less favourable treatment since all absentees are treated alike (save where the absence stemmed from an accident which was work related).’*

(That is to say, the disabled employee was dismissed ‘for a reason which relates to the disabled person’s disability;’ the comparator was someone who was not disabled and therefore not absent from work ‘for a reason which relates to the disabled person’s disability.’ Thus, this reason could not and would not apply to the comparator. However, although the hypothetical comparator was not absent for that particular reason, he or she would be deemed, like the claimant, to have been absent from work (although for a non-disability reason). Would the

employer have dismissed the comparator for a long-term absence from work? If so, there would be no less favourable treatment melted out to the disabled employee since both the disabled employee and the able employee would have been treated the same by being dismissed for long-term absences from work).

Explanation: in **Novacold (1999)**, both the ET and the EAT decided that the relevant section was aimed at a specific circumstance that was, in the case of the claimant in **Novacold (1999)**, limited to an absence cause by and related to the claimant's disability and not any other kind of absence. The comparator, not having a disability, could not be absent from work for a disability-related reason but could or would be absent for a non-disability reason. This is why the ET and EAT decided that the correct comparator was: (i) a person who was not disabled but (ii) who had been absent from work for a similar period as the claimant. So the 'reason' for the less favourable treatment, being the disabled employee's absence from work, was a specific and limited reason being a dismissal of someone who was absent from work for the very precise reason which related to his or her disability. That 'reason which relates to the disabled person's disability' could not and did not apply to the hypothetical comparator who, however, was or would be deemed to be similarly absent from work.

The other way of reading the section, that was preferred by the Court of Appeal, is to restrict the wording of s.3A(1)(a) to the words 'for a reason' and omitting 'which relates to the disabled person's disability.' The 'reason' would have been the absence from work per se of the disabled person and, by dismissing her or him, the employer allegedly would have treated him less favourably than he would have treated his other employees (the non-disabled comparators) to whom the reason (absence from work) did not apply. But reading the section in that way – which was the choice made by the Court of Appeal in **Novacold (1999)** – eventually caused similar problems of interpretation and disagreement as shown by **Malcolm (2008)**. In hindsight it may have been immaterial for the Court of Appeal to have entertained the argument that the section (now s.3A(1)) could be read in two different ways. The way the tribunals and the courts reached their respective decisions in **Novacold (1999)** was to compare what the two sets of comparators did and the way the employer treated them both or would have treated them because of what they did or were deemed to have done. But, in making such a comparison based on that reason and the treatment, they omitted to consider the proscribed reason: Parliament had passed a law, in the form of the Disability Discrimination Act 1995, the provisions of which state that disabled people should be treated differently than those without disabilities. These provisions state what the proscribed reason is, which is that a disabled person's disability and a reason which relates to disability shall not be taken into account for dismissal or disciplinary purposes. Yet this is just what the ET and EAT in **Novacold (1999)** did, as did the House of Lords in **Malcolm (2008)**.

This analysis can be verified by examining another area of anti-discrimination law in which Parliament had similarly enacted statutory provisions which stated that discriminating against women for reasons which relates to their pregnancy or their maternity leave are proscribed or outlawed reasons. What really mattered then as now and what was and is important is the

purpose and effect of that section as intended by Parliament as stated by Baroness Hale at para.80 in **Malcolm (2008)**.

The way **Novacold (1999)** should have been decided is this: was the claimant a disabled person? Yes. Was he discriminated against, i.e. treated less favourably than others, those others being non-disabled employees, for a reason which relates to his disability? Yes, he was dismissed because of his absence from work caused by his disability when they were not dismissed because that reason, being absent from work for a disability-related reason, did not apply to them. The law, in the form of s.3A(1)(a) of the DDA 1995, gave the claimant statutory protection from being dismissed or subjected to some other detriment because of his disability or for a reason which relates to his disability. If any non-disabled employees of the employer were or had been similarly absent from work but for a non-disability reason, the employer would or should have taken disciplinary action against them by using the fairness of employment provisions by considering whether there was a statutorily fair reason to dismiss such non-disabled employees under s.98(1)&(2) and, in doing so, whether the decision was reasonable under s.98(4), ERA 1996. In other words, an employer when considering whether or not to dismiss or take disciplinary action against a disabled employee for the reason of disability or a reason which relates to the disabled person's disability, would not decide such a dismissal or disciplinary action in the same way as the employer would decide a non-disability conduct or capability dismissal.

So the outcome in **Novacold (1999)** was that if the employer treated a disabled employee less favourably by dismissing her or him (or subjecting her or him to any other kind of detriment) 'for a reason' being 'an absence from work' (albeit arising from or related to the employee's disability) when the employer had not or would not dismiss its non-disabled comparator employees, being 'others to whom *that reason* does not or would not apply,' then that would be an act of unlawful disability discrimination against the disabled employee.

