EQUAL TREATMENT, FAULT-BASED LIABILITY, AND DISABILITY-RELATED- DISCRIMINATION

Lewisham London Borough Council v Malcolm [2008] UKHL 43

ABSTRACT

This case concerns the meaning disability-related-discrimination. It centred on the housing or 'premises' provisions of the Disability Discrimination Act 1995 (DDA 1995), but this House of Lords' judgment, overruling the long-established *Clark v Novacold* [1999] ICR 951, CA, is of great significance to the Act's coverage of employment and the provision of goods, facilities and services. Under the DDA 1995, the functional equivalent of indirect discrimination is disability-related-discrimination, which is defined as less favourable treatment for a reason related to a person's disability, which cannot be justified. The House of Lords undermined two major and established principles of disability-related-discrimination. First, for the challenged treatment to be 'related' to the claimant's disability, the defendant must have known, or ought to have known, of the disability at the time of the treatment. Second, (Baroness Hale dissenting) when identifying if the treatment was 'less favourable' the correct comparator is a person in the same circumstances save for the disability. Hence, where a restaurant has a 'no dogs' rule, the correct comparator is a sighted customer *with* a dog, or where an employer fires a worker who is long-term absent because of his disability, the comparator is a worker without a disability who *was* long-term absent.

FACTS AND DECISION

Courtney Malcolm was diagnosed with schizophrenia. In 2002, he exercised his right to buy his flat from Lewisham council, but completion was delayed for some time. In May 2004 he lost his job and in June 2004, in contravention of his tenancy agreement he sub-let the flat and moved out. Just after that, he informed the council he wished to complete the transfer on 26 July. It seems his plan was to sub-let after the purchase (which was permissible), but he 'jumped the gun', either because he was unemployed and needed the money, or because his judgment was impaired by his schizophrenia. However, on 6 July, the council discovered the sub-letting, and gave him notice to quit, in accordance with the tenancy agreement and the Housing Act 1985, section 93, which allows no discretion. Subsequently, both Malcolm's psychiatrist and social worker wrote to council asking for a reprieve as they feared it would cause him another breakdown. Nonetheless, the council persisted and issued proceedings for possession. Malcolm claimed his eviction amounted to disability-related-discrimination contrary to the Disability Discrimination Act 1995 (DDA 1995).

At first instance, the County Court trial judge found for the council, holding that Malcolm did not have a disability for the purposes of the Act, and that in any case the reason he sub-let early was to raise money whilst unemployed. It was not a mistake caused by his illness. Thus, the eviction did not relate to his disability. The Court of Appeal reversed [2008] Ch 129, finding that Malcolm's schizophrenia amounted to a disability and that as he sub-let the flat when his judgment was impaired by his disability, the possession order was related to his disability. Accordingly, he was treated less favourably than a person who did not have schizophrenia and who *did not* sub-let his council flat. The House of Lords restored the County Court decision, holding (by a majority) that Malcolm *did* have a disability, but (Baroness Hale dissenting) he was not treated less favourably because the correct the comparator was a person without schizophrenia who *had also* sub-let his council flat (overruling *Clark v Novacold* [1999] ICR 951, CA), and in any case (unanimously) the possession order was not related to his disability.

THE ISSUES

The conventional model of indirect discrimination - a facially neutral practice that adversely affects a protected group, which is not justifiable - was not employed in the DDA 1995. This is because, in contrast to other protected groups such as race or sex, it is unlikely that any facially neutral practice would adversely affect persons with a disability as a whole group. The assortment of disabilities is too varied for the conventional model. Instead, in combination with a duty to make reasonable adjustments (which was not in force for the premises provisions in time for this case), the

Act outlaws 'disability-related-discrimination.' This also reflects the position under the long-standing disability law in the United States, where, in addition to direct discrimination, and a duty to make 'reasonable accommodation', the courts recognise 'discrimination by proxy', which is treatment 'directed at an effect or manifestation of a handicap' such as a 'no wheelchair' or 'no dogs' ban. The courts treat the proxy as a pretext for direct discrimination and both carry a justification defence.[i]

The definition of disability-related-discrimination is substantially the same for the employment (s 3A(1)), the provision of goods, facilities and services ('services', s 20(1)), and the premises (s 24(1)) parts of the Act, and so this case has implications for the employment and service provisions. Section 24(1) provides:

> [A] person . . . 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.

For a prima facie case under (a), there are two elements: the treatment must be for a reason 'related to' the victim's disability, and that treatment must be less favourable.

