



HR Briefing

August 2008

DISABILITY DISCRIMINATION

This month we look at the implications of two recent cases: Coleman v Attridge Law and the Mayor and Burgesses of the London Borough of Lewisham v Malcolm.

Disability discrimination: Associative Discrimination

On 17 July 2008, the European Court of Justice (ECJ) ruled in favour of Sharon Coleman by finding that able-bodied people could be unlawfully subjected to discrimination on the grounds of disability.

Ms Coleman was a legal secretary at Attridge Law. She gave birth to a son who was born with serious respiratory problems. As a result, it was necessary to request time off to care for him. Ms Coleman claims that when she requested such time off, she was called 'lazy' by her Managers and as a consequence felt forced to accept voluntary redundancy. She later brought a claim for constructive dismissal and disability discrimination.

The effect of this ruling is to broaden the scope of discrimination law allowing those who are not actually disabled themselves to bring a claim, if they are mistreated on the grounds of the disability of a person who is closely associated to them. Her case will now return to the Employment Tribunal for a ruling.

Disability Discrimination: The correct comparator/ required knowledge

The House of Lords has also handed down an important decision in the case of Mayor and Burgesses of the London Borough of Lewisham v Malcolm.

Although this case relates to a housing authority's decision to evict a tenant suffering from schizophrenia, it is thought that the decision taken by the House of Lords will have far-reaching implications in employment related disability discrimination cases. The reason for Mr Malcolm's eviction was because he had unlawfully sublet his flat.

Arguments raised in the case

Mr Malcolm argued that, but for his schizophrenia, he would not have

Key Recommendations

- The ECJ have ruled that the EC Equal Treatment Framework Directive does provide protection where a non-disabled person has been discriminated against on the grounds of their association with a disabled person, "associative discrimination".
- Employers must ensure that all requests made for flexible working are considered on a case-by-case basis and must pay particular attention where such requests are to care for another person.
- In deciding whether to dismiss an employee who has been absent through long-term sickness, employers should now consider how they would treat a non-disabled person absent from work for a similar length of time.

acted in such an irresponsible manner and unlawfully sublet the premises. He added that on this basis the council, in seeking to evict him, had treated him less favourably for a reason related to his disability, than they would have treated another person to whom that reason did not apply.

Mr Malcolm lost at first instance but was successful on appeal to the Court of Appeal. The Council then appealed to the House of Lords.

The House of Lords upheld the council's appeal, holding that Mr Malcolm had not been treated less favourably **than a non-disabled comparator who had illegally sublet his property**. The House of Lords also held that unless the Council knew or ought reasonably to have known about his disability, they could not be liable for disability-related discrimination. Furthermore, they could not find a connection between Mr Malcolm's disability and his decision to sublet his flat, and agreed therefore that the reason for Mr Malcolm's eviction was not related to his disability.

Implications for the future

Clearly, given the narrow definition of a comparator that has now been assigned by the House of Lords it will now be harder for workers to successfully claim for disability related discrimination. This is because it is likely in a case where an employee is dismissed following a long period of sickness absence, that a non-disabled person absent for the same length of time would have also been dismissed.

On this basis, it is envisaged that claimants who are no longer able to succeed in a discrimination case by comparing him or herself to a person who had not been absent, will now focus their attention on the issue of whether their employer made the necessary reasonable adjustments required. This could look at, for example, whether the employer should have reviewed and made reasonable adjustments to its policy of dismissing those employees who have been absent through long-term sickness.

- Employers must consider all possible reasonable adjustments prior to dismissing an employee on ill health related grounds.
- This includes consulting with the affected employee to ascertain whether they consider that there are any reasonable adjustments that can be made to enable them to return to work. This could include flexible working for example.
- Employers must also continue to base their decisions on medical evidence. An Employment Tribunal is unlikely to be sympathetic to an employer who fails to take such steps.
- Employers should also ensure that they have an absence policy in place, which indicates how the employer's organisation intends to manage absence.

If you have any queries on any of the above please contact **Alison Loveday** at alisonl@berg.co.uk to discuss further issues. Alternatively you contact **Alison** on **0161 833 9211**. If you do not wish to receive further mailings please email alisonl@berg.co.uk with the words "unsubscribe" in the heading.

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