In one way, the judgment in **Novacold (1999)** was correct since it achieved the result intended by Parliament in that it corresponded to other strands of discrimination law although in **Malcolm (2008)** the Law Lords to a man (but not to the dissenting lady judge) say it was not. What Lord Justice Mummery and the other Court of Appeal judges in **Novacold (1999)** sought to do was state the law as it applied to other anti-discriminatory legislation which requires employers not to take into account for the purposes of disciplinary or dismissal purposes an employee's disability or a reason which relates to the disabled person's disability. In other words, just as employers are required ***not*** to take into account for disciplinary or dismissal purposes an employee's pregnancy or her statutory maternity leave or a reason which relates to both, so employers should act the same way with regards to an employee's disability.

In other words, it seems wrong to say as the law lords said in **Malcolm (2008)** that someone absent from work for a proscribed reason (i.e. being one that Parliament has exempted – on public policy grounds – so that it cannot be taken into account by employers when they consider whether to dismiss or

discipline the person who is or has been absent for such a reason) should be treated the same as a person who has not been absent for a reason of that kind.

Commentators have said that in **Novacold (1999)** the Court of Appeal held that the comparator need not be ‘... *in the same or similar circumstances...*’ as the disabled complainant (meaning that the comparator does not have to be a person who is deemed to have been similarly absent from work as the disabled person was). The only problem with what these commentators say is that s.3A(1) (i.e. disability-related discrimination) does not state any requirement that the comparator has to be ‘... *in the same or similar circumstances...*’ as the disabled person. It is only s.3A(5) (i.e. direct disability discrimination) that states that requirement.

The facts in **Malcolm (2008)** were that the Respondent in this appeal, Mr Malcolm, acquired the tenancy of a council flat from Lewisham Council and shortly afterwards sublet it while living elsewhere. When the Council discovered he had breached the terms of the tenancy contract, the Council revoked it and, after asking Mr Malcolm to vacate the flat which he declined to do, took proceedings to recover its own municipal property. At the Court hearing of first instance, Mr Malcolm sought to defeat the Council’s application for possession by asserting that he suffered from a statutory disability and that his behaviour in subletting his flat was related to that psychiatric disorder and, that being so, in seeking to gain possession of the flat, the Council was treating him less favourable than the way it would treat or would have treated others to whom that reason does not or would not apply – the others in this particular instance were those as stated by the Court of Appeal in the employment law case of **Clark v Novacold Ltd (1999)** that identified the **correct statutory comparators** for the purposes of the Disability Discrimination Act 1995 as those who **did not have a disability and had not done** what the claimant had done.

That is to say, the judgment of the Court of Appeal in **Novacold (1999)**, can be broken down into the following parts: (i) ‘the less favourable treatment’ was the dismissal of the disabled employee by the employer (ii) for ‘a reason’ which was his absence from work (albeit for a disability-related reason) and (iii) the comparator was a person without a disability (v) who was not absent from work.

In contrast to the judgment of the Court of Appeal in **Novacold (1999)**, the judgments of the employment tribunal and the Employment Appeal Tribunal can likewise be broken down into similar parts but with a different outcome (and, following **Malcolm (2008)**, is now the law): (i) ‘the less favourable treatment’ was the dismissal of the disabled employee by the employer (ii) ‘for a reason which relates to the disabled person’s disability’ (iii) which was his absence from work for a disability-related reason (iv) the comparator was a person without a disability (iv) who was also absent from work like the disabled claimant (v) but, not being disabled, the comparator was not and could not have been absent from work for ‘that reason’ (vi) therefore the employer did not treat the disabled employee less favourable than a comparator because ‘that reason’ for the employer’s treatment of the disabled employee (being the disabled

employee's **disability-related absence** from work) did not apply to 'others,' being the employer's employees, one of whom was the comparator.

Following the decision of the Court of Appeal in **Novacold (1999)** as to who are the correct comparators, the comparators for the purposes of **Malcolm** were those who were tenants of the Council but had neither a statutory disability nor had sublet. So the simple argument and question was: 'Would the Council have sought a Court order for eviction and repossession of the comparators' flats?' The answer would have been an unequivocally 'no.' However, the trial judge decided that Mr Malcolm did not have a statutory disability at the time he sublet and, even if he had, the motivating factor that caused his behaviour was not a psychotic episode related to his mental disability but an intention to make a financial profit from subletting the flat and possibly selling it at a later date. Mr Malcolm succeeded at the Court of Appeal that held that he had a statutory disability and, following **Novacold (1999)**, that the Council had treated him less favourably than it would have treated the statutory comparators defined in that case. On appeal to the House of Lords, all five members of the judicial Appellate Committee upheld the Council's appeal that repossession proceedings were lawful and, in a four to one decision (Baroness Hale dissenting), overturned the judgment of the Court of Appeal in **Novacold (1999)** as to who are the correct statutory comparators for use in a disability discrimination case under s.5(1) [now s.3A(1)] of the Disability Discrimination Act 1995.