Until *Malcolm*, the established meaning of these elements was set out in *Clark v Novacold* [1999] ICR 951, at 964-966. The reason for the less favourable treatment need only be *related* to the disability. Thus if a cafe has a 'no dogs' rule, the reason for refusing entry to a blind man with his guide dog relates to his disability (Minister of State for Social Security and Disabled People, 253 HC Official Report (6th series) col 150, 24 Jan 1995). Similarly, a disabled customer who is told to leave the restaurant because she has difficulty eating as a result of her disability is so treated for a reason *related to* her disability. Accordingly, the choice of comparator differs from that under direct discrimination. In these examples the comparator is a person without the 'reason', *ie*, *without* a dog, or *without* an eating difficulty. If it were otherwise, and the comparator were a sighted man *with* a dog, or a person who had difficulty eating for a reason unrelated to a disability (say a coughing fit, or because the food tasted awful), the scope of disability-related-discrimination would be drastically reduced, effectively to direct discrimination. It follows that the comparison cannot be made until the reason for the treatment is identified, and the comparator is a person without that reason.

In *Clark v Novacold*, Mr Clark suffered a back injury at work which caused soft tissue injuries around the spine. He appeared to be unable to work for at least 12 months, and after four months absence, he was dismissed. In response to Clark's claim for disability-related discrimination Novacold argued that it would have dismissed any person unable to work for that long. The Court of Appeal held that argument used the wrong comparator. First, the reason for Clark's dismissal was his inability to work, which was the 'reason' which related to his disability. Therefore, the correct comparator should be a worker with neither the disability *nor the* '*reason*', that is a worker without his disability and able to work. Speaking for the court, Mummery, LJ observed that this approach would avoid the problems encountered by the courts in their 'futile attempts' to identify a hypothetical non-pregnant male comparator for a pregnant woman in sex discrimination cases before the ECJ decision *Webb v EMO Air Cargo* Case C-32/93 [1994] IRLR 482, ECJ. It was also consistent with the availability of the justification defence (which is not available for direct discrimination) which can legitimise an employer's less favourable treatment, where it is proportionate.

The definition was taken a stage further in *Heinz v Kendrick* [2000] ICR 491, at §25, EAT,[ii] where Lindsay, J said that there was no need for the defendant to have had knowledge of the disability. He used two vivid examples to illustrate this point. First, a postman with a concealed artificial leg may be dismissed for being too slow. Second, a secretary with undeclared dyslexia may be dismissed for 'typing hopelessly misspelt letters'. The Code of Practice supports this view, giving an example of a woman dismissed for persistent absenteeism (as any worker would be) where the employer was unaware that the reason for her absence was her multiple sclerosis.[iii] In all these examples, the employer's act amounts to treatment related to the worker's disability (which may or may not be justified).

The House of Lords in *Malcolm* disapproved of these principles. Instead, for the treatment to be 'related' to the claimant's disability, the defendant must have known, or ought to have known, of the disability at the time of the treatment (Lords Bingham (§ 18), Scott (§ 29), Neuberger (§ 163), Baroness Hale (§ 86)). Lord Scott appeared to go a step further, holding that the defendant must have been 'motivated' by the disability (§ 29). Further, for identifying if the treatment was 'less favourable' the correct comparator was a person in the same circumstances save for the disability. Hence, in the examples above, the correct comparator is a sighted customer *with* a dog, a person without a disability but *with* eating difficulties, or a worker without a disability who *was* long-term absent. This reverses *Clark v Novacold*.[iv] Baroness Hale dissented on this point.[v]

COMMENT

Malcolm's case actually turned on the finding of fact by the trial judge that the sub-letting was not a result of Malcolm's illness. However, the Law Lords' wider remarks on disability-related discrimination deserve attention because they overruled the long-established *Clark v Novacold*, and applied not only to the housing provisions of the DDA 1995, but also those covering employment, and the provision of goods, facilities and services.

