



HR Alert

Halliwells' Electronic Alert from the Employment Group

1 July 2008

New Approach to Disability Discrimination

On 26 June the House of Lords handed down its decision in the disability discrimination case of London Borough of Lewisham v Malcolm. The facts concerned the rights of a tenant yet the decision looks set to have a huge impact on employment cases. The claimant Mr Malcolm suffered from a mental health disability. He had a tenancy with Lewisham Council. In breach of the terms of the tenancy he had let out the property to a third party. The Council had sought possession of the property from Mr Malcolm. He claimed that the reason he had let it out was connected to his mental health condition and that repossessing the property would amount to less favourable treatment contrary to the Disability Discrimination Act.

The main focus of the case was the identity of the correct comparator. The disability discrimination legislation protects a person not only from less favourable treatment on the grounds of their disability but also less favourable treatment on grounds related to their disability if this cannot be justified.

In order to succeed in his claim Mr Malcolm would have to show that he had been less favourably treated. However who did he have to show that he had been less favourably treated than? Should a comparison be made with persons without a mental disability who have sublet a Lewisham flat and gone to live elsewhere or tenants of Lewisham flats who have not sublet or gone to live elsewhere.

It is a fundamental point on which every disability claim relies. The test that has been applied in Employment Tribunals for the last nine years is that a comparison should be made with the latter group. The Court of Appeal in the leading case *Clark v Novacold* 1999 had adopted this analysis referring to the absence of any provision in the disability legislation that requires relevant circumstances in the case of the claimant to be the same as or not materially different in the comparator. This would inevitably lead to a finding of less favourable treatment and the test was whether the employer could show justification for the treatment.

However in *Malcolm* the House of Lords found that it would be more appropriate to make a comparison with the former group in that the comparator should be someone in the same circumstances who was not disabled. It considered that this would be a much more natural comparison as if the reason did not apply there would be no cause to take action and it would be a pointless comparison. The decision in *Clark -v- Novacold* that had established the approach to disability cases for the last nine years was wrongly decided.

Employment Impact

In the employment context this means that an employee who claims that his dismissal on grounds of sickness absence amounted to disability related discrimination will have to show that another non-disabled employee who has also been absent for the same period would not have been dismissed.

A clear consequence is that the number of cases where the claimant will be able to show that there has been less favourable treatment will dramatically reduce. This significantly reduces the scope of the protection given by the disability discrimination legislation.

The House of Lords made it clear that before a discrimination claim could succeed it was necessary to establish what was the real reason for the treatment? On the facts in this case it held the reason for seeking possession was a pure housing management decision that had nothing to do with the tenant's mental disability. This is also likely to narrow the scope of claims as employers will no doubt point to decisions being based on grounds of business efficiency rather than the actual disability.

A possible consequence of this decision is that the Employment Tribunal will focus much more on the duty to make reasonable adjustments. Whilst it would appear difficult to establish less favourable treatment it will be still possible to claim that the employer has failed to make reasonable adjustments, for example, to the sickness absence policy.



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