The decision of the House of Lords in **Malcolm (2008)** is that if **Clark v Novacold (1999)** were decided today, the correct statutory comparators and the application of the comparators to the reason for the allegedly less favourable treatment for the purposes of s.3A(1), DDA 1995 would be:

**Other employees of the employer who are NOT disabled and HAVE BEEN absent from work for the same or a similar period of time as the disabled employee.**

(The above is a paraphrasing and application to **Novacold (1999)** of the words of Lord Scott at 40 in **Malcolm (2008)**: '*... the statutory comparator, in my opinion, would be a secure tenant with no mental illness who had sublet.*' And the words of Lord Bingham at 16: '*I would... hold the correct comparison... to be with persons without a mental disability who have sublet... and gone to live elsewhere.*' Also Lord Neuberger's at 177: '*... (in agreement with Lords Bingham, Scott and Brown) there was no discrimination because the Court of Appeal applied the wrong approach to the identification of the comparator.*')

Contrasting their Lordships' judgment in **Malcolm (2008)** to that of the Court of Appeal in **Novacold (1999)**, Lord Brown said at 108: '*... the Court of Appeal held that the disabled employee had been treated less favourably than others would have been treated because the comparison to be made was with those employees who were not disabled and who were therefore continuing to do their work.*'

But ascertaining the correct comparators and then comparing how each have been treated in relation to each other is only the beginning of the analytical process of determining whether less favourable treatment for a reason which relates to the disabled person's disability has taken place and, if it has, whether it amounts to unlawful disability discrimination.

What the Court of Appeal sought to do in **Novacold (1999)** was give effect to the intention of Parliament by interpreting the particular statutory provision so that employees who have statutory disabilities were protected from suffering unlawful disability-related discrimination by their employers. This interpretation by the Court of Appeal corresponded to other anti-discrimination legislation that requires employers not to discriminate against employees who are pregnant or absent from work on maternity leave. As the law is supposed to be a legal science then, for that reason, the anti-discrimination rules should apply consistently across the spectrum of discrimination. The judgment in **Novacold (1999)** achieved that purpose.

To ascertain whether the disabled employee has a cause of action, being a claim for compensation for losses caused by unlawful disability discrimination, the first requirement is to identify the correct comparators: if the employee making the claim is disabled then, as a matter of logic, the comparators are non-disabled employees. There is a specific reference in the DDA 1995 to who are the statutory comparators: '*... the disabled person... in comparison with persons who are not disabled...*' s.4A(1). Comparators are necessary in order to establish whether there was or is a difference in treatment between a disabled person and those who are not disabled.

The next requirement is to identify the reason why an employer treated a disabled employee less favourably, whether for a mere reason or 'for a reason which relates to the disabled person's disability' in comparison with its non-disabled employees and in most cases this is self-evident. In **Novacold (1999)**, the employer dismissed the disabled employee because he had been absent from work for a long time albeit for a reason which relates to his disability. As the Appellate Committee said in **Malcolm (2008)**, most employers would dismiss such an employee for that reason. And most would dismiss non-disabled comparators who had been similarly absent from work.

It has to be remembered that disability-related discrimination under s.3A(1), DDA 1995 is indirect discrimination therefore, as in indirect sex discrimination, it is appropriate to identify the 'provision, criterion or practice' applied by the employer in order to ascertain less favourable treatment. The provision, criterion or practice that the employer imposed in **Novacold (1999)** was that the disabled employee must not be absent from work regardless of whether the absence was for a proscribed reason. The non-disabled comparators could satisfy this requirement but the disabled employee could not '... for a reason which relates to his disability:' s.3A(1)(a).

In **Malcolm (2008)**, the House of Lords said it is wrong to merely say, as the Court of Appeal did, that the comparison is to be made with others to whom the reason for the treatment did not apply, even if their circumstances are

difference, in that it is less favourable treatment and therefore unlawful disability discrimination if an employer dismisses a disabled person who is absent from work for a long time when the employer would not dismiss its non-disabled employees who were not similarly absent from work.

As Lord Brown said at 112 and with which Lady Hale agreed at 71, when approving the dissenting judgment of Toulson LJ in *Novacold* (1999): ‘... *the construction in Clark v Novacold (1999) “reduces the comparison test to one which will always be met.”*’

After the judgment in **Malcolm (2008)**, the process of establishing whether or not a disabled employee has been subjected to unlawfully disability discrimination can be ascertained by an employment tribunal asking the following questions: ‘We have found that the claimant has a statutory disability that satisfies the requirement under s.1(1) of the Disability Discrimination Act 1995; and we have also found that there was no less favourable treatment at the comparison stage; but did the employer discriminate against the disabled employee by applying a requirement (or was there a physical feature of the premises) that placed the disabled employee concerned at a substantial disadvantage in comparison with its non-disabled employees by failing to take steps as it is reasonable, in all the circumstances of the case, to prevent the provision, criterion or practice (or feature) having that effect and, if the employer did, can it show that the treatment in question was justified?’

