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Disability discrimination

Time to breathe a sigh of relief?

Marsons' Briefing Note issued in March 2008 warned that, following the Court of Appeal's decision in *Lewisham LBC v Malcolm [2007] EWCA Civ 763*, social landlords would potentially be in danger of unlawfully discriminating against disabled occupiers in all types of situations. The Court of Appeal's decision had far-reaching consequences in that landlords who had no prior knowledge of an occupier's disability might find themselves facing a successful Disability Discrimination Act 1995 (DDA) defence in cases where the Landlord would usually be entitled to a possession "as of right". It appeared that assured shorthold tenants, contractual tenants, licensees and even tolerated trespassers, might be able to claim the protection of the DDA, where they could show that they had a physical or mental disability which had played some part in the conduct which had caused the Landlord to take steps aimed at securing possession.

Thankfully, on 25th June 2008, an appellate committee of the House of Lords delivered opinions which have the effect of reversing the Court of Appeal's decision in *Malcolm* and clarifying the way in which the DDA is to be interpreted in practice.

The Facts

Mr Malcolm was granted a secure tenancy of a Lewisham Council flat in February 2002. Having accrued a right to buy through a previous tenancy, he applied to exercise that right in March 2002. By June 2004, Mr Malcolm had accepted the Council's offer price and had arranged a mortgage. At that stage, he signed the transfer document with a view to completing the purchase the following month. At the same time, he sublet his flat and moved in with his girlfriend.

Inevitably, the subletting was contrary to the terms of his tenancy agreement. Crucially, it meant that, by virtue of Section 93(2) of the Housing Act 1985, his tenancy ceased to be a secure tenancy.

Through an occupancy check in July 2004, the Council discovered the subletting. A Notice to Quit was served to bring the tenancy to an end and possession proceedings were subsequently issued.

Unbeknown to the Council, when it served the NTQ, Mr Malcolm had been diagnosed with schizophrenia in 1985, he had been hospitalised as a result on a number of occasions, but since 1989 his condition had been managed as an outpatient and he had been consistently in work. From about October 2003, however, Mr Malcolm ceased taking his medication, he became dysfunctional at work and, by May 2004, his employment (with a housing association) had ended. Mr Malcolm defended the possession proceedings arguing that he was a disabled person under the DDA, that at the time of the subletting his thoughts were confused as a result of his schizophrenia, and that the Council's actions in seeking possession against him therefore amounted to unlawful discrimination.

The Statutory Provision

Section 24(1)(a) of the DDA provides that "[a] person…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…"

Specific Findings

The Law Lords found that:

1 Mr Malcolm was a disabled person for the purposes of the DDA. He had a long-term mental impairment that

continued over...

affected his ability to carry out relevant day to day activities. The effect of that impairment on his abilities was substantial in that it could not be regarded as minor or trivial.

2 Lewisham's reason for pursuing possession against Mr Malcolm was the subletting and Lewisham's policy of not allowing tenancies to continue where the property was no longer being occupied by the tenant, bearing in mind the demand on its stock and that it could be criticised or even judicially reviewed if it failed to act.

3 The subletting could not be said to have been caused by, or to be related to, Mr Malcolm's disability – the two things were insufficiently linked. The subletting was not an irrational act caused by Mr Malcolm's illness. It would have enabled Mr Malcolm to service his mortgage and get some return on the property whilst he was out of work. It was done when his purchase was apparently "in the bag", his only mistake was "jumping the gun".

4 In any event, as the treatment given to Mr Malcolm – a Notice to Quit followed by possession proceedings with a view to eviction – was exactly the same as would have been given to any non-disabled tenant who had sublet, there could be no discrimination as he had not been treated" less favourably".

General Principles

The Judgment given by the House of Lords has provided answers to a number of the questions that have arisen since the DDA was first considered by the appeal courts in the context of possession proceedings. The Lords held as follows:

1 *No discrimination without knowledge* – A landlord cannot unlawfully discriminate against a disabled tenant unless that landlord actually knows or ought reasonably to have known, that the tenant suffers from a physical or mental impairment.