Knowledge of the Disability

The notion that the defendant must have had knowledge of the disability when acting is at odds with the concept of indirect discrimination. This is all more so when demanding, as Lord Scott alone did, that the disability *motivated* the treatment. The concept of indirect discrimination is concerned with the *impact* of facially neutral conduct, rather than the state of mind of the defendant. The notion that an employer can discriminate 'blind' is well established. Most typically, studies of entrance exams can reveal an adverse impact on a particular protected group (see *eg Bushey v New York State Civil Service Commission* 733 F 2d 220 (2nd Cir 1984)[vi]). In *Price v Civil Service Commission* [1978] ICR 27 EAT, the employer's age limit of 17-27 adversely affected women because of family responsibilities. In *Falkirk Council v Whyte* [1997] IRLR 560 EAT, the employer's selection criterion, 'management training and supervisory experience', adversely affected women, whilst the 'no beards' policy in *Panesar v Nestle Co Ltd* [1980] ICR 144 CA adversely affected orthodox Sikhs. In none of these cases could it be suggested that for liability the employer should have been aware of the discriminatory impact of its practice.

A requirement of knowledge reduces the reach of disability-related-discrimination to *less than* that provided by direct discrimination, where it is possible for an employer to directly discriminate without knowledge of the victim's disability. For instance, the employer may advertise internally for a promotion, stating that the post is not suitable for anyone with a history of mental illness, and exclude, unknowingly, a member of staff with a history of schizophrenia (see the *Code of Practice* § 4.11).[vii] This principle holds at EC level, where public statements by a director that he would not employ immigrants was held to be direct racial discrimination: *Feryn* Case C-54/07 (2008) ECJ. Further, it had been thought possible for the employer to directly discriminate by acting on discriminatory factors of which it is unaware. In *Williams v YKK* EAT/0408/01 AM Elias, J (§ 32) suggested *obiter* that an unprejudiced manager's decision may be affected, or tainted, by a report made by a prejudiced supervisor. So for instance, a manager who is unaware that a worker's absenteeism was due to her disability, may be influenced to dismiss her by unfavourable opinions delivered by prejudiced colleagues who were aware of her disability. This is direct discrimination because the reason for the treatment is the victim's disability: the basis of the prejudiced opinions was disability, rather than absenteeism. This is known and established in the United States as 'Cat's Paw' theory.[viii] The feature of this theory is that the prejudiced subordinate has influence over the decision-maker and so 'poisons the well'[ix] from which that decision-maker draws his knowledge.

Lord Bingham (§ 18) and Baroness Hale (§ 86) considered that as disability-related-discrimination carries a justification defence, knowledge must be an element, otherwise the defendant would be in no position to justify the challenged treatment. Once again, this overlooks the basic tenets of indirect discrimination theory. In any of the examples above, it is perfectly possible that the employer had a justifiable reason for its challenged practice without being aware of the adverse impact on a protected group. Once it becomes aware (say at the start of the litigation process) it would have to concede its case or argue it on its merits. In the context of housing, a landlord without knowledge of his tenants' mental illness could justify evicting them for causing a nuisance to their neighbours, even though their behaviour was caused by the mental illness (*Manchester City Council v Romano* [2005] 1 WLR 2775 CA). The landlord's justification stands to be judged whether or not he knew of the disability.

The demand for knowledge is undermined further by considering how the justification defence relates to the duty to make reasonable adjustments. The DDA 1995 states that where there is duty to make reasonable adjustments, disability-related-discrimination cannot be justified until that duty is met. In some fields (employment and - since the *Malcolm* case arose - premises) the duty cannot arise until the defendant is aware (or ought to have been aware) of the disability. Hence, in these fields disability-related-discrimination is only likely to be justified where no duty to make adjustments arises, in other words, when the defendant has no knowledge of the disability. The conclusion must be that the Act envisages that the justification defence to disability-related-discrimination can be invoked where the defendant had no knowledge of the disability.[x]

Lords Scott (§ 28), Bingham (§ 18) and Neuberger (§ 162) related their opinion to the availability of damages. For instance, Lord Neuberger observed:

> ... it would require very clear words before a statute could render a person liable for damages for discrimination against a disabled person, owing to an act which was not inherently discriminatory carried out at a time when the person had no reason to know of the disability which could render the act discriminatory.

This implies that the Lords are looking for fault liability. The use of the phrase 'inherently discriminatory' augments this view. The history of Britain's discrimination legislation points to a different conclusion. Both the Sex Discrimination Act 1975 and Race Relations Act 1976 originally provided that for indirect discrimination no damages shall be awarded where it was unintentional.[xi] However, it became clear that this restriction did not comply with EC law. In *Draehmpaehl v Urania Immobilien Service ohg* Case C-180/95 [1997] IRLR 538, the ECJ held that a Member State may not make an award of compensation in a sex discrimination case dependent on showing fault on the part of the employer. Consequently, the restriction was dropped and cannot apply to any case falling under Equal Treatment (sex), Race, or Framework (sexual orientation, religion or belief, age, and disability) Directives.[xii] The DDA 1995 provides, like the other statutes, that damages may be awarded when a court or tribunal considers it 'just and equitable' (s 17A(2)). It makes no distinction between employment (covered by the Directive) and other matters and so apparently has the same meaning for all areas covered. As such, it must be read to comply with the Directive, and this means that damages cannot be dependant upon fault.