If the answer is ‘yes,’ the finding will be that the disabled employee has been subjected to less favourable treatment, being a substantial disadvantage, for a reason which relates to his disability and, because he is entitled in law to protection against being subjected to less favourable treatment for a reason which relates to his disability, his treatment will constitute unlawful disability discrimination. Unless, of course, the employer takes such steps as it is reasonable to take to prevent the disabled employee being placed at a substantial disadvantage in comparison with the employer’s non-disabled employees or the employer can show that the treatment of the disabled employee is justified if the reason for it is both material to the circumstances of the particular case and substantial:’ s.3A(3), DDA 1995.

This reasoning process can be applied to other areas of unlawful discrimination such as less favourable treatment for the reason of pregnancy or maternity leave. To test it, merely replace the word ‘disability’ with ‘pregnancy’ or ‘maternity leave.’

The most straightforward way of reading s.3A(1), when applied to a case like **Novacold (1999)**, is to follow the wording of this section and consider whether, per s.3A(1)(a), an employer would be acting lawfully (and reasonably) within this section by dismissing a disabled employee who had been absent from work for a long period when the employer would not dismiss non-disabled employees who had not been similarly absent *but only if*, per s.3A(1)(b), the employer can show that the treatment in question is justified. If the employer contented that this is so, a tribunal or court would then need to consider the employer’s justification defence being: Did the employer comply with its

s.4A(1) duty to make reasonable adjustments? If so, can the employer show that there were none that it could make? Can the employer, per s.3A(3), therefore justify the treatment of the disabled employee for a reason that is both material to the circumstances of the particular case and substantial?

Returning to **Malcolm (2008)**: if their Lordships had upheld the definition of statutory comparators as stated by the Court of Appeal in **Novacold (1999)**, the comparators in this case would have been: '*(b) tenants of Lewisham flats who have not sublet or gone to live elsewhere,*' per Lord Bingham at 13. By following this definition of what constituted the correct comparators in **Novacold (1999)**, the outcome of the appeal in **Malcolm (2008)** may have been a finding that the claimant had been treated by the council less favourably for a reason (sub-letting) than the council treats or would treat others (the comparators) to whom that reason does not or would not apply.

Four of the five members of the House of Lords' Appellate Committee held that the identification of the statutory comparators in **Novacold (1999)** was wrong. On this point, Lord Neuberger at 158 said:

*'As Lord Brown points out in para 111, the principle reasons for rejecting the wider construction of section 24(3) (i.e. applying the comparators defined in Novacold (1999) to that section) is its potentially extraordinary penal consequences for property owners and the apparent pointlessness of the comparison exercise, and the same arguments apply to the wider construction of section 5(1)(a) [now s.3A(1)(a)] in relation to employers.'*

The result would have been that whereas the council could have lawfully evicted non-disabled tenants who did as Mr Malcolm had done which was breach the terms and conditions of the tenancy contract by (i) questionably acquiring the tenancy of a council flat when he apparently did not need it and lived elsewhere (ii) then applied for a mortgage to buy it (iii) and sublet it before possibly selling it to make a profit, the council could not have regained possession of his flat, that was its property in any case, because a reason which did not apply to the comparators would require the council, by following the judgment of the Court of Appeal in **Novacold (1999)**, to ignore Mr Malcolm's conduct, thereby allowing him to continue to sublet while living elsewhere and, over a period of time, profiting from doing this at the council's expense by receiving the rent from subletting or selling the flat for its market value.

The problem that their Lordships and Ladyship were seeking to resolve was that if they had agreed that the previous comparators as defined in **Novacold (1999)** were correct, one legal outcome would be that a property owner who let her or his premises to a disabled tenant who then did not pay the contractual rent as required by the tenancy agreement and this was because the tenant was unable to manage her or his financial affairs for a reason which did not apply to the non-disabled comparators, the property owner could possibly have never regained possession of the property as the tenant could claim indefinitely the protection of the DDA 1995. Section 22(3) of the DDA 1995 which relates to premises, unlike the provisions which relate to employment and which provide a fairly wide ground for justifying discrimination, does not

provide for similar broad grounds for justification. Under s.5(3) (now s.3A(3)), (the employment provisions), the Act states: Treatment is justified ... if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.' In other words, the alleged discriminator is given the opportunity to justify the decision he or she made about the employee or potential employee. By contrast, as Lord Neuberger said at 156: *'No such broad grounds exist under section 22(3).'* This section relates to premises and states: '(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.'

