

Disability Discrimination – all change

The House of Lords' recent decision in the case of *Mayor and Burgess of the London Borough of Lewisham v Malcolm* ("Malcolm") is likely to have significant implications for disability discrimination and the treatment of disabled employees. Whilst Malcolm is a housing case, it will still impact upon employment cases as the law is similar in a number of areas.

In the past, when considering whether a person had been discriminated against for a reason relating to their disability (effectively indirect disability discrimination) comparison would be made to the treatment of a person not suffering from the condition that gave rise to the disability. If there was less favourable treatment, consideration would turn to whether such treatment could be justified. That position has now changed.

Take an employee with a medical condition (which is a disability) that requires him to take regular breaks, and such breaks lead to a reduction in productivity. If that employee was dismissed for a lack of productivity he may claim that his dismissal was related to his disability and therefore discriminatory. To assess whether any discrimination took place a comparison used to be drawn with a similar employee without that medical condition and who did not have the same productivity issues. Given that such an employee would be

unlikely to be dismissed, it was relatively easy for a disabled employee to establish disability related discrimination at which point the focus would then be on whether such treatment was justified. The *Malcolm* case has changed this orthodox such that the correct comparator is someone who is not disabled but has a reduced productivity for another reason. In short, if there are two employees, one of whom is disabled and both of whom have reduced productivity, and they are both dismissed, there will now be no disability related discrimination.

It remains to be seen whether this case will be successfully relied upon by employers in employment cases. However, employers are likely to take the view that with a narrowing of their obligations under the DDA, they can afford to be more robust with a member of staff who is (for example) underperforming due to a medical condition.

However, employers should still proceed with care as the focus is likely to switch to the duty to make reasonable adjustments and the duty not to discriminate against a disabled person on the grounds of their disability (effectively direct disability discrimination).

In particular, it is likely that disabled employees will seek to argue that the (positive)

duty to make reasonable adjustments should include steps such as opting to not dismiss a disabled employee for a lack of productivity, and in doing so adjusting the productivity threshold that would be deemed acceptable for disabled employees.

With respect to discrimination 'on the grounds of a disability' (which cannot be justified) disabled employees may seek to argue that the treatment they have received is so closely connected to their disability as to amount to discrimination 'on the grounds of a disability'.

It is possible that this issue will be revisited in the forthcoming Equality Bill in which UK discrimination law is to be drawn together and consolidated. In the meantime, a period of some uncertainty is likely to follow both for employers and employees suffering from a disability.

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