The demand for knowledge or fault based liability is at odds the principle of indirect discrimination and prevailing EC law, as well as the relationship between disability-related-discrimination and the duty to make reasonable adjustments,

The Comparator

The device used to identify if the treatment was less favourable is a comparison, a matter 'fundamental to the concept of discrimination which underlies the whole of the DDA' (Baroness Hale § 69). Technically speaking, the problem is whether the 'reason' (for the treatment) at the beginning section 24 is the same reason at the end ('he treats him less favourably than he ... would treat others to whom that reason .... would not apply ... '). The wide interpretation supposes that the comparator is *not* endowed with the 'reason' for the treatment.

The majority's technical argument was that the wide interpretation would mean that Malcolm's treatment would be compared with a tenant who had *not* sub-let. It would also mean that a worker off sick for a long period because of his disability would be compared to a non-disabled worker *not* off sick. Of course, the council would not evict this tenant nor would the employer dismiss this worker. As such, this test 'would always be met'[xiii]and is therefore 'pointless'.[xiv] Lord Scott concluded: 'Parliament must surely have intended the comparison .... to be a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not'.[xv]

This logic enabled the Lords to attack the examples given in *Clark v Novacold*. Lord Bingham said that, 'A more natural comparison ... would fall to be made ... 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.'[xvi] Lords Scott and Neuberger agreed that a blind person with a dog should be compared to a sighted person *with* a dog,[xvii] with Lord Scott labelling this the 'common sense' answer.[xviii]

However, to call the wider comparison 'pointless' lacks imagination. For example, using the wide interpretation, the comparator could be a tenant who is being evicted, along with the claimant, because the council wish to refurbish their block of flats, or perhaps demolish it because it has been condemned unsafe. An 'eviction' could be part of re-housing programme. Similarly, the comparator worker may be dismissed, not because of his long-term absence, but because the whole workforce (or a section of it), including the claimant, is being made redundant. In either case, this comparison reveals the treatment was *not* related to the claimant's disability. As such, this wider comparison will not 'always be met' and is not pointless.

As disability-related-discrimination (along with the reasonable adjustments duty) is the functional equivalent of indirect discrimination, applying the majority's logic to a classic case of indirect discrimination exposes the inadequacy of the narrow comparator. Suppose entrance exams were challenged as disfavouring black applicants. The 'reason' for their non-selection is the failure of the exam. The correct comparator group would be the white applicants, without that reason, in other words *all* the white applicants. Where a significantly lower proportion of black, than white, applicants passes the exam, a prima facie case is made. If the 'narrow comparator' theory were applied here, the comparator group would be exactly the same as the claimant group, save for race. In other words, it would include the 'reason' and so consist only of whites who did *not* pass the exam. Of course, no adverse impact would be revealed. This would be a 'pointless' comparison as it would reveal nothing about the impact of the exam

on black and white applicants. For disability-related-discrimination, the narrow comparison is equally pointless, as it would reveal nothing about the impact of the employer's policy on the person with a disability.

The difference for disability-related-discrimination is that the claimant's group consists only of one person, and this may have led to the mistake. Where the claimant's group contains all of those who *took* the exam, it will comprise, normally, some who failed and some who passed. The 'natural' or 'common sense' (and correct) comparator group of white candidates will contain also some who failed and some who passed. For disability-related-discrimination, the claimant's 'group' will consist of one person, and so 100% of this 'group' are disadvantaged by the practice. Thus, it is tempting to project the claimant's identity minus only his disability onto the comparator's 'group' (of one), which in *Malcolm*, would be a person who also sub-let. This is the mistake. In the rare conventional indirect discrimination cases where 100% of the claimant's group are disadvantaged by the practice, the comparator's group still discards the 'reason'. In *Greencroft Social Club v Mullen* [1985] ICR 796 EAT, only members were entitled to a disciplinary hearing. Women were not admitted as members, so the proportion of women not entitled to membership or the disciplinary hearing was 100%. Nonetheless, the EAT found that a prima facie case had been made. If the *Malcolm* logic were projected onto this case, the comparator group would be men who were not members (the 'reason'), an absurd and pointless comparison.