More specifically, Lady Hale at 58 said: *'Instead of the broad but objective criteria laid down in section 5(3) and (4), section 20(3) provides that treatment can be justified only if (a) in the opinion of the provider one or more of the conditions listed in section 20(4) applies and (b) it is in all the circumstances reasonable for him to hold that opinion. Thus there is a focus on what the provider believed, provided that it was reasonable for him to do so. But the list of justifying conditions in section 20(4) is short and precisely defined.'*

Importantly, on the question of justification or on the lawful ability of a landlord or property owner to take or defend action that is justified, Lady Hale, referring to the section 24(3) list of conditions of which one or more permit justification, said at 60: *'There is nothing, for example, to cover the situation of a landlord or other landowner who is entitled to recover possession of his property where in all the circumstances of the case it is reasonable for him to do so.'*

Her Ladyship drew attention to the way that the present limitation on the defence of justification in respect of the property sections could be remedied. At 103 she said: *'... far and away the simplest way to provide for it (i.e. discretion by a court to weigh the competing interests) would be by expanding the list of potential justifications for the landlord's actions in section 24(3). This could be done by regulations made under section 24(5) for that very purpose.'*

In the context of employment law and prior to their Lordships' and Ladyship's judgment in **Malcolm (2008)**, an employer was required to follow the decision of the Court of Appeal in **Novacold (1999)** so that when considering, say, what disciplinary or dismissal action to take against a disabled employee who had, for example, been absent from work for a reason which did not apply to the comparators, the employer would have had to ignore such a disability-related absence or absences for disciplinary or dismissal decision-making purposes. Following **Malcolm (2008)**, the correct comparators which an employer will use in a case like **Novacold (1999)** will be other employees who are **not** disabled and **have been** absent from work for a similar period of time as the disabled employee; i.e. those in the same or similar circumstances.

Indeed, on this point and on the point of whether there need be a causal link between the reason and the disability, Lord Neuberger said at 171: *‘If the wider comparator construction (adopted by the Court of Appeal and preferred by Baroness Hale) is correct, then there would have been discrimination, if there had been a sufficient link between the disability and the subletting.’*

(In **Malcolm (2008)** it was held that there was no such link between the Respondent’s subletting and his disability – the subletting took place independently of his disability or the manifestation of his disability.)

Lord Brown at 114 was of the opinion that section 3A(1) would be severely restricted by saying: *‘I recognise, of course that this approach to the section reduces its reach: it confines it largely if not entirely to the proscription of direct discrimination only...’*

However, it is suggested that the alleged importance of the comparators is but one in the list of criteria to be considered during the decision-making process. In other words, it is not the one and only issue to consider. It is also suggested that their Lordships’ and Ladyship’s opinions do not and will not change the outcome in future disability discrimination cases as far as employment law cases are concerned. The reason, as explained, is that after the comparison stage, the question that arises is whether the employer could have taken any steps which were reasonable to take to prevent the disabled employee’s being placed at a substantial disadvantage in comparison with the employee’s non-disabled employees.

Although it is not relevant to consider the contention as to who are the correct comparators, if, however, the opinions of the majority of the House of Lords are applied to other areas of discrimination law without considering whether the claimant is entitled to statutory protection using the provision, criterion or practice requirement to ascertain whether he or she has been subjected to less favourable treatment/substantial disadvantage or, indeed, other legislative protection, it gives unsatisfactory results.

For example, the dissenting judgment by Toulson LJ, who was one of the judges hearing Mr Malcolm’s successful appeal in the Court of Appeal, was quoted with approval in **Malcolm (2008)** by Lord Bingham at 14 being:

*‘... 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 correctness of his Lordship’s opinion can be verified by applying the wording to a practical example such as the following:

‘... the complainant is logically bound to be able to satisfy the requirement of showing that his treatment (e.g. being refused employment) is less favourable than would be accorded to others (being those given employment) to whom the reason for his treatment (being black) did not apply (because they were white).

For without the reason (being that he is black) there would not be the treatment (a refusal to employ him for racial reasons).’

Another practical example could be:

‘... the complainant (e.g. a pregnant job applicant or employee) is logically bound to be able to satisfy the requirement of showing that her treatment (e.g. being refused employment or dismissed) is less favourable than would be accorded to others (being non-pregnant employees) to whom the reason for her treatment did not apply. For without the reason (e.g. being pregnant) there would not be the treatment (e.g. a refusal to employ or if employed dismissed).

Lord Scott arrived at his opinion by omitting to mention that certain employees in certain circumstances are entitled to statutory protection from being treated less favourably if they come within legislative provisions that deem their treatment to be unlawful discrimination on the grounds of pregnancy, maternity leave, disability, and so on. At 32, Lord Scott asked:

*‘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?’*

The answer to these questions posed by his Lordship is that Parliament has given specific protection against dismissal or detriment to specific classes of employees. For example, one can read his Lordship’s last question this way: If a person has been dismissed because she will be absent from work for a year on statutory maternity leave, what is the point of making the lawfulness of her dismissal dependent on whether those who will not be absent from work will be dismissed?