2 *No discrimination without motivation* – A landlord cannot discriminate against a tenant unless, consciously or unconsciously, the tenant's disability was a motivating factor in the Landlord's decision to take action against that tenant.

3 *No discrimination without causation* – A landlord cannot discriminate against a tenant unless, to some extent, the disability has caused or is linked to the reason for the Landlord's action against the tenant.

4 *No discrimination without less favourable treatment* – The question of whether a disabled person has been treated less favourably is to be answered by the simple means of comparing the treatment given to the disabled tenant with that which would have been given to a non-disabled tenant in the same situation.

Conclusion

The House of Lords has chosen to give Section 24(1)(a) of the DDA a narrow construction rather than a wide one. As a result of that narrow construction, the action taken by a landlord in proceeding against a disabled tenant is now to be compared with the action a landlord would have taken against a non-disabled tenant in the same circumstances. Previously, in accordance with decisions made by the Court of Appeal, a wide construction had been adopted. That meant the Landlord would be regarded as guilty of discrimination if a tenant's unacceptable conduct of a tenancy was linked to a disability, even if the Landlord had no knowledge of the disability.

The Law Lords pointed out that a wide construction could place a landlord in a position of being unable to remove a disabled tenant who fails to pay rent, a licensee whose licence has been terminated, and even a trespasser whose presence was attributable to a disability. It "would involve private rights [of landlords and land owners] being taken away without compensation, potentially in circumstances which could be regarded as extraordinary and positively penal" and that would be "absurd". Accordingly, the Lords concluded that Section 24 of the DDA is of limited reach; its effect is that, when it comes to landlords seeking to bring tenancies to an end, disabled tenants are not treated "less favourably" than non-disabled tenants; it does not have the effect of requiring disabled tenants to be treated "more favourably" than non-disabled tenants.

Marsonstips

- It is not yet clear how the House of Lords' decision will be applied in local County Courts
- In anti-social behaviour cases, landlords should still take the precaution of deciding whether discrimination would be justified under the DDA
- In rent arrears cases, Social Landlords should still follow the protocol by taking extra measures where tenants have learning difficulties or mental health problems, or are otherwise disabled or vulnerable
- At any hearing, always let the Judge know if you consider the tenant may have a disability.

Registered social landlords set to face judicial review and human rights claims

What is Judicial Review?

Under our common law, public bodies such as Local Authorities, National Health Trusts and government departments, are potentially answerable in our Courts for the decisions they make. Persons who are aggrieved by a decision made by a public body, otherwise known as a public authority, can challenge that decision by asking the Court to carry out a Judicial Review. If the Court considers there may be a case to answer, it will review the decision and the process by which the decision was reached. Where a Court carries out a Judicial Review and finds, for instance, that the public body went beyond its statutory powers in making the decision, or that the public body failed to take all relevant matters into account when making its decision, or that in all the circumstances the decision was irrational, the Court can "quash" the decision and direct the public body to reconsider.

Traditionally, Judicial Review claims could only be brought in the High Court. Over recent years, there has been a debate as to whether Registered Social Landlords (RSLs) should be regarded as public bodies for Judicial Review purposes i.e. as to whether they should be added to the list of organisations whose decisions can be scrutinised and overturned by Judicial Review. We are still waiting for the definitive answer to that question, but the decision in *R(Weaver)-v-London Quadrant Housing Trust [2008] EWHC 1377(Admin)*, handed down by the High Court on 24th June 2008, brings it one step closer.

Mrs Weaver's Challenge

London and Quadrant Housing Trust (LQHT) had served a Notice of Seeking Possession on their assured tenant, Mrs Weaver, on Ground 8 of Schedule 2 to the Housing Act 1988 – the mandatory rent arrears ground. At the time, she had 19 weeks' rent arrears and there was a history of rent arrears and Court proceedings. Mrs Weaver applied to the High Court for a Judicial Review of the decision to serve the Notice on Ground 8. It was contended, on her behalf, that:

1. Housing Corporation guidance recommends that "before using Ground 8 Associations should first pursue all other reasonable alternatives to recover the debt".
2. Mrs Weaver had a "legitimate expectation" that LQHT would follow that guidance.
3. LQHT had failed to follow the guidance in that it could have used the discret-ionary rent arrears grounds ie Grounds 10 and 11.