In addition, as Baroness Hale explained in her dissent on this issue,[xix] the legislative history supports the wider interpretation. When introduced, the Disability Discrimination Bill provided that the comparison should be with 'others who do not have that disability' (clause 4(1)(a)). Then the Government replaced this with the words 'to whom that reason does not or would not apply' in what became section 5(1)(a) (employment) and section 24(1)(a) (services), and 'others to whom that reason does not or would not apply' in what became section 20(1)(a) (premises). When introducing these amendments, the Government explained it now meant that a job applicant who could not type because of arthritis should now be compared with a job applicant who *could* type, rather than an applicant without a disability who could not type. Such a case should turn on justification, not the comparison.[xx]

Baroness Hale then pointed to subsequent amendments made to the employment provisions (to implement the Framework Directive 2000/78/EC), on the basis that *Novacold* was correct. The Government introduced a specific definition of direct discrimination which was not justifiable to run alongside disability-related-discrimination, which is justifiable (respectively ss 3A(5), 3A(1), DDA 1995).[xxi] As the narrow construction reduces disability-related-discrimination to direct discrimination,[xxii] it must be incorrect, otherwise the section providing disability-related-discrimination would be redundant.

Policy Considerations

Underpinning the majority speeches on both elements was concern for the limited housing stock and waiting lists (§ 9), and the difficult position of Lewisham council, who might well have faced judicial review had it not evicted a tenant who was sub-letting (§§ 8, 90). Moreover, there was concern for the position of landlords, public or private, who may never be able to evict a disabled tenant, who, for instance, permanently sub-let, or never paid any rent (§§ 29, 102, 158). Clearly, the Law Lords were afraid, as Lord Neuberger put it, of giving disability-related-discrimination 'extraordinarily far-reaching scope'.[xxiii]

These concerns miss the true problem, which is the limited justification defence for premises (and services). In the field of premises, disability-related-discrimination justification is limited to an exhaustive list of specific conditions, such as to avoid endangering the health or safety of any person, or that the person with a disability is incapable of entering into an enforceable agreement (s 24(3)). None of these conditions covers sub-letting or the non-payment of rent. Thus, if for a reason related to his disability a tenant permanently sub-lets, or fails to pay any rent, he could never be evicted. This contrasts with the employment field, where the grounds of justification are unrestricted and amenable to a whole range of circumstances. As Baroness Hale explained (§ 80), 'It may well be that Parliament had not understood that the narrow scope for justification in relation to services and premises would give rise to the problems we face in this case.'

But there are some worrying trends underlying in these speeches. First, the majority's narrow construction of the comparison reveals a fear of apparently treating Malcolm *more* favourably than other tenants who sub-let. Meanwhile, Lord Brown observed that the duty to make reasonable adjustments arises because, 'The needs of the disabled are rather different and require sometimes to be met by positive action.'[xxiv] This suggests the judges are rooted in some 'common sense' or 'natural' notion of discrimination law,[xxv] where anything beyond equal treatment is positive discrimination and undesirable. This misunderstands the purpose of disability-related-discrimination and the reasonable adjustments duty, which is to encourage *different* action so people 'can play as full as possible a part in society whatever their disabilities.'[xxvi]

The other underlying trend is the judges' fear of liability without knowledge. Again, to assume that a person cannot discriminate without knowing misunderstands the purpose of discrimination law generally, and indirect discrimination and disability-related-discrimination in particular, which is more concerned with the discriminatory *effect* of a person's act, rather than his state of mind. This drift towards fault-based liability was apparent also in the House of Lords' speeches in the victimisation case *Chief Constable of West Yorks v Khan* [2001] 1 WLR 1947,[xxvii] where they devised an *honest and reasonable* benign motive defence, and the direct discrimination case of *Shamoon v RUC* [2003] ICR 337, where they replaced the *but for* test with the *but why*? question.[xxviii]

CONCLUSION

The House of Lords could have resolved this case much more simply, either by sending it back to a tribunal to decide if the eviction was related to Malcolm's disability, this time on the basis that Malcolm had a disability, or more simply, on the trial judge's finding that the premature sub-letting was not a result of Malcolm's illness. In either case, it should have warned Parliament of the dangers associated with the narrow justification defence in the fields of premises (and services), which, as Baroness Hale accepted (§ 102), may interfere with a landlord's property rights under the European Convention on Human Rights (1st protocol, art 1).