At 33, to support his opinion, Lord Scott suggests that there needs to be a close connection (perhaps a very close connection) between ‘... the reason...’ and ‘... which relates to the disabled person’s disability...’ before liability for disability discrimination will arise against an employer. There will, of course, be cases where a disabled employee is reasonably and justifiably dismissed for a reason that has nothing to do with her or his disability: **Taylor v OCS Group Ltd (2006)** EWCA Civ 702 but where the dismissal is for a reason which relates to the disabled person’s disability, then that will be (or would have been pre-**Malcolm (2008)**) unlawful discrimination: **H. J. Heinz Co Ltd v Kenrick (2000)** ICR 491.

As stated, Parliament recognised that some forms of discrimination are socially and economically undesirable and so it enacted various strands of discrimination legislation which require that people in certain circumstances **should be treated differently** than others ‘to whom that reason does not or would not apply’ so that employers, providers of goods and services as well as

owners of property for rent or sale, must have in mind that there is a statutory requirement that states that they must not treat a disabled person less favourably than others who are not disabled if the reason for so doing is because of her or his disability or a reason which relates to the disabled person's disability and, in the context of employment, employers cannot justify the treatment.

In this regard, Lord Brown in *Malcolm* (2008) said at 107:

*'... in certain respects a landlord must treat the disabled more favourably: he must make reasonable adjustments in relation to the premises. And that, indeed, equates to what has always been the position with regard to employers... they from the outset have been under a duty to make reasonable adjustments to cater for disability and have been liable for discrimination if they fail to do so – see for example the decision of the House in Archibald v Fife Council (2004) UKHL 32, (2004) ICR 954.'*

So when the discriminatory reason is removed – as intended by Parliament when it enacted the Disability Discrimination Act 1995 – the reason for discriminating is also removed unless, where employment is concerned, the discriminatory treatment can be justified if the reason '... is both material to the circumstances of the particular case and substantial' (per s.3A(3), DDA 1995.)

In other words, employers are required not to apply any discriminatory requirements and must remove from their minds any discriminatory reason or reasons which Parliament has deemed to be unlawful when considering what decision to take when recruiting, disciplining or dismissing an employee who has a statutory disability. Examples of unlawful discriminatory reasons are: dismissing an employee who becomes disabled because she or he might be absent from work for periods of time for medical treatment and may have periodic absences thereafter for a reason that relates to her or his disability or may need reasonable adjustments to be made to enable her or him to continue to do her or his job; refusing to employ a job applicant because that person has a facial disfigurement that other employees and its customers or clients might dislike or feel uncomfortable about; failing to promote a disabled employee who is capable and is the best qualified to do a particular job for the reason that the employer believes that the accepted norm is that only a person without a disability can or should do the job. These are all examples of direct disability discrimination or less favourable treatment because of a reason which relates to the disabled person's disability. Discrimination of this kind is unlawful unless, where permitted under the law or there are no reasonable adjustments which can be made, the employer can justify it.

The purpose of the appeal to the House of Lords and, indeed, the fact that the House of Lords agreed to hear it, was to overturn the judgment of the Court of Appeal in **Novacold (1999)** in order to defeat Mr Malcolm's claim for security of tenure as well as to defeat similar future claims. Mr Malcolm had no reasonable claim because the reason the Council treated him the way it did, did not relate to his disability. So the House of Lords could have simply decided the case on that basis. But in deciding the case on that basis, it also took the opportunity to change the judgment of the Court of Appeal in **Novacold (1999)** as to the way that the comparators should be applied in disability discrimination

cases. This judgment reversed the choice the Court of Appeal made to resolve the ambiguity as to the two ways which ‘the reason’ could be interpreted and which enabled tribunals following the judgment to apply the disability law in the way intended by Parliament.

One thing that their Lordships and Ladyship failed to make clear was that after the comparison stage has been completed, it is then necessary for tribunals and Courts to be asked whether or not there were any ‘reasonable adjustments’ which the employer could have made if the employer had applied a ‘provision, criterion or practice’ or whether or not there was any physical feature of the employer’s premises that placed the disabled employee at a substantial disadvantage in comparison to the employer’s non-disabled employees and, if so, whether the employer took steps which were reasonable to prevent the provision, criterion or practice or the physical feature having that effect.

Incidentally, the test of objective justification in indirect discrimination cases was stated by the Court of Appeal in **Hampson v Department of Education and Science (1989) ICR 179** (that was a race case) being that a balance is required to be struck between the effect of a ‘provision, criterion or practice’ and the reasonable needs of the employer.