Is an RSL a Public Authority?

The first question which arose was, could the High Court judicially review the decision? In other words, is LQHT to be regarded as a public authority when exercising its housing management functions? The answer given by the High Court was, yes. The judges found that the management and allocation of housing stock by LQHT is a function of a public nature and LQHT is therefore to be regarded as a public authority in that regard. In reaching that conclusion they referred to the following factors:

1. As a non-profit making charity acting for the benefit of the community, LQHT's activities do not have typical private and commercial features.
2. The social rented sector in which LQHT operates is permeated by state control and influence.
3. LQHT is heavily subsidised by the state via receipt of capital grants from the Housing Corporation.
4. The voluntary transfer of stock from Local Authority landlords to LQHT (representing 10% of LQHT's total stock) indicates the performance of a function similar to that of a Local Authority.
5. As a result of the statutory duty of co-operation, over half of LQHT's new lettings are taken up by Local Authority nominations.

The Future

On this occasion, the actual challenge brought by Mrs Weaver failed. The Court found that she did not have a legitimate expectation that Ground 8 would not be used. - She had been unaware of the Housing Corporation Guidance at the relevant time and, in any event, the Guidance does not require Grounds 10 and 11 to be used before Ground 8.

The decision that LQHT is a public authority, which is based on factors that would apply to almost any RSL, opens up the possibility of all RSLs facing Judicial Review challenges in the future. Moreover, the Court's finding that LQHT is a public authority also applies in the field of human rights. As public authorities for the purposes of the Human Rights Act 1998, it will be unlawful for RSLs to act in a way which is incompatible with the Human Rights Convention.

Other recent developments in public law mean that challenges to decisions and to the decision-making process, on grounds of Judicial Review, can now be raised as a defence in County Court proceedings, and can be adjudicated upon in the County Court, rather than having to be the subject of separate Judicial Review claims.

Accordingly, the decision in *Weaver* means that RSLs pursuing "simple" rent arrears cases, particularly those based on Ground 8, are likely to find themselves faced with complex public law and human rights defences.

LQHT has launched an appeal against the High Court's decision on the public authority point. The appeal is expected to be heard by the Court of Appeal in February 2009, so watch out for future bulletins.

One of our clients suggested we include a section on frequently asked questions.

Questions in this issue are on the subject of Notices

Q **Should all Notices served on tenants be marked 'Without Prejudice'?**

A No. It is generally not necessary. The practice arose because of concerns that a subsequent Notice might be seen as "waiving" a breach of tenancy referred to in an earlier Notice, or might be seen as implying the existence of a tenancy where, unbeknown to the person serving the Notice, the occupier was a mere tolerated trespasser. Case law has established that those concerns are unfounded.

Circumstances in which it is advisable to mark Notices 'Without Prejudice' are where two different types of Notice are being served at about the same time. For instance, a Notice to Quit and a Notice of Seeking Possession are being served against an absent tenant, or a Notice of Seeking Possession and a Notice Requiring Possession are being served against an Assured Shorthold Tenant. At such times, the Notices should be marked 'Without Prejudice' to each other to indicate that the Landlord is keeping its options open and may proceed on the basis of either Notice or both Notices.

Q **Why should I serve a Notice of Seeking Possession as well as a Notice to Quit?**

A This tends to arise where there is evidence that the tenant has left the property and, either it is empty, or there are unauthorised occupiers. Where a Notice to Quit alone is served, it can be defeated by the tenant promptly returning to the property, or subsequently claiming an "intention to return". Where the property was simply left empty, the Landlord may be content with the tenant's return but, where there were unauthorised occupiers, the property was sub-let or the tenant has other accommodation elsewhere, the Landlord may be keen to secure possession. In those circumstances, a Notice of Seeking Possession on Ground 12 enables the Landlord to continue to seek possession on the basis that the tenant has breached the terms of the agreement by parting with possession and/or sub-letting.

If you have any questions, send them by email to mary.martil@marsons.co.uk

frequently asked questions

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