Instead, with its requirement for 'knowledge' and a narrow comparison, the House of Lords has reduced disability-related-discrimination to something *less than* direct discrimination, and imposed this view on the employment provisions.[xxix] As such, this judgment makes an unnecessary challenge to the EC discrimination law principles that knowledge is not necessary for liability and that disability law must provide for indirect discrimination.

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[i] See McWright v Alexander 982 F 2d 222, 228, (7th Cir 1992).

[ii] See also Callaghan v Glasgow CC [2001] IRLR 724, EAT, 726.

[iii] Code of Practice Employment and Occupation (2004), at § 4.31, London: TSO (ISBN 0 11 703419 3).

[iv] [2008] UKHL 43, Lords Bingham § 15, Scott §§ 30-40, Brown § 113, and Neuberger §158.

[v] Ibid, §§79-80.

[vi] A written examination was used for the post of Captain in the State prisons. Of the 243 whites taking the test, 119 passed (45%). Of the 32 non-whites, 8 passed (25%). As the passing rate for non-whites was approximately fifty per cent that of whites, a prima facie case was made out. Similarly in Firefighters Institute v St Louis 616 F 2d 350 (8th Cir 1980), cert denied sub nom St Louis v United States 452 US 938 (1981), 16.7 per cent of whites passed a test in comparison to 7.1 per cent of blacks. The black pass rate was 42.5 per cent that of whites. As this fell well short of the '80 per cent rule' the test was held to be discriminatory.

[vii] Code of Practice Employment and Occupation (2004), London: TSO (ISBN 0 11 703419 3).

[viii] See Shager v Upjohn 913 F 2d 398 (7th Cir 1990); see also Russell v McKinney Hosp 235 3 F 3d 219, at 227 (5th Cir 2000); Griffin v Washington Convention Centre 142 F 3d 1308, at 1312 (DC Cir 1998); Burlington Ind v Ellerth 524 US 742, at 762 (Sup Ct 1998); Poland v Chertoff 494 F 3d 1174 (9th Cir 2007).

[ix] Sarate v Loop Transfer Inc US Dist LEXIS 13170, at 12 (ND Ill 1997)

[x] This point was articulated by Karen Monaghan, Equality Law, (2007 OUP), §§ 6.153-6.154.

[xi] SDA 1975, s 66(3); RRA 1976, s 57(3); see eg Orphanos v QMC [1985] AC 761, HL.

[xii] Respectively Council Directives 76/207/EEC, 2000/43/EC, and 2000/78/EC.

[xiii] [2008] UKHL 43, Lords Bingham § 14, and Brown § 112. In her dissent, Baroness Hale acknowledged this conclusion, § 71.

[xiv] Ibid, Lords Scott §§ 32-33, and Neuberger §151.

[xv] Ibid, § 32, and see Lord Brown § 113.

[xvi] Ibid, § 15.

[xvii] Ibid, §§ 35 and 155 respectively.

[xviii] Ibid, § 30 & 31.

[xix] Ibid, §§ 78-81.

[xx] Minister of State, Department for Education and Employment, Lord Henley, Hansard (HL), 18 July 1995, col 120.

[xxi] Inserted by Disability Discrimination Act 1995 (Amendment) Regulations 2003, SI 2003/1673.
[xxii] Acknowledged by Lord Brown, [2008] UKHL 43, § 114. Lord Neuberger acknowledged that the narrow construction was 'unattractively restrictive' (ibid § 119) and 'very limited' (ibid §141).
[xxiii] Ibid, § 119.
[xxiv] Ibid, § 114.
[xxv] Ibid, §§ 15, 30, respectively.
[xxvi] Baroness Hale, ibid, § 42.
[xxvii] Applied Bird v Sylvester [2008] ICR 208, CA, § 10. See also St Helens BC v Derbyshire [2007] ICR 841 HL. See generally, Michael Connolly, 'Reinterpreting Khan—Easy Case Makes Bad Law' Industrial Law Journal [2007] Vol 36 364.
[xxviii] For other cases see, M. R. Freedland, Simon Deakin, and Bob Watt, 'Goodbye "but-for", hello "but-why?"?' (1998) 27 (2) Industrial Law Journal 121 and Lizzie Barmes 'Promoting Diversity and the Definition of Direct discrimination' (2003) 32 (3) Industrial Law Journal 200.
[xxix] [2008] UKHL 43, §§ 14, 28, 80, 112, 158.