Despite the House of Lords judgment in **Malcolm (2008)**, the existing inherent problem with the Disability Discrimination Act 1995 remains. The problem is that there is inadequate provision in section 24(3) for landlords and property owners to justify their alleged less favourable treatment of a disabled tenant or occupier. It seems the only way to remedy this inadequacy is to do what Lady Hale suggests at 103 when she said: *‘I entirely agree with the (Equality and Human Rights) Commission that such a discretion would be much the best solution... the simplest way to provide for it (i.e. give a Court a discretion whether or not to grant the possession order, having weighed up all the competing interests) would be by expanding the list of potential justifications for the landlord’s actions in section 24(3). This could be done by regulations made under section 24(5) for that very purpose. Whatever the outcome of this appeal, I urge that this be done as a matter of urgency.’*

Although an employer can now compare the way it treats one of its disabled employee with the way it treats its non-disabled employees, both of whom are deemed to be in ‘the same or similar circumstances’ even though these particular words are absent from s.3A(1), by following the judgment in **Malcolm (2008)**, an employer will still need to take any steps which the law deem to be reasonable to prevent the disabled employee being placed at a substantial disadvantage compared to its non-disabled employees which impedes the disabled employee from doing her or his job. If there are no reasonable steps which can be taken in this respect, the employer will need to justify the reason for any discriminatory treatment by showing that there were no reasonable steps which could be taken.

**Another question that arose to be resolved in Malcolm (2008) was: is knowledge of the disabled person’s disability necessary for liability for unlawful disability discrimination to arise?** The Appellate Committee said

‘yes’ and reversed the decision made by the majority in the Court of Appeal in **Kenrick (2002)** by confirming that, for liability to arise against an employer for discriminating against an employee or potential employee on the grounds of the person’s disability, the employer must have knowledge of the person’s disability or know of factors which might indicate the manifestation of such a condition without the employer expressly being told: **H. A. Heinz v Kenrick (2002)** IRLR 144. At 86, Lady Hale said: *‘I agree with Lord Bingham that to establish liability for the statutory tort of discrimination against a disabled person, it is necessary to show that the alleged discriminator either knew or ought to have known of the disability (not, of course, that in law it amounted to disability within the meaning of the Act).’*

**On the matter of comparators:** contrary to the convoluted opinions given by most members of the Appellate Committee of the House of Lords in **Malcolm (2008)**, the law in this area is very simple: the reason and purpose of having a comparator is to find out whether there is or has been any difference in treatment between the two comparators; e.g. that between a pregnant employee compared to a non-pregnant employee; that between an employee who is or has been away on maternity leave compared to an employee who is not or has not been absent from work because of maternity leave; that between a non-white skinned employee compared to a white skinned employee; that between a homosexual employee compared to a heterosexual employee.

Selecting a comparator in disability discrimination cases is slightly different: it is not sufficient to compare how an employer is treating or has treated an employee who has a statutory disability with how the employer is treating or has treated the comparator that is – as a matter of logic - an employee who does not have a statutory disability as the disabled employee has; a further consideration is required, that is to examine whether the employer is discharging or has discharged the statutory duty placed on it, the employer, by taking any steps which are reasonable to take to prevent any requirement applied by the employer from placing the disabled employee at a substantial disadvantage compared to its non-disabled employees and, also, by not treating the disabled employee less favourably than others to whom that reason does not or would not apply and the employer cannot justify the treatment; i.e. the focus is on the reason for the treatment rather than on a simple like-for-like comparison of treatment as in a sex or race discrimination case.

So, unlike in claims in which it is alleged that there has been sex or race discrimination in which the requirement is to make a simple comparison between the treatment of two individuals or groups which have distinctly opposite qualities from each other, the comparative exercise in disability discrimination cases require a multi-stage analysis in which the employer’s treatment of the disabled employee is compared to the treatment of the non-disabled employee(s) then, at further stages, there are further requirements which are, for example, a need to ascertain whether the employer has placed the disabled employee at a substantial disadvantage by applying a provision, criterion or practice (or there is a physical feature of the employer’s premises that has that effect) which non-disabled comparator employees can satisfy or are unaffected by but which place the disabled person at a substantial disadvantage.

**London Borough of Lewisham v Malcolm (2008) UKHL 43** – immediately below is the full suggested analytical decision-making steps which could have been used in **Clark v Novacold (1999)** or could be used in future similar disability discrimination cases. Although the Disability Discrimination Act 1995 would seem to suggest that these are the logical steps which an employment tribunal or higher Court should utilize when ascertaining the facts and applying the law to the facts when determining a disability discrimination case, tribunals and Courts at the moment are following and are obliged to follow the stage-skipping procedure applied in **London Borough of Lewisham v Malcolm (2008) UKHL 43**. It has to be stressed that these suggested decision-making steps below are not the law.

**Clark v Novacold (1999) IRLR 318, CA** and the question of ascertaining:

- (1) the correct comparators (the ‘others’ being the comparators for the purposes of section 3A(1)(a) of the DDA 1995);
- (2) less favourable treatment compared to comparators;
- (3) whether the less favourable treatment arose as a result of the employer applying a provision, criterion or practice and, if so;
- (4) whether the duty to make reasonable adjustments arose;
- (5) whether less favourable treatment under section 3A and or not taking steps to make reasonable adjustments under section 4A and section 18B can be justified and, in the latter case, by showing that there were no reasonable steps which could be taken.

The case of **Clark v Novacold (1999)** was about an employee who had suffered an injury to his back that constituted a statutory disability. He was dismissed after he was absent from work because of the injury. As a result of being dismissed for that reason, Mr Clark made a claim to an employment tribunal for compensation for unlawful discrimination on the ground of disability.

When determining the claim, these are the suggested analytical decision-making steps that the employment tribunal and/or the Court of Appeal should have taken in that case:

- (1) Did the claimant have a statutory disability that satisfies the definition of section 1(1) of the Disability Discrimination Act 1995 at the time of the event that led to the employer dismissing him?
- (2) If ‘yes,’ did the employer allegedly dismiss the claimant for a reason which relates to the claimant’s disability?
- (3) If ‘yes,’ what was that reason?
- (4) The reason was absence from work. The cause of his absence from work was a back injury that was a reason which relates to his disability.
- (5) Did the employer have knowledge of the disabled employee’s disability?
- (6) If the answer is ‘yes,’ can the claimant compare the way he was treated by the employer with the way the employer treated its other employees?
- (7) If the answer is ‘yes,’ who are the comparators with whom the claimant can compare his treatment?

- (8) Following the ruling by the House of Lords in **London Borough of Lewisham v Malcolm (2008)**, the comparators will be non-disabled employees of the employer who are in the same position as the claimant; in this instance, they would have been absent from work like the claimant but for a reason other than disability. So the question to be asked is: Would the employer have dismissed its non-disabled employees who had been similarly absent from work like the claimant?
- (9) If the answer is 'yes,' there is no less favourable treatment between the claimant and the comparators at this stage of the decision-making process.
- (10) Nonetheless, by applying a requirement that its employees must not be absent from work, did that requirement constitute a provision, criterion or practice?
- (11) If the answer is 'yes,' were the claimant and the non-disabled comparators able to comply with that provision, criterion or practice?
- (12) If the answer is 'no,' was it the claimant or the comparators or both who were unable to comply with the requirement?
- (13) The comparators were not disabled and according had no need to be absent and were not absent from work so they were able to comply with the requirement. The claimant, however, was and is disabled and was absent from work for a reason which relates to his disability so he was unable to comply with the employer's provision, criterion or practice
- (14) Was the claimant placed at a substantial disadvantage in comparison with the non-disabled comparator employees because the employer applied this particular provision, criterion or practice?
- (15) If the answer is 'yes,' did the employer discharged its statutory duty by taking such steps as were reasonable for it to take as required under s.4A(1)(a) to prevent the provision, criterion or practice having the effect of placing the disabled employee at a substantial disadvantage in not being able to comply with the requirement not to be absent from work?
- (16) If the answer is 'no,' because there were no reasonable steps which the employer could have taken to make reasonable adjustments, the final two questions are: (1) under s.3A(3), DDA 1995, can the employer show with regard to less favourable treatment, whether it can justify the treatment of the claimant for a reason that was both material to the circumstances case and substantial? (2) Under s.3A(6), DDA 1995, can the employer show with regard to any failure to take steps to make reasonable adjustments, that failure was because there were none which it could have reasonably taken in the circumstances of this case and that its treatment of the claimant was justified?
- (17) If the decision-making process proceeds to the justification stage and the employer can show justification, then there is no discrimination on the grounds of the claimant's disability. However, if the employer is unable to show justification or that there were steps it could have taken but failed to take, liability for unlawful disability discrimination will be established and a remedies hearing will take place to assess the amount of compensation that the employer will be ordered to pay the claimant to recompense him for the financial losses which he can prove he has suffered as a result of being dismissed for this reason in these circumstances by the employer.

This suggested decision-making process would give both the claimant and the respondent employer the opportunity at each stage of the procedure to present and prove or defend and justify what happened throughout the dismissal from start to finish. By being given the opportunity to go through on a stage by stage basis as to what happened, both the claimant and the respondent would have the fullest opportunity to claim or defend their respective rights under the Disability Discrimination Act 1995 and justice would be done and seen to be done.

Compiled: **18 July 2008**

Email: [employmentlawexpert@googlemail.com](mailto:employmentlawexpert@googlemail.com)

[www.employment-law-expert.co.uk](http://www.employment-law-expert.